Sub-prime primer: the key legal issues facing creditors, mortgage loan originators and servicers in Chapter 11

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The year 2007 will likely be remembered for the sub-prime tsunami that hit the US credit markets, devastating sub-prime mortgage lenders across the land. Rarely has the insolvency world seen an entire industry collapse in such a short period of time. The cause of this implosion was a perfect storm that swept across the sub-prime mortgage industry:

- the decline of residential property values in most regions in the United States;
- relaxed underwriting standards by sub-prime and Alt-A loan originators struggling to meet aggressive revenue growth targets despite rising default rates by homeowners that pushed investors in mortgage-backed securities to the sidelines;
- a weak US dollar that drove foreign investors to seek alternative investments outside the United States; and
- a tightening of the tap by Wall Street firms and major banks, which were the primary source of capital that fuelled the origination of sub-prime loans.

Faced with such adverse conditions, sub-prime mortgage lenders were forced to seek the protection of the bankruptcy courts. Insolvency professionals, who represented them and their creditors, were faced with a number of unique issues in those Chapter 11 cases, including searching for creative ways to maximise the return to creditors and addressing newly enacted provisions of the US Bankruptcy Code that focused specifically on the mortgage industry and had not yet been dealt with by bankruptcy courts. This chapter discusses some of those issues and the ways that courts have resolved them to date.

Major asset sales in Chapter 11 by liquidating mortgage lenders

With rare exception, sub-prime mortgage debtors have shut down their loan origination platforms (ie, the part of their business that originated mortgage loans) immediately before or after their Chapter 11 filings because they lacked the capital to fund new loans. A number of these debtors still had significant assets that needed to be preserved and liquidated in a manner that maximised value. These assets typically included pools of 'scratch and dent' mortgage loans, residual interests and mortgage loan servicing rights and related business (ie, the servicing platform). The manners in which such assets have been sold by debtors to achieve the highest values have varied depending on the particular circumstances involved, including the type of assets being sold and the potential buyer's business model. Often in the case of the sale of a debtor's major assets – the debtor's operating platforms (loan origination and servicing) and whole loans owned by the debtor – the sales process undertaken to achieve the highest value has in some significant ways deviated from that employed in the typical Chapter 11 case.

Bankruptcy sales of sub-prime lenders' operating platforms

Generally, once a sub-prime mortgage lender enters into bankruptcy it will seek to sell its operating loan origination and servicing platforms to maximise value for the bankruptcy estate. A debtor's ability to sell its loan origination platform, however, is significantly impeded by the bankruptcy process. In many instances, the fact that a mortgage lender does not have sufficient liquidity to continue to fund existing loan applications or provide assurance that it will be able to fund such loans in the future is the primary cause of its bankruptcy filing. This liquidity crisis is generally precipitated by large pre-petition margin calls by the mortgage lender's funding sources. Once a loan origination business stops funding new loans, even for a short period of time, its value is eroded almost instantaneously. Failure to close on committed loans in the pipeline will invariably constitute a violation of various state regulations and will likely result in states' attorney general offices taking immediate enforcement action against the lender. If a mortgage lender intends to preserve its loan origination platform after it files for bankruptcy protection, careful planning will be required to ensure that, as of the petition date, it will have sufficient liquidity to continue operating its loan origination platform, including the processing and funding of new loan applications.

One of the rare Chapter 11 cases where a debtor was successful in selling an operating origination platform and continued to fund new loans through the bankruptcy proceeding was *In re ResMae Mortgage Corporation* (Case 07-10177 (Bankr D Del February 12 2007)). That case was unique because:

- it was one of the first sub-prime cases to file;
- it had a buyer and financial backer with significant financial resources lined up near the inception of the case to acquire the business (subject to the transfer of the various state licences), and provide a repurchase line of credit in order to continue to fund the pipeline of newly originated loans; and
- it was able to confirm a Chapter 11 plan in a relatively quick three months.

Experience indicates that it is far easier for a debtor to preserve the value of its mortgage servicing platforms utilising existing cash and debtor-in-possession financing to operate in the ordinary course of business and ensure that the debtor has sufficient liquidity to fund servicer advances to pay for such things as foreclosure costs associated with defaulted loans, monthly taxes and insurance payments and, if required, monthly principal and interest payments to the securitisation trusts.

One of the issues that can complicate the sale of a mortgage servicing platform, whether or not the servicer is in bankruptcy, is that in this highly regulated industry many states require that a servicer be licensed to service mortgage loans before it can operate. If the buyer is a strategic buyer (a party already operating in the industry), it might be able to close on a sale transaction quickly because it already has all the requisite servicing licences in place to operate the business. A financial buyer (a party with money but not already operating in the industry) may be willing to pay a premium to get into the business by acquiring the debtor's servicing platform. However, it may be unable to close on the sale for several months due to its need first to obtain the appropriate state licences before taking ownership of the servicing platform. Outside the bankruptcy setting, the delay in closing on the sale to a financial buyer can be managed, assuming the seller has sufficient liquidity or such liquidity is provided by the potential purchaser. The delay of the sale to a financial buyer may pose a more difficult hurdle, however, where the seller is in bankruptcy and unable to fund the servicing platform for an extended period. In a recent case, the parties attempted to avoid this problem and the associated losses that the debtor's estate could experience as a result of a delayed closing by utilising a two-step closing process – an economic or initial closing and a legal or final closing that permitted the debtor to maximise the value of its assets, while at the same time giving the financial buyer the time needed to get all of the appropriate licensing from the various states in which it intended to operate its business (see *In re American Home Mortgage Holdings, Inc*, Case 07-11047 (Bankr D Del August 6 2007)). In that case, the purchaser assumed the economic risk of the transaction, including providing non-recourse debtor-in-possession financing from and after the economic closing to fund the operation's ongoing cash needs, but the debtor continued to operate its business through the final closing. The structure required careful negotiations so as not to impose any hidden liabilities on the estate, such as cure costs, professional fees, continued servicer advances and indemnification obligations.

A sale of the servicing platform will also require a debtor to assume and assign to the proposed purchaser various mortgage servicing agreements, to the extent that the court finds they are executory contracts. Therefore, the debtor will be required to cure, pursuant to Section 365 of the code, pre-petition defaults related to those servicing agreements. To the extent the contractual provisions relating to the servicing of mortgage loans are integrated in a single agreement that also addresses either whole loan sales or repurchase obligations, the debtor may have to seek court authorisation to sever and cure only claims related to the servicing of the underlying mortgage loans, not claims related to the loan sales or repurchase transaction. The later claims could include those claims against the debtor for breaches of representations and warranties related to the sale of the mortgage loans (sale breach claims), as well as early payment default (EPD) claims. Unless these claims are severed from the agreement's servicing components, the cost to the debtor of the cure claims could significantly reduce or even eliminate the economic viability of the servicing rights sale transaction.

In the *American Home Mortgage Case* the bankruptcy judge specifically found that the sale breach claims and EPD claims were severable from the mortgage servicing components of the agreements to be transferred to the purchaser (see order dated October 29 2007 entered in *American Home Mortgage*, Case 07-11047). The court found that only the breaches related to the servicing business needed to be cured under Section 365 of the code and permitted the sale of the severed mortgage servicing rights (MSRs) to proceed (*id*).

Numerous other potential complications need to be considered with respect to a two-step closing structure, such as:

- which party will assume liabilities for debts arising under the servicing business for the period prior to the economic closing that relate to outstanding servicer advances as of that date;
- how to retain the employees necessary to preserve the quality and integrity of the servicing business and ensure that the post-closing adjustments reflect economic reality, since the employees who will possess much of this information will be tied to the new purchaser as their future employer; and
- how to establish an appropriate cure reserve or secured party escrow to ensure that the estate is protected from potential unfunded administrative liabilities.

Bankruptcy sales of mortgage loans

In addition to a servicing platform, a mortgage lender may own whole loans that it needs to liquidate for the benefit of the bankruptcy estate. These may be:

- loans that were originated and never sold by the debtor either because of timing issues or because of problems associated with the loans; or
- loans that had been previously sold by the debtor but were repurchased as a result of EPD claims or sales breach claims (generally referred to as 'scratch and dent' loans).

While the debtor will seek to utilise Section 363 of the code to sell these loans free and clear, the nature of these assets has required some variations to the normal bankruptcy auction process. Depending on market conditions and the type of assets being sold, a sealed bid process might result in a greater return to the estate than the traditional open outcry auction. A sealed bid auction may be more appropriate if the seller anticipates that the range of values could vary widely among different bidders due to the nature of the pool of assets being sold. Some sub-prime debtors have conducted a staged auction with indicative bids solicited first, after which the debtor, in consultation with the unsecured creditors' committee, will choose the highest three or four qualified bids. The second round of bidding will be in the form of final sealed bids, with the winning bidder chosen from those sealed bids. In those auctions, the debtors agreed to pay modest expense reimbursements to the final qualified bidders to encourage them to conduct the necessary due diligence on the portfolios in order to submit a final binding bid. Given the market volatility of mortgage loans, such auctions are usually conducted on a truncated schedule. If at all possible, holdbacks should be avoided and the agreement should provide that the sale is on an 'as is, where is' basis, with no material representations or warranties (except as to title and transfer of the key mortgage loan documents) and no post-closing adjustments.

Special bankruptcy protection provided to the counterparties to financial contracts

Bankruptcies of sub-prime lenders are further nuanced by Sections 555, 556, 559, 560 and 561 of the code (the safe harbour provisions). These sections are designed to provide special protections to transactions involving the financial markets. Financial markets can and often do experience significant and fast-moving fluctuations that could lead non-debtor parties to suffer heavy losses if the non-debtor party is unable to terminate, liquidate or accelerate certain agreements with a debtor upon the commencement of its bankruptcy case.

Rights of counterparties to repurchase agreements

Wall Street firms and major banks typically provided liquidity to mortgage lenders by entering into master repurchase agreements or securities contracts (which may contain provisions concerning mortgage servicing rights). Sections 362(b)(6) and (7), 555 and 559 of the code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, exempt from the automatic stay the contractual right of a counterparty to a qualifying repurchase agreement or securities contract to liquidate, terminate or accelerate such agreements. While this chapter focuses specifically on counterparties to repurchase agreements, the reader should note that the safe harbour provisions apply to various types of financial contract, including securities contracts, repurchase agreements and others (collectively, financial contracts). The statute also distinguishes between the types of counterparty entitled to the safe harbour protections. If an agreement qualifies as a repurchase agreement under Section 101(47) of the code, any counterparty thereto is afforded remedy. If an agreement is characterised as only a securities contract, because either the underlying structure does not have the repurchase feature or the term exceeds the one-year requirement, then only certain delineated parties (eg, stockbrokers, financial institutions and securities clearing agencies) are entitled to utilise the safe harbour.

For bankruptcy purposes, a repurchase agreement is an agreement whereby enumerated assets are transferred from a transferor to a transferee, subject to an obligation on the part of the transferee to reconvey the assets back to the original transferor within one year in exchange for the transfer of funds (see Section 101(47) of the code). Since the definition of a 'securities contract' in Section 741(7) of the code expressly includes repurchase and reverse repurchase agreements, but does not mandate a one-year temporal end to the particular agreement, a repurchase transaction governed by an agreement that does not technically qualify as a repurchase agreement under the code may nonetheless arguably be considered a securities contract (compare Sections 741(7) and 101(47) of the code).

The safe harbour provisions enable the non-debtor repurchase counterparty to seek redress against a mortgage lender under the terms of their agreements if there are any defaults, including a mortgage lender's failure to provide additional margin payments to cover perceived diminution in the value of the pool of loans that the repurchase counterparty has purchased. Under the safe harbour provisions the repurchase counterparty may seek margin payments from the mortgage lender to cover such diminution in the value or exercise its contractual rights, even:

- on the eve of bankruptcy, without fear of being compelled to disgorge such payments pursuant to the Chapter 5 avoidance provisions of the code if that mortgage lender later files for bankruptcy protection; or
- after a bankruptcy filing, without regard to the provisions of the otherwise ubiquitous automatic stay.

Section 559 of the code also addresses the circumstances where a party to a repurchase agreement "liquidates one or more such agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor". In such an event, any excess of the market prices received on liquidation of such assets (or, if such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognised source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices, and all expenses in connection with the liquidation of such repurchase agreements, shall be deemed property of the estate, subject to the available rights of set-off (Section 559 of the code).

The language of Section 559 suggests that there will be an available market price for the assets transferred at the time of liquidation or, if the assets are not disposed of at the time of liquidation, that there is a generally recognised source to determine the market price for the assets at that time. The concepts of a 'generally recognised source' and 'commercially reasonable determinants of value' (Section 562(b) of the code) are arguably better suited for measuring asset values under repurchase agreements prior to the enactment of the 2005 amendments, when the definition of a 'repurchase agreement' was expanded to include transfers of interests in mortgage loans. Prior thereto, the definition of a 'repurchase agreement' was limited to government-type obligations for which there was unquestionably a well-recognised, liquid market. The inclusion of mortgage loans, which are, by their nature, not uniform and may vary greatly in value depending on the types of loan and their individual characteristics – leaves it to the courts to decide what constitutes a generally recognised source or commercially reasonable determinants for value and what is a reasonable period of time for a counterparty to market such assets for sale in order to determine their fair value.

Methodology for computation of claims in sub-prime bankruptcies

Deficiency claims arising under repurchase agreements

Section 562 of the code governs the timing of damage measurement for financial contracts. Damages with respect to financial contracts arise either when the bankruptcy trustee or debtor rejects the financial contract or when a non-debtor counterparty exercises its contractual rights. Barring any unusual circumstances, Section 562(a) provides that "damages shall be measured as of the earlier date of — (1) the date of such rejection; or (2) the date or dates of such liquidation, termination, or acceleration" (Section 562(a) of the code). This provision was included to arm the debtor with the ability to reject a financial contract, thereby setting the date on which damages are fixed in order to prevent the non-debtor party from timing its liquidation in such a way as to secure the maximum possible damage claim.

With respect to the time at which damages are fixed when a non-debtor party exercises its rights, it is unclear whether the drafters of this provision intended to distinguish between the events of liquidation, termination or acceleration, or intended those terms to be synonymous. Since Section 562 of the code applies to all qualifying financial contracts, it is possible that the use of multiple terms was simply meant to cover all relevant provisions in such financial contracts. If Congress did not intend to distinguish between liquidation, termination and acceleration, the measurement of damages when a non-debtor party exercises its contractual rights would occur as of the time of any of these three events – that is, liquidation, termination or acceleration. Section 102(5) of the code, which provides guidance on the rules of construction, provides that 'or' is not exclusive. According to the legislative history of this rule, "[when] a party 'may do (a) or (b),' then the party may do either or both" (HR Rep No 95-595, 95th Cong, 1st Sess 316 (1977); S Rep No 95-989, 95th Cong, 2d Sess 28 (1978)).

An alternative reading of Section 562(a) of the code is that the language stating that "damages shall be measured as of the earlier date of…" was meant to apply both between parts one and two, which distinguish between the situation when the trustee rejects and when the non-debtor counterparty exercises its contractual rights, and within part two. If this is the case, then Section 562 requires damages to be measured as of the earlier date of the liquidation, termination or acceleration by a non-debtor counterparty, even if liquidation were to occur subsequent to the termination or acceleration. *Collier on Bankruptcy* contemplates that the terms may not be synonymous, stating: "Typically, liquidation, termination and acceleration of a [financial contract under Section 562] will all occur as of the same date, although it is possible that there could be a period of gap (generally measured in days rather than weeks) between contract termination and liquidation of certain types of collateral" (see *Collier on Bankruptcy*, Section 562.2, n 2 (15th ed rev 2007)).

Key legislative history of Section 562 also reveals that its drafters provided for Section 562(b) to address "certain unusual circumstances, such as dysfunctional markets or liquidation of very large portfolios, [where] there may be no commercially reasonable determinants of value of liquidating any such agreements or contracts or for liquidating all such agreements and contracts in a large portfolio on a single day" (HR Rep No 109-31, 109th Cong, 1st Sess 20, 134-35 (2005)). In these circumstances, Congress provided the party determining damages with the discretion to determine the dates when damages are measured. The measurement of damages is "circumscribed unless there are no 'commercially reasonable' determinants of value for it to measure damages as of the date or dates of their rejection or liquidation, termination or acceleration" (*id*).

The code also provides that "if damages are not measured as of the date or dates of rejection, liquidation, termination, or acceleration" and a party objects to the timing of the measurement of damages, the party asserting that there was no commercially reasonable determinant of value as of such date(s) has the burden of proving such (Section 562(c) of the code). Thus, when there is no readily available measure of value for unique assets such as mortgage loans, Section 562 of the code may be interpreted as giving the non-debtor counterparty the option of conducting a commercially reasonable sale within a reasonable period of time in order to value the assets and thereby measure the actual damages, if any. The other option available to the non-defaulting counterparty in this situation is to engage in a deemed sale, whereby the counterparty takes in the assets upon termination and ascribes a value to the assets. In either case, the value given to the assets would arguably be open to contest involving issues of fact. The burden of proof would likely be on the non-defaulting counterparty to prove the appropriateness of the manner in which the assets were liquidated and the reasonableness of the value obtained or ascribed.

Issues in the calculation of damages for sale breach claims and EPD claims

One of the more involved and potentially costly components of any sub-prime bankruptcy proceeding is the resolution of sale breach claims and EPD claims. At first blush it would appear that resolution of these claims would be a pure mathematical exercise. However, even the smallest of sub-prime lenders probably originated tens of thousands of loans. Therefore, the amount of raw data that needs to be analysed to evaluate potential claims based on these mortgage loans is immense.

An EPD claim typically arises when a borrower defaults on one of its first two or three monthly payments. Does such a default automatically mean that a damage claim exists? What if, after six months of seasoning, the loan becomes current – has the loan purchaser experienced any true economic loss? What about sale breach claims? Often the existence of a sale breach claim might not come to light until the borrower has defaulted on its monthly payments and the servicer, when it seeks to enforce its rights as a result of the default, discovers the breach. Does that mean that no such breach existed until its discovery? Is the only way to determine the damages for an EPD or sale breach claim to examine the individual borrower's files and loan level detail for each of the potentially hundreds of thousands of loans? There are also significant issues concerning the appropriate measure of damages for a breach. Did the purchaser appropriately liquidate the loan or underlying property? Could the purchaser have realised greater value for the loan had it acted in a different manner? Was the purchaser's delay in liquidating the loan unreasonable, resulting, for example, in a greater loss than was necessary? Attempting to resolve these complicated, subjective issues on a loan-by-loan basis can be a very costly and time-consuming approach to claims reconciliation. As a result, estate representatives have searched for alternatives to the traditional claims resolution process in bankruptcy.

One alternative approach developed for resolving these claims is to employ a protocol that would establish parameters for estimating the magnitude of each loan purchaser's claim based on specific, objective criteria applied uniformly to all claimants. The debtor uses internal empirical data in conjunction with information provided by individual claimants to determine the magnitude of these claims. The key in any such protocol is to ensure that each class of creditors is treated fairly so that, while the ultimate claims are an approximation, the protocol affects all claimants consistently. When such methodology is developed and utilised, it should significantly reduce the costs of resolving claims and streamline the process.

Are MSRs protected by the safe harbour provisions?

As discussed above, the safe harbour provisions allow a non-debtor counterparty to a repurchase agreement to liquidate, terminate or accelerate the repurchase agreement, notwithstanding the filing of a bankruptcy petition by the debtor counterparty. The application of these provisions, however, becomes more complicated when the debtor has retained the MSRs to the mortgage loans under the terms of the repurchase agreement. Such an integrated agreement gives rise to certain legal issues, such as whether:

- the non-debtor counterparty continues to have the right to liquidate, terminate or accelerate the entire contract, including the MSRs, under the safe harbour provisions;
- the provision of the agreement pertaining to the MSRs can be severed from the other provisions in the agreement, thereby allowing only the portion of the agreement relating to the repurchase of the mortgage loans to be liquidated, terminated or accelerated pursuant to the safe harbour provisions; or
- the MSRs cannot be severed and thus the entire

contract, including the sale and repurchase portion, no longer qualifies for the protections of the safe harbour provisions.

Prior to a decision of the Delaware Bankruptcy Court in the *American Home Mortgage Case*, there was very little judicial guidance to determine how these issues might be resolved.

In a case of first impression, the court considered the issue regarding the application of the expanded safe harbour provisions of Sections 555 and 559 of the code to a repurchase agreement involving mortgage loans and their associated MSRs (see *Caylon New York Branch v American Home Mortgage Corp*, 379 BR 503 (Bankr D Del 2008)).

In that decision, Calyon's repurchase agreement required the transfer of mortgage loans to Calyon, as administrative agent, in exchange for a transfer of funds to the debtors and the subsequent return of the mortgage loans to the debtors in exchange for the transfer of funds to Calyon within six months of the initial transfer. The judge found that the agreement between the debtors and Calyon for the sale and repurchase of mortgage loans on a "servicing retained" basis qualified as a repurchase agreement under Section 101(47) of the code. Consequently, Calyon's right to liquidate, terminate or accelerate the repurchase portion of the agreement was "not stayed, avoided or otherwise limited by the operation of the Bankruptcy Code" (*id* at 50). The court, however, also found that the portion of the repurchase agreement relating to the MSRs was severable under applicable state law and did not qualify as either a repurchase agreement or a securities contract under the code. Since the MSRs portion of the repurchase agreement was not subject to the safe harbour provisions, the judge found no basis to require the debtors to transfer servicing of the mortgage loans to Calyon's designated servicer (as required by the repurchase agreement upon default). A brief discussion of the court's reasoning is warranted.

A few days prior to the debtors' bankruptcy filing, Calyon sent notices to the debtors of the occurrence of an event of default under the agreement and demanded that servicing be transferred to Calyon's designated servicer. The demand was ignored. Shortly after the debtors commenced their bankruptcy cases, Calyon filed a complaint seeking a declaratory judgment that the agreement was a repurchase agreement as defined under the code and subject to the safe harbour provisions, and that the debtors be compelled to transfer servicing of the mortgage loans to Calyon's designee. In response, the debtors argued that the agreement was not a repurchase agreement, but instead a secured financing, and in any event the servicing portion of the agreement was severable and not protected under the safe harbour provisions.

In rejecting the debtors' 'disguised secured financing' argument, the court applied the plain meaning of the code's definition of 'repurchase agreement'. In doing so, the court found that the agreement satisfied all the elements of a repurchase agreement and therefore the safe harbour provisions applied. The court alternatively found that since the repurchase agreement was a securities contract and Calyon qualified as a financial institution, the safe harbour provisions of Section 555 of the code were also applicable. Accordingly, Calyon was permitted to exercise its termination rights under the agreement arising from the debtors' alleged default.

The court next considered the impact of its holding on the debtors' MSRs, which were imbedded in the Calyon repurchase agreement. The court attempted to examine the intent of the parties in entering into the agreement to determine whether the servicing portion of the agreement was severable and therefore could be excluded from the purview of the safe harbour provisions. In its analysis, the court considered several factors:

- It considered the difference in the terms, nature and purpose of the provisions in the agreement relating to the sale and repurchase of the mortgage loans from those related specifically to MSRs.
- The court gave considerable weight to the fact that the loans subject to the agreement were sold on a servicing retained basis as "strong evidence of the parties' intent to sever servicing or the right to designate the servicer from the sale and repurchase of the mortgage loans".
- The court noted that the consideration for servicing mortgage loans, a monthly fee, was readily apportioned and distinct from the consideration for the sale of the mortgage loans, the price differential paid.
- The judge considered testimony establishing that the mortgage industry views MSRs as separate assets which are frequently traded separately and accorded distinct accounting treatment.
- The court noted that Calyon itself acknowledged the distinct nature of the two agreements by issuing two separate notices of

default on the same day – one to the seller of the mortgage loans and one to the servicer.

The court further noted that severing the servicing portion of the agreement would not frustrate the purpose of the repurchase agreement and the safe harbour provisions because Calyon was not precluded from liquidating its investment by selling the mortgage loans. Calyon was free to sell the mortgage loans as it bought them, on a servicing retained basis, albeit at a lower price than if sold on a servicing released basis. To allow Calyon to do otherwise, the court reasoned, would be to permit the purchaser to "receive a windfall – the right to designate the servicer without paying the concomitant premium" (*Calyon* opinion at 522).

Conclusion

The flood of bankruptcy filings by mortgage loan lenders starting in 2007 has resulted in insolvency practitioners advocating to bankruptcy courts alternative interpretations of newly enacted provisions in the code. Courts face a particularly daunting task given that there is little, if any, judicial precedent interpreting many of these sometimes ambiguous provisions and the legislative history is relatively sparse. Decisions such as *American Home* represent the courts' attempted harmonisation of these arguments and ambiguities in addressing important issues of first impression. Bankruptcy professionals representing the estates of mortgage lenders and their creditors can be expected to continue to develop a roadmap for these sub-prime cases in an effort to find creative ways to maximise the values achieved for the estates' assets.

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