

SPECTRUM

AN ELECTRONIC REPORT FROM THE CUNA LENDING COUNCIL

To Reaffirm or Not to Reaffirm, That Is the Question

By Juliann W. Graves, Kramer and Frank P.C., Kansas City, MO



Mark Your Calendars

Remember, the 7th Annual CUNA Lending Council Conference is scheduled for November 4-7, 2001, at Le Meridien Hotel in New Orleans. The conference agenda will be completed by late July. Look for more details in the next issue of this newsletter, in your mailbox, or on our web site at www.cunalendingcouncil.org.

What are the duties of a debtor under Section 521(2) of the Bankruptcy Code? That depends on the circuit in which your debtor filed his/her bankruptcy, and in some cases which judge has been assigned to the case.

Last year the United States Court of Appeals for the Second Circuit reaffirmed its decision that a debtor not in default on the underlying secured loan may retain the collateral without reaffirming or redeeming the debt. The Second Circuit joins the Fourth, Ninth and Tenth Circuits in holding that a debtor who is not in default may retain the collateral without reaffirming.

Other circuits, including the First, Fifth, Seventh and Eleventh, limit the debtor to the options of redemption or reaffirmation in order to keep the collateral.

In some circuits, such as the Eighth, where this issue has not been decided, the judges remain divided on the issue. Therefore, the client's results will differ not only from circuit to circuit but also from judge to judge within a circuit.

This division of the courts poses a real problem for creditors whose obligors reside in the circuits that do not require reaffirmation. For attorneys such as this author whose clients have obligors in both the Tenth Circuit and the Eighth Circuit clients' expectations must be addressed immediately.

Section 521(2) specifically states:

...(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate:

- A. within thirty days after the date of the filing of a petition under chapter 7 of

this title...the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that debtor intends to reaffirm debts secured by such property;

- B. within forty-five days after the filing of a notice of intent under this section...the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

The courts that have interpreted this language to limit the options of the debtor have held that the Bankruptcy Code does not give the debtor an option to simply retain the collateral and continue making payments. *Taylor v. AGE Federal Credit Union*, 3 F.3d 1512, 1516 (11th Cir.1993); *In re Edwards*, 901 F.2d 1383, 1386 (7th Cir. 1990); *In re Gerling*, 175 B.R. 295, 297(Bkcty. W.D.Mo. 1994). (For a detailed analysis from the creditor's perspective, see the dissenting opinion of Judge Shadur, *Capital Communications Fed. Credit Union v. Boodrow* (In re Boodrow), 126 F.3d 43 (2nd Cir. 1997).)

These courts have examined arguments in favor of allowing the debtor to retain the collateral without reaffirming and have concluded that this interpretation poses an unacceptable risk to the creditor due to depreciation of the collateral. Additionally, these courts have found that Congress intended § 521(2)(A) to do more than merely notify the creditor of the debtor's intent as to the property. If the section serves



notice purposes only, § 521(2)(B) requiring the debtor to perform his intent has no meaning.

All of the courts deciding this issue have supposedly conducted a “plain language” analysis, but reached different conclusions. Additionally, the courts have evaluated the respective positions of the parties.

The circuits that do not require reaffirmation reason that if the creditor can force the debtor into renegotiating the obligation, the debtor loses the “fresh start” that the Code is designed to provide. *In re Boodrow*, at 51. The other circuits have rejected this argument and have held that the debtor is not entitled to modify his/her obligation with a secured creditor. If the debtor wishes to alter his obligation without the agreement of the creditor then the

debtor should file a Chapter 13. *In re Gerling*, at 298.

Fortunately, this issue may be decided for creditors in the near future. The current bankruptcy legislation contains language that answers this question. The proposed amendment limits the debtor to the options stated in the Code, so the debtor must reaffirm or redeem the collateral to keep it. ♦

The information contained in this article is not legal advice and is for informational purposes only.

This article originally appeared in the newsletter of the National Association of Retail Collection Attorneys newsletter (<http://www.narca.org>) and was reprinted with permission.

Join the CUNA Lending Council Listserv!

Have you joined the CUNA Lending Council Listserv yet? It's a great way to network, solve problems, and get feedback from your peers. Recent postings have discussed:

- The pros and cons of sight drafts
- Payday loan programs
- Bankruptcy preparation software for creditors
- Fees for overdraft lines of credit

To join the discussion, you just need to subscribe. Simply send a blank message from your own e-mail account to **join-clccouncil@doig.cuna.org**. You'll receive an e-mail confirmation when you've been added to the list.

Once you've subscribed, posting and receiving

messages is easy. Just send your message to clccouncil@doig.cuna.org, and it automatically goes to the entire listserv. And if you ever want to change how often you receive messages, or browse past discussions, you can easily do that and more from the Listserv section of the CUNA Lending Council web site (www.cunalendingcouncil.org).

Until now, the listserv has been an optional benefit of membership. Beginning August 1, every council member will receive this service. It's another great way to be part of the CUNA Lending Council community.

For more information and important listserv usage guidelines, please visit the Listserv section of www.cunalendingcouncil.org. ♦



Food For Thought.....Internet Friend or Foe!

By Sharon Gaugler, Senior Vice President of Lending, Boeing Wichita

How many times have you shopped an item or service on the internet and found different prices for the same item from the same company? Companies have the ability to determine how cost-conscious a consumer is by the way they shop the internet. If a company can determine how much you are willing to spend for an item or service, maybe they can tell how much you are willing to pay for an interest rate.

There are currently web sites that determine the price you pay based on the avenues you take to select an item. If you want to know all the background information on an item first,

and then how much the price is, you may not be viewed as a price-conscious individual. On the other hand, if you look at price first, and then the background information, you may be viewed as price-conscious and be offered a lower price. The more time you spend on a web site also gives an indication of how interested you are.

If retailers can do this on consumer products, I am sure someone is doing this on loan rates. This may be an area you want to talk to your technology people and attorneys about. Could we as credit unions be missing something? Just a little food for thought. ♦

Bankruptcy Notes

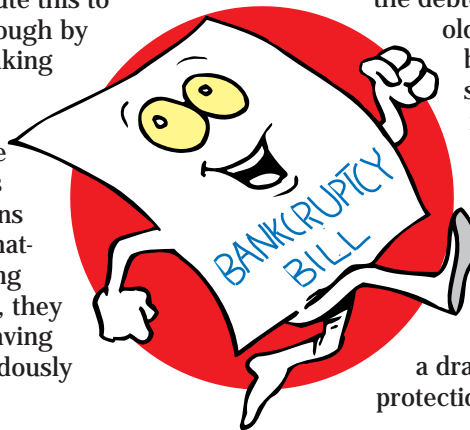
By Eric D. Bruce, Bruce, Bruce, and Holt, LLC, Wichita, KS

It seems certain that a major revision of the Bankruptcy Code is going into effect soon. For a long time, it appeared that the changes would be clogged up in Congress forever. They are still clogged up in Congress, but it is now likely that they will become unclogged soon. The House has passed one bill and the Senate has passed another. They have some differences, but those areas that are alike are much greater than those that are different. The most recent vote was an 80-to-13 cloture vote in the Senate. With that kind of majority in favor of moving forward, it is unlikely that there will be no bankruptcy change.

Assuming there will be substantive changes, and without looking at the specific details, what is likely to happen in bankruptcy during the next year? First of all, there will be a tremendous increase in the number of bankruptcies. Nationally, bankruptcy filings have remained relatively static in the last two years. However, this year's indications are that across the country, bankruptcy filings are increasing 35% to 50% per month. This appears to be related to a number of causes. The first is the downturn in the economy. More people are laid off during an economic downturn; thus more people develop financial problems. Second, there has been a significant increase in consumer utility bills, in some areas between 300% and 400%. When this happens, people that are already at the edge are pushed over the edge. Third, and finally, there is the beginning of what I refer to as the Congressional Tsunami. Bankruptcy Code changes are being promoted in the press as making bankruptcies tremendously harder. Most press reports attribute this to changes being forced through by credit card companies making large congressional donations. Reports say that credit card providers have donated 40 million dollars to congressional campaigns during 1998, and they donated 80 million dollars during 2000. Thus, it is indicated, they will receive a payoff by having bankruptcy made tremendously harder.

Whether that is true or not will be determined by the Code changes when they finally come through. Probably, at the very least, bankruptcy will be made harder by being made more expensive. Bankruptcy is the only Court where a debtor cannot file using a poverty affidavit, saying they do not have sufficient funds to pay the filing fees, etc. In bankruptcy Court, a debtor must pay the filing fee. By increasing the cost of bankruptcy, it will make it harder overall for people to file. Having said that, the key here is that there is a general perception in the press and the public that bankruptcy will be made harder by new changes in the law. Assuming these changes go through in the same form, and assuming the press reports are not substantially different, then there will be a rush to the Courthouse caused by the enactment of the bankruptcy code changes. These bankruptcy code changes would go into effect six months after signing by the President. This would allow attorneys six months to advertise that potential filers should get into bankruptcy before the law changes. My guess is that we will have a 200% to 300% increase in bankruptcies before the changes become effective.

Debtors will be galloping to the Courthouse to be there before the Bankruptcy Code changes make it harder. Be prepared. Once the new changes go into effect, what will happen? Assuming bankruptcies were turned off entirely and that nobody else could file bankruptcy once the new changes went into effect, would this mean that everybody would automatically begin to pay? I wish! But it is more likely that, in fact, what will happen will be that the debtor's attorneys will go back to old defenses that they have left by the wayside. Things like the sale not being commercially reasonable; things like Truth In Lending, Equal Credit Opportunity, and Fair Debt Collection Practices Act violations. I would expect, therefore, that shortly after the new Bankruptcy Code goes into effect, there will be a dramatic increase in consumer protection defenses raised by debtors.



This will mean that there will probably be a new line of battle before the judgment stage in litigation. During the last ten years or so, this has not generally been a battle area, as debtors' attorneys have generally rolled over on judgments knowing they had the ability to file bankruptcy. It was easier to do that than defend using the consumer protection defenses. I think that within the six months after the bankruptcy code goes into effect, we will see a dramatic change in the way that collection lawsuits are litigated. You might want to take a careful look at your loan portfolio to try to protect yourself from those kinds of claims. During the last few years, we have only worried about consumer protection issues when the auditors came in. I suspect that consumer

protection litigation will be more of a problem when the new Bankruptcy Code goes into effect.

Conclusion

With the enactment of a new Bankruptcy Code we can expect a dramatic increase in bankruptcies before the new changes go into effect. Then, after the changes go into effect, there should be a dramatic increase in consumer protection defenses to collection litigation. We should be projecting and reviewing our paperwork to make sure that it complies. You can visit our web site at www.KsAdvocates.com for links to further updates and information. ♦

Got a Credit Question? Ask Max!

The following is an excerpt from Ask Max, an online consumer credit advice column provided by Experian Information Solutions and was reprinted with permission.

You can read more of Max at <http://www.experian.com/corporate/max/>.

Dear Max,

Does a charged-off account fall off your credit report seven years after the account was charged off or seven years after the debt is repaid?

—STA

Dear STA,

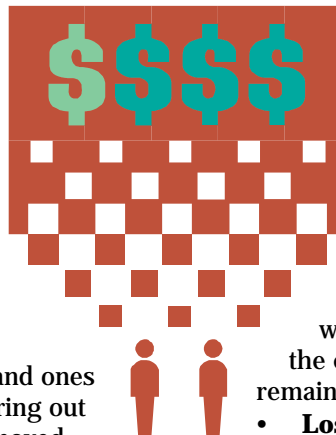
I probably hear your question and ones like it more than any other. Figuring out when negative information is removed from your credit report can be very confusing, and understandably so. I am going to take this opportunity to answer your question and many others by listing the most common types of negative information that appear on credit reports, how long each remains on an Experian credit report, and from what point the time is measured. I hope this helps.

- **Delinquencies (30–180 days):** Can remain seven years from the date of the initial missed payment.
- **Collection accounts:** Remain seven years from the date of the initial missed payment that led to the collection (the original delinquency date). When a collection account is paid in full, it will be marked “paid collection” on the credit report.

- **Charged-off accounts:** Remain seven years from the date of the initial missed payment that led to the charge off (the original delinquency date), even if payments are later made on the charged-off account.

- **Closed accounts:** Closed accounts are accounts that are no longer available for further use. Closed accounts may or may not have a zero balance. Closed accounts with delinquencies remain seven years from the date they are reported closed, whether closed by the creditor or by the consumer. Positive closed accounts remain 10 years.

- **Lost credit card:** If there are no delinquencies, credit cards that are reported lost will continue to be listed for two years from the date the card is reported lost. Delinquent payments that occurred before the card was lost are reported for seven years.
- **Bankruptcy:** Chapters 7, 11, and 12 remain for 10 years from the filing date. Chapter 13 remains seven years from the filing date. Accounts included in bankruptcy will remain seven years from the date they were reported as included in the bankruptcy.
- **Child support judgments:** Remain seven years from the date the judgment is filed.
- **Civil and small claim judgments:** Remain seven years from the date the judgment is filed.



- **City, county, state, and federal tax liens:** Unpaid tax liens remain 15 years from the filing date. Paid tax liens remain seven years from the paid date of the lien.
- **Inquiries:** Most inquiries listed on your credit report will remain for two years. All inquiries must remain for a minimum of one year from the date the inquiry was made. Some inquiries, such as employment or preapproved offers of credit, will show only to you.

Positive open credit information remains indefinitely and paid positive accounts remain 10 years, making your credit report a great benefit for you in obtaining and using financial services.

Negative information is purged from your credit report so that if you have credit problems you will have an opportunity to build a good credit history over time.

Thanks for asking. ♦

Second Annual Excellence in Lending Awards Will Double Number of Credit Union Winners

The second annual Credit Union Excellence in Lending Awards are underway. Credit unions can apply until July 31, 2001. This year, four credit unions will be chosen to receive Awards - two in consumer lending and two in mortgage lending. Two awards will be presented to credit unions with assets over \$100 million, and two to credit unions with assets under \$100 million. Last year, two credit unions, Baxter Credit Union (Illinois) and Boeing Employees' Credit Union (Washington) were presented Awards.

The purpose of the Awards is to identify, recognize and share examples of lending excellence within the credit union movement. Credit unions are honored for their ability to serve their members while sustaining sound financial performance.

"Credit unions have never before faced such a high level of competition for loan business," says E.C. Williams, CUNA Lending Council chair and Senior Vice President at MacDill Credit Union in Tampa, Florida. "The challenges and pressures are tremendous. The Awards program is an excellent way for credit unions to share their expertise and knowledge and learn how to run a more effective, efficient loan operation."

"There are many credit unions conducting outstanding lending programs," says Williams. "I encourage those credit unions to apply. Credit unions doing innovative things with their lending operations are especially encouraged to apply."

Applicants will be automatically scored on these weighted ratios: Loan/Share, Borrower/Member, Average Loan Balance, Delinquent Loans/Total Loans, and Net Charge Offs/Average Loans. Credit unions competing for the mortgage award will also be judged on the percentage of mortgage growth as compared to the industry growth average, and on the percentage of real estate loans to number of members including all real estate-related loans — first, second and home equity lines of credit.

This year's judges are Joe Brancucci, Vice President of Lending and chief lending officer at Boeing Employees' Credit Union in Tukwila, Washington; Dan Green, Executive Vice President, CUNA Mortgage Corporation; Bill Klewin, Assistant Vice President, CUNA Mutual Group; Mark Wilburn, Senior Vice President and Chief Lending Officer at 66 Federal Credit Union, Bartlesville, Oklahoma; and Linda Winkfein, vice president of lending services, Texas Credit Union League.

Award winners will be recognized at the CUNA Lending Council Conference in November, with winners receiving free registration and travel expenses. Best practices of award winners will be publicized throughout the year. Credit unions interested in applying can go to directly to the CUNA Lending Council web site at <http://www.cuna.org/data/cu/councils/clc/recognition.html> or call 800-356-2644, ext. 5312 and request an application. ♦



Lending Council Scholarship Awards... Credit Unions Helping Credit Unions

Each year the CUNA Lending Council grants scholarships to credit unions in need of lending training. The CUNA Lending Council has a key mission to provide educational opportunities to the members of the credit union movement in order to provide them with a source for developing expertise necessary to deliver lending products and services to credit union members. This year alone, the CUNA Lending Council has granted nine scholarships totaling \$6,695 to credit unions around the country.

In January of this year, Utah Oil Worker's Credit Union, Salt Lake City, Utah, with assets totaling \$13.3 million, was awarded a \$1000 scholarship. Bob Chiodo, president of Utah Oil Worker's Credit Union, says that the scholarship was very beneficial to his credit union. Not only did it help pay for valuable training for Marilyn Waters, one of their loan officers, but she was able to bring back with her some new innovative ideas that they have begun implementing. Utah Oil Worker's Credit Union hopes to take advantage of the scholarship process again when the need arises. Bob said that without the scholarship they would have been unable to send Marilyn to this needed training.

Betsy Harris, from Rose Hill Federal Credit Union, Grand Junction, Colorado, with assets of \$6.4 million, recently attended the CUNA Residential Mortgage Lending School. The CUNA Lending Council Scholarship gave her

the opportunity to expand her mortgage background and provide her the opportunity to connect with her peers. Betsy feels not only did she gain knowledge from this class, but the networking opportunity and sharing of ideas was an added bonus.

These credit unions were granted scholarships so far in 2001:

- Hershey FCU, Pennsylvania, \$28 million in assets, Consumer Lending Management School
- CO-NE FCU, Colorado, \$3.5 million in assets, Consumer Lending School
- Sears Pacific FCU, California, \$4.5 million in assets, Collections & Credit Counseling School
- Sabattus Regional CU, Maine, \$18.9 million in assets, Consumer Lending Part I School
- United Maryland Employees' FCU, Maryland, \$6.5 million in assets, Consumer Lending Foundation School
- Rockford Community FCU, Michigan, \$8.9 million in assets, First Stage of Lending School
- MBHS FCU, Mississippi, \$3.2 million in assets, Consumer Lending Foundation School

For more information or to apply for a CUNA Lending Council Scholarship, visit <http://www.cuna.org/data/cu/councils/clc/recognition.html>. ♦



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