

Detailed Chart Comparing Provisions of Current Bankruptcy Bills Dealing with Modification of Home Mortgages, as of October 8, 2007

Prepared by Mark S. Scarberry

Professor of Law, Pepperdine University School of Law

Robert M. Zinman Scholar in Residence, American Bankruptcy Institute

	Durbin Bill, S. 2136	Specter Bill, S. 2133*	Miller Bill, H.R. 3609
Eliminates or limits § 1322(b)(2) prohibition on modification of mortgage on principal residence	Yes, if debtor has insufficient current income to make mortgage payments and cure arrearages, after deducting other expenses permitted under § 707(b)(2)(A) & (B).	Yes, in certain cases, but only in specified ways described below. To modify a mortgage, the debtor must have current monthly income (including spouse's income) less than 150% of median per as determined under § 1325(a)(4)(A)(ii) (I)-(III). (Bill could be read to apply 150% multiplier only to debtors in households of one person.) Modification is limited to mortgages "initiated before September 26, 2007."	Deletes prohibition in § 1322(b)(2).
Allows strip down of mortgage lien to value of home in chapter 13	Yes, if modification of mortgage is permitted. Strip down is not addressed specifically but would be permitted under the general authorization to modify the mortgagee's claim.	Yes, if modification of mortgage is permitted, but only if debtor and mortgagee so agree in writing.	Yes. Strip down is not addressed specifically but would be permitted under the general authorization to modify the mortgagee's claim.
Allows payment of modified mortgage beyond duration of chapter 13 plan	Yes, if modification of mortgage is permitted. Unclear whether it provides exception to § 1325(a)(5)(B)(I)(bb) to allow mortgagee to retain lien after debtor	Apparently yes, if modification of mortgage is permitted, because allowed modifications do not include changes in payment schedule. Unclear	Yes. Provides expressly for mortgagee to retain lien after debtor receives discharge despite provisions of § 1325(a)(5)(B)(I)(bb). Also provides

	receives discharge. Does not provide expressly for discharge to be granted on completion of payments other than mortgage payments. Does not expressly provide for mortgage not to be discharged as personal liability of debtor.	whether it provides exception to § 1325(a)(5)(B)(I)(bb) to allow mortgagee to retain lien after debtor receives discharge. Does not provide expressly for discharge to be granted on completion of payments other than mortgage payments. Does not expressly provide for mortgage not to be discharged as personal liability of debtor.	expressly for discharge not to be delayed until completion of mortgage payments, and for mortgage obligation not to be discharged.
Allows chapter 13 plan to provide for extension of mortgage payments beyond term of mortgage	Yes, if modification of mortgage is permitted. Mortgage term can be extended to thirty years from origination of mortgage.	No.	Yes, without any express limitation on term.
Allows or requires court to determine mortgage interest rate for home mortgage modified in chapter 13 plan	Yes, if modification of mortgage is permitted. Court must set mortgage rate at most recent annual Fed figure for yield on conventional mortgages plus risk premium.	No.	Yes. Ordinary rules for determining interest rate needed to provide full present value of secured claim apparently would apply. No further guidance given in bill.
Allows chapter 13 plan to determine home mortgage interest rate.	No (except to extent that plan proponent must include appropriate interest rate in plan).	Yes, to a limited degree. If modification permitted, plan may modify right of holder of adjustable rate mortgage by “prohibiting or delaying adjustments to the rate of interest applicable to the debt on and after the date	No (except to extent that plan proponent must include an interest rate that court will find to be sufficient to provide full present value of secured claim).

		of filing of the plan or voiding any such adjustments that occurred during the 2-year period preceding that date of filing.”**	
Limits post-petition fees and charges imposed by oversecured home mortgagee where debtor is in chapter 13	Only lawful and reasonable fees provided for in the mortgage agreement may be added, and only if mortgagee gives court notice.	Not clear. Same treatment as interest in cases of substantial failure to disclose material terms regarding fees. See footnote **.	Requires timely notice of fees to debtor and trustee.
Allows waiver of prepayment penalty in chapter 13 plan	Yes, whether or not mortgage may be modified otherwise, and without regard to income and expenses.	Yes, in chapter 13 plan, but only if modification of mortgage is permitted.	Yes (not specifically but as part of general authorization to modify mortgagee’s claim in chapter 13 plan).
Disallows mortgage claim for violations of law	Yes. Applies generally to allowance of claims under all chapters of Bankruptcy Code. Entire mortgage claim is disallowed (and mortgage lien is voided) if mortgage is subject to any damages or rescission claim for any violation of TILA or any other state or federal consumer protection law in effect when noncompliance occurred, even if mortgagee obtained foreclosure judgment.	No.	No.
Waives pre-filing credit counseling requirement where home is in foreclosure	Yes, if mortgage foreclosure sale has been scheduled, and regardless of which chapter of the Bankruptcy Code the	Yes, as a pre-filing requirement, but debtor must obtain such counseling after the filing, apparently in addition to the	Yes, if mortgagee has initiated judicial or nonjudicial foreclosure on debtor’s principal residence. Waiver applies only in chapter

	filing is made under.	required pre-discharge financial management course. Waiver applies only in chapter 13 cases.	13 cases.
Allows debtor (or trustee, upon timely intervention) to pursue claims (or defenses) held by debtor but not scheduled as asset of debtor (or as defense, presumably by way of scheduling creditor's claim as disputed).	Yes. Defendant cannot avoid liability by claiming that debtor is not real party in interest or by asserting judicial estoppel. Applies generally, not just in chapter 13 cases.	No.	No.
Allows court to refuse enforcement of arbitration agreement in core matters involving consumer debtor	Yes. Applies generally, not just in chapter 13 cases.	No.	No.
Creates \$75,000 federal bankruptcy homestead exemption for debtors over 55	Yes. Applies generally, not just in chapter 13 cases. A \$75,000 exemption is added to §§ 522(b)(3) and 522(d). Could be read to be in addition to whatever homestead exemption is provided under state law, where state law exemptions are used.	No.	No.
Requires study to be performed	No.	Yes. Comptroller General must conduct a study "to determine the impact of allowing bankruptcy judges to restructure principal residence mortgages on the secondary market for mortgages" and submit a report to Congress within 180 days of enactment.	No.

* S. 2133 would apply only to chapter 13 cases, and only to such cases filed before its sunset date, seven years after the date of enactment.

** Apparently this would allow lock-in of teaser rates (or of adjustable rate below market rate for non-adjustable rate mortgages) for full term of mortgage. Voiding of increases might entitle debtors to refunds of some interest paid pre-petition. The bill also explicitly allows court to order recovery (in chapter 13 cases only) of pre-petition interest payments as fraudulent transfers if there was a substantial failure to disclose material terms regarding interest. Under § 548(a), up to two years of pre-petition interest could be recoverable. Section 548(a) apparently would not allow recovery of post-petition interest paid by debtor during the plan (though this is not clear), and bill does not characterize the obligation to pay interest going forward as a fraudulently incurred obligation.