

## Chapter 13 Bankruptcy May Modify Some Mortgages

We are all on the edge of our seats, watching the news about the [Obama Home Affordable](#) program and how so many trial loan modifications are failing in comparison to the number of applications for [mortgage modifications](#). We have also stood by and watched Congress shoot down the Mortgage Cramdown Legislation under [SB61](#) that would have given bankruptcy judges the authority to modify mortgages in chapter 13 bankruptcy cases. While all of this continues to take center stage in the news, there is a quiet storm brewing in the practice of chapter 13 bankruptcy that may modify some residential mortgages.



11 U.S.C. § 1322 (b) (2) is referred to as the 'anti-modification' statute and allows modification of secured loans; however, a bankruptcy court's power to modify loans does not extend to loans secured "only by a security interest in real property that is the debtor's personal residence." What this means is that most homeowners are precluded from filing a chapter 13 case for the purpose of modifying their mortgages. However, and here is where it gets flavorful because bankruptcy courts have distinguished some residential loans as not being protected under § 1322 (b) (2).

In re Scarborough, 461 F.3d 406 (3rd Cir. 2006) held that, "based on the plain language of 1322 (b), a creditor does not receive anti-modification protection for a claim secured by real property that includes both the debtor's principal residence and other rental property that is not the debtor's principal residence. In re Bulson, 327 B.R. 830 (Bankr. W.D. Mich. 2005) allowed modification of a loan secured by an interest in property in which the debtor resided when the property involves multi-unit dwellings. These two cases point to situations where the residential homeowners both lived in their homes and rented out a portion thereof, or otherwise lived in duplexes or other multi-unit properties. This may be good news for some residential mortgage holders.

But here is the twist. The lender must know, or have reason to know that the property was being used as both the principal residence and providing rental income **at the time of the loan**. So, if you had a tenant on your property when you took out your loan and used that rental income in part, to qualify for that loan, then you may be able to modify your residential mortgage in a chapter 13 bankruptcy.