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The Changing Practice of Bankruptcy Law: An Analysis of How Bankruptcy Practice Has Changed in the Last Decade

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THE CHANGING PRACTICE OF BANKRUPTCY LAW: AN ANALYSIS OF HOW BANKRUPTCY PRACTICE HAS CHANGED IN THE LAST DECADE

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INTRODUCTION

The practice of bankruptcy law has changed drastically over the last decade. An attorney starting out in the field in 2009 faces different issues than one who began in 1999. However, it's not just the issues that come up with clients that make the practice so different, but the law of bankruptcy itself has changed. The economic downturn of the last eighteen months has changed the way the public views bankruptcy. The Bankruptcy Reform Act of 2005[1] and *In re Bateman*,[2] a case decided in 2008, altered the landscape of bankruptcy practice forever. This article will walk through a decade of bankruptcy reform, from the points of view of an attorney practicing in 1999 and one practicing in 2009. The purpose of this article is to provide a practical review of the new bankruptcy laws and their impact on how attorneys should practice in today's bankruptcy world. Through a discussion of the economic climate, legal reform, and the social reform surrounding bankruptcy, we hope to educate today's attorneys not only of the present state of the law, but the future of bankruptcy practice as well.

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[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 33 (2005).

[2] *See generally*, Branigan v. Bateman (*In re* Bateman), 515 F.3d 272 (4th Cir. 2008).

I. THE EXPERIENCE OF A BANKRUPTCY ATTORNEY IN THE LAST DECADE

JILL L. PHILLIPS*

A. *The Paper Trail*

It is difficult to imagine a time when being green was not the philosophy of the day. The world of a bankruptcy attorney revolved around making sure the correct amounts of copies were filed with the court. The rule used to be: one original copy and three copies for all filing in consumer cases, whether it was the petition itself or just a motion to extend time. There were also midnight runs to the court to drop off court documents to be stamped by the United States Marshal on duty, proving that the documents were filed before the deadlines. Paper ruled the day. Attorneys used date-stamped documents to prove documents were filed, and to ensure that the attorney demonstrated they had completed all required due diligence on a case. Basically, the practice involved a big file full of paperwork, as opposed to today where filing is done electronically and much work is completed through emails.

B. *No Income Limits*

Anyone could file a chapter 7 case. It was common for a practicing attorney to see cases in which people making over $250,000 a year filed chapter 7 cases. There were only two showings required to file a chapter 7 case: (1) the debtor's

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estate contained no assets and (2) there was no disposable income available at the end of the month. The challenge in these cases was demonstrating that all the expenses that were listed were legitimate expenses, thereby confirming that the debtor should be entitled to filing a chapter 7 case. For a chapter 13 filing, the burden to initially determine eligibility for a chapter 13 payment plan was on the attorney. A good practicing attorney would act within their ethical duties and not place a debtor making $250,000 into a chapter 7 case. However, many of the attorneys would be creative and argue to the trustee that expenses were legitimate for someone making $250,000. More often than not, those arguments were successful, leading to the abuse of the chapter 7 system.

C. No Pre or Post Debtor Certificate or Education Required

Ten years ago nothing was required for the debtor to do before or after filing a bankruptcy case. As a result, there were often repeat filers clogging up the systems unnecessarily. To avoid future bankruptcies, debtors need to understand how they got into their situation. Unfortunately, there were no good programs available for the rehabilitation of a debtor's credit. Debtors were often just left to their own devices to find a way to rehabilitate their credit.

D. Few Documents Were Needed

When the Chapter 341 Meeting of Creditors was held, the only documents required were the debtor's photographic identification, two paystubs from the debtor's last couple months of employment, and the debtor's most recent tax forms.[3] The emphasis was on the testimony of the client, not on the documents required.[4] An attorney provided the trustee

[3] *See* 11 U.S.C. § 341 (1994).
[4] *Id*.

with the documents on the day of the meeting. The trustee did a brief overview and returned the documents to the client.[5] No other documents were required from either the attorney or the client. Around 2001, the United States Trustee started requesting that the debtor's social security card be provided at the meeting of creditors, as well as proof of property values, two years of tax returns and two months of paystubs.[6] They also started requesting that the documents be mailed to the trustee before the meeting, if possible, but the documents were absolutely required on the day of the meeting of creditors.[7]

E. Bankruptcy Stigma

Bankruptcy law was not the most popular law to practice in 1999, nor was it as accepted in the mainstream population. Bankruptcy was the very last step debtors took to deal with their debt. Debtors took every step to try to pay back their debt without filing a bankruptcy case. The main reason for this was because credit was far more important than it is today. It was much harder to obtain credit from credit cards and mortgage companies. Bankruptcy carried a stigma. It was a hard choice to make and not used as a means to an end.

F. Mortgage Revolution

It is hard to believe the term "refinance" was a dirty word in the world of consumer mortgages.[8] An attorney would never recommend refinancing because the costs involved to

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[5] *See* HANDBOOK FOR CHAPTER 7 TRUSTEES (U.S. Dep't of Justice 1999).

[6] HANDBOOK FOR CHAPTER 7 TRUSTEES 7-1 (U.S. Dep't of Justice 2001).

[7] *See id.*

[8] *Cf.* Jay Romano, *Your Home: Mortgage Refinancing Strategies*, N.Y. TIMES, Feb. 21, 1999.

the consumer were too great. Only really desperate people considered refinancing. Then the mortgage revolution happened.

By the year 2001, the mortgage industry began making the term refinancing a good word and also a good option for bankruptcy debtors.[9] The interest rates dropped and the cost of a mortgage became affordable.[10] Refinancing a mortgage presented a good option for debtors to avoid filing a bankruptcy. As home values began to rise, debtors were able to refinance their current mortgages and pay off most of their credit card debt.

By the mid 2000s, the first step in bankruptcy law practice was for attorneys to recommend looking at refinancing options before filing a bankruptcy case. It also became good practice for attorneys to recommend looking at refinancing options while a debtor was in a bankruptcy, especially chapter 13 cases, due to the fact that debtors could refinance their way out of a bankruptcy.

However, the mortgage revolution is one of the leading factors leading to the new practice of today's bankruptcy law.

G. *Learning from the Past*

All of these prior practices were reviewed because they are important to the understanding of the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA), the law that changed the fundamental practice of bankruptcy.[11] Furthermore, reviewing prior practices helps to illustrate how the practice of bankruptcy law is ever-changing. After BAPCPA was passed, many attorneys chose not to continue practicing bankruptcy law. One reason was that there were so many changes made to Title 11 that attorneys simply did not want to deal with them. To practice bankruptcy law, one must

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[9] *Id*.

[10] *See generally id*.

[11] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23.

be prepared to change not only with the law, but with the economy and society as well. The next section talks specifically about BACPA, along with the new practice of bankruptcy law and a case that defines the future of how attorneys can use bankruptcy filings as a tool in dealing with debt.

II. CHANGING THE ANALYSIS OF A BANKRUPTCY ATTORNEY: NEW STEPS IN HELPING DEBTORS DEAL WITH NEW DEBT ISSUES

MICHAEL GOLDSTEIN**

The practice of bankruptcy law has changed greatly in the last four years due to changes in bankruptcy law and the present state of the economy. Practice has also changed by helping to reduce costs and resources through electronic filing, by requiring more documentation for more accurate cases, and by shifting the burden from attorneys to the Code as a determination for filing debtors. This occurred as a result of attorneys being forced to demand more documentation from their clients, which made misinformation and client omission of information less likely to occur though the document verification process.

However, bankruptcy practice has faced a complete makeover with respect to how bankruptcy practitioners should approach a case. This article will review some of the key steps an attorney needs to look at for a debtor, and also some of the other laws that attorneys must consider on behalf of their clients.

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A. Avoiding Foreclosure

In these economic times, the percentage of foreclosures in America is on the rise.[12] Homeowners facing foreclosure of their primary residences have several options to avoid foreclosure. They can negotiate with the lender in an attempt to modify or refinance the loan, get a short sale approved or deed the residence back to the lender in lieu of foreclosure. If the lender is unwilling to negotiate with the homeowner or their representative, then the homeowner has the option of filing a chapter 13 bankruptcy or a reverse mortgage if the property in jeopardy is an investment property.

Even with all of these options, once foreclosure becomes evident, first and foremost, the homeowner must decide either to try to keep the home if they are financially able, or to allow the home to go into foreclosure.

Most homeowners attempt to avoid foreclosure due to the misconception that they will save their credit rating if their homes are not foreclosed on. Unfortunately, this is not correct. However, few people are aware of the fact that a short sale occurring after three to four missed mortgage payments is treated in a bank's credit score ratings like a foreclosure on the borrower's credit report.[13] If the homeowner's only reasoning for saving the home is to save their credit rating, they are already hindered. Most homeowners want to save their home because they need a place to live and need assistance to get out of a situation which millions of Americans have gotten themselves into.

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[12] Anthony C. Valiulis, *Illinois Supreme Court Extends a Helping Hand to Homeowners and Lenders*, NAT'L L. REV., May 29, 2009, *available at* http://www.natlawrevi.com/article/illinois-supreme-court-extends-helping-hand-to-homeowners-and-lenders (last visited June 17, 2010).

[13] Elizabeth Krukova, *Short Sale a Savior or a Killer?*, RUSSKAYA AMERICA, September 2008, *available at* http://www.ncls-inc.com/publications.htm (last visited June 17, 2010).

If homeowners want to avoid foreclosure, and it is not too late in the process (meaning the auctioneer is not at the front door), then homeowners can open a line of negotiations with their lenders in an attempt to work out new terms with their mortgage company, also know as a loan modification.[14] Loan mortgage modification is a new term that many homeowners never thought they would need to hear or understand in order to possibly save their homes or their credit. No one planned for such a drop in home values and such a rise in costs.

With all of the new terms and severe changes in this economy, it is no wonder homeowners fear doing anything when they are faced with financial hardship. Homeowners need no longer fear these terms. More importantly, homeowners must understand why loan modifications and short sale refinancing may make the difference in allowing them to keep their homes, avoid bankruptcy, and save their credit.

We have all heard about the great "bailout" of 2008, which is more specifically referred to as The Emergency Economic Stabilization Act of 2008. We heard both the pros and the cons with our government bailing out several banks, insurance companies and financial institutions.[15] However, the biggest benefit resulting from the government bailout has been for homeowners. The benefit is that mortgage companies are now starting to stop foreclosure sales and short sales.[16] Mortgage companies are now looking to homeowners to modify their existing loans to allow homeowners to keep their home irrespective of their failure to pay their mortgage payments in the past. Therefore, debtors who wish to fight to keep their homes will begin to see an order of process in these unprecedented times of financial suffering.

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[14] *See* Bruce Arthur, *Housing and Economic Recovery Act of 2008*, 46 HARV. J. ON LEGIS. 585, 602 (Summer 2009).

[15] *See generally* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765, H.R. 1424, 110th Cong. (2d Sess. 2008).

[16] *See generally id*.

A loan modification likely will be the first step for homeowners to consider when they want to keep their home. A loan modification is simply a homeowner asking the mortgage company to modify the current terms of their mortgage.[17] The reasons for modification vary but could include late payments, variable interest rates, and high monthly mortgage payments.

There are many differences between loan modifications and refinancing. When refinancing, you may or may not move into a fixed interest rate. You may or may not decrease your payments. The biggest benefit to refinancing often is the ability to pull out equity in order to pay other bills. As stated earlier, a very high credit rating is needed to refinance in this market.

A loan modification generally is considered a short term refinance, in order to help debtors get back on their feet, or to wait out an uncertain real estate market. Debtors will be moved into a lower fixed interest rate for five or more years.[18] The most significant benefit of a loan modification is that credit scores do not come into play.[19] An attorney will negotiate with the bank on the debtor's behalf based upon the debtor's hardship. There are no closings needed for a loan modification. As such, there are no closing costs, no points being paid, no new title insurance fees, no application fees, or any other fees typically incurred in a traditional mortgage transaction.

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[17] Lauren Newman, *Troubled Mortgage Loans and Workouts Before Acceleration*, COMMERCIAL REAL ESTATE FINANCING 2009: HOW THE WORLD CHANGED 59, 63, REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK SERIES (Practising Law Institute, 2009).

[18] Michael Hall, *KPMG: What's Happening to FAS 140?*, SUBPRIME CREDIT CRISIS: EVERYTHING YOU NEED TO KNOW NOW, 1021, 1024, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES (Practising Law Institute, 2008).

[19] Tom Mack, *No Credit Score Needed For Loan Modification*, http://www.call-center-articles.steptocallcenter.com/Article/No-Credit-Score-Needed-For-Loan-Modification/204 (last visited June 17, 2010).

However, the loan modification process is very time consuming and, with the exception of the Home Affordable Modification Program ("HAMP") and the HOPE Program, there are no guidelines to follow. Each lender has its own set of rules to determine whether a consumer can qualify for a modification. Some lenders will look at the homeowner's credit rating at the time of the negotiations to see if there are any other bills outstanding, if the homeowner is in any other financial distress, and if there is equity in the home (approximately 25–30%). Additionally, the mortgage investor may be required to modify the loan payments and move the arrearage payments to the back of the loan and re-amortize the loan through HAMP.[20]

In addition, some lenders will look to the amount of time the homeowner has gone without making a mortgage payment. Sometimes the workout will be as simple as moving from an adjustable rate mortgage (ARM) loan to a fixed mortgage rate, or if there is a FHA loan involved, the homeowner could qualify for a partial claim. A partial claim is when the loan is brought current and a lien is placed on the property for the outstanding balance until the property is sold or refinanced.[21] With most negotiations, a forbearance agreement is used by the lender in which the homeowner is allowed to delay or reduce payments for a short period of time with the understanding that another option will be used at the close to bring the account current. It is a temporary cease of any and all legal action against the homeowner until a plan of action is determined. This step of refinancing to avoid foreclosure must be used early in the process. The homeowner must move quickly once a Notice of Default is initiated.

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[20] Tom Mack, *No Credit Score Needed For Loan Modification*, http://www.call-center-articles.steptocallcenter.com/Article/No-Credit-Score-Needed-For-Loan-Modification/204 (last visited June 17, 2010).

[21] Brian M. Heaton, *Hoosier Inhospitality: Examining Excessive Foreclosure Rates in Indiana*, 39 IND. L. REV. 87, 101 n.94 (2005).

Another part of the loan modification stage is HAMP.[22] As many homeowners have found it increasingly difficult to make ends meet and afford their home mortgage payments, mortgage defaults and foreclosure proceedings have risen.[23] These homeowners have several options that may put them in a position to bring their accounts current and allow them to make their subsequent mortgage payments. One such option if a homeowner qualifies is to take part in HAMP.

This program is a shared debt reduction program between lenders and the government. The first step is for lenders to reduce their monthly mortgage payments including principal, interest, taxes, insurance and condominium fees to reflect no more than thirty-eight percent (38%) of the homeowner's gross income.[24] Gross income is defined as total salary, tips, dividends and other income prior to taxes. Once the lender or bank has reduced the homeowner's payment to thirty-eight percent (38%) of their monthly gross income, the Treasury Department will then step in and match dollar for dollar any additional reduction that the lender provides down to thirty-one percent (31%) of the homeowner's gross monthly income for up to five years.[25]

The benefit to a homeowner is rather obvious, a very large reduction in monthly mortgage payments. Additionally, should the monthly payment be reduced by six percent (6%) or more, homeowners are eligible to receive $1,000 per year for up to five years.[26] Payments go directly to reducing the principal, so long as homeowners are current on their monthly payments. [27]

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[22] *See generally* Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009).

[23] *See* Anthony C. Valiulis, *Illinois Supreme Court Extends a Helping Hand to Homeowners and Lenders*, NAT'L L. REV., May 29, 2009, *available at* http://www.natlawrevi.com/article/illinois-supreme-court-extends-helping-hand-to-homeowners-and-lenders (last visited June 17, 2010).

[24] *See* Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009), at 1.

[25] *Id*.

[26] *Id*. at 12.

[27] *Id*.

In order to encourage lenders and banks to take part in the program, the lender also receives various significant financial benefits.[28] First and foremost is their ability to avoid foreclosing on another house that likely has no equity. The lender shares the financial burden with the Treasury Department. Additionally the lender or bank receives compensation from the government in the amount of $1,000 for each loan modified pursuant to the program.[29] The lender will also receive up to $1,000 per year for each year homeowners remain in the program and stay current on their new mortgage obligation.[30] Should the homeowner be current when entering into the modification, a one-time incentive payment of $1,500 will be paid to the lender.[31]

Granted, this program sounds like a fantastic win-win situation for both a homeowner in financial distress and a lender uncertain as to the borrower's ability to stay current on their mortgage obligation. What are the requirements to take part in this program?

B. Homeowners

First and foremost, the homeowner's mortgage itself must qualify. In order to qualify, the loan must have commenced prior to January 1, 2009.[32] In addition, the following criteria must be satisfied:

- The home must be a primary residence and a single family dwelling of no more then four units.[33] More specifically, the home may not be investor owned or vacant.[34] Homeowners will need to prove that they live in the home by

[28] *Id*. at 11.
[29] *Id*.
[30] Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009), at 11.
[31] *Id*.
[32] *Id*. at 2.
[33] *Id*.
[34] *Id*.

providing a tax return or a utility bill. Both are sufficient to prove residency in the mortgaged property.[35]

- The payoff on the primary mortgage must not exceed: 1 Unit: $729,750, 2 Units: $934,200, 3 Units: $1,129,250, or 4 Units: $1,403,400.[36]
- A homeowner must have a current or imminent financial hardship.[37]
- Loans can only be modified once under this program. As such, if a homeowner has modified once, the homeowner will not be able to go back to the well a second time.[38]
- The home must have an appraised or assessed value not older then sixty days.[39]
- Borrowers will need to verify their income by submitting an IRS form that allows the lender to request taxes directly from the IRS.[40] Additionally, borrowers will be required to submit their two most recent pay stubs.[41]
- Borrowers must also represent to the lender that they do not have enough money in the bank to stay current.[42]
- If a homeowner's overall debt is greater then fifty-five percent (55%) of their gross monthly income, the homeowner will need to first take part in a credit counseling session with a HUD-approved counselor and receive a certificate of compliance.[43]

C. Lenders

Participating lenders are required to consider all eligible loans under the program guidelines, unless there is a pre-

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[35] *Id*.
[36] Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009), at 2–3.
[37] *Id*. at 5.
[38] *Id*. at 3.
[39] *Id*. at 4.
[40] *Id*.
[41] *Id*.
[42] Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009), at 4.
[43] *Id*. at 5.

existing agreement that expressly states otherwise. For any modification request originating from a homeowner in default, a net present value of cash flow test will be applied. This test essentially looks at whether a modification will increase the homeowner's cash flow if a modification is granted.

D. How does the Process work?

The process starts by providing a lender with all the required documentation and information. Once the bank or lender has confirmed it has received a homeowner's full package and has reviewed it, a loan negotiator will be assigned to the case. The lender must start by determining if there are any missed loan payments.[44] If so, the lender may capitalize the late payments.[45]

The next step is for the lender to calculate thirty-one percent (31%) of the homeowner's gross income.[46] Once this income level is determined, the lender must follow a three-step process to reduce the monthly payment to that thirty-one percent (31%) amount.[47]

- Reduce the interest rate as low as two percent (2%).[48]
- If the rate reduction does not bring the mortgage payments down to the thirty-one percent (31%) mark, then the lender is to extend the duration of the loan to forty years from the date of the modification.[49] It should be noted that a full forty-year extension may not be required, but the lender only needs to extend to the point where the payment reaches the thirty-one percent (31%) watermark.

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[44] *Id*. at 6.
[45] *Id*. at 7.
[46] *Id*.
[47] *Id*.
[48] Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009), at 7.
[49] *Id*.

- The next step is for the lender to forbear principal.[50] Should interest forbearance be used, no interest will accrue on the forbearance amount.[51] If there is a principal forbearance amount, a balloon payment of that forbearance amount will be due on the maturity date, upon sale of the property, or upon payoff of the interest bearing balance.[52]
- If a homeowner has a junior lien (second mortgage, equity line, etc.) and the first or primary mortgage is modified through the program, then, and only then, can the junior lien be modified.[53] The government is offering certain monetary incentives to investors in order to modify junior liens in this timeline.[54]

E. The Loan Modification Approval Process

The first step in the approval process is for the homeowner to take part in a ninety-day trial period based upon the new loan modification monthly payment.[55] The borrower must remain current for the first three months or ninety-day period.[56]

If the borrower's total monthly debt exceeds fifty-five percent (55%) of their gross income, the lender or bank must notify the borrower in writing of HUD-approved credit counselors.[57] The borrower must complete a credit counseling program and obtain a certificate of compliance.[58] If the homeowner's debt does not rise to the fifty-five percent (55%) level, the foregoing is not required.[59] The lender must

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[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *See generally id.* at 15.
[54] Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009), at 15.
[55] *Id*. at 9.
[56] *Id*. at 9–10.
[57] *Id*. at 10.
[58] *Id*., at 5, 10.
[59] *Id.* at 5, 10.

waive any late fees upon completion of the ninety-day trial period.[60] The lender may not require the borrower to contribute cash.[61]

F. What about homes in foreclosure?

Subsequent to a HAMP modification agreement between the homeowner and the lender, any foreclosure action will be temporarily suspended during the ninety-day trial period.[62] In the event that the HAMP modification agreement or alternative foreclosure prevention options fail, the foreclosure action may be resumed.[63] However, pursuant to HAMP, should the modification fail, banks and lenders are required to consider other programs before foreclosure, including but not limited to short sales and deeds in lieu of debt.[64]

A bankruptcy in either chapter 13 or chapter 7 might need to be filed to prevent the foreclosure sale.[65] However, the filing of a bankruptcy case might not eliminate the continuing negotiations of either a loan modification or HAMP. In Massachusetts, it is also possible to continue to negotiate a loan modification or mortgage workout inside the bankruptcy, notwithstanding the automatic stay.[66] For debtors in Massachusetts, a new standing order of the Bankruptcy Court may provide for significant mortgage relief even when the automatic stay is in place.[67] The benefit of mortgage workouts or loan modifications has not been an option for many debtors who have filed for protection under the

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[60] Press Release, U.S. Treasury Dep't, Home Affordable Modification Program Guidelines (March 4, 2009), at 10.

[61] *Id*.

[62] *Id*. at 3.

[63] *Id*.

[64] *Id*. at 9.

[65] Elizabeth Warren, *What is a Woman's Issue? Bankruptcy, Commercial law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 29 (2002).

[66] Standing Order No. 09.03, *Permitted Billing And Settlement Communications* (Bankr. D. Mass. 2009).

[67] *Id*.

bankruptcy laws. Specifically, Section 362 of the Bankruptcy Code makes it illegal for a creditor and debtor to negotiate a change to the terms of their mortgage or any other contract pursuant to the Automatic Stay.[68] However, Standing Order No. 09-03, which was issued by the U.S. Bankruptcy Court for the District of Massachusetts on May 6, 2009, may now provide some relief.

Standing Order 09-03 reads, in pertinent part:

> To the extent that the automatic stay pursuant to 11 U.S.C. § 362(a) may be applicable to a debtor or property of the estate and has not been terminated or lifted, relief from the automatic stay shall be deemed granted, without a hearing or further order . . . in order to enable a secured creditor . . . to discuss and or negotiate with a debtor a proposed modification of the terms of any secured indebtedness including without limitation, a home mortgage . . . .[69]

What the foregoing would seem to say is that it is now permissible to file a chapter 7 or 13 bankruptcy in order to discharge unsecured debt; and while inside that bankruptcy, it is also permissible to conduct a loan modification. Once a proposal has been put forth by the creditor and accepted on principal by the debtor, only then do the parties need to obtain court approval for such a transaction, "Further, nothing herein shall authorize a debtor or creditor to enter into a loan modification without court authority." [70]

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[68] *See* 11 U.S.C. § 362(a) (2005).

[69] Standing Order No. 09-03, *Permitted Billing and Settlement Communications* (Bankr. D. Mass. 2009).

[70] *Id.*

G. What if a Homeowner Does Not Want to Keep the Home

The first option is to sell the home. Unfortunately, the sale might be a short sale. A short sale, also known as a distress sale, is the sale of a home for less than the value of the mortgage owed on the property.[71] Many homes have declined in value over the past few years, and are now worth less than when they were purchased. More specifically, newobservations.net projects that residential real estate prices will fall twelve percent nationwide in 2010.[72] Short sales are a good option for homeowners who need to get out from underneath the debt of a mortgage, but do not want to keep their homes. The main benefits of a short sale for homeowners are that homeowners are released from liability for any amount owed on the mortgage as a result of the shortness of the sale, and homeowners are also released of tax liability.[73]

A short sale also benefits the lender by getting the distressed property sold quickly, thereby allowing the lender to quantify its loss without the time and expense of a foreclosure. A short sale may benefit investors by allowing them to buy properties at distressed prices, and then when market conditions improve, sell the properties and make a profit.[74]

Even when borrowers engage in a legitimate short sale, there is no guarantee of success. It is difficult to have an agreement where the interests of all parties are satisfied. The interests of lenders, homeowners, agents, buyers and investors who held the mortgage must all be taken into account. In addition, if a husband and wife are divorcing,

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[71] Rupp v. Ayres (*In re* Fabbro), 411 B.R. 407, 413 n.7 (Bankr. D. Utah 2009).

[72] Michael David White, *Property Values Projected to Fall 12 Percent in 2010* (January 27, 2010), http://newobservations.net/2010/01/27/property-values-projected-to-fall-12-percent-in-2010/ (last visited June 17, 2010).

[73] *In re Fabbro*, 411 B.R. at 413 n.7.

[74] *Id.*

both must agree to have a short sale. To make informed decisions during a short sale, sellers should review loan documents with an attorney. With the lender's agreement, homeowners can sell their property for the fair market value. The deficiency in the mortgage is then considered unsecured, and the lender should then completely forgive the debt under the Mortgage Forgiveness Debt Relief Act of 2007.[75]

The Mortgage Forgiveness Debt Relief Act of 2007 (2007 Act) was enacted on December 20, 2007 to assist homeowners in need of debt relief.[76] Prior to the 2007 Act, a homeowner attempting to avoid foreclosure would short sell the property, or deed their home in lieu of foreclosure back to the bank holding the lien on the property. Such remedies often left the homeowner with a debt for property no longer in their possession. In most situations, the lender would forgive the homeowner's debt either in part or in full. Unfortunately, this left the homeowner facing an additional, and in most cases, undischargeable financial difficulty — the Internal Revenue Service (IRS). The IRS recognized the debt, which was so graciously forgiven by the lender, as taxable income. The homeowner received a tax bill for the money forgiven, but never truly received.[77]

The 2007 Act is designed to exclude such debt forgiveness on a debtor's principle residence if the balance of the loan is less than $2 million.[78] The 2007 Act only applies to debt forgiven in the 2007, 2008 or 2009 tax years.[79] Debt reduced through mortgage restructuring, as well as mortgage debt forgiven in connection with a short sale or foreclosure, may qualify for this relief. The requirements are that the debt must have been used to buy, build or substantially improve the taxpayer's principal residence, and it must have been secured by that residence. Debt used to refinance qualifying debt is also eligible for the exclusion, but only up to the

[75] *See* 11 U.S.C.A. § 1 (West 2008).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

amount of the old mortgage principal just before the refinancing.[80]

What does this mean to homeowners in trouble? Everything. There is now another option available to them, which will not lead them from one financial frying pan to another. Prior to the 2007 Act, homeowners would attempt to negotiate with a lender to file suit against them rather than forgiving the deficit in the loan. This strategy was based on the reasoning that a judgment lien is dischargeable under a chapter 7 or chapter 13 bankruptcy, but IRS liens are not. IRS tax liens remain throughout the bankruptcy filing and distribution.[81] Homeowners would end up with the lien coming out on the other side of the bankruptcy, leaving them in the same predicament of owing money on income never actually received.

The 2007 Act does not extend to other forgiven debt, such as debt on second homes, income or rental property, business property, credit cards or car loans.[82] Depending on a homeowner's financial situation, a chapter 7 or chapter 13 bankruptcy filing might be in the homeowner's best interest. As such, homeowners should always consult with an attorney regarding the best strategy for their specific circumstances.

A deed in lieu of foreclosure is another option available to homeowners who are not going to keep their homes. Lenders must approve this process in which a homeowner deeds the home over to the lender in satisfaction for the loan in full. In this situation, a homeowner will not have the shortage as described in the short sale. However, the lender will now own the property. This is sometimes a more difficult negotiation for the homeowner to conduct with the lender. The key to a successful negotiation is for the homeowner to identify the savings to the lender by avoiding a foreclosure, and to convince the lender that the property could be sold in the near future. Unfortunately, a deed in lieu of a foreclosure can only

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[80] *See* 11 U.S.C.A. § 1 (West 2008).

[81] *See* 11 U.S.C. § 521 (2009).

[82] *See* 11 U.S.C. § 108(a)(1)(E) (limiting forgiven debt to a qualified principal residence).

be perfected when there is no second or junior lien holder on the property.[83]

However, in most situations, the reality is that homeowners have waited too long. The time for negotiation is long past when they walk through the attorney's door for help. In most cases, homeowners have already received the Notice of Default, several demand letters, and the letter that foreclosure is imminent. In these situations, homeowners who want to keep their property, or at least get some breathing room in order to decide what to do, have the option of filing a chapter 13 bankruptcy in order to avoid foreclosure. The chapter 13 petition gives immediate protection in the form of an automatic stay. An automatic stay stops all foreclosure processing immediately upon the filing of the chapter 13 petition.[84]

Under a chapter 13 petition, the homeowner must face a repayment plan with the lender in which the lender receives 100% of the missed payments over the course of thirty-six to sixty months.[85] In these situations, the best solution may be to completely discharge this liability under chapter 7.

H. Other Options Attorneys Must Consider for Their Clients

Many individuals are living with financial decisions causing them to hold assets, such as houses, automobiles and boats, whose values have plummeted. Individuals are living in properties whose values have dropped far below the mortgages, or driving cars valued at a third of the loans. These individuals with financial difficulties are looking for assistance through the bankruptcy courts in order to get out from underneath all of the debts and liens acquired, which now vastly exceed their current assets. There are two types of

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[83] *See* RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 8.5, cmt. e (1997).

[84] *See* 11 U.S.C. § 362(a) (2009).

[85] *See* 11 U.S.C. § 1325(b)(4)(a) (2009).

liens that can be attached to an individual's property or assets. The first is a voluntary lien, where an individual agrees to use an asset as collateral for debts, such as mortgages and auto loans. The second type is a non-voluntary lien, where a creditor has the right to force an individual to sell an asset to pay off the asset (judgments and tax liens, for example). These liens are either secured or unsecured as to the asset to which they are attached.

A common situation in today's economy is where homeowners have both a first and second mortgage on a primary residence, are facing bankruptcy, and are wondering if they have the ability to save the family home. As real estate markets and home values fall, homeowners are left with mortgages that far exceed the current fair market value of their homes. Fortunately for homeowners, lien stripping is a process that can help many homeowners in this situation.

Lien stripping refers to the process of reducing a secured claim to the value of the underlying collateral.[86] It uses the combined effect of 11 U.S.C.A. § 506(a) and 11 U.S.C.A. § 506(d) to bifurcate the lien into secured and unsecured parts. The secured lien is allowed in the amount up to the fair market value of the property at the time of the stripping. The balance of the lien, which exceeds the fair market value of the property, is now deemed unsecured.[87]

Liens can be stripped off of the debtor's assets in chapter 13 when there is not enough equity in the assets. Sections 506(a) and 506(d) of the Bankruptcy Code acknowledge that a lien is only a secured claim to the extent there is value in the asset to which it attaches. To the extent that the claim exceeds the value of the collateral, that portion of the lien is unsecured. The most common application of lien stripping is the reduction of liens on car loans to the present value of the vehicles. However, lien stripping is currently used more often with home mortgages in bankruptcy situations. Lien stripping

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[86] *See* Rosemary Williams, Special Commentary, *Bifurcation and avoidance, or "stripping" of liens, security interests, and encumbrances held by undersecured creditors by rehabilitating and liquidating debtors in bankruptcy,* 158 A.L.R. FED. 1 (2009).

[87] *Id.*

with car loans has been limited to vehicles purchased over 910 days.[88]

Lien stripping is generally not a viable option for debtors in a chapter 7 case. This is particularly important for debtors who originally file under chapter 13 for the purpose of lien stripping and then file a motion to convert to chapter 7 to discharge their debt. According to the Bankruptcy Court, lien stripping does not survive conversion of cases from chapter 13 to chapter 7.[89]

Pursuant to 11 U.S.C. § 349(b)(1)(C), in the event of the dismissal of a chapter 13 case, any lien voided is deemed revived.[90] The same should be true if the case is converted to chapter 7. Pursuant to § 1307(a), "[t]he debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable."[91] In the past, the weight of authority held that the satisfaction of an allowed secured claim in a chapter 13 case survived the conversion of that case to chapter 7.[92] However, the United States Supreme Court has held that a chapter 7 debtor cannot use 11 U.S.C. § 506(d) to void a lien to the extent that the creditor's claim exceeds the value of its collateral.[93]

The Bankruptcy Code does permit a bankruptcy plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence".[94] Section 1322(b)(2) provides protection to the holder of a claim secured only by a lien on the debtor's principal residence by prohibiting any modification of the terms. However, the issue of whether this

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[88] 11 U.S.C.A. § 1325(a)(5) (West 2009) (*see* "hanging paragraph").

[89] *In re* Jean, 306 B.R. 708, 712–14 (Bankr. S.D. Fla. 2004) (discussing 11 U.S.C. §§ 506(a), 348(f)).

[90] McDonough v. Plaistow Coop. Bank (*In re* McDonough), 166 B.R. 9, 14 (Bankr. D. Mass. 1994).

[91] *See* 11 U.S.C.A. § 1307(a) (2009).

[92] *In re* Hargis, 103 B.R. 912, 915–17 (Bankr. E.D. Tenn. 1989) (citing *In re* Estep, 96 B.R. 87, 89–90 (Bankr. E.D. Ky. 1988), and *In re* Tunget, 96 B.R. 89, 89 (Bankr. W.D. Ky. 1988)).

[93] Dewsnup v. Timm, 502 U.S. 410, 414 (1992).

[94] 11 U.S.C.A. § 1322 (b)(2) (2009).

section precluded lien stripping of under-secured residential mortgages has been raised. Bankruptcy Code section 506 appears to permit bifurcation of under-secured mortgages and voiding of unsecured portions of a mortgage lien. At least two bankruptcy court judges sitting in Massachusetts have permitted such bifurcations.[95]

However, an exception exists for second or third liens on the same property. For those liens, lien stripping is available to render them totally unsecured if the first mortgage balance equals or exceeds the value of the personal residence.[96] The exception only applies if there are two distinct mortgages on the property, not when refinancing the property. Significantly, the limitation of lien stripping of first mortgages only applies to personal residences. Lien stripping will be allowed for a mortgage on a building used for business or renting.[97]

Another very powerful tool available to debtors in bankruptcy situations is the ability to pay only the value of an asset. This is particularly enticing for liens against secured property such as automobiles, mortgages on income property (but not on residences) or pieces of furniture that far exceed the value of the property. The common term for this disparagement in the value of assets versus the value of the loan is being "upside down".[98] In most of these cases, the value of automobiles, boats, or furniture being financed decreases more rapidly than the loan that is being repaid. For example, most debtors owe much more on their car or truck than the market value of their car or truck.

Additionally, debtors may be able to lower the interest rate on their payments (though not on a mortgage). Many

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[95] Brown v. Shorewood Financials (*In re* Brown), 175 B.R. 129, 133 (Bankr. D. Mass. 1994); Richards v. Citicorp Mortgage (*In re* Richards), 151 B.R. 8, 18 (Bankr. D. Mass. 1993).

[96] *See* 11 U.S.C. §§ 506(a), 1322(b)(2) (2009); *In re* Baez, 244 B.R. 480, 486 (Bankr. D. Fla. 2000).

[97] *See* 11 U.S.C. § 1322(b)(2) (2009); Waters v. The Money Store (*In re* Waters), 276 B.R. 879, 887 n.6 (Bankr. N.D. Ill. 2002).

[98] Laura Dietrich, Note, *Massachusetts' New Predatory Lending Law and the Expanding Rift Between Federal and State Lending Protection*, 26 B.C. THIRD WORLD L.J. 169, 194 n.195 (2006).

debtors have secured loans where they agreed to pay eighteen percent to thirty-five percent interest, and sometimes even more. In a chapter 13 bankruptcy, a debtor only has to pay most secured debts at the prime rate plus one to three percent, depending on a debtor's circumstances. A debtor in a chapter 13 bankruptcy can request that the bankruptcy court lower the amount owed on nearly all secured debts, leaving only the fair market value of that property to be paid and allowing the balance to be discharged.

More specifically, an allowed claim of a creditor secured by a lien on property, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property; and is an unsecured claim to the extent that the value of such creditor's interest is less than the amount of such allowed claim.[99] The disadvantage is that, in most cases, the entire present value of the secured property may be repaid at a prime-plus interest rate. More specifically, the court may determine the adequate rate of interest on cram down loans depending only on the state of the financial markets, circumstances of the bankruptcy estate, and characteristics of a loan, not on a creditor's circumstances or its prior interactions with the debtor."[100] This interest rate is the Prime Rate of Interest, which varies, plus a Risk Premium of one to three percent.[101]

There are certain restrictions or limitations on cramming down a debt.[102] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) places limitations on a chapter 13 debtor's ability to cram down when dealing with Purchase Money Security Interests

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[99] *See* 11 U.S.C. § 506(a) (2009); Franklin v. Union Mortgage Co. (*In re* Franklin), 126 B.R. 702 (Bankr. N.D. Miss. 1991).

[100] Till v. SCS Credit Corp., 541 U.S. 465 (2004).

[101] *See* 11 U.S.C. §§ 506, 1325(a) (2009); Community America Credit Union v. Griffin (*In re* Gallagher), No. KS-07-051, 2007 Bankr. LEXIS 3223 at *7 (B.A.P. 10th Cir. 2007).

[102] *See* 11 U.S.C. § 1325(a)(9) (2009) (under the Bankruptcy Code, a court may confirm a plan even if the plan has not been approved by all classes of creditors).

(PMSI).[103] This restriction applies to debts like car loans, where the money is borrowed to purchase the collateral. If the collateral for a PMSI debt is an automobile acquired for personal use within two and half years prior to the chapter 13 filing, the debt cannot be crammed down to the value of the vehicle. However, if the collateral is not an automobile, the prohibition on cramming down debt only applies if the PMSI debt was incurred within one year prior to the bankruptcy filing.

III. CHANGING THE FACE OF BANKRUPTCY: THE BANKRUPTCY ABUSE AND CONSUMER PROTECTION ACT OF 2005

SAMANTHA EINHORN[***]

In the wake of perceived abuses of the Bankruptcy Code, members of Congress sponsored a bill to control the influx of bankruptcy filings and to make it "more difficult for people to file for bankruptcy."[104] This affected individual debtors in several ways, most notably by creating a new presumption of abuse.

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[103] *See* 11 U.S.C. § 506 (2009); *In re* Peaslee, 358 B.R. 545, 554–55 (Bankr. W.D.N.Y. 2006).

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[104] Senator Chuck Grassley, Opening Statements at the Bankruptcy Reform Hearing (Feb. 10, 2005), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=9716# (last visited June 17, 2010).

A. Stemming Abuse: Debtor Income and the Means Test

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[105], there was no income-related requirement for filing a bankruptcy under chapter 7 of the Bankruptcy Code (Code). This led to a perceived abuse of the bankruptcy system, where many potential petitioners used the Code to get out of paying off their creditors, regardless of their means. To correct this abuse, BAPCPA amended the Code by requiring that a debtor's income must fall below the median income of their state.[106] Any debtor whose income[107] is above that median[108] must file a chapter 13 petition or pass the BAPCPA-created means test.

The presumption of abuse now arises through bad faith, determined by a totality of the circumstances,[109] or when a debtor whose income is above the median income fails to pass the means test.[110] The means test calculates the debtor's current monthly income, minus an allowed set of IRS-specified deductions.[111] The presumption of abuse will arise if the debtor has at least $166.67 in current monthly income available after any allowed deductions, or has at least $100 of

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[105] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 33 (2005).

[106] *See* 11 U.S.C. § 707(b) (West 2008).

[107] 11 U.S.C. § 101(10A) (2009) (defines current monthly income as the monthly average of income received by the debtor (and spouse, in jointly filed cases) during a six-month period prior to the filing of the bankruptcy case).

[108] Median income is adjusted by family size, based on the United States Census (available in a state-by-state chart on the United States Trustee Program's website at http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited June 17, 2010).

[109] 11 U.S.C. § 707(b)(3) (West 2008).

[110] 11 U.S.C. § 707(b)(2) (West 2008).

[111] *See* United States Department of Justice, BAPCPA, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited June 17, 2010) (these deductions include, but are not limited to, expenses for primary education up to $1500, contributions to care for nondependent family members, contributions to tax-exempt charities, and additional home energy costs).

monthly income, and that sum would be enough to pay more than twenty-five percent of unsecured debt (this presumption is based on statistical information from the United States Census Bureau and the Internal Revenue Service).[112]

B. Keeping the Debtor on Course: Credit Counseling and Financial Management

Although the creation of the presumption of abuse and means test were the most striking reforms of BAPCPA, other reforms also affected individual debtors. Today, debtors are required to take both a pre-bankruptcy credit counseling course and a post-bankruptcy financial management course.[113] The pre-bankruptcy course is intended to reconfirm that the debtor has a financial hardship and that the debtor really should be filing a bankruptcy case. The course can help debtors understand why they are filing despite their beliefs that they already know. Although the purpose is to educate the debtors on what they might do in the future to remain free from debt, it does not provide for a complete plan on how to rehabilitate the debtor from the position they are currently in.

C. Curbing Immediate Filings and Protecting Creditors by Creating a Waiting Period

Before the passage of BAPCPA, debtors that received a chapter 7 discharge could immediately file for a chapter 13 case, allowing them to discharge one-hundred percent of their unsecured debt and immediately use the payment plan to pay off their secured and priority debts.[114] BAPCPA amended the Code to provide that a debtor filing a petition under chapter 13 will be denied a confirmation and discharged if they

[112] 11 U.S.C. § 707(b)(2) (West 2008).
[113] 11 U.S.C. § 111 (West 2008).
[114] *See* discussion *supra* Part I.

received a chapter 7 discharge within the previous four years.[115] However, three years after the passage of BAPCPA, the Fourth Circuit case of *In re Bateman* refined this four-year rule.[116]

D. Creating a Chapter 20 for the Twenty-First Century: In re Bateman

The *Bateman* court interpreted a debtor's eligibility to file a chapter 13 petition under 11 U.S.C. § 1328(f) when a discharge was unavailable because of the debtor's prior chapter 7 discharge.[117] The trustee argued that the filing of Bateman's petition was in bad faith, because he received a chapter 7 discharge within the statutory time prohibition. Bateman countered that discharge was not the goal of his chapter 13 filing and therefore, he should not be barred from "utiliz[ing] the tools in chapter 13."[118]

The Fourth Circuit first questioned whether the dates in § 1328(f) referred to filing date to filing date or discharge date to filing date, eventually holding that the plain language of the statute supports a "filing date to filing date interpretation."[119] Even more relevant, the court analyzed whether a chapter 13 debtor was precluded from filing because she was ineligible for discharge. While BAPCPA was created to end serial filings, the court held that where, in a situation such as Bateman's, the petitioner's plan involves the full payment of one hundred percent of debts, there is no bad faith. Bateman was using the "tools" of chapter 13 to "reorganize" his life and pay off debts, not necessarily to receive discharge.[120]

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[115] 11 U.S.C. § 1328(f)(1) (West 2005).
[116] *See* Branigan v. Bateman (*In re* Bateman), 515 F.3d 272 (4th Cir. 2008).
[117] *Id.* at 280.
[118] *Id.* at 283.
[119] *Id*. at 277.
[120] *See id*. at 283.

E. The Old Chapter 20

Prior to BAPCPA and *Bateman*, a debtor could receive a chapter 7 discharge and file a chapter 13 case on that same day. This situation was known as the "Chapter 20."[121] Why would a debtor file a Chapter 20? Attorneys would recommend filing the chapter 7 case first to provide the relief of a discharge of all unsecured debt under Title 11. As a result, the debtor in the chapter 13 case would only be required to pay back a pro rata portion of these unsecured debts. Therefore, the debtor's plan payment would be less each month because the unsecured debt was not included. The debtor's plan would only include arrears owed to secured debts, post petition debts from the chapter 7 case and priority debts. However, under a chapter 13 case, the debtor was always entitled to a discharge of any unsecured debt that might still be owed, but the debtor was only required to pay a pro rata portion of the debt. An example of unsecured debt might be a post petition debt the debtor incurred or a second mortgage that might have been stripped under 11 U.S.C. § 506. Therefore, the debtor's plan would be a fraction of what it might have been if the debtor included all of the unsecured debt owed that was discharged in the chapter 7 case.

F. The New Chapter 20

After BAPCPA and *Bateman*, a "New Chapter 20" developed. Although it appears that the new law prevents these types of Chapter 20 filings, it really does not. Despite changes in the law, the effects are actually minimal. Debtors can still file a chapter 13 case the same day that they get a chapter 7 discharge. Debtors can still use the chapter 13 case to pay back arrears owed and priority debts without the

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[121] *See In re* Bridges, 326 B.R. 345, 348 n.4 (Bankr. D. S.C. 2005) (defining "Chapter 20" filing).

burden of the unsecured debt owed. However, after *Bateman*, a debtor must pay back 100% of arrears on secured debts, priority debts and unsecured debts. Debtors are no longer allowed the windfall of paying only a pro rata portion of unsecured debts owed. As the *Bateman* court ruled, a debtor can use the chapter 13 case as a tool to get the same protection of the automatic stay available under the old Chapter 20. However, debtors cannot receive a discharge if the chapter 7 discharge was received within the last four years. The impact is not great, but it does prevent a debtor from using bankruptcy to discharge post-petition unsecured debts incurred immediately after filing a chapter 7 case.

G. The Experience of a Bankruptcy Attorney in 2009

The Bankruptcy Reform Act and *Bateman* have changed the way the law of bankruptcy is practiced. An attorney practicing in 2009, must also deal with other practical changes beyond changes in the substantive law. Advances in technology combined with economic and social changes have altered the practice of law for the bankruptcy attorney and her clients.

In 1999, a case was filed by hand and in person at the bankruptcy court.[122] The manual filings added days to cases, and left attorneys scrambling to submit amendments, objections, and responses within the proposed deadlines, taking time away from the rest of their practice and the rest of their clients. Now, with the Case Management/Electronic Case Files (CM/ECF) system established by the federal courts, filings can be made almost instantaneously.[123] This is a boon for the practicing bankruptcy attorney, but one that comes with a price.

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[122] *See* discussion *supra* Part I.

[123] *See* United States Courts, Court Records, Case Management/Electronic Case Files, http://www.uscourts.gov/cmecf/cmecf.html (last visited June 17, 2010).

An attorney learning the intricacies of bankruptcy practice must now familiarize herself with a program called EZ-Filing. EZ-Filing bills itself as "the only bankruptcy software . . . that fulfills all federal bankruptcy filing requirements."[124] But, it is an expensive program[125] with a steep learning curve. The best way to learn to navigate the complicated program is to file a petition. Otherwise an attorney can become lost in the links between Schedule F and Schedule A, neither of which are labeled as the schedules they eventually are filed under. And, as with all software, EZ-Filing comes with its share of bugs. Although technical support and software updates are fairly helpful, cases have been filed with completely blank schedules due to software errors.[126] Yet EZ-Filing remains the best and easiest way to ensure a complete and timely filing, particularly for the attorney that practices in multiple jurisdictions.

Changes in the practical aspects of the attorney's life are not the only changes affecting the experience of a bankruptcy attorney in 2009. As the shame and stigma of bankruptcy have diminished, the demand for bankruptcy attorneys has increased and the initial intake of clients is now easier. At one time, the stigma of filing bankruptcy, or even seeking any kind of professional debt relief, was high. Now, potential clients need only look down their street at the number of homes for sale, talk to their neighbors about layoffs and wage freezes, or see the bleak economic statistics on television to realize that others face similar financial problems. These four words, "you are not alone", have made it easier for the bankruptcy attorney to convince a client that avoiding bankruptcy will not help, but will only hurt. The true purpose

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[124] *See* EZ-Filing, The Smarter Bankruptcy Software, http://www.ezfiling.com.

[125] EZ-Filing, *supra* note 138. (The EZ-Filing Basic Package, which includes only Chapter 7 software, costs $599. In order to prepare petitions for Chapters 9, 11, 12, or 13, an attorney must buy the Professional Package, which costs $799. If a small firm wishes to run the program on more than one computer at a time, it must pay $999 for each computer).

[126] This is my personal knowledge, as well as anecdotal discussions with other attorneys in the bankruptcy practice.

of a bankruptcy filing is for relief of one's debt.[127] In this bleak economic climate, the need to relieve one's debt is greater than ever.

Today, the bankruptcy process begins at intake, with a heartfelt conversation with potential debtors that takes into account the current economic climate. The process continues with collecting all the newly-required documents, drafting of the bankruptcy petition, providing the required documents to the Trustee no less than seven days prior to the Chapter 341 Meeting of Creditors, and dealing with objections, responses, and amendments that need to be filed in order to get a discharge or a confirmation for a client. The process can seem intimidating and complicated for a new bankruptcy attorney. But, today's bankruptcy attorney, like today's bankruptcy petitioner, can take comfort in the fact that she, too, is not alone.

H. The Future of Bankruptcy Practice

In the wake of the technological, economic, and legal changes that have transformed the practice of bankruptcy law, the questions shift from "where are we" to "where do we go from here"? The economic pendulum has yet to swing back towards the boom times of a decade ago, and the housing and job markets continue to be weak. People cannot afford the rates of the large "high-end" bankruptcy firms. The bleak and blunt truth is that the people who are considering bankruptcy in these difficult economic times are lucky if they can provide properly for their families. Therefore, the future of bankruptcy practice is not in large firms, filing reorganization chapter 11s for giant corporations, but in the solo-practitioner and small firms servicing middle-class and lower-income clients.

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[127] 11 U.S.C. § 101 (West 2007).

And yet these solo practitioners and small firms cannot afford the infrastructure required to manage a large caseload and keep their firms afloat. Legal secretaries and paralegals come at a premium, and it is very time consuming to process the massive amounts of documentation needed to properly draft a complete bankruptcy petition. Smaller firms need the ability to tap into a dedicated group of attorneys and knowledgeable bankruptcy professionals that can do the "dirty work" more quickly and at a lower price. Smaller companies staffed by bankruptcy and consumer debt experts can use practical and proven processes to work with bankruptcy attorneys, saving their clients time and money and, most importantly, helping them towards the goal of a chapter 7 discharge or a chapter 13 confirmation.

Bankruptcy reform can make many important changes to assist debtors, but bankruptcy reform alone will not solve the ever-increasing need for relief. The future of bankruptcy is in helping the individual debtor break free from the crushing debt that she is under so that she may move forward, provide for her family, and once again become a consumer in a country whose lifeblood is consumers. The future of bankruptcy practice begins with assisting individual chapter 7 and chapter 13 debtors, and culminates in a stronger practice for attorneys and a stronger economy for the country.