

NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

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October 17, 2007

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Washington, D.C. 20515

Dear Members:

The National Bankruptcy Conference (“NBC”) has considered the issues raised by recently introduced bills designed to provide protection against home foreclosures in light of the subprime mortgage crisis. Those bills are H.R. 3609 (the “Miller Bill”), S. 2136 (the “Durbin Bill”), S. 2133 (the “Specter Bill”), and H.R. 3778 (the “Chabot Bill”). As you may be aware, the NBC provided a Report, dated July 17, 2007 (“NBC July Report”), on a draft of the Durbin Bill, in which we provided technical comments and addressed certain policy considerations. A copy of the NBC July Report is attached. The NBC remains committed to the policy positions set forth in the NBC July Report.

Based upon the work of the NBC’s Committee on the Individual Debtor, and with the approval of the Executive Committee, the NBC believes that the principle of equality of distribution underlying Bankruptcy Code § 506(a) supports modification of mortgage debt on the debtor’s principal residence in chapter 13 and reamortization of loans at reasonable fixed rates. We prefer the approach taken in the Miller Bill because it provides more flexibility and is designed to reflect economic reality. The NBC also supports relief from the pre-filing credit counseling requirement for chapter 13 debtors who face imminent home foreclosure.

We are aware of the argument that such legislation would adversely affect the supply of home mortgage loans. However, we believe that historical experience with similar remedies provided in chapters 11 and 12, as well as with similar remedies available for vacation or other second homes in chapter 13, belie such concerns. By recognizing economic reality and averting foreclosures and liquidation, which often depress values in entire neighborhoods, modification of secured obligations under chapters 11 and 12 actually preserves value for creditors and debtors. Such provisions have not had perceptible adverse effect on credit markets. Because of that, we do not support a “sunset provision” with respect to this important law reform.

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In addition, the NBC supports provisions, such as those in the Durbin Bill, that would: (1) require all fees and charges on secured debts incurred while a chapter 13 plan is in effect to be subject to objection in the bankruptcy court; (2) codify for consumer cases that mandatory arbitration clauses need not be honored in core proceedings; and (3) prevent use of judicial estoppel to eliminate consumer protection claims against lenders based on inadvertent nondisclosure of such claims in the borrower's bankruptcy. We do not support any provision, such as found in the Specter Bill, that would require lender consent to modifications, as such a provision would effectively negate the change proposed in the Miller and Durbin bills. Lenders are currently free to agree to changes. However, without the power of the bankruptcy court to require mortgage modifications, lenders have little if any incentive to agree.

We continue to be available to provide technical drafting assistance with respect to this important legislation, so that the sponsors' or committee's intentions are clearly expressed (even if we may disagree with them) and to avoid unanticipated consequences, such as litigation pitfalls often resulting from new legislation. Please contact us with any questions or concerns you may have.

The NBC will be meeting in Washington, D.C. on October 25-26, 2007, during which time we will discuss further the issues raised by the above-noted bills. We will advise you of the position of the entire Conference after our meeting.

Thank you for your interest in and sponsorship of legislation in this important area.

Sincerely,

Richard Levin
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