

# The Chapter 13 Reporter



THE OFFICE OF MICHAEL H. MEYER, STANDING CHAPTER 13 TRUSTEE

Eastern District of California, Fresno Division

May 2013

## Refinance vs. Loan Modification



The Chapter 13 Trustee's office is receiving many ex parte motions for loan modifications, based upon the perceived interpretation of Local Rule 3015-1(i)(3). In fact, the Local Rule pertains to "refinance" of an existing home loan and not modification. We have set forth the Local Rule herein for review and offer an explanation in the hope that it will clear up some confusion between the definition of "refinance" and "modification".

## Stipulations: Don't Forget the Order

Our office sees numerous stipulations between debtors and creditors for matters such as relief from stay, motions to value, confirmation, etc.

While the Trustee finds the agreements between two parties very interesting, unless there is an "order

Local Rule 3015-1(i)(3)  
Refinance of Existing Home Loans. The Court may approve an ex parte motion by the debtor to **refinance** existing debt(s) encumbering the debtor's residence if the trustee's written consent is filed with or as part of the motion. The debtor's motion and the trustee's approval are their certification to the Court that:

- (A) All payments required by the chapter 13 plan are current;
- (B) The chapter 13 plan is not in default;
- (C) A declaration, which may be in the format of Schedules I and J, by the debtor has been filed within the prior thirty (30) days

thereon" the only parties bound by the stipulation are the parties with signatures on the stipulation. If you are expecting the Trustee's compliance, you will need an order or his signature on the stipulation.

Before filing a stipulation with the court, ask yourself

that demonstrates an ability to pay all future plan payments, project living and business expenses, and the refinanced debt;

(D) the new debt is a single loan incurred only to refinance existing debt encumbering the debtor's residence;

(E) The only security for the new debt will be the debtor's existing residence;

(F) All creditors with liens and security interests encumbering the debtor's residence will be paid in full from the proceeds of the new debt and in a manner consistent with the chapter 13 plan;

(G) The monthly payment (the principal and interest

If you have a question you would like to see answered in our newsletter, please send your questions to:  
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two questions, (1) "who do I want to be bound by this stipulation?" and (2) "who does this stipulation affect?"

If nobody but the two parties are affected and the only parties bound are those signing the stipulation, then an order may not be necessary.

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**“AN EX PARTE APPLICATION TO APPROVE A HOME LOAN MODIFICATION DOES NOT COMPLY WITH THE LOCAL RULES.”**

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payment on account of the new debt plus all impounds, taxes, insurance, association fees, and bonds and other assessments) will not exceed the greater of the debtor’s current such monthly payment(s) on the existing debt(s) being paid or \$2,000.00. The Court will not approve ex parte motions to obtain secured credit pursuant to 11 U.S.C. § 364(d).

(Emphasis added)

This office defines a refinance and a loan modification as follows

Refinance: A refinance is the creation of a new loan to pay off your existing loan. The refinance can be done with a different or existing lender.

Modification: A loan modification is a temporary or permanent change of the terms

of your existing loan agreement that is usually requested to make the mortgage payments more affordable.

Based on these definitions a loan modification could not possibly ever fit within the provisions of the Local Rules in that it is not **new debt** under subsection (D) nor will the loan modification pay **in full all creditors with liens and security interests** on the real property as required under subsection (F).

Therefore, an ex parte application to approve a home loan modification does not comply with the Local Rules and this office cannot provide written consent on such ex parte applications.

The Trustee is given very limited power to approve sales, transfers, and credit on an ex parte basis. See Local Rule 3015-1(i). However, the

Local Rules specifically state that “if the debtor wishes to incur new debt or transfer property on terms and conditions not authorized by those Subparagraphs [in the Local Rules], the debtor shall file the appropriate motion...” (See Local Rule 3015-1(i)(5).



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However, if you want relief that only a court can grant, such as “relief from stay,” “valuation of collateral” or “plan confirmation” an order will be necessary.

Additionally, keep in mind the Trustee will not agree to terms in a stipulation that will change the plan without such terms being approved in the order confirming plan as well.

Example: Debtor files a plan

seeking to pay the creditor \$4,000, which is the value of the car. Then, after some discussion, the debtor and creditor agree that the car should be valued at \$5,000.00. The parties need to consider whether this change will affect the plan. If the plan requires a dividend increase, then the Trustee will require that there also be a plan payment increase to cover the increase in dividend. Those terms will

need to be in the order confirming plan as well as in a Stipulation and Order thereon.

Therefore, two orders will be necessary to give affect to this agreement: (1) the Order on the Stipulation to Value; and (2) the Order Confirming the Plan.

Without the Order on the valuation the Trustee is required to pay the “amount” listed in the claim. Without

# Eastern District of California, Fresno Division

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## cont. from page 2, Stipulations: Don't forget the Order

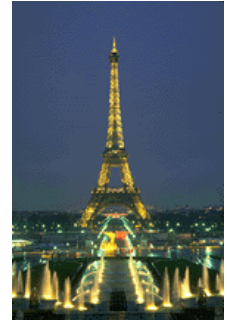
the order confirming the Trustee must pay the dividend stated in the plan.

Lastly, the Trustee will not always agree to sign off on stipulations. Often this is because the Trustee cannot independently verify the information therein. And sometimes, it is because the Stipulation has terms that the Trustee knows the court will oppose.

If the Trustee refuses to sign a stipulation, the proper procedure is not to harass the Trustee's office with numerous requests and revisions. The quickest and easiest approach is to get the matter before the court.

Filing a motion for relief from stay, a motion to value, or an objection to a plan is just as effective as a stipulation, with the added benefit that you

will have the opportunity to speak to the court about what the court will and will not allow. Additionally, a noticed motion will allow the Trustee's office to review your motion ahead of time and address his concerns with the court. A noticed motion frequently assists in the resolution of any disputed matters.



## Tax Season is Annual Review Season

Being tax season, the Trustee would like to remind debtor's counsel that it is also annual review season.

There are generally two ways annual reviews will come up in a debtor's case: (1) by operation of the order confirming plan; or (2) upon request of the Chapter 13 Trustee or a party in interest.

If the Trustee has requested an annual review as a condition to plan confirmation, those requests are generally placed in the order confirming plan.

Sometimes the order will state a specific month that the Trustee wishes to review new financial documents. The date is generally based on the anticipation of some event, i.e. new employment, furlough reprieves, seasonal work of the debtor, etc.

However, often times the order simply requests there be an annual review.

If you are wondering where the Trustee gets the authority to ask for updated financial information on the debtor, please review both the language of the plan and 11 §USC 521.

In both, the pre and the post May 1, 2012 chapter 13 model plans, there is a section on Debtors' duties. This section states that a Debtor shall provide tax returns, W-2s and 1099s to the Trustee.

But more importantly, the Bankruptcy Code provides in 11 USC §521(f) and (g) some very important duties that debtors' counsel should inform their clients.

Section 521(f)(1) states that upon the request of the court, US Trustee, or a party in interest, a debtor **shall** file with the court **at the same time filed with the taxing authority** a copy of each of the debtor's tax returns required under applicable law for

each tax year ending while the case is pending.

Section 521(f)(2) states that in a chapter 13, the Trustee, or any party in interest, may request, and the debtor shall file, a statement of income and expenditures, describing how such expenditures and income are calculated.

While there may be numerous ways to comply with §521(f)(2), the easiest way to comply would be to file amended Schedules I and J attaching paystubs and evidence of expenses.

The Trustee highly recommends that you take the time to review Sections 521 (f) and (g) carefully and if you represent debtors, that you also advise your clients appropriately.

If the Trustee has requested an annual review as part of confirmation, or at some time thereafter, the Debtor **shall** file the current tax returns each year at the same time

**"THE TRUSTEE HIGHLY RECOMMENDS THAT YOU TAKE THE TIME TO REVIEW SECTIONS 521(F) AND (G) CAREFULLY AND...ADVISE YOUR CLIENTS APPROPRIATELY."**



**“IT IS THE DEBTOR’S DUTY, NOT THE TRUSTEE’S, TO CALENDAR THE EVENT EVERY YEAR...DO NOT EXPECT TO RECEIVE AN ‘ANNUAL REVIEW NOTICE’ IN THE MAIL.”**

**cont. from page 3, Tax Season is Annual Review Season**

filed with the taxing authority; and *shall also file* the statement within 45 days of the confirmation anniversary.

Lastly, if you are wondering where the Trustee obtains the authority to seek tax refunds, paystubs, W-2s, or other financial documents post confirmation, the Trustee urges you to review, the plan and 11 USC §521(a)(3) and (4).

The Trustee is allowed to request information regarding property of the estate under §521(a)(4). Property of the estate is different in Chapter 13 than in Chapter 7 and is defined in 11 USC §1306. Property of the estate includes all property that is property in a Chapter 7 estate, in addition to earnings after the filing of the case and after acquired property as well.

Section 521(a)(3) simply states the Debtor must cooperate with the Trustee to enable the Trustee to perform his duties. This simple section, however, gives the Trustee authority to request a wide range of information from the Debtor. The Trustee has numerous duties that must be performed throughout the life of a plan. In order to assist the Debtor in the repayment of his plan, the Trustee requires the cooperation of the debtor. Therefore, this section is often used by the Trustee in the request of documents and other information from the debtor.

To clear up any remaining confusion, it is not necessary, however, for annual review language to be in an order confirming plan before the Trustee can request information from the debtor. The code sections mentioned herein clearly allow the Trustee to request such information at any time throughout the pendency of the plan.

The Trustee would like to leave you with the following reminder. If you have language in the order confirming plan requiring an annual review, it is the debtor’s duty, **not the Trustee’s**, to calendar the event every year. This is an affirmative on-going duty of the debtor. Do not expect to receive an “annual review reminder” in the mail. The debtor must comply whether or not the Trustee provides them with a reminder.



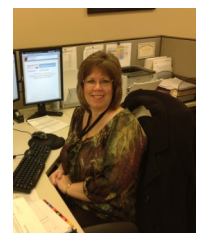
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