

Saving Homes in Bankruptcy



National Housing Law Project
Western Center on Law & Poverty
National Consumer Law Center
Tenants Together

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January 13, 2015

**This webinar is provided by the National consumer
Law Center and the National Housing Law Project (NHLP)**

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Moderator – Tara Twomey

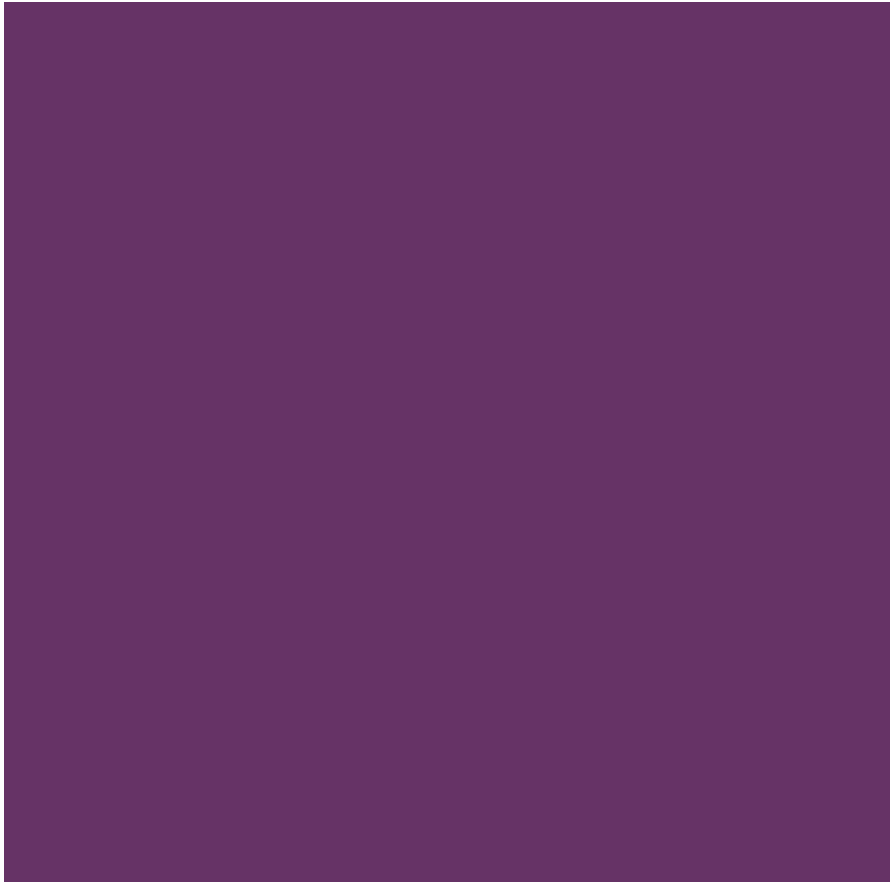
- Tara Twomey is currently Of Counsel to the National Consumer Law Center and the Project Director for the National Consumer Bankruptcy Rights Center.
- She previously lectured at Stanford, Harvard and Boston College Law Schools.
- She is a contributing author of several books published by the National Consumer Law Center, including [Foreclosures](#) and [Bankruptcy Basics](#).



Presenter – Sarah Bolling Mancini

- Sarah Bolling Mancini is Of Counsel for NCLC half-time, focusing on foreclosures and mortgage lending, and works half-time as an attorney in the Home Defense Program of Atlanta Legal Aid.
- She has experience representing homeowners in bankruptcy cases and litigating in state, federal district, and bankruptcy courts.
- She received her B.A. in public policy from Princeton University and her J.D. from Harvard Law School.





Saving Homes In Bankruptcy

Sarah Bolling Mancini
Of Counsel, National Consumer Law Center

January 13, 2015
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Why Bankruptcy?



Bankruptcy Code

Federal Rules of
Bankruptcy Procedure

Local Rules and Standing
Orders

7

1
3

9

1

13

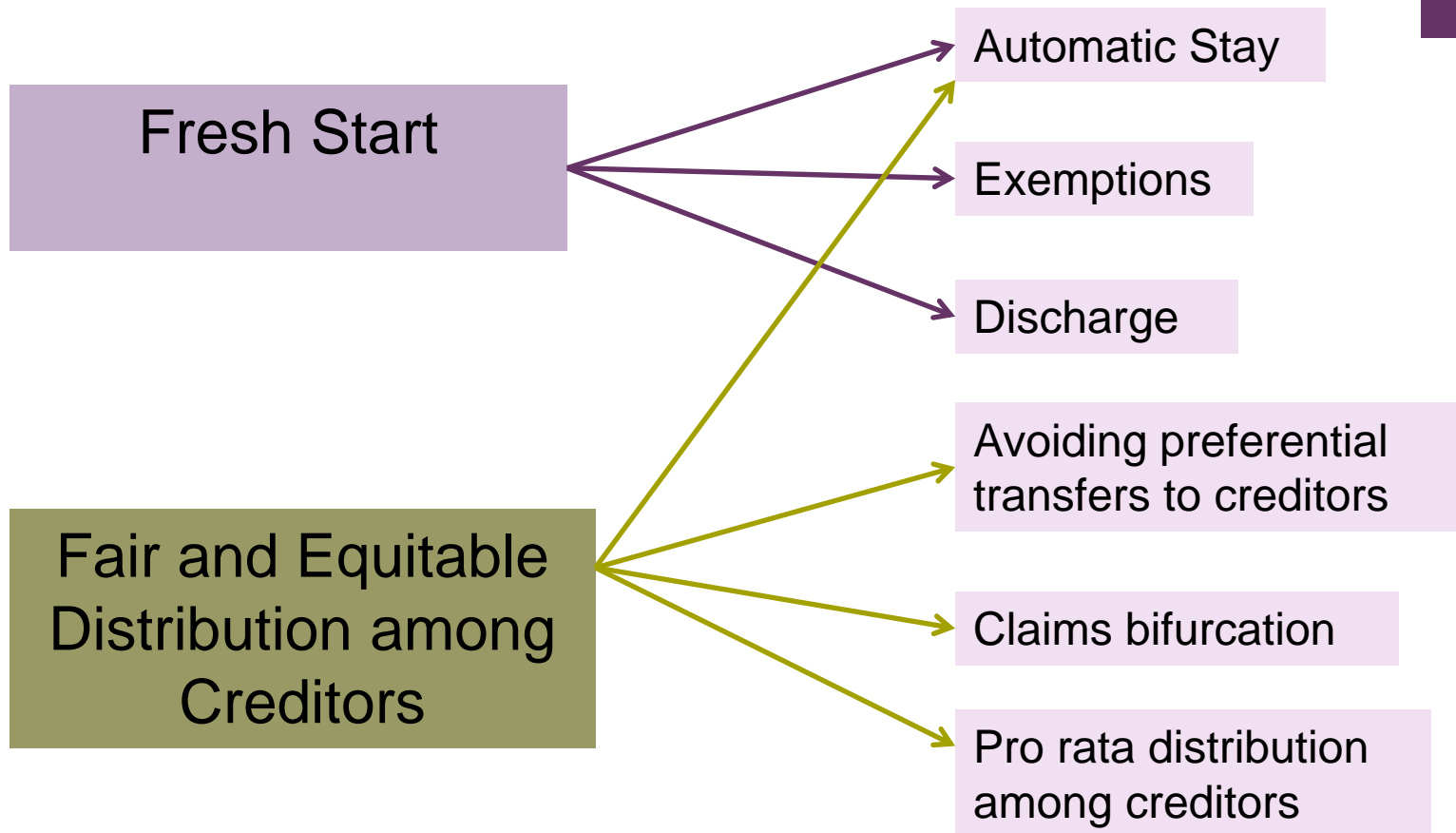
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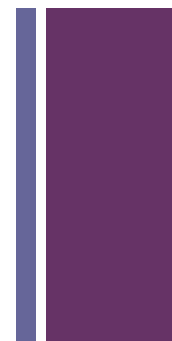
***Fresh Start for Debtors**

***Fair and Equitable
Distribution of
Non-Exempt Assets to
Creditors**

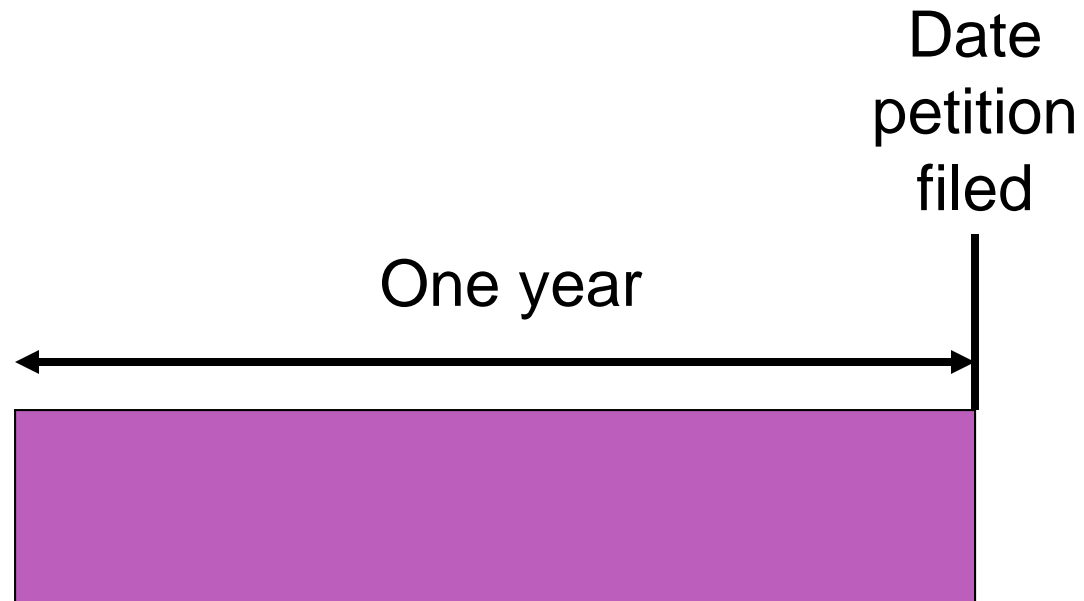
+ Key Bankruptcy Concepts



The Automatic Stay



Limits of the Stay: Repeat Filers

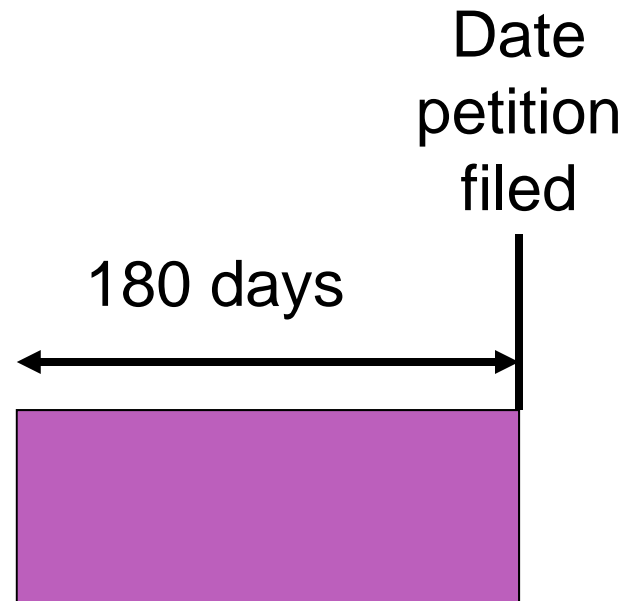
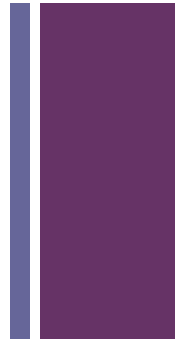


Within one year before filing:

One dismissal = auto stay for 30 days (unless extended)

Two or more dismissals = no automatic stay! (§ 362(c))

Eligibility to File: Repeat Filers



Within 180 days before filing:

Voluntary dismissal after a Motion for Relief from Stay?

Court order dismissing with prejudice for willful failure?

= Ineligible to file, and no auto stay (§ 109(h), § 362(b)(21))



Credit Counseling

Filing Fee/Fee Waivers

Means Test

Why not Chapter 7?

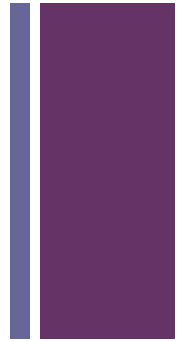
Secured Creditors Stay Secured

- Unless a Court orders otherwise, the **lien** (or security interest) survives the bankruptcy
- Thus, secured creditors will still be able to foreclose on a home or seize other property if consumer is in default
 - They may file a motion for relief from stay or wait for the discharge to be entered
- Personal liability on secured debts is wiped out (no deficiency after foreclosure, for example)

Saving Homes In Chapter 13



Secured Claims



- “Allowed secured claim” is limited to the value of the collateral – § 506(a)
- Undersecured claims may be bifurcated into their secured and unsecured portions

Debt Owed - \$10,000



Value- \$6,000



Allowed Secured Claim
\$6,000

Allowed
Unsecured Claim
\$4,000



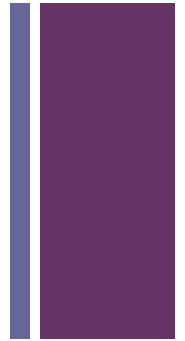
Anti-modification Rule (mortgage on principal residence)



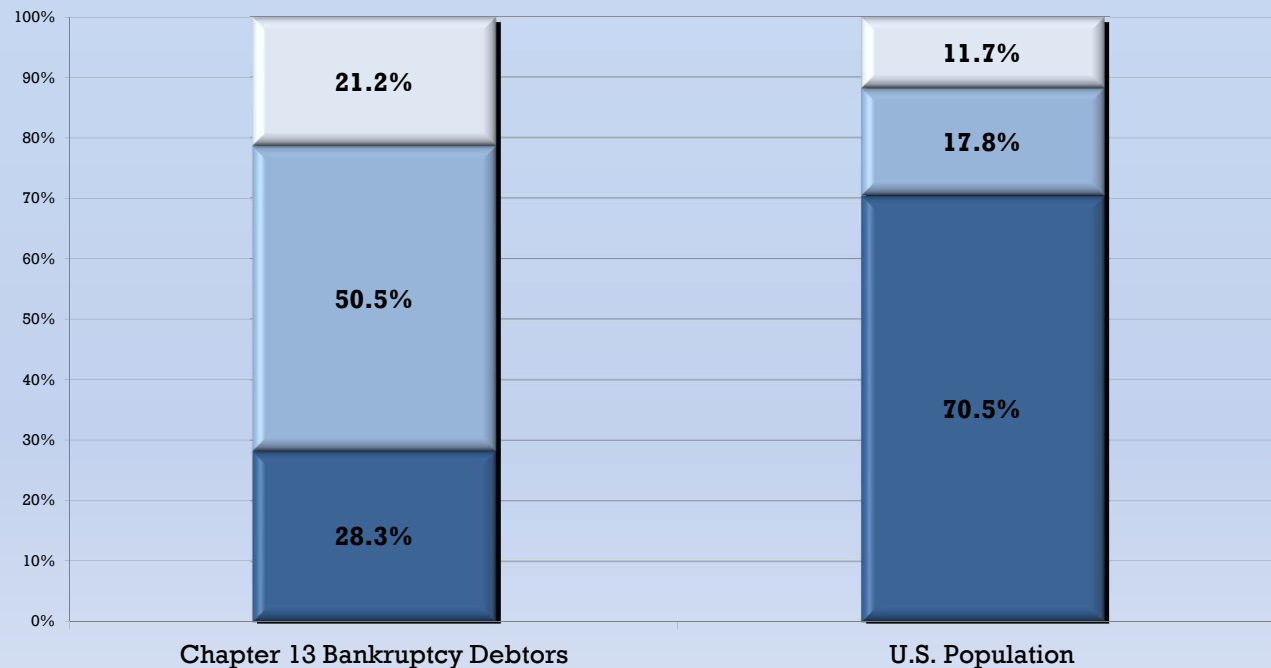
Section 1322(b)(2) – The plan may “**modify the rights** of holders of secured claims, **other than a claim secured** only by a security interest in **real property that is the debtor’s principal residence**, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims”

So... what can you do?

- Automatic Stay to stop foreclosure
- Cure and maintain the mortgage (unwind acceleration)
- Apply for loan mod while in ch 13
- Modify/strip off some mortgages
- Avoid judicial liens



Housing Cost as a Percentage of Income

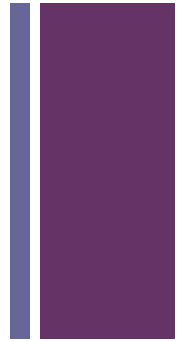


■ Severely Unaffordable (>50%) ■ Unaffordable (30% - 50%) ■ Affordable (<30%)



Cure and Maintain

Right to Cure



- 1322(b)(5) the plan may provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any claim in which the last payment is due after final plan payment
- Arrearages include reasonable pre-petition foreclosure costs
- All payments are made under the plan even if debtor disburses ongoing maintenance payments.

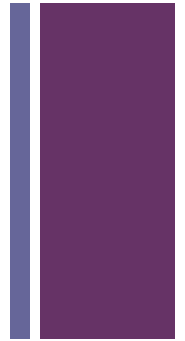
New POC Requirements

Payment Change Notices

Notice of Fees or Charges

Notice of Final Cure

New POC Requirements



- For all claims, itemized statement of interest, fees and other charges
- For security interest in debtor's property, amount necessary to cure any default
- For security interest in debtor's principal residence, Official Form B10, Attachment A and mortgage escrow statement prepared as of petition date

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ Case number: _____

Name of creditor: _____ Last four digits of any number you use to identify the debtor's account: _____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. Principal due (1) \$ _____

2. Interest due

Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
____%	_____	_____	\$ _____
____%	_____	_____	\$ _____
____%	_____	_____	+ \$ _____
Total interest due as of the petition date			\$ _____

Copy total here ▶ (2) + \$ _____

3. Total principal and interest due (3) \$ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney's fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Advertisement costs	_____	(5) \$ _____
6. Sheriff/auctioneer fees	_____	(6) \$ _____
7. Title costs	_____	(7) \$ _____
8. Recording fees	_____	(8) \$ _____
9. Appraisal/broker's price opinion fees	_____	(9) \$ _____
10. Property inspection fees	_____	(10) \$ _____
11. Tax advances (non-escrow)	_____	(11) \$ _____
12. Insurance advances (non-escrow)	_____	(12) \$ _____
13. Escrow shortage or deficiency (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13) \$ _____
14. Property preservation expenses. Specify: _____	_____	(14) \$ _____
15. Other. Specify: _____	_____	(15) \$ _____
16. Other. Specify: _____	_____	(16) \$ _____
17. Other. Specify: _____	_____	(17) + \$ _____
18. Total prepetition fees, expenses, and charges. Add all of the amounts listed above.	_____	(18) \$ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

- No
- Yes Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

1. Installment payments due Date last payment received by creditor _____
mm/dd/yyyy

Number of installment payments due (1) _____

2. Amount of installment payments due

_____ Installments @ \$ _____

_____ Installments @ \$ _____

_____ Installments @ + \$ _____

Total installment payments due as of the petition date \$ _____ Copy total here ▶ (2) \$ _____

3. Calculation of cure amount

Add total prepetition fees, expenses, and charges Copy total from Part 2 here ▶ + \$ _____

Subtract total of unapplied funds (funds received but not credited to account) - \$ _____

Subtract amounts for which debtor is entitled to a refund - \$ _____

Total amount necessary to cure default as of the petition date (3) \$ _____

Copy total onto Item 4 of Proof of Claim form



B 10 (Attachment A)(12/11)

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor:

Case number:

Name of creditor: **JPMorgan Chase Bank, National Association**

Last four digits of any number you use to identify the debtor's account: _____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. Principal due					\$27,511.77
2. Interest due	Interest rate	From	To	Amount	
		mm/dd/yyyy	mm/dd/yyyy		
	7.500%	09/01/2010	11/30/2012		
	Total interest due as of the petition date			\$4,644.30	Copy total here \$4,644.30
	Deferred Amount (if any)				\$0.00
	Escrow Advance Balance				\$2,420.73
3. Total principal and interest due, plus advances, minus credits, if any.					\$34,576.80

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included except for Line 13, in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates Incurred	Amount
1. Late charges	See Attachment B	(1) \$385.15
2. Non-Sufficient funds (NSF) fees	"	(2) 0.00
3. Attorney's fees	"	(3) \$487.50
4. Filing fees and court costs	"	(4) \$0.00
5. Advertisement costs	"	(5) \$420.00
6. Sheriff/auctioneer fees	"	(6) \$0.00
7. Title costs	"	(7) \$325.00
8. Recording fees	"	(8) \$0.00
9. Appraisal/broker's price opinion fees	"	(9) \$78.00
10. Property inspection fees	"	(10) \$238.00
11. Tax advances (non-escrow)	"	(11) \$0.00
12. Insurance advances (non-escrow)	"	(12) \$0.00
13. Escrow shortage or deficiency (Do not include amounts that are part of any installment payment listed in Part 3.)	"	(13) \$3,185.81
14. Property preservation expenses. Specify: _____	"	(14) \$0.00
15. Other. Specify: See Attachment B	"	(15) \$5.79
16. Other. Specify: _____	"	(16)
17. Other. Specify: _____	"	(17)
18. Total prepetition fees, expenses, and charges. Add all of the amounts listed above.		(18) \$5,125.25

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

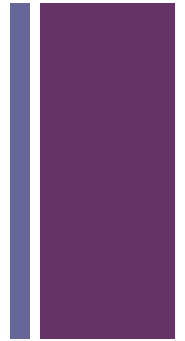
- No
- Yes. Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable non-bankruptcy law.

1. Installment payments due	Date last prepetition payment received by creditor	11/02/2010	
	Number of installment payments due	27	
2. Amount of installment payments due	27 installment(s) @	\$320.49	
	Total installment payments due as of the petition date	\$8,653.23	Copy total here (2) \$8,653.23
3. Calculation of cure amount	<u>Add</u> total prepetition fees, expenses, and charges		Copy total from Part 2 here + \$5,125.25
	<u>Add</u> total of post-petition payments		+ \$1,898.60
	<u>Add</u> total of post-petition attorney fees/costs		+ \$826.00
	<u>Subtract</u> total of unapplied funds (funds received but not credited to account)		- \$0.00
	<u>Subtract</u> amounts for which debtor is entitled to a refund		-
	Total amount necessary to cure default as of the petition date		(3) \$16,503.08

Copy total onto Item 4 of Proof of Claim form

Effective 1/1/2013 the total ongoing mortgage payment amount will be \$474.65.

New POC Requirements



- Summary of documents no longer sufficient - clarifies that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest - not just summaries - must be attached to POC
- New signature declaration: “I declare under penalty of perjury that the information provided is true and correct to the best of my knowledge, information and reasonable belief”
- Signer must indicate capacity (e.g., creditor; creditor’s authorized agent; trustee or debtor)



8. Signature: (See instruction #8)

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent.
(Attach copy of power of attorney, if any.)
- I am the trustee, or the debtor,
or their authorized agent.
(See Bankruptcy Rule 3004.)
- I am a guarantor, surety, indorser, or other codebtor.
(See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____

Title: _____

Company: _____

Address and telephone number (if different from notice address above):

(Signature) (Date)

Telephone number: _____ email: _____

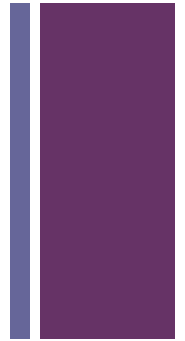
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Payment Change Notices



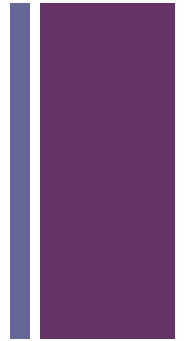
- Applies to security interest in debtor's principal residence treated in plan under § 1322(b)(5)
- Notice of payment change **21 days** prior to change – Fed. R. Bankr. P. 3002.1(b)

Notice of Fees and Charges



- Applies to security interest in debtor's principal residence treated in plan under § 1322(b)(5)
- Notice of fees or charges imposed during the chapter 13 case, no later than **180 days** after fees incurred – Fed. R. Bankr. P. 3002.1(c)
- 180-day period based on date when fees “incurred,” not when advanced or determined to be recoverable

Notice of Final Cure

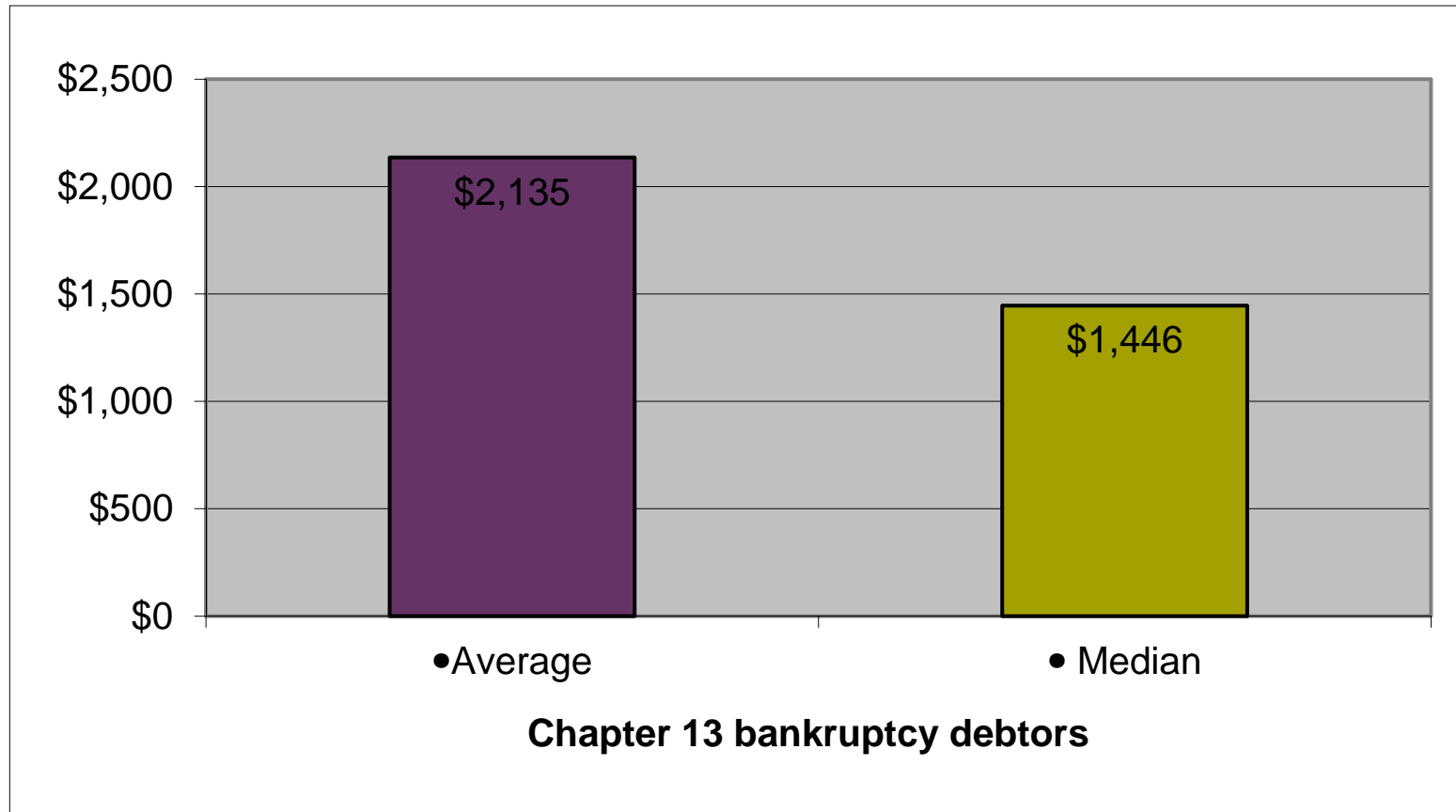


- Notice of final cure filed by trustee no later than **30 days** after plan completion - Fed. R. Bankr. P. 3002.1(f)
- If trustee does not file notice and debtor believes all cure and plan payments have been made, debtor may file notice
- Notice informs mortgage holder of obligation to file response
- No Official Form for notice, so become familiar with your trustee's form

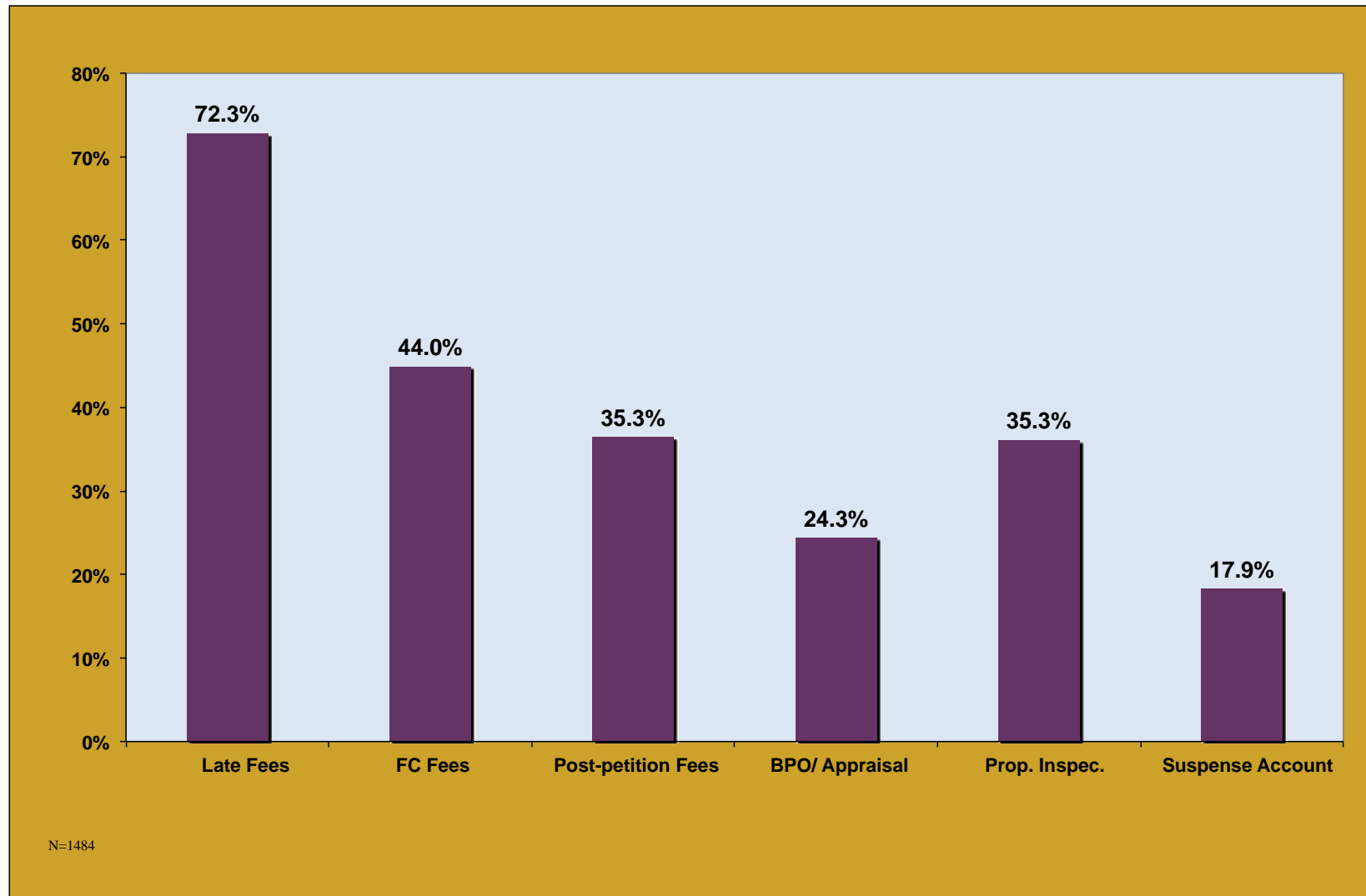


Challenging Amounts Due

Default Fees and Costs



The Usual Suspects






PRE-PETITION ARREARAGE

10/05-04/06 (7 x \$637.19)	\$ 4,460.33
Inspections	251.70
Recording fees	7.00
Prior attorney fees – bankruptcy	500.00
Prior attorney fees – foreclosure	1,355.00
Previous servicer expense	1,496.16
BPO	450.00
Restructured interest	454.45
Escrow shortage	377.87
Late charges	1,006.20
NSF charges	25.00
	<u>\$10,383.71**</u>

****PLUS INTEREST AT 12.150% AS DETERMINED BY THE TRUSTEE OVER THE LIFE OF THE PLAN.**



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	\$10,383.71**



****PLUS INTEREST AT 12.150% AS DETERMINED BY THE TRUSTEE OVER THE LIFE OF THE PLAN.**

Fixed rate note, P&I payment: \$468.08; Late Fee = 5% of P&I = \$23.40; Assessed Late Fees - 43



PRE-PETITION ARREARAGE



10/05-04/06 (7 x \$637.19)	\$ 4,460.33
Inspections	251.70
Recording fees	7.00
Prior attorney fees – bankruptcy	500.00
Prior attorney fees – foreclosure	1,355.00
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****PLUS INTEREST AT 12.150% AS DETERMINED BY THE TRUSTEE OVER THE LIFE OF THE PLAN.**

Fixed rate note, P&I payment: \$468.08



Loss Mitigation and Litigation in Bankruptcy

Loss Mit in Bankruptcy

- Borrower may apply for a loan mod during bankruptcy (or continue with an application that was initiated prior to the bankruptcy)
- No HAMP rule prohibits mods while in bankruptcy (MHA Handbook, Ch. II, §§ 5.2, 8.6)
 - Fannie Mae: at servicer's discretion, § 609.01
 - Freddie Mac: borrower in active bk must be considered if borrower, borrower's attorney, or the trustee submits request; § C65.7.1
- Bankruptcy attorney may have to sign a form or send a letter authorizing servicer to keep communicating with borrower or the borrower's 3P rep

Loss Mit in Bankruptcy

Options for the Ch. 13 Plan:

1) Standard plan to cure mortgage arrears

- Can client afford it? Does this contradict the request for mod?

2) Plan for a loan mod, saying arrears will be cured through loan mod and including the anticipated modified payment of 31% of debtor's gross monthly income in the budget (may serve as pre-confirmation adequate protection)

- *In re Arizmendi*, 2011 WL 2182364 (Bankr. S.D.Cal. May 26, 2011) (finding that TPP payments provided sufficient adequate protection even though contract interest not being paid)

3) Confirmable plan with lump sum at the end to treat the arrearage

- Feasibility is based on the expected loan modification

* Remember the binding effect of plan confirmation order.

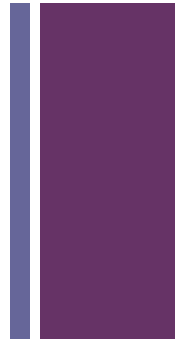
Bankruptcy and HAMP

Court Approval of loan mods:

- Servicer and its counsel must work with borrower or borrower's counsel to obtain any court and/or trustee approvals required in accordance with local court rules and procedures.
 - MHA Handbook Ch II, 8.5
- *In re Smith*, 409 B.R. 1 (Bankr. D. N.H. 2009) (finding that motion for approval of loan mod. does not present court with a case or controversy unless filed in connection with proceedings for stay relief, plan confirmation, or plan modification)

Loss Mit/Litigation in Bankruptcy

- RESPA Reg on Loss Mitigation, 12 USC 1024.41, does not have a bankruptcy exemption!
- Servicer must acknowledge application and notify borrower if it is complete, docs needed to complete it (and deadline) within 5 business days
- Servicer must evaluate within 30 days of receipt of a complete application
- Dual tracking restrictions (use them to argue against Motion for Relief from Stay?)
- Consider filing an Adversary Proceeding for a claim under RESPA





Stripping Off 2nd Mortgages

Anti-modification Provision



Section 1322(b)(2) – The plan may “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*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims”

Parsing the Language



Section 1322(b)(2) – The plan may “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, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims”

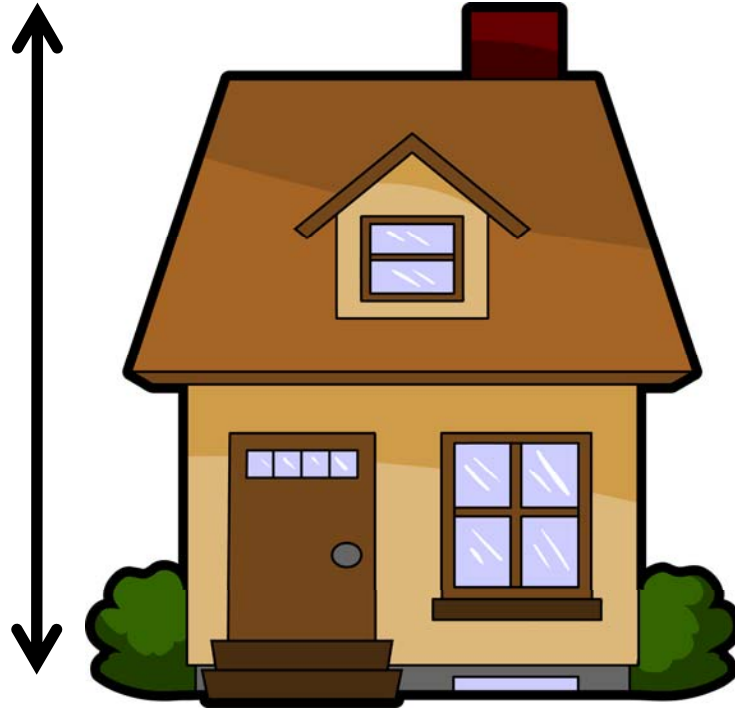
Underwater Homes



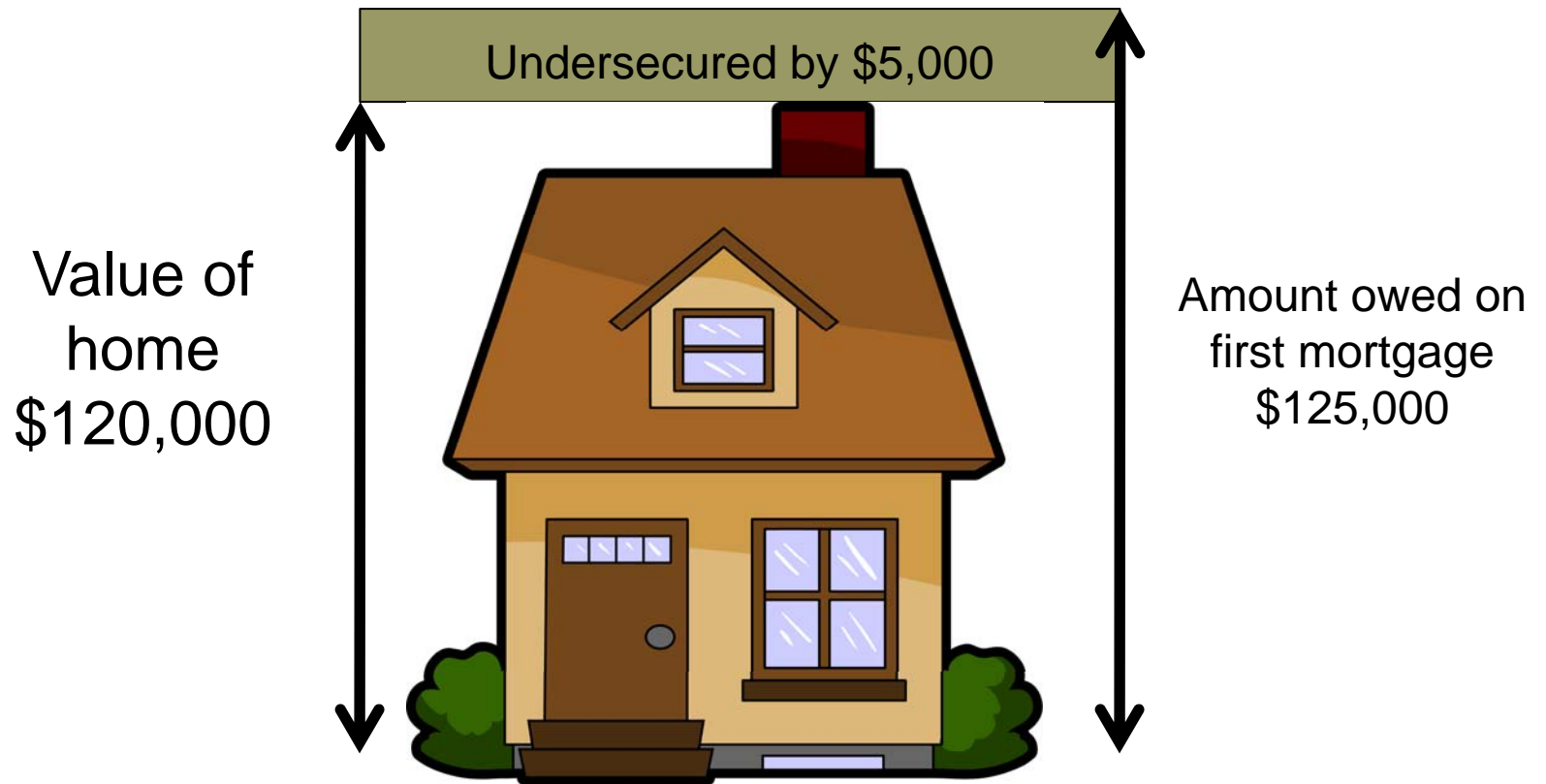
Value of Home: \$120,000
Amount due on First
Mortgage: \$125,000
Amount due on Second
Mortgage: \$15,000
Total Amount of debt:
\$140,000

Underwater Mortgages

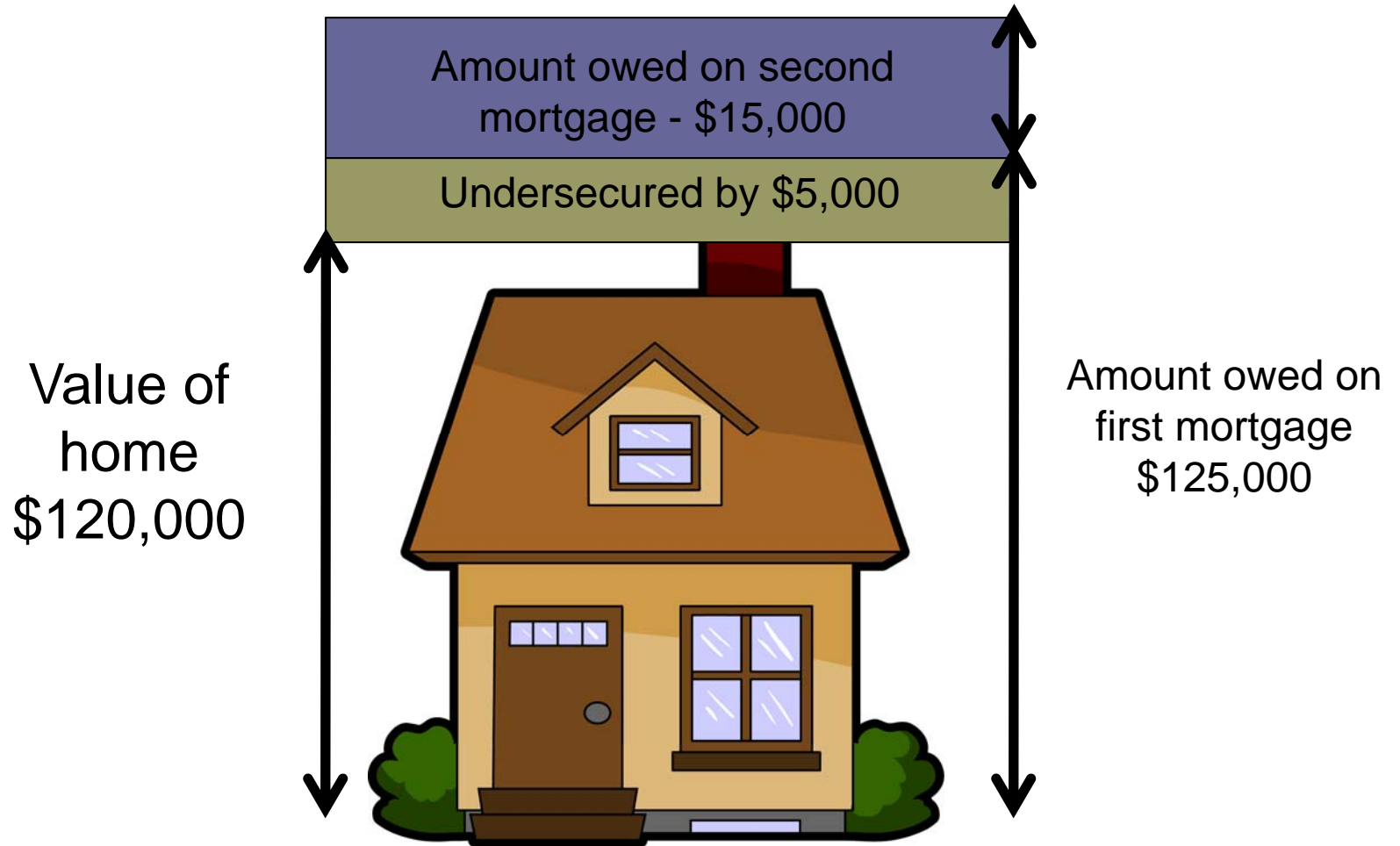
Value of home
\$120,000



Underwater Mortgages



Underwater Mortgage



Doing the Calculations

- If total of all **senior liens** equal or exceed property's **value**, junior lien creditor has no allowed secured claim
- Homestead Exemption not considered
- Other considerations:
 - Effect of first lien loan mod with principal reduction?

Proving Value of the Property

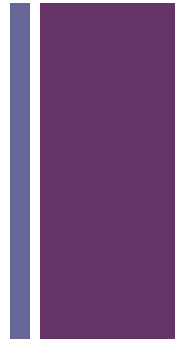
- Valuation date (three approaches):
 - Petition date
 - Effective date of plan (helpful in declining market)
 - Flexible approach
- Discovery
 - Obtain pre-foreclosure appraisal by servicer
 - Make use of request for admissions
- Debtor may initially rely upon BPO or recent appraisal, but will need appraiser to testify if value contested
- Debtor may testify as to condition of property, neighborhood, etc. as lay witness (F. Rule Evid. 701)

Strip Off Procedure

*Check Local Decisions, Rules and Practice

Adversary proceeding?

- Complaint to determine validity and extent of lien
- Motion/Contested matter?
 - Motion to determine value of claim secured by lien (Rule 3012)
- Chapter 13 plan provision
 - Make explicit and serve under Rule 7004 (due process)
- Objection to Claim
 - Avoid decisions on preclusive effect of claim allowance process



DISMISSAL OR CONVERSION

No discharge cases

Co-obligors



Other Permissible Mortgage Modifications

Parsing the Language



Section 1322(b)(2) – The plan may “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, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims”

Multi-family Buildings



Modification permitted when other real property, such as rental units, is part of security interest

Parsing the Language



Section 1322(b)(2) – The plan may “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, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims”

Mobile Homes



Loans on mobile homes that are considered personal property under state law are not subject to the anti-modification provision

Parsing the Language



Section 1322(c)(2):


“in a case in which the last payment on the original payment schedule for a claim secured only by... the debtor’s principal residence is due before the date on which the final payment under the plan is due...”
... may be modified.

Short-term loan/ final payment within next 5 years



Loans where the final payment will come due within the term of the chapter 13 plan are not subject to the anti-modification provision

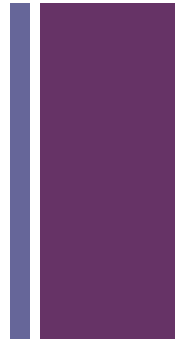
(people near the end of their 30-year mortgage...)



Lien Avoidance

Lien Avoidance

- Debtor may avoid “fixing of a lien” on interest of the debtor in property to the extent the lien impairs an exemption
- Judicial liens
- A lien shall be considered to impair an exemption to the extent that the sum of –
 - the lien;
 - all other liens on the property; and
 - the amount of the exemption that the debtor could claim if there were no liens on the property;
 - exceeds the value that the debtor’s interest in the property would have in the absence of any liens
- Courts have held that this formula is to be applied literally

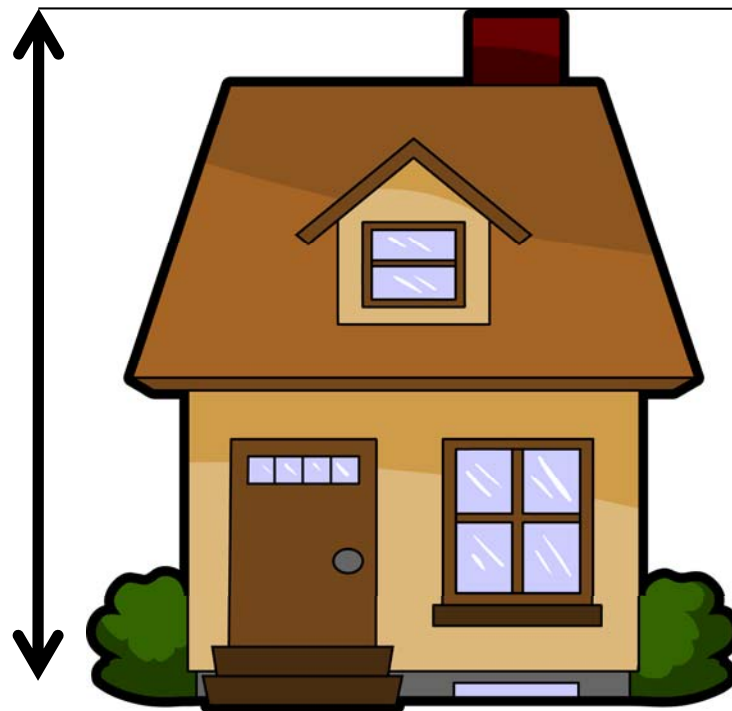


Example

In re Jochum, 309 B.R. 327 (Bankr. E.D. Mo. 2004)

Homecomings First Deed of Trust	\$ 76,405.00
Concord Judicial Lien	\$ 16,305.00
Portfolio Judicial Lien	\$ 14,156.00
Homestead Exemption	<u>\$ 8,000.00</u>
TOTAL	\$114,866.00

Value of home
\$100,000

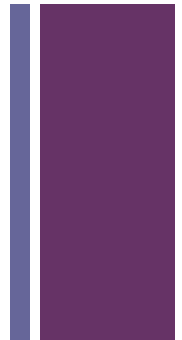


Portfolio Judicial Lien
\$ 14,156

Concord Judicial Lien
\$ 16,305

Homecomings
First Mortgage
\$76,405

Homestead Exemption
\$8,000

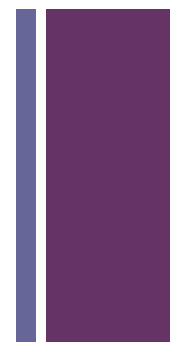


Example

Homecomings First Deed of Trust	\$ 76,405.00
Concord Judicial Lien	\$ 16,305.00
Portfolio Judicial Lien	\$ 14,156.00
Homestead Exemption	<u>\$ 8,000.00</u>
TOTAL	\$114,866.00

Portfolio Judicial Lien:

- Value of debtor's interest in property without any liens is \$100,000.00.
- Total of all liens plus debtor's homestead exemption exceeds value of the debtor's interest by amount of \$14,866.00.
- Amount of Portfolio's debt that is secured by its judicial lien (\$14,156.00) is less than \$14,866.00.
- Portfolio lien therefore impairs debtor's exemption and is void



Questions?

Saving Homes in Bankruptcy



National Housing Law Project
Western Center on Law & Poverty
National Consumer Law Center
Tenants Together

Sarah Bolling Mancini, Of Counsel, National Consumer Law Center
Tara Twomey, Of Counsel, National Consumer Law Center

Lauren Mahoney
National Consumer Law Center

January 13, 2015

**This webinar is provided by the National consumer
Law Center and the National Housing Law Project (NHLP)**



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