

Below are the preliminary technical comments of the Commercial Law League of America ("CLLA") concerning the amendments to the Bankruptcy Code proposed by H.R. 3609 (the "Bill"). Our comments are limited to the application of the amendments to the Code and Chapter 13 practice. The CLLA takes no position on whether the underlying policy for the changes is desirable or not.

ANALYSIS

I. Modification of Mortgages (Bill Sections 3,4, 6 and 7): These Sections: (i) permit the modification of a mortgage on real property that is the principal residence of the debtor; (ii) permit the modification to extend over a period more than 5 years which differs from other provisions of Chapter 13, but is consistent with the provisions of Chapter 11, and (iii) limit the modification to the value of the collateral which is consistent with other provisions of Chapter 13 and Chapter 11. However, in Section 4(b) of the Bill there is a reference to a proposed change to "Code Section 1325(b)(5)"; this, we believe, should be "Code Section 1325(a)(5)". With this suggested change, there is no other statutory conflict between the amendments and the other provisions of the Code, and the proposed changes achieve their purposes plainly and clearly.

II. Elimination of Prepetition Credit Counseling (Bill Section 5): This Section eliminates the prepetition counseling when a foreclosure is pending. It sets firm standards by permitting the waiver of this requirement when the mortgage holder on "a debtor's principal residence has initiated a judicial or non-judicial foreclosure . . ." Although this relies upon state law for the definition of "initiated", "judicial", "non-judicial" and "foreclosure", these are standard terms that the Bankruptcy Courts can readily define if there is any controversy. This proposal does not conflict with other Code provisions, although the introductory language of Code Section 109(h)(1) should be changed from "Subject to paragraphs (2) and (3)" to "Except as otherwise provided in this subsection" to allow for the new exception proposed in the Bill and other exceptions currently existing under Code Section 109(h).

III. Limitation of Fees, Cost, and Charges (Bill Section 2): This Section requires "timely notice" to the debtor and trustee by a mortgage holder (of the debtor's principal residence) of fees, costs, or charges. However, this Section creates confusion rather than the certainty. For example, is notice "timely" if the creditor notifies a debtor upon the commencement of a case that it is entitled to charge fees, costs, or charges as provided in the originally executed mortgage documents? By contrast, if notice is required prior to each fee, cost, or charge, does that require a creditor to notify the debtor (i) each time a late fee is incurred (because the monthly payment is late), or (ii) each time the creditor must pay for unpaid real estate taxes (which results in additional interest due to the delay), or (iii) each time that the creditor must incur the cost of attorneys when required to file a motion for relief from stay (which could be caused, for example, by the failure to insure the property)? Also the "notice" proposed by the Bill might prejudice a creditor who should be entitled to protect its collateral from defaults of the debtor and charge a debtor upon a debtor's default -- it may even prejudice the debtor due to the delays and expense that may be incurred.

Memo to Susan Jensen
House Judiciary Committee
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There is another element of confusion that is created by this Section. Monthly mortgage bills often are not sent by many mortgage lenders as they are concerned that such bills may be construed as violations of the automatic stay. Confusion may result if a debtor receives a notice of a late fee, but not the underlying monthly bill.

Therefore, if the intent of Section 2 is to provide notice to debtors without prejudicing creditors, it should be rewritten so that both debtors and creditors have clear standards upon which they can rely. The CLLA is prepared to provide additional language concerning the drafting of this Section if it has additional guidance regarding the intent of the phrase “timely.”