

BANKRUPTCY



MICHAEL FURMAN | BUSINESS JOURNAL

Bob Graham, an attorney with Foster Graham Milstein & Calisher LLP in Denver, says bankruptcy filings have significantly increased during the recession.

Bankruptcy reform comes up empty in cutting filings

BY DOUG MCPHERSON

SPECIAL TO THE BUSINESS JOURNAL

Attorney Bob Graham explains that the Bankruptcy Reform Act of 2005 had great intentions: to curb the number of Chapter 7 bankruptcies (which liquidate assets to pay creditors) and steer many filers into Chapter 13 (which reorganizes their debt).

But in the last two years, Graham said, he's seen the number of Chapter 7 bankruptcies increase instead.

"Filings under both chapters have increased significantly since the economic downturn in September of 2008," said Graham, an attorney with Foster Graham Milstein & Calisher LLP in Denver. "I've had an increase in clients who are filing because of the negative equity they have in their personal homes and investment properties they bought in the real estate boom before 2009 and that were foreclosed. Now the lender wants to collect the difference between the value of the property and what's owed."

Nancy Miller, an attorney with Kennedy and Fogg in Denver who has practiced bankruptcy law for 35 years, agreed with Graham, and said some studies suggest the changes made to the bankruptcy law "are not having the intended consequences."

A new situation both Graham and Miller have seen is that some debtors make too much money to file a Chapter 7.

"Now all consumer debtors are means-tested, but because of the huge deficiencies after a foreclosure, they also have too much unsecured debt to file a Chapter 13," Graham said. "Their only option at that point is to file a Chapter 11. That's an extremely expensive option that effectively prevents them from filing bankruptcy."

Miller said there's been some consideration about creating a more streamlined Chapter 11 process to help those who have too much income to be eligible for Chapter 7, but too much debt to be eligible for Chapter 13.

James Nottingham, an attorney with Berenbaum Weinshienk PC in Denver, said bankruptcy courts are continuing

to analyze the 2005 reforms and that in the recent past, there was a congressional push to try to pass a bill — the so-called "cram-down" amendment — that would have given bankruptcy judges the power to lengthen mortgage terms, cut interest rates and reduce loan balances for home owners in bankruptcy.

Lawmakers rejected the bill, but Nottingham said, it remains to be seen whether there'll be another push to pass such legislation.

Regardless of what might happen, Graham said there's plenty of financial suffering to go around, particularly in real estate.

"The downturn in the real estate market has led to more mortgage brokers and Realtors filing bankruptcy because those industries have been hit so hard," Graham said.

An example, Miller said, is that in many commercial real estate properties and projects, there's no equity and limited cash flow to allow for reorganization under Chapter 11.

"There's less ability to reorganize. The downturn in real estate cuts across so many businesses," Miller said. "This also shows up in the residential market, with so many homeowners with their mortgages upside down."

And she said commercial banks struggle as well. "There's been so much consolidation in the title insurance industry. We've seen the downturn in other markets, such as automobiles and manufacturing, impacting on so many small businesses and employees."

Miller said she's seen many cycles of boom and bust. She said what's different about the current cycle is the downturn's depth and breadth.

She said each of the five bankruptcy judges in the United States Bankruptcy Court for the District of Colorado have more than 7,000 open cases.

"It may be time to create a sixth bankruptcy judgeship to deal with the crushing caseload," she said.

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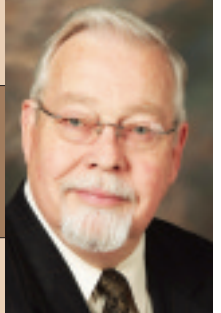
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