

Handout for March 1, 2018 Judge's Roundtable Cheyenne, Wyoming

A nuts and bolts primer about utilizing bankruptcy to save the family home from foreclosure-at all costs¹

The bankruptcy process provides an opportunity for a homeowner to save their home from foreclosure. This handout will attempt to provide a practical step by step outline of the process and factors to consider in assisting a client with a home in foreclosure.

a. Initial contact with client.

Determining how far along the lender is in the foreclosure process is the most critical information to be obtained when first contacted by a prospective client. If the foreclosure sale has already occurred there are very few options to save the home. The formal foreclosure process begins with a letter sent by certified mail and a subsequent publication of the sale date and time in a local newspaper for four weeks. The mortgage lender must also advise the borrower of the sale time and date by mail. If the debtor misplaces the written foreclosure notice or claims they never received it, you could call the sheriff's office, review the newspaper legal classifieds for the published notice, or contact the mortgage company or their counsel to find out when is the sale date. Sometimes you will rush to file a bankruptcy petition and subsequently be told by the mortgage lender's law firm that the sale was postponed for a month or two. An individual told me that his

¹ This handout was written by Paul Hunter and the views expressed are those of the author and do not reflect the views of United States Bankruptcy Court for the District of Wyoming or the other roundtable participants.

lender promised it would take action to postpone the foreclosure sale-but then went ahead and held it. It is advisable to confirm with the local sheriff's office that the sale has in fact been cancelled or postponed.

Even if the client provides a written notice indicating that the sale has already occurred-it does not hurt to contact the mortgage lender or their law firm to be certain. I had a client provide a foreclosure notice that indicated the sale had been held several months previously but had in fact not occurred. If you review the county assessor web site and the property is listed in the name of the mortgage company or a subsequent purchaser it is probably too late.

I will ask when is the sale date at the beginning of the initial first phone contact and also in my written questionnaire that is completed by the client (below).

If you want to keep your home or other real estate secured by a mortgage, please tell me if there is a foreclosure sale pending. In most cases, very little may be done to save the property after the foreclosure sale occurs. The foreclosure sale is scheduled for _____.

Failing to file the bankruptcy petition before the foreclosure sale could result in a malpractice action-because the debtor loses the ability to cure the mortgage default. I was retained as an expert witness in a malpractice action. The debtor alleged that his attorney failed to file the bankruptcy petition before the foreclosure sale-and also failed to file the appropriate Chapter (the debtor filed under Chapter 7 instead of Chapter 13). The state court found that the attorney was negligent in failing to promptly file. The attorney was fortunate-however-because the court found there were no compensable damages because the debtor did not have any equity over the mortgage balance.

b. Evaluating the wisdom in saving the home

Many times remaining in the home may be a poor option for the debtors. Counsel should discuss the benefits of saving the home. Please read the below hypothetical case for Mr. and Mrs. Smith.

Sample case.

Mr. and Mrs. Smith are married, have one child, four black labs and 3 cats. Mr. Smith is 48 and Mrs. Smith is 51. Their annual income is around \$80,400. They have had sporadic income and brief periods of unemployment. They pay \$240 to an HSA. They are paying \$1,900 per month on a 30 year mortgage they obtained 3 years ago and have been unable to prepay the mortgage. The balance on the mortgage is \$265,000 and the home is probably worth \$270,000. They are 3 or 4 months in arrears on the mortgage. They have been too “stressed” to open up all their mail. They own two cars-both are only 3 years old. The financed car was purchased about 2 years ago. The first car is worth \$16,000 and is subject to a \$12,500 loan. The second car is free and clear. They have \$25,000 in credit card and medical debt. They pay tuition to a private school for their only child--\$2,800 per year. Mr. Smith owes past due child support of \$1,000-the current monthly payment is presently \$200. They have no savings for an emergency and their only retirement is social security.

Counsel’s best financial advice for the Smiths is for them to sell the home and consider renting for a few years. This type of ‘reality check’ advice may not be well received by some clients-and you may be reminded that you will be retained for meeting their objectives-saving the home at all costs. Below are some reasons why the Smiths might wish to retain their home-despite many reasons not to.

-They are in love with their home. The clients are making an emotional decision- it is very difficult for them to see the practical difficulties of retaining the home. A related situation occurs when the clients have spent too much money and labor fixing up the home (“remodeling fever”)-have the home just the way they want-and no other living arrangement are acceptable (although they have saved nothing and may be way behind on the mortgage payments and other bills as a result of remodeling).

-they worry that their credit is shot and they will never be able to buy another home. A debtor usually has to wait about two and a half years following a Chapter 7 filing to qualify for a mortgage-assuming that have a decent earning capacity a reasonable credit score at that time.

-losing the home will affect their self-esteem-they will have to tell family and friends that they were not able to keep the payments current. The foreclosure notice in the newspaper may be read by persons they know.

-they have too much equity.

-the rental options-especially for animal owners-are abysmal. A move to another location may result in the child having to attend a different school or relocation of the family to another city or region.

-if they are unable to sell the home and pay the mortgage in full or have the mortgage deficiency debt forgiven they will end up having to file a chapter 7 bankruptcy anyway-so why not just save the home and avoid the deficiency.

c. Options for saving the home outside of bankruptcy

For many sensitive individuals, especially those that end up in a contested filing, the bankruptcy process may be one of the most denigrating and stressful events of their life. For the client who is unwilling to be completely honest the filing of a petition may result in a criminal prosecution for perjury or fraud. All of this is avoided if the borrower is able to obtain a suitable result without a bankruptcy filing. The manner in which financial institutions deal with past due borrowers changed dramatically after the Great Recession. Prior to that time-most mortgage lenders rarely let the debtors get more than six payments behind. Rarely did you hear of someone modifying a mortgage. The only option was to find another lender-which did happen infrequently. Since the Great Recession it became more common to see situations in which borrowers are up to three to four *years* behind in payments. After the bankruptcy case is filed, debtor's counsel will often be bombarded with letters from mortgage lenders explaining options for modifying the borrower's mortgage. A successful modification may involve

having the past due payments put at the end of the loan or even forgiven. Some require a cash payment that most borrowers simply cannot afford, e.g. \$8,000 to \$14,000 and then a resumption of payments.

The modification process may be grueling for some borrowers. It may not be necessary to retain a professional to assist with the modification process--some credible companies will provide useful assistance. Many others, however, appear to simply cheat gullible borrowers. I advise clients to keep written records of every contact and to make a copy of every document transmitted to the lender. I have heard many complaints from borrowers that the modification process is very frustrating and the mortgage lender's staff is sometimes uncaring, not helpful or unprofessional.

Beware that some lenders will simply not provide a modification. The WCDA will sometimes permit a few payments to be abated but has less flexibility than many private lenders.

Sometimes the borrower may be able to obtain an unsecured loan from a family member or friend to cure the default. Be aware that as debtor's counsel you are a debt relief agency and should tell the client to borrow funds in anticipation of bankruptcy.

Obtaining a replacement lender is also an option to save the home from foreclosure-but usually most borrowers do not have a high enough credit score or sufficient income. Even if the lender is willing to provide a loan-the terms may be substantially less competitive (higher interest rate) than the existing loan.

d. Utilizing bankruptcy to save the home-Chapter 7 and 13.

In the United States there are two basic forms of bankruptcy-liquidation and reorganization.

Liquidation - Chapter 7. Chapter 7 is the “straight liquidation” chapter and is filed by approximately 80-90% of debtors. Most debtors prefer Chapter 7 because the process does not take so long. Below is a comparison of the differences:

Chapter 7

- Generally faster
- Attorney fees less
- Bankruptcy is removed from your credit report more quickly

Chapter 13

- Payment required for 3-5 years
- Broader coverage for some debts
- May cure a mortgage default
- Taxes may be paid without interest

The primary purpose of a Chapter 7 bankruptcy case is to liquidate assets and pay something to the debtor’s creditors. The debtor will receive a discharge of most debts in exchange for the turnover of certain types of property. Very little or nothing is paid to the creditors in the majority of Chapter 7 filings.

Returning to the hypothetical case, Chapter 7 may be a better option if the Smiths elect to surrender their home or are able to enter into a modification or some other arrangement to address the mortgage default. If the Smiths decide to surrender the home, the Chapter 7 discharge will cover the deficiency liability provided they do not intentionally damage the home. If the Smiths elect to vacate the home they should be sure to let the mortgage company know. It is also a good idea to take photos of the home or have someone walk through the home with the borrower to confirm the home was in good condition when vacated.

If the Smiths are able to deal with the other remaining medical and credit card debts they could also attempt to settle the mortgage deficiency. As with credit card and auto repossession claims the lender may be willing to settle for a reduced amount-between 20% and 80% of the balance with a lump sum payment.

A short sale may also be utilized to reduce the amount of the liability-rather than letting the home be sold at the foreclosure sale. Sometimes the lender will

forgive the remaining balance in connection with a short sale.

The chapter 7 filing will stop the foreclosure sale-but does not have a mechanism to provide for the payment of the mortgage default. The filer may also convert the Chapter 7 to Chapter 13 (the Chapter 13 will provide a mechanism to cure the default) if they change their mind and decide to retain the home.

Conversions from Chapter 7 to Chapter 13 are governed by Section 706 and are best made shortly after filing and before the entry of the discharge in 3-4 months.

The chapter 7 debtor does lose control over the sale process when the chapter 7 petition is filed. Usually it is better for the debtor to sell the home rather than the trustee.

Chapter 7 may not be available to high income filers.² The debtor must provide a six month income form with the petition. If the debtor will not be able to discharge a mortgage deficiency in a chapter 7 filing the borrower maybe better off choosing to file Chapter 13 and to retain the home.

e. Utilizing Chapter 13 to save the home.

Chapter 13 may be the debtor's last resort if the debtor is unable to find a replacement lender, borrow the funds to cure, and is not able to obtain an in-house modification. Chapter 13 enables a borrower to cure the mortgage default over three to five years. If the debtor is significantly behind on making their mortgage payments-it is once again wise to have a "reality check" discussion. A debtor who is 42 payments behind and has a \$1,300 monthly mortgage payment will have to

² The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) brought the most substantial change to the bankruptcy laws in 27 years. BAPCPA was enacted in part to make it more difficult for higher income consumer debtors to file bankruptcy and in response to a perception that too many individuals were improperly filing bankruptcy. As stated by one of the bill's sponsors, the bankruptcy system functions such that "deadbeats can get out of paying their debt scott free while honest Americans who play by the rules foot the bill." A bankruptcy filing by a debtor who is able to pay back a certain amount to his creditors is deemed to be a substantial abuse. BAPCPA provides for the imposition of sanctions against debtor's counsel who improperly files such a case, including having to pay the trustee's reasonable attorney fees and expenses and possibly a civil penalty.

pay approximately \$1,250 as a Chapter 13 plan payment (in addition to the ongoing mortgage payment)-not including amounts to other creditors under the plan. A debtor who is “only” 3-5 payments behind will have a much easier time convincing the trustee the debtor is capable of making future payments. The debtor must commence the normal monthly payments shortly after filing. The mortgage may not be modified unless it is secured by property other than the debtor’s primary residence. The debtor may include one postpetition payment in the amount to be cured-but more than one may be questioned by the standing trustee or the mortgage lender. The effectiveness of Chapter 13 is limited if the debtor’s mortgage provides for a balloon payment in the near future.

f. The initial filing documents.

As discussed previously, the bankruptcy petition must be filed prior to the foreclosure sale to retain the ability to cure the default. Individuals that file bankruptcy may not always be the most organized and may tend to procrastinate to a greater degree than the general population. I have been contacted an hour before the sale and even a few minutes after. The closest I have come to actually filing is approximately three hours before the foreclosure sale. I was contacted at 3:30 p.m. the day before the sale. An attorney who passed away several years ago was able to file a petition within approximately one hour of the initial contact. This is also more impressive because this occurred prior to the adoption of e-filing by the court.

The bankruptcy case is commenced by the filing of the petition and related schedules. The petition and schedules set forth the debtor’s assets, liabilities, two budgets and 28 financially related questions. Great care must be undertaken in preparing the schedules-the petition and related documents should be reviewed page by page and the client should be thoroughly questioned about the information.

False information may result in a permanent denial of bankruptcy relief and a criminal prosecution. Congress significantly amended the Bankruptcy Code in 2005 (“BAPCPA of the Bankruptcy Abuse Prevention and Consumer Protection Act”) to address perceived fraudulent debtor conduct. BAPCPA places more responsibility upon debtor’s counsel to ensure that the information is correct. The debtor’s attorney must have made a reasonable inquiry verify the factual accuracy and legal basis for everything contained in the bankruptcy schedules and other documents. The trustee will be much more likely to oppose confirmation of the plan or seek dismissal if there are material misstatements in the schedules.

Almost all bankruptcy attorneys utilize commercial software to prepare the petitions. It is advisable to purchase the highest quality software.

The 2005 BAPCPA amendments also provided for a random audit of cases by the United States Trustee’s Office. A summary of the audit findings may be found at the United States Trustee’s website

<https://www.justice.gov/ust/bankruptcy-data-statistics/reports-studies>. The audit is generally done by an accounting firm retained by the United States Trustee’s Office. The audit program has been suspended and reinstated several times due to budget shortfalls. The auditor conducts an asset search, reviews the last two tax returns and bank statements and income information for six months prior to filing. It is advisable to utilize a private service, such as Lexis that will conduct a similar asset search on your client. You could also conduct your own asset searches by contacting the assessor’s office or the court clerk. It is important to review the client’s tax returns and bank statements to make sure the information is accurate.

When you are contacted at the last minute before a sale it is very difficult to prepare and file a complete set of accurate documents. You might want to consider an “emergency” or “incomplete” filing.” Local Rule 1002-1 permits an initial “incomplete” filing. The missing documents must then be filed in 14 days.

Minimum Filing Requirements to Commence a Case

(A) To commence a bankruptcy case, the following must be filed with the bankruptcy clerk:

- The applicable filing fee, an application to pay in installments with a minimum initial twenty-five percent (25%) installment, or an application in forma pauperis;
- A petition, a federal employer identification number or a redacted social security number on the petition, and a Form 21 - Statement of Social Security Number;
- A Clerk's Notice to Consumer Debtor(s) when debts are primarily consumer debts;
- A list of creditors and their addresses;
- A list of assets and their location;
- Certificate of Counseling;

I would much prefer to file an incomplete petition and schedules than file a document for which I have little confidence it is accurate. If you do not have time to finalize the documents within 14 days, an extension for more time is usually granted.

g. The credit counseling requirement.

When the filing must be accomplished on an expedited basis-the first item to address is the need to go through a credit counseling session. The debtor must have had an individual or group briefing from an approved nonprofit budget and credit counseling agency within 180 days of filing. The briefing is available in person, by phone or online. The U.S. Trustee is charged with approving non-profit credit counseling agencies and financial management courses. A list of the approved credit counseling agencies is available at the U.S. Trustee's web site. <https://www.justice.gov/ust/credit-counseling-debtor-education-information> The cost for a credit counseling certificates ranges from \$10 to \$35. The court has dismissed several cases in the last few months because the certificate was not obtained within the proper time period.

There is an exception for situations in which the debtor was not able to obtain a briefing within 5 days of the request or there are exigent circumstances (if you are called on Monday afternoon at 4:30 and told that there is a foreclosure sale on Tuesday at 10:00 am may possibly be an exigent circumstance). The subsequent briefing may be obtained 30 days after filing and an additional 15 days if a motion to extend is filed. I usually advise the client to simply secure the credit counseling first in the process and not utilize the exception for exigent circumstances. Although the filing may be an emergency for you-the debtor has probably known about the foreclosure sale for a month and a half. It takes only an hour to complete the credit counseling session.

h. Eligibility to file Chapter 13

Counsel must make sure the client is eligible to file a Chapter 13. There are debt limits for a Chapter 13 filer.

Secured debt	\$1,184, 200
Unsecured	\$394, 725

Further, Chapter 13 relief is available to individuals-but not corporations, LLC, or partnerships.³ The debtor must also have a regular source of income. If your client exceeds the debt limits a filing as an individual Chapter 11 debtor may have to be considered. The filing of a chapter 11 is very expensive-the filing fee alone is \$1,717 (versus \$335 for a Chapter 7 and \$310 for a Chapter 13).

i. Problems when the debtor has filed previously.

You should also determine if the debtor has any prior bankruptcy filings. BAPCPA has new requirements related to stay relief that are a trap for unaware

³ Be sure the debtor has not transferred the home into an estate planning trust. The mortgage lender could claim that the debtor may not cure because the home is not property of the estate.

counsel. The automatic stay provided by 11 U.S.C. § 362(a) comes into effect immediately when the petition is filed. The automatic stay prohibits a creditor from taking any action to obtain property of the bankruptcy estate or to exercise control over property of the estate-including the commencement or continuation of a foreclosure action. If the debtor has had a case dismissed within the last year, the automatic stay terminates 30 days after filing. The debtor must obtain a signed order extending the stay protection before the end of the 30 day period. In other words, you are very unlikely to have the order signed if the motion is filed on day 29. Local Rule 4001-1 provides that the motion to continue the stay must be filed immediately after the case is filed.

If the debtor does not have to address stay relief issues-serial filings may still make confirmation of the plan more difficult. The more the debtor has filed the more likely the debtor may face a challenge that the petition was not filed in good faith. The longer the debtor is able to wait between filings the better.

Although Chapter 13 may also be utilized by debtors who have a recent bankruptcy filing-the debtor may also be limited in the ability to obtain a Chapter 13 discharge. Under the pre BAPCPA law a debtor could not receive a Chapter 7 discharge if a prior Chapter 7 discharge was received in a case commenced within the last 6 years. BAPCPA has extended this time period to 8 years. There are also limitations on a Chapter 13 debtor's ability to obtain a discharge if a Chapter 7 case was filed within the last four years or a Chapter 13 case was filed within the last two years. This does not limit the debtor's ability to obtain confirmation of a plan-but the debtor will not be able to discharge other debt-such as credit cards or medical bills. Many times the driving factor will be the need to file before the foreclosure sale. The debtor may not be able to wait out the four year waiting period because of the need to file before the foreclosure sale.

j. Drafting the plan

The debtor's plan must be filed with the petition or within 14 days after filing as part of the "incomplete" or "emergency" filing. The court recently adopted a national plan form. Information about the national plan form is available on the court's web site. I strongly recommend that a draft of the plan be sent to the Chapter 13 trustee for a review prior to the court filing. This is a very considerate and useful service by the standing trustee. The refiling review will help eliminate math errors and other easy to fix problems and will reduce or eliminate plan objections.

I usually try to contact the mortgage lender to obtain a cure amount. Many times the lender is not able to provide a cure amount until later in the case. It is very common to have to amend the plan once the mortgage lender's proof of claim is filed.

The Chapter 13 plan will also treat unsecured debt, e.g. medical, credit card, pay day loans, and repossession claims. Unsecured debts are paid between 2% and 100% depending on the type of property owned by the debtor and the amount of disposable income. Although the Chapter 13 may have been filed primarily to address the mortgage arrearage-it will also provide a benefit to debtor by subjecting the creditors to payment plan (the debtor will not have to be concerned about a bank or wage garnishment).

k. Documents for the trustee and the 341 meeting

A 341 meeting is held in about a month after the case is filed. Although referred to as the "first meeting of creditors"--creditors rarely attend the meetings. The typical 341 meeting lasts 10-30 minutes. The meeting mainly serves as an information gathering opportunity for the trustee. The trustee will mail a letter to the debtor and counsel that will usually request the last four filed tax returns

(transcripts are acceptable), copies of titles for vehicles that are subject to a loan, an automobile insurance binder, bank statements for the month the case was filed in, the assessor valuation for any real estate, financial statements, loan documents, and a “domestic support obligation” form. A debtor who fails to provide the documents in a timely manner or at all is unlikely to obtain confirmation of a plan. The first Chapter 13 plan payment is due at the 341 meeting and must be paid with a money order or cashier’s check.

1. Issues in obtaining confirmation

The plan is initially sent to all creditors by the debtor. The court mails an initial notice of a confirmation hearing and an opportunity to object to the plan (the “Notice of Chapter 13 Confirmation Hearing and Opportunity to Object”- ntccho form) to all the creditors. The initial confirmation hearing is held in about 5 weeks after the petition filing. Objections must be filed 7 days prior to the phone hearing.

The prospects for obtaining the confirmation of a consensual uncontested plan are good if the debtor has the correct mortgage arrearage amount, has provided the proper documents to the trustee, and has presented a feasible case. If a plan objection is filed, the court will schedule a later evidentiary hearing or the debtor may withdraw the plan and file an amended plan. If an amended plan is filed the debtor must mail the plan and a notice of opportunity to object to the creditors. The plan notice form may be found at page 86 of the local rules. In some situations the court may permit the objection period to be shortened and limit the parties that have to be noticed. Below are common objections that may be raised:

- late on plan payments or mortgage payments or no payment made at all;
- debtor has not presented a feasible budget
- petition, plan or both not filed in good faith
- incorrect mortgage arrearage amount

- failure to file tax returns
- technical or math problems in the plan
- failure to provide information or documents to the trustee

m. Issues following confirmation

Once the debtor obtains confirmation of the plan one would hope that no new issues will arise. All the debtor has to do is make the ongoing monthly mortgage payments, pay the monthly plan payment to the trustee, and turn over any tax refunds as required by the plan. Unfortunately many debtors will again become delinquent on their mortgage payments that become due after filing. The mortgage company will then, oftentimes without any prior notice, file a stay relief motion (a motion to end the protection of the bankruptcy). The stay motion has a 17 day period for objections. Failing to timely file an objection to the stay relief motion is probably fatal. The court will set a telephonic hearing in a 2-3 weeks and a final evidentiary hearing in about 3-5 weeks.

A common objection will tell the lender and the court that the debtor should be able to bring the payments current by the time of the final hearing. The ability to do so will usually resolve the stay relief motion. The debtor may be able to have funds gifted by a relative. The trustee must be notified if the debtor seeks to borrow funds to cure the default. *See* Local Rule 2083-1(B).

Sometimes a settlement may be reached. Below is language from a fairly typical stay relief stipulation.

2. The debtor and Big Bank have reached an agreement regarding the stay litigation. The postpetition default amount is \$5,898.96 (calculated as the monthly payment for April - July 2017 in the amount of \$1,467.24 and NSF fee of \$30.00). The debtors agree to cure the default amount (\$5,898.96) within 70 days from the date of the order approving this stipulation.

3. The parties further agree that if the debtors do not pay the ongoing monthly mortgage payments from the date of this stipulation going forward or otherwise provide for the cure of the postpetition default amount, Big Bank will be entitled to the entry of an order modifying the automatic stay to allow it to foreclose on the residence without further hearing or notice. Prior to filing an affidavit of default, Big Bank shall provide a written notice of default to the debtors and debtor's counsel to the address of record with this court. The debtors shall have a 15 day cure period from the date of the default notice. The debtors shall have 5 days to object to the affidavit of default. Big Bank shall be entitled to a \$75 fee for each default notice mailed to the debtors.

The debtor may also see if the lender might agree to the filing of a modified plan that will include a postpetition arrearage (on top of the prepetition arrearage already in the plan). The standing trustee may oppose the motion to modify if the debtor is not current on the plan payments or is trying to pay less to the unsecured creditors than the amount already in the confirmed plan.

2. The debtor and Wyoming Development Authority have reached an agreement regarding the stay litigation. The postpetition default amount is \$12,444.38 thru December 15, 2017. The debtor will resume making regular postpetition payments January 1, 2018. The debtor and Wyoming Development Authority agree that the debtor may file an amended plan that will include the postpetition arrearage. The debtor shall file the plan within 20 days from the date the court enters an order approving this stipulation. The parties agree that the default amount may be adjusted by mutual agreement if the debtor provides proof of additional payments not reflected in the payment history.

Sometimes the mortgage company will not oppose a modification of the debtor's plan so that the past due payments and the mortgage company's attorney fees are included with prepetition arrearage already treated under the plan.

n. Other options to address postconfirmation financial challenges

There are other possible options to assist a debtor who may become

delinquent on his mortgage payments. A motion to abate the plan payments for 1-4 months may be filed if the debtor is experiencing a temporary disruption of income or unexpected expenses. The term of the plan is extended so that the debtor pays the same amount originally proposed for the payment of the creditors. The motion is served on the trustee. The trustee has seven days to object to the motion. The trustee does not object in most cases provided the debtor has a reasonable basis for the abatement. Judge Parker recently entered General Order 15-02 that sets for the requirements for an abatement motion. If the debtor has above average income under BAPCPA and had to file a 60 month plan, the abatement option is usually not available.⁴ If the debtor is below the BAPCPA income levels it is usually advisable to file a plan for a term less than 60 months so that an abatement motion may be filed. If the payment abatement does not sufficiently address the debtor's problems, a modified plan may also be filed. The court may permit the debtor to file a modified plan with a reduced payment if the debtor is able to show that their income has been reduced or that expenses have increased.

o. The hail mary pass-dismissal and a new beginning.

The debtor may have to consider a dismissal and refiling if unable to bring the payments current or negotiate a settlement of a stay relief motion (this type of case is sometimes referred to as a "retread"). The debtor would have the opportunity to file a new case and include the postpetition arrearage in the new filing. In a new filing the debtor will have to immediately seek an extension of the automatic stay and obtain an order within 30 days of the filing. The debtor is also very likely to face an objection by the trustee that the plan is not filed in good faith or is not feasible-just as in the prior filing.

⁴ A motion to abate may be available if the debtor has already turned over tax refunds to the standing trustee.

The debtor will not be eligible to refile a bankruptcy petition for 180 days if the debtor seeks a voluntary dismissal after a stay relief motion is filed. 11 U.S.C. §109(g)(2). If the mortgage lender quickly cues up a foreclosure the debtor may be unable to stop the sale. An unopposed dismissal on the trustee's motion is probably not within the ambit of Section 109(g)(2) .

p. Sale of the Home in Chapter 13

The debtor could also consider a sale of the home pursuant to Section 363 as a possible way to deal with a serious postpetition mortgage default. The sale must be noticed on all parties in interest and there is a 23 day objection period. The trustee will usually not oppose the debtor retaining an amount for a properly claimed homestead exemption. The sale might allow the debtor to limit the amount of a deficiency and have the repayment plan for other creditors remain in place. In some situations it is simpler to dismiss the Chapter 13 and sell outside of bankruptcy (the filing of a Section 363 motion will not be required).