

# **Much Ado About Mortgage Reaffirmation Agreements: Practical Considerations for Consumer Practitioners**

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University of Texas  
Ninth Annual Consumer Bankruptcy Practice Seminar

Galveston, Texas  
August 2013

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Sweet love, renew thy force; be it not said  
Thy edge should blunter be than appetite,  
Which but to-day by feeding is allay'd,  
To-morrow sharpened in his former might:  
So, love, be thou, although to-day thou fill  
Thy hungry eyes, even till they wink with fulness,  
To-morrow see again, and do not kill  
The spirit of love, with a perpetual dulness.  
Let this sad interim like the ocean be  
Which parts the shore, where two contracted new  
Come daily to the banks, that when they see  
Return of love, more blest may be the view;  
As call it winter, which being full of care,  
Makes summer's welcome, thrice more wished, more rare.  
Shakespeare, Sonnet 56<sup>1</sup>

## Introduction

Most would agree that had the Bard<sup>2</sup> written the Code there would be more excitement and passion about debtors reaffirming their debts and renewing their relationships with their creditors. Instead, reaffirmation, particularly of mortgage loans, generally garners the same amount of passionate interest as a 4:00 a.m. rerun of Steven Seagal's twenty-sixth installment of "Under Siege" on Telemundo.<sup>3</sup> There are, however, several unique issues involved in mortgage reaffirmations.

As a starting point, most practitioners are already aware that the bankruptcy discharge in a

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<sup>1</sup> While the authors quote one of the greatest writers in history throughout the paper, they make no pretension to ever having actually read any of his works other than his best seller, *Cliffs Notes*.

<sup>2</sup> Not to be confused with "Braille and Audio Reading Download" although sometimes one wonders whether some of the Code provisions were crafted by those blind to the practicalities of bankruptcy practice.

<sup>3</sup> The "Under Siege" movie franchise was renamed "Alerta Maxima" for the Spanish-speaking market. "Alerta Maxima" translates into "maximum alert" which by the nonexistent twenty-sixth installment (yes, the one where Seagal fights off an army of radicalized penguins with a used Taco Bell spork and nunchucks made from two herring tied together with dental floss) translates into "yawn."

Chapter 7 case only extinguishes the in personam liability of the debtor. A debt that has not been reaffirmed may otherwise be enforced in rem (against the property). *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L.Ed.2d 66 (1991); *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992); *In re Penrod*, 50 F.3d 459 (7<sup>th</sup> Cir. 1995). This concept eludes the occasional pro se debtor (and sometimes counsel who decide to “dabble” in our beloved area) who believes that filing a Chapter 7 case wipes out the debt and entitles them to a free house.

Unlike other secured property, there is little concern that the mortgage creditor will show up at the debtor’s front door the day after discharge with a flatbed trailer ready to haul away the house (unless, of course, the house is on wheels).<sup>4</sup> Despite the absence of the burly repo guy, there are consequences worth considering for both the debtors and creditors in the mortgage reaffirmation process.

## **I. Considerations of Time and Completeness**

“Summer’s lease hath all too short a date.” Shakespeare, Sonnet 18

Mortgage reaffirmation agreements are not, and should not be, made in Easy Bake ovens. Careful attention should be paid to the terms and the supporting documents. In preparing the agreement, the creditor and its counsel should review the underlying documents and the payment history to make certain the correct amount is set forth in the agreement. This requires an expenditure of time not dissimilar to that required in the preparation of a proof of claim.

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<sup>4</sup> They are instead more likely to do a drive-by inspection. If you don’t get this joke, stop reading the footnotes for the remainder of the paper.

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First appeared as part of the conference materials for the  
9<sup>th</sup> Annual Consumer Bankruptcy Practice session

"Topic B: Reaffirmation Agreements—Personal and Real Property"