

Mortgages in Chapter 13

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New Rules: 3001(c) & 3002.1
A Preview of the Proposed Rule and Form Changes

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Unless Congress says otherwise, new bankruptcy rules will take effect on December 1, 2011. Of particular interest to the consumer bankruptcy community are the changes to Rule 3001(c), the creation of Rule 3002.1, and the new proof of claim forms. The purpose of this article is to explain the proposed changes and to outline the responsibilities the new rules and forms impose.

RULE 3001(c)

In essence, the additions to Rule 3001(c) will increase the amount of information a lender must provide via the proof of claim form. Be advised that the proposed amendment requires the creditor to disclose more details and perform more work. However, the fairness to the debtor arguably outweighs the inconvenience that compliance with the rule may cause the creditor.

Rule 3001(c) mandates that claimants attach the original or duplicate writing that supports the claim. If the writing is lost or destroyed, the circumstances must be described in a statement that is filed with the claim.

Rule 3001(c) also requires the creditor to disclose all charges that are included in a claim. In addition to reporting the principal amount due, the creditor must itemize any interest, fees, expenses and all other charges that were assessed pre-petition.

Lastly, if the creditor has a security interest in the debtor's property, the claim must disclose the amount of the default that existed upon filing. Also, if the lender is a mortgagee on the debtor's residence, and the lender established an escrow account for property taxes and insurance, then an escrow account statement must be attached to the claim. The proposed proof of claim form now contains an attachment that allows lenders to conform to the new rule's requirements.

RULE 3002.1

The provisions of the new bankruptcy rule 3002.1 apply only if two requirements are satisfied. First, the subject mortgage must be secured by the debtor's home. In addition, the debtor's plan must be proposing to cure the loan's arrears while maintaining ongoing payments to the lender. If these elements are

satisfied, the lender must be aware of the new requirements that it must follow pursuant to Rule 3002.1. In addition, the standing trustee and the debtor must pay close attention to the disclosures the lender will make during the life of the case.

Notice of Payment Change

Mortgagees must file and serve a notice of payment change on the debtor, the debtor's counsel and the standing trustee. This notice must be filed at least 21 days prior to the new payment's due date, and the notice is required even if the payment change is due to an escrow analysis or an interest rate adjustment. This requirement is incorporated into a document that will supplement the official proof of claim form.

Notice of Post-Petition Charges

The new rule also requires lenders to file and serve an itemized statement of post-petition charges if the lender intends to hold the debtor or the collateral responsible for the charges. As a result of this rule, the debtor, the debtor's attorney and the trustee will be notified of late fees, NSF charges, attorney fees, and all other fees, charges and expenses the lender is assessing post-petition. The official proof of claim form contains a supplement, which creditors must use to report the charges.

The debtor or trustee has one year to object to the lender's post-petition charges. An opposing party may assert that the charges are unreasonable or excessive, that the charges are not recoverable under state or federal law, or that the costs are not allowed under the mortgage or the note.

The rule makes it clear that the notices of post-petition charges and payment changes do not have the same evidentiary value as a proof of claim. These notices are not prima facie evidence of the notice's validity or the payment amount, which eases the burden of objecting to the information the notice contains.

Notice of Final Cure

The rule also establishes a uniform process for determining whether the mortgagee should treat a debtor's loan as current. The rule states that the trustee shall file and serve a notice of final cure on the lender, the debtor and the debtor's attorney within 30 days from the time the debtor makes his final payment. If the trustee does not timely file the notice, the debtor's may file and serve the notice. The purpose of the notice is to inform the parties that the debtor has cured his pre-petition arrears. In addition, the notice must also inform the lender of its duty to respond to the trustee's notice.

The lender's response must be in the form of a statement that indicates whether the debtor actually has cured the default and whether the debtor has paid all of his post-petition mortgage payments. The notice also must specify the amount of any existing shortages. The creditor must file its response within 21 days from the filing of the notice of cure. The rules state that the creditor's response does not carry the same evidentiary weight that a proof of claim does. As a result, the amounts listed in the statement can be rebutted with significantly more ease.

Once the lender files its statement, the burden shifts again. At that point, the debtor or the trustee has 21 days to file a motion that asks the court to resolve the conflicting statements. During the hearing, the court must determine if the debtor has cured the pre-petition default and if the debtor has paid all the post-petition amounts that have come due. Depending on the outcome, the debtor may have to resume making payments to the lender.

Enforcement

Considering that sanctions can be imposed for failure to comply with Rule 3001 or Rule 3002.1, courts are better equipped to hold creditors accountable for adhering to the rules. Rule 3002.1 states that a lender can be penalized for failing to file a payment change notice, a notice of post-petition charges, fees and expenses or a statement in response to a notice of final cure. Similarly, Rule 3001 gives courts the authority to sanction a creditor for filing an incomplete claim. In both cases, after notice and a hearing, courts can order a creditor to pay expenses and

attorney's fees that result from the lender's inaction. The court can also bar the lender from introducing the omitted information as evidence during contested matters or adversary proceedings. However, if the creditor can convince the court that the inaction was harmless or justified, the lender may be allowed to present the omitted information.

Conclusion

The underlying theme of the proposed rules appears to be disclosure. The changes allow for the release of relevant information, increase transparency between the creditor and the debtor, and the changes mandate that these practices are adhered to uniformly across the country. Although the rules impose additional responsibilities on the actors in our system, the new changes will cause more good than harm. Moreover, the likelihood of errors and abuses will reduce significantly since the details related to most transactions will be readily available.

APPENDIX

Proposed Federal Rules of Bankruptcy Procedure Rule 3001(c),
Rule 3002.1, & Official Proof of Claim Form

Rule 3001. Proof of Claim

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

* * * * *

COMMITTEE NOTE

Subdivision (c). Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information.

Existing subdivision (c) is redesignated as (c)(1).

Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.

If a claim is secured by a security interest in the property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default. If the claim is secured by a security interest in the debtor's principal residence, the proof of claim must be accompanied by the attachment prescribed by the appropriate Official Form. In that attachment, the holder of the claim must provide the information required by subparagraphs (A) and (B) of this paragraph (2). In addition, if an escrow account has been established in connection with the claim, an escrow account statement showing the account balance, and any amount owed, as of the date the petition was filed must be submitted in accordance with subparagraph (C). The statement must be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.,* 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act). Thus the holder of the claim may provide the escrow account statement using the same form it uses outside of bankruptcy for this purpose.

Subparagraph (D) of subdivision (c)(2) sets forth sanctions that the court may impose on a creditor in an individual debtor case that fails to provide information required by subdivision (c). Failure to provide the required information does not itself constitute a ground for disallowance of a claim. *See* § 502(b) of the Code. But when an objection to the allowance of a claim is made or other litigation arises concerning the status or treatment of a claim, if the holder of that claim has not complied with the requirements of this subdivision, the court may preclude it from presenting as evidence any of the omitted information, unless the failure to comply with this subdivision was substantially justified or harmless. The court retains discretion to allow an amendment to a proof of claim under appropriate circumstances or to impose a sanction different from or in addition to the preclusion of the introduction of evidence.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) **IN GENERAL.** This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(b) **NOTICE OF PAYMENT CHANGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) **NOTICE OF FEES, EXPENSES, AND CHARGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) **FORM AND CONTENT.** A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) **DETERMINATION OF FEES, EXPENSES, OR CHARGES.** On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) **NOTICE OF FINAL CURE PAYMENT.** Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) **RESPONSE TO NOTICE OF FINAL CURE PAYMENT.** Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to

cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) **DETERMINATION OF FINAL CURE AND PAYMENT.** On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) **FAILURE TO NOTIFY.** If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee must be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a) requires the holder of a claim secured by the debtor's principal residence to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount. Notice must be provided at least 30 days before the new payment amount is due.

B 10 (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		PROOF OF CLAIM
Name of Debtor: _____		Case Number: _____
<p>NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.</p>		
Name of Creditor (the person or other entity to whom the debtor owes money or property): _____		COURT USE ONLY
Name and address where notices should be sent: _____ Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if this claim amends a previously filed claim. Court Claim Number: _____ (If known) Filed on: _____
Name and address where payment should be sent (if different from above): _____ Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
1. Amount of Claim as of Date Case Filed: \$ _____ If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.		
2. Basis for Claim: _____ (See instruction #2)		
3. Last four digits of any number by which creditor identifies debtor: _____	3a. Debtor may have scheduled account as: _____ (See instruction #3a)	3b. Uniform Claim Identifier (optional): _____ (See instruction #3b)
4. Secured Claim (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.		Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: \$ _____
Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: _____		Basis for perfection: _____
Value of Property: \$ _____		Amount of Secured Claim: \$ _____
Annual Interest Rate _____% <input type="checkbox"/> Fixed or <input type="checkbox"/> Variable (when case was filed)		Amount Unsecured: \$ _____
5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.		
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).
<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).	<input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).	<input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____).
Amount entitled to priority: \$ _____		
*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.		
6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)		

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

- I am the creditor. I am the creditor's authorized agent. I am the trustee, or the debtor, or their authorized agent. I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)
 (Attach copy of power of attorney, if any.) (See Bankruptcy Rule 3004.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
 Title: _____
 Company: _____
 Address and telephone number (if different from notice address above): _____

 (Signature) (Date)

Telephone number: _____ email: _____

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
 Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
 Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
 State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
 State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
 State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
 Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
 If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
 Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).
 If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
 An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
 Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
 The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

INFORMATION

Debtor

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor

A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim

A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

Acknowledgment of Filing of Claim

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.nsc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

B 10 (Official Form 10) (Committee Note) (12/11)

COMMITTEE NOTE

The form is amended in several respects. A new section—3b—is added to allow the reporting of a uniform claim identifier. This identifier, consisting of 24 characters, is used by some creditors to facilitate automated receipt, distribution, and posting of payments made by means of electronic funds transfers by chapter 13 trustees. Creditors are not required to use a uniform claim identifier.

Language is added to section 4 to clarify that the annual interest rate that must be reported for a secured claim is the rate applicable at the time the bankruptcy case was filed. Checkboxes for indicating whether the interest rate is fixed or variable are also added.

Section 7 of the form is revised to clarify that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest must be attached to the proof of claim. If the documents are not available, the filer must provide an explanation for their absence. The instructions for this section of the form explain that summaries of supporting documents may be attached only in addition to the documents themselves.

Section 8—the date and signature box—is revised to include a declaration that is intended to impress upon the filer the duty of care that must be exercised in filing a proof of claim. The individual who completes the form must sign it. By doing so, he or she declares under penalty of perjury that the information provided “is true and correct to the best of my knowledge, information and reasonable belief.” That individual must also provide identifying information—name; title; company; and, if not already provided, mailing address, telephone number, and email address—and indicate by checking the appropriate box the basis on which he or she is filing the proof of claim (for example, as creditor or authorized agent for the creditor). Because a trustee or debtor that files a proof of claim under Rule 3004 will indicate that basis for filing here, the checkbox on the first page of the form for stating the filer’s status as a trustee or debtor is deleted. When a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.

Amendments are made to the instructions that reflect the changes made to the form, and stylistic and formatting changes are made to the form and instructions. Spaces are added for providing email addresses in addition to other contact information in order to facilitate communication with the claimant. The provision of this additional information does not affect any requirements for serving or providing official notice to the claimant.

B 10 (Attachment A) (12/11)

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ Case number: _____
 Name of creditor: _____ Last four digits of any number you use to identify the debtor's account: _____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. Principal due (1) \$ _____

2. Interest due	Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
	_____ %	___/___/___	___/___/___	\$ _____
	_____ %	___/___/___	___/___/___	\$ _____
	_____ %	___/___/___	___/___/___	+ \$ _____
Total interest due as of the petition date				\$ _____ Copy total here ▶ (2) + \$ _____

3. Total principal and interest due (3) \$ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney's fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Advertisement costs	_____	(5) \$ _____
6. Sheriff/auctioneer fees	_____	(6) \$ _____
7. Title costs	_____	(7) \$ _____
8. Recording fees	_____	(8) \$ _____
9. Appraisal/broker's price opinion fees	_____	(9) \$ _____
10. Property inspection fees	_____	(10) \$ _____
11. Tax advances (non-escrow)	_____	(11) \$ _____
12. Insurance advances (non-escrow)	_____	(12) \$ _____
13. Escrow shortage or deficiency (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13) \$ _____
14. Property preservation expenses. Specify: _____	_____	(14) \$ _____
15. Other. Specify: _____	_____	(15) \$ _____
16. Other. Specify: _____	_____	(16) \$ _____
17. Other. Specify: _____	_____	(17) + \$ _____
18. Total prepetition fees, expenses, and charges. Add all of the amounts listed above.		(18) \$ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

- No
- Yes. Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

1. Installment payments due	Date last payment received by creditor	_ / _ / _	
	Number of installment payments due	(1) _____	
2. Amount of installment payments due	_____ installments @	\$ _____	
	_____ installments @	\$ _____	
	_____ installments @	+ \$ _____	
	Total installment payments due as of the petition date	\$ _____	Copy total here ► (2) \$ _____
3. Calculation of cure amount	<u>Add</u> total prepetition fees, expenses, and charges		Copy total from Part 2 here ► + \$ _____
	<u>Subtract</u> total of unapplied funds (funds received but not credited to account)		- \$ _____
	<u>Subtract</u> amounts for which debtor is entitled to a refund		- \$ _____
	Total amount necessary to cure default as of the petition date		(3) \$ _____

Copy total onto Item 4 of Proof of Claim form

B 10 (Attachment A) (Committee Note) (12/11)

COMMITTEE NOTE

This form is new. It must be completed and attached to a proof of claim secured by a security interest in a debtor's principal residence. The form, which implements Rule 3001(c)(2), requires an itemization of prepetition interest, fees, expenses, and charges included in the claim amount, as well as a statement of the amount necessary to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement must also be attached to the proof of claim, as required by Rule 3001(c)(2)(C).

Changes Made After Publication

Part 2. The instruction at the beginning of this part was changed to require itemization of "fees, expenses, and charges due on the claim as of the petition date," rather than "fees, expenses, and charges incurred in connection with the claim as of the petition date."

The parenthetical following "Escrow shortage or deficiency" was changed to state more clearly that amounts that are part of any installment payment listed in Part 3 should not be included here.

Item numbers were added to the left and right columns.

Part 3. A heading labeled "3. Calculation of cure amount" was added.

A line reading "Subtract amounts for which debtor is entitled to a refund" was added.

* * * * *

B 10 (Supplement 1) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____

Chapter 13

Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last four digits of any number
you use to identify the debtor's
account: _____

Date of payment change:
Must be at least 21 days after date of
this notice _____/_____/_____

New total payment: \$ _____
Principal, interest, and escrow, if any

Part 1: Escrow Account Payment Adjustment

Will there be a change in the debtor's escrow account payment?

- No
- Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why:

Current escrow payment: \$ _____

New escrow payment: \$ _____

Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

- No
- Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____%

New interest rate: _____%

Current principal and interest payment: \$ _____

New principal and interest payment: \$ _____

Part 3: Other Payment Change

Will there be a change in the debtor's mortgage payment for a reason not listed above?

- No
- Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (Court approval may be required before the payment change can take effect.)

Reason for change: _____

Current mortgage payment: \$ _____

New mortgage payment: \$ _____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

- I am the creditor. I am the creditor's authorized agent.
 (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

X _____ Date / /
 Signature

Print: _____ Title _____
 First Name Middle Name Last Name

Company _____

Address _____
 Number Street

 City State ZIP Code

Contact phone (____) ____ - _____ Email _____

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to provide notice at least 21 days prior to a change in the amount of the ongoing mortgage installment payments. The form requires the holder of the claim to indicate the basis for the changed payment amount and when it will take effect. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. The instruction to "Attach a copy of the escrow account statement, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law."

Part 2. The instruction to "Attach a copy of the rate change notice, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law."

Part 4. In the declaration, the word "claim" was changed to "Notice."

* * * * *

B 10 (Supplement 2) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last four digits of any number you use to identify the debtor's account: _____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- No
- Yes. Date of the last notice: ____/____/____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Bankruptcy/Proof of claim fees	_____	(5) \$ _____
6. Appraisal/Broker's price opinion fees	_____	(6) \$ _____
7. Property inspection fees	_____	(7) \$ _____
8. Tax advances (non-escrow)	_____	(8) \$ _____
9. Insurance advances (non-escrow)	_____	(9) \$ _____
10. Property preservation expenses. Specify: _____	_____	(10) \$ _____
11. Other. Specify: _____	_____	(11) \$ _____
12. Other. Specify: _____	_____	(12) \$ _____
13. Other. Specify: _____	_____	(13) \$ _____
14. Other. Specify: _____	_____	(14) \$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

X _____ Date ____/____/____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street
City State ZIP Code

Contact phone (____) ____-____ Email _____

B 10 (Supplement 2) (Committee Note) (12/11)

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to file a notice of all postpetition fees, expenses, and charges within 180 days after they are incurred. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. Item numbers were added to the left and right columns.

Part 2. In the declaration, the word "claim" was changed to "Notice."

* * * * *

CHAPTER 13 CRAM DOWN OF JUNIOR MORTGAGES WHEN DEBTOR IS NOT ELIGIBLE FOR A DISCHARGE

Submitted by:
James J. Haller
B.J. Maley

INTRODUCTION:

At the last Chicago Consumer Seminar, the mortgage panel presented materials concerning strip downs of junior mortgages. Whether or not this could be done, hinged up on whether the lien was secured or under-secured versus “wholly unsecured”. Determination of secured status is governed at 11 USC 506 which provides that a claim “is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property” and “is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property”.

Section 506(a) can lead to three possible valuation alternatives. If the secured claim is less than the value of the underlying collateral, the claim is fully secured. If the secured claim partially exceeds the value of the underlying collateral, the claim is bifurcated into secured and unsecured components, a process sometimes referred to as a "stripdown" of the creditor's claim. See *Dewsnup v. Timm*, 502 U.S. 410, 412, 112 S. Ct. 773, 775, 116 L. Ed. 2d 903 (1992). Finally, if the secured claim completely exceeds the value of the underlying collateral, the claim is asserted to entirely "strip off," leaving the creditor wholly unsecured.

Barnes v. American Gen. Fin. (In re Barnes), 207 B.R. 588, 590 (Bankr. N.D. Ill. 1997)

The Supreme Court made is clear that the anti-modification provisions of 11 USC 1322(b)(2) protected residential mortgages, even if the mortgage in question was undersecured,

and that the claims of mortgage lenders secured by the debtor's principal residence could not be reduced to the value of the residence.

In other words, to give effect to § 506(a)'s valuation and bifurcation of secured claims through a Chapter 13 plan in the manner petitioners propose would require a modification of the rights of the holder of the security interest. Section 1322(b)(2) prohibits such a modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence.

Nobelman v. American Sav. Bank, 508 U.S. 324, 332 (U.S. 1993)

If the loan was wholly unsecured, however, the majority of courts ruled that the protection of §1322(b)(2) did not apply. No less than six circuit courts ruled that such claims were modifiable.

Since *Nobelman*, the issue of whether Section 1322(b)(2) precludes strip-off has been decided by a large number of courts. The Seventh Circuit has not yet decided the issue but each of the six Courts of Appeal that have, has held that a wholly unsecured mortgage may be stripped off in Chapter 13 notwithstanding Section 1322(b)(2) and *Nobelman*. *In re Pond*, 252 F.3d 122 (2nd Cir. 2001); *In re McDonald*, 205 F.3d 606 (3rd Cir. 2000), cert. denied, 531 U.S. 822, 121 S.Ct. 66, 148 L.Ed.2d 31 (2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

In re King, 290 B.R. 641, 646 (Bankr. C.D. Ill. 2003) [Judge Perkins]

Several Illinois Judges followed suit including: Northern District Court Judge Darrah [see, *In re Holloway*, 2001 U.S. Dist. LEXIS 16898, 2001 WL 1249053 (N.D.Ill., 2001)], Northern District Bankruptcy Judge Squires [see, *Waters v. Money Store (in Re Waters)*, 276 B.R. 879, 882 (Bankr. N.D. Ill. 2002)]; Central District Bankruptcy Judges Perkins [see, *King*, cited above], Fines (while sitting in the Southern District) [see, *Havel v. Household Mortg. Servs. (In re*

Havel), 2002 Bankr. LEXIS 1004 (Bankr. S.D. Ill. Aug. 15, 2002)]and Gorman [see, *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008)]

One additional obstacle to stripping off a wholly unsecured, junior mortgage lien (whether by adversary or other means) remained for debtors who are not eligible for discharge. As reported last, courts had consistently held that the lien stripping is contingent upon the debtor's receipt of a discharge. [See, *In re King*, 290 B.R. 641, 651 (Bankr. C.D. Ill. 2003) and *In re Jarvis*, 390 B.R. 600, 606 (Bankr. C.D. Ill. 2008).] This may not continue to be the case.

DISCUSSION:

Can a debtor strip off a wholly unsecured junior mortgage in a chapter 13 bankruptcy when the debtor is not eligible to receive a discharge in that case? At first glance, this issue seems simple. A debtor can't obtain a cram down of an unsecured mortgage if the debtor can't discharge the debt.

However, the issue is much more interesting and complex than it appears. Furthermore, there is a split of authority over this issue. Courts disagree regarding whether a debtor's ineligibility for a discharge bars a debtor from using § 1322(b)(2) to strip off a wholly unsecured lien on the residence. Those that do not require discharge eligibility include *In re Fisette*, 2011 Bankr. LEXIS 3178, 18-19 (B.A.P. 8th Cir. Aug. 29, 2011); *In re Jennings*, 2011 Bankr. LEXIS 2693, 2011 WL 2909888 (Bankr. N.D. Ga. July 11, 2011); *Okosisi*, 451 B.R. 90; *Fair*, 450 B.R. 853 (E.D. Wis. 2011); *In re Waterman*, 447 B.R. 324 (Bankr. D. Colo. 2011); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010). *In re Grignon*, 2010 Bankr. LEXIS 4279, 2010 WL 5067440 (Bankr. D.Ore.); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010); *In re Burnett*, 427 B.R. 517 (Bankr. S.D. Cal. 2010); and *In re Davis*,

2011 Bankr. LEXIS 1045, 2011 WL 1237638 (Bankr. D. Md.). Other courts say that a debtor cannot permanently strip off a lien on his principal residence if he is ineligible for a discharge. *See, e.g., In re Victorio*, B.R. , 2011 Bankr. LEXIS 2704, 2011 WL 2746054 (Bankr. S.D. Cal. 2011); *In re Gerardin*, 447 B.R. 342 (Bankr. S.D. Fla. 2011); *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re Mendoza*, No. 09-22395 HRT, 2010 Bankr. LEXIS 664, 2010 WL 736834 (Bankr. D. Col. Jan. 21, 2010); *In re Jarvis*, 390 B.R. 600, 604-06 (Bankr. C.D. Ill. 2008). *In re Blosser*, 2009 Bankr. LEXIS 1049, 2009 WL 1064455 (Bankr. E.D. Wis.); *In re Mendoza*, 2010 Bankr. LEXIS 664, 2010 WL 736834 (Bankr. D. Colo.); *In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007); *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re Woolsey*, 438 B.R. 432 (Bankr. D. Utah 2010); *In re Collins*, 2010 Bankr. LEXIS 4640, 2010 WL 5173840 (Bankr. D. Ore.); and *In re Picht*, 428 B.R. 885 (10th Cir. BAP 2010).

Cases that hold that a debtor can strip off a wholly unsecured mortgage generally use the following argument. Section 1322(b)(2) of the Bankruptcy Code allows a debtor to modify the rights of secured creditors. However, this section prohibits modifications that are secured “only by a security interest in real property that is the debtor's principal residence.”

The Supreme Court in *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993), held that a debtor could not strip down an unsecured **portion** of a residential mortgage under Section 1322(b)(2). If the mortgage is at all secured by the value of the residence, it cannot be modified under Section 1322(b)(2).

Following this decision, chapter 13 debtors (in cases eligible for discharge) began to strip down wholly unsecured mortgages arguing that Section 1322(b)(2) did not apply since the creditor held no “secured” debt as defined by Section 506(a) of the Bankruptcy Code. This principle has been uniformly approved. *See, e.g., Zimmer v. PSB Lending Corp. (In re Zimmer)*,

313 F.3d 1220 (9th Cir. 2002); *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002); *Pond*, 252 F.3d at 127; *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *McDonald v. Master Fin. Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000); *In re Griffey*, 335 B.R. 166 (B.A.P. 10TH Cir. 2005); *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000).

Would these court have held the same way if the debtors in their cases had not been eligible for a discharge? One of the early Illinois cases addressing the relationship of the discharge to the stripping of a junior lien was decided by Judge Perkins in the Central District of Illinois. Judge Perkins held that the mortgage lien would remain intact unless and until the discharge was granted.

this Court also holds that the lien-avoiding effect of the confirmed plan, while established at confirmation, is contingent upon a discharge pursuant to Section 1328. Accord, *In re Stroud*, 219 B.R. 388, 390 (Bankr.M.D.N.C. 1997); *In re Leverett*, 145 B.R. 709, 713 (Bankr.W.D.Okla. 1992). BANK ONE has no duty to release its mortgage until then. If, for any reason, the DEBTORS do not receive a discharge under Section 1328, BANK ONE 'S mortgage lien remains in effect.

In re King, 290 B.R. 641, 651 (Bankr. C.D. Ill. 2003)

His colleague, Judge Gorman, specifically address the issue of eligibility for discharge. *In re Jarvis*, 390 B.R. 600, 607 (Bankr. C.D. Ill. 2008). In *Jarvis*, Judge Gorman held that the actual lien stripping did not occur unless and until a discharge was entered. She found that “A no-discharge Chapter 13 case may certainly be utilized to obtain the protections of the automatic stay for the purpose of proposing a plan to make payments on debts. A no-discharge Chapter 13 case may not, however, result in a permanent modification of a creditor's rights where such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted.” *Jarvis*, at 605-606.

This issue was also addressed by Judge Cox in *In re Fenn*, 428 B.R. 494, 2010 Bankr. LEXIS 1512 (Bankr. N.D. Ill. 2010). In *Fenn*, the debtors had previously received a Chapter 7 discharge and were ineligible for a Chapter 13 discharge under 11 U.S.C. § 1328(f) because less than four years had passed. Judge Cox denied confirmation for the Fenn's proposed plan because it treated the junior mortgage claim as unsecured and did not provide for lien retention.

One might argue, however, that since the rights a creditor in rem are not affected by a discharge in chapter 13 bankruptcy, the lack of a discharge has nothing to do with the creditor rights against the property.

Section 524(a)(2) of the Bankruptcy Code states "A discharge . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." See also *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991) ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim - namely, an action against the debtor in personam - while leaving intact another - namely, an action against the debtor in rem."). *In re Fisette*, 2011 Bankr. LEXIS 3178 (B.A.P. 8th Cir. Aug. 29, 2011). As such, a discharge should have no bearing on whether an in rem interest of a creditor can be affected by a chapter 13 plan in which the debtor is not eligible for discharge.

There are other sections of the code which might apply as well. For example, 11 U.S.C. § 349(b)(1)(C) states that a dismissal of a chapter 13 case reinstates any lien voided under section 506(d) of the Bankruptcy Code. The completion of a chapter 13 bankruptcy case doesn't result in a dismissal but rather a closing of the bankruptcy. As such this section would not be relevant except in the situation in which the chapter 13 is dismissed prior to completion.

Cases that hold that a debtor cannot strip off a wholly unsecured mortgage generally focus on the language and interpretation of § 1325(a)(5)(B)(i)(I) and (II). These sections state:

(5) with respect to each allowed secured claim provided for by the plan--

(B) (i) the plan provides that--

(I) the holder of such claim retain the lien securing such claim until the earlier of--

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328 [11 USCS § 1328]; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

These cases argue that a lien cannot be stripped unless the underlying debt is paid in full or the debtor obtains a discharge. Clearly the debtor can't do either in a case that is not discharged. Therefore, the lien cannot be stripped off in a chapter 13 bankruptcy. The argument continues that even though a bank may not have any equity to support its lien, that fact doesn't change its status as the holder of an allowed secured claim under § 1325(a)(5)(B)(i)(I). *In re Lindskog*, 2011 Bankr. LEXIS 1666 (Bankr. E.D. Wis. 2011).

Furthermore, allowing a debtor to strip off a junior mortgage in a chapter 13 would effectively eviscerate the holding in *Desnup*. It would also be contrary to the spirit of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to hold debtors more accountable. Finally it would also run afoul of the "spring back" provisions found in Sections 348(f)(1)(C) and 349(b)(1)(C) of the Bankruptcy Code. Judge Kelley states:

The Jarvis reasoning is compelling because allowing a debtor to file Chapter 7, discharge all dischargeable debts and then immediately file Chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the Chapter 7 itself. But Chapter 7 debtors are not allowed to use § 506 to avoid liens. *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992). Moreover, lien stripping under these circumstances does not appear to comport with Congressional intent, as evidenced by the 4-year bar between a Chapter 7 discharge and eligibility for a Chapter 13 discharge, and the

provisions allowing avoided liens to "spring back" on conversion or dismissal of the Chapter 13 case. 11 U.S.C. §§ 348(f)(1)(C), 349(b)(1)(C).

In re Blosser, 2009 Bankr. LEXIS 1049 (Bankr. E.D. Wis. 2009).

The reasoning of *Jarvis* and *Blosser* was specifically rejected, however, by the U.S. District Court for the Eastern District of Wisconsin earlier this year.

None of the cases which refuse to allow lien stripping in a no-discharge chapter 13 case acknowledge or confront the plain language of § 1328(f)(1), which simply prohibits "a discharge of all debts provided for in the plan." A bankruptcy discharge "extinguishes only one mode of enforcing a claim – namely, an action against the debtor in personam – while leaving intact another – namely, an action against the debtor in rem." *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). Accordingly, a bankruptcy discharge "does not release a lien from the Debtor's property, and the lien may continue to be enforced against the debtor's property which is subject to that lien." *Frazier*, 2011 Bankr. LEXIS 78, 2011 WL 1206198, at *5. When Congress amends the bankruptcy laws, it does not write "on a clean slate." *Dewsnup*, 502 U.S. at 419. The Court must presume that Congress understood the distinction between discharging in personam liability and modifying the terms of an in rem lien when it enacted § 1328(f)(1). In other words, denying certain chapter 13 debtors the right to a discharge did nothing to change the fact that lien stripping is generally allowed under chapter 13. In many chapter 13 cases, "it is the ability to reorganize one's financial life and pay off debts, not the ability to receive a discharge, that is the debtor's 'holy grail.'" *In re Bateman*, 515 F.3d 272, 283 (4th Cir. 2008). Congress did not intend to prevent lien stripping through § 1328(f)(1), and it is inaccurate to characterize lien stripping as a de facto discharge under the bankruptcy code.

In re Fair, 450 B.R. 853, 857 (E.D. Wis. 2011)

The Courts *allowing* a strip off indicate that Section 1325(a)(5) doesn't apply because pursuant to Section 506, there is no allowed secured claim. Since there is no allowed secured claim, *Dewsnup* is not applicable. Further, the effect of the lien strip would not be permanent unless the plan is completed and not dismissed or converted. In this manner the code sections 348(f)(1)(C) and 349(b)(1)(C) are harmonized.

Additional issues may also remain for ineligible debtors even in courts that permit lien stripping without discharge. One of these issues was addressed by the court in *Fair*:

This is not to say that debtors enjoy an absolute right to strip off unsecured liens in a no-discharge chapter 13 case. Courts have an independent duty to determine whether chapter 13 proceedings are conducted in good faith. §§ 1325(a)(3), (7). Filing a chapter 13 case "solely for the purpose of the lien avoidance" suggests manipulation of the bankruptcy code and is evidence of bad faith. *Hill* at 184 (citing *Tran* at 238).

In re Fair, 450 B.R. 853, 858 (E.D. Wis. 2011) citing *In re Hill*, 440 B.R. 176,184 (Bankr. S.D. Cal. 2010)

If courts find that that the debtor's plan is proposed in bad faith, independent grounds will exist for denying discharge regardless of whether or not the court requires discharge.

CONCLUSION

While it seems fairly settled that wholly unsecured mortgages can be stripped in Chapter 13, the issue of whether eligibility for discharge and discharge itself is required for this lien stripping to take place remains open. This issue will continue to progress in the current economic climate. It remains to be seen which approach will emerge as the majority opinion.