CONCURRENT SESSION

Let's Make It Clear: Federal Rules of Bankruptcy Procedure 3001 and 3002 and Lien-stripping in a Distressed Real Estate Market

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Hon. Michael G. Williamson
U.S. Bankruptcy Court (M.D. Fla.); Tampa

Let's Make It Clear: Federal Rules of Bankruptcy Procedure 3001 and 3002 and Lien-stripping in a Distressed Real Estate Market

On Dec. 1, 2011, Federal Bankruptcy Rules of Bankruptcy Procedure 3001 and 3002 were amended to provide increased transparency in proofs of claim and costs assessed during chapter 13 cases.

This panel will focus on the effects of these changes on debtors, secured lenders and chapter 13 trustees. We will also review recent lien-stripping litigation, including the latest "chapter 20" case developments.

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New Requirements under Federal Rules of Bankruptcy Procedure 3001 & 3002

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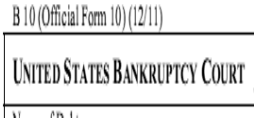
What are some of the new requirements under the Bankruptcy Rules?

- New B10/Proof of Claim form.
- Proof of Claim Attachment form.
- Providing notice of payment changes.
- Providing notice of post-petition fees, expenses and charges.
- Responding to the trustee's notice of final cure.

B10 Form Changes

Most recent version of the form is dated (12/11). Copies of all forms may be found at the Court's website:

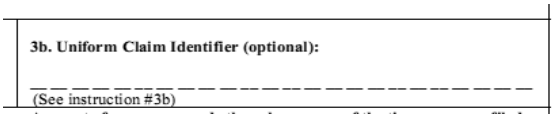
http://www.uscourts.gov/FormsAndFees/Froms/BankruptcyForms/BankruptcyFormsPendingChanges.aspx


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

UNITED STATES BANKRUPTCY COURT

B10 Form Changes

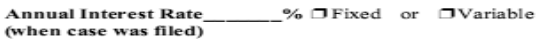
- UCI (uniform claim identifier): is an optional 24 character identifier that creditors may use to facilitate electronic payment in chapter 13 cases.


3b. Uniform Claim Identifier (optional):

_ _

(See instruction #3b)

- Interest Rate: Identify fixed or variable rate


Annual Interest Rate_____% ❒ Fixed or ❒ Variable (when case was filed)

B10 Form Changes

SIGNATURE BLOCK: New descriptions to identify who is filing the claim: Creditor, Creditor's authorized agent, Trustee/Debtor, or Guarantor, surety, indorser, or other co-debtor.

8. Signature: (See instruction #8)

Check the appropriate box.

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

Amended Rule 3001

3001(c)(2)(A) - IF, your claim includes **pre-petition** interest, fees, expenses, or other charges an itemized statement must be filed with the claim.

3001(c)(2)(B) – IF you claim a security interest in the debtor's property (i.e., secured), a statement of the amount necessary to cure the default as of petition date must be filed with the claim.

3001(c)(2)(C) – IF the security interest claimed is the Debtor's principal residence:

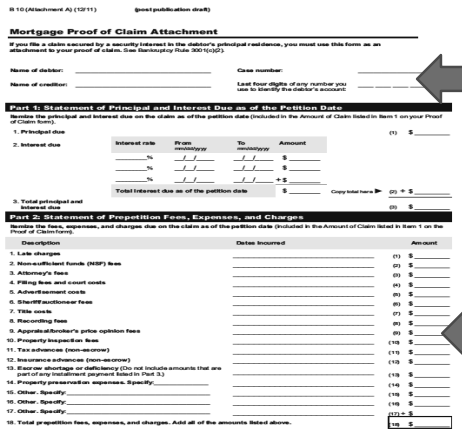
☑ The B-10 Attachment (A)

☑ And, if the loan is escrowed as of the date of filling , an "escrow account statement … in a form consistent with applicable non-bankruptcy law" must be filed with the proof of claim.

Rule 3001: Official Committee Notes

- Statement must include sufficient specificity to make clear the basis for the claimed amount.
- RESPA form filed with court can be in the same form used outside of bankruptcy.
- Preconfirmation Attorney's Fees may be listed on the POC Attachment.
- Failure to provide the information on the claim is not reason for disallowance of the claim but if an objection is filed or other litigation arises concerning the status of treatment of the claim, the court may preclude presentation of the omitted information.

POC Attachment Form



B 10 (Attachment A) (12/11) (post publication draft)

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) $_____

Required only for principal residence claims.
Practically, they will likely be filed for all mortgage claims.

Includes a breakdown Dates incurred.

▪Payment Change Form

B 10 (Supplement 1) (12/11) (post publication draft)

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: $ _____

Payment Change Form

- Only file in Chapter 13 cases.
- Required only for principal residences.
- Must be filed 21 days before the payment change.
- Must be filed as a Supplemental POC and served on the debtor, debtor's attorney & Trustee.
- Supporting documentation must be attached, depending on the reason for the payment change, including: escrow change (provide escrow analysis), interest rate change (provide payment change letter), loan modification.

Notice of Post-Petition Mortgage Fees and Costs

- Only file in Chapter 13 cases.
- Required only for principal residences.
- Must be filed no later than 180 days after fee or cost incurred.
- Must be filed as a Supplemental POC and served on the debtor, debtor's attorney & Trustee.
- Provide counsel with a copy of supporting documentation such as invoices or canceled checks.

Notice of Final Cure Payment

- No later than 30 days after making final payment of any cure amount on a claim secured by a security interest in the debtor's principal residence, the Trustee shall file and serve upon the holder of the claim, 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."
- 21 days after service of the Notice, creditor must file a Response on the debtor, debtor's attorney and trustee.
- Response must indicate whether the debtor has paid in full the amount to cure the default and whether the debtor is current on all payments.
- Must be filed as a Supplemental POC and served on the debtor, debtor's attorney & Trustee.

Notice of Final Cure Payment

- If the response indicates that the debtor is not current, the debtor or Trustee will file a Motion for Determination of Final Cure and Payment.

- The Court will set Motion for a hearing and if the creditor failed to provide payment change notices, notice of fees/costs during the bankruptcy case, the Court may disallow the creditor from presenting the omitted information and/or award attorney's fees and costs to the debtor for caused by the creditor's non-compliance.

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.

* * * * *

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,

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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.

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

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		PROOF OF CLAIM
Name of Debtor:	Case Number:	
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.*		
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:		❒ 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:		❒ 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.

❒ 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: ❒ Real Estate ❒ Motor Vehicle ❒ Other **Describe:**

Basis for perfection: _____

Value of Property: $_____

Amount of Secured Claim: $_____

Annual Interest Rate_____% ❒ Fixed or ❒ 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.

❒ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

❒ 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).

❒ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

Amount entitled to priority:

❒ 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).

❒ Taxes or penalties owed to governmental units – 11U.S.C. §507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

$_____

**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)

B 10 (Official Form 10) (12/11) 2

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

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

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.

INFORMATION

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.psc.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 (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**

   Add total prepetition fees, expenses, and charges Copy total from Part 2 here ▶ + $ _____

   Subtract total of unapplied funds (funds received but not credited to account) - $ _____

   Subtract 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 (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.

✘ _____ 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) (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.

✘ _____ Date ___/___/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____–_____ Email _____

Let's Make It Clear: Recent Litigation Regarding Federal Rule of Bankruptcy Procedure 3002.1

On December 1, 2011, Federal Bankruptcy Rule of Bankruptcy Procedure 3002.1("Rule 3002.1") was enacted to increase the transparency of fees and costs assessed during Chapter 13 cases. The rule was created to ensure: 1) mortgage creditors provided full disclosure of fees and/or costs assessed post-petition on a debtor's principal residence mortgage loan treated pursuant to 11 U.S.C. § 1322(b)(5); and 2) consistency and standardization of rules related to payment change letters and post-petition notices. As a result, debtors, mortgage lenders and Chapter 13 trustees must now adapt to new requirements and increased documentation.

Although the intent of Rule 3002.1 is to bring standardization to Chapter 13 bankruptcy proceeding across the country, litigation involving the interpretation of these new rules is starting to occur. In addition to disputes over interpretation, several jurisdictions have published their own Administrative Orders expanding the Bankruptcy Rules to impose additional requirements on mortgage servicers.[1] This article examines recent litigation and opinion memorandums surrounding Bankruptcy Rule 3002.1.

[1] *See e.g.* Southern District of Florida, Administrative Order 11-03 : Order Adopting Interim Rules and Clarifying Status of Local Forms Related to Chapter 13 Matters Addressed in Local Rule 3070-1 and Related to Local Rules 2002-1 and 4004-3 (November 18, 2011) ; http://files.e2ma.net/1353878/assets/docs/sdflorderonnew_rules.pdf; Southern District of Illinois, General Order 11-5 : Rule 3001(c)(2) and Rule 3002.1 of the Federal Rules of Bankruptcy Procedure (December 1, 2011) http://www.ilsb.uscourts.gov/docs/orders/genord11-5.pdf.

FEDERAL RULE OF BANKRUPTCY PROCEDURE: 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.

A. Overdisclosure…not always necessary?

The impetus for amending the bankruptcy rules resulted from concerned consumer lawyers, judges, and bankruptcy trustees reporting that debtors were unaware of fees and costs assessed to their loans during bankruptcy. Rule 3002.1 (c) addresses this concern requiring that holders of claims secured by an interest in the debtor's principal residence and provided for under § 1322(b)(5) must:

> 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 within 180 days after the date on which the fees, expenses, or charges are incurred.

Bankruptcy Rule 3002.1(d) specifies that the notice shall be prepared using Official Form B10 (Notice of Postpetition Mortgage Fees, Expenses, and Charges or Supplement 2 Form) and filed as a supplement to the holder's proof of claim.

While the Supplement 2 Form contains language instructing which fees and costs may be excluded, Rule 3002.1 does not contain this language. Supplement 2 Form's language states, "do not include…any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court." Following the letter of the law rather than the form's instructions, some creditor attorneys out of an abundance of caution began including all fees and costs assessed on accounts within 180 days after the date which the fees, expenses, or charges were incurred.

In a recent opinion, the court in *In re Sheppard*, reasoned that creditors could not include, in its Supplement 2 Form charges that had been resolved in the parties' prior consent order. *In re Sheppard*, Memorandum Opinion, 2012 WL 1344112 (Bankr. E.D. Va., April 18, 2012). Here, the creditor filed a Motion for Relief from Stay to recover delinquent mortgage payments from the debtors. The Motion was resolved by a Consent Order which required the debtors to file a modified plan providing for the remaining outstanding post-petition arrearages and attorney's fees which would be paid through the plan by an amended claim. The creditor filed the Supplement 2 form, under Rule 3002.1 (c) listing the post-petition arrearage and attorney's fees which were agreed to in the Consent Order. The trustee filed a Motion under Rule 3002.1(e) requesting the Court to determine whether the trustee was required to fund the expenses listed in the Supplement 2 form.

The Court determined that in order to prevent duplicate notices and prevent further confusion to the debtors on what fees and costs were owed on their account:

> [t]he plain language of the rule does not explicitly make any exception to the filing requirement. However, Bankruptcy Rule 3002.1 does require creditors to use Official Form B10 (Supplement 2). That Official Form provides that a creditor asserting post-petition fees, expenses, or charges must include on the form 'any amounts [not] previously itemized in a notice filed in this case *or ruled on by the bankruptcy court*' (emphasis added). The fees, expenses, and charges that were adjudicated in the Consent Order were 'ruled on' by the Court; and, therefore, they should not have been included in the separate Notice filed by [the creditor] under Rule 3002.1(c). *Id*. at 1344115.

The Court further noted that the trustee has no obligation to make payments on notices filed under Bankruptcy Rule 3002.1 because the supplemental claim is not intended to be pleading or a claim.

B. Can creditors shift the burden of costs associated with compliance under Rule 3002.1?

With the enactment of Rule 3002.1, creditors now burdened by increased reporting requirements argue that they should be able to recover fees from the debtor incurred as a direct result of complying with mandated requirements. The court in *In re Carr*, did not permit the creditor to collect the corresponding attorney fee incurred from the debtor when its counsel responded to the trustee's notice of final cure. *In re Carr*, 2012 WL 930337 (Bankr. E.D. Va., Mar. 19, 2012). The mortgage creditor filed two responses to the trustee's notice. One response agreed the default had been cured and the debtor was current with respect to post-petition payments. The second response was in the form of a notice of post-petition fees and costs claiming a $150 attorney fee for the preparation of the response to the trustee's notice of final cure payment. The issue in this case was whether the mortgage creditor could recover the corresponding attorney fee incurred for responding to the trustee's notice as required under Rule 3002.1. The court reasoned that the mortgage creditor could not assess a fee for simply acknowledging that the debtor's account was current. The court further indicated that Rule 3002.1 was to provide:

> a prompt, efficient, and cost-effective means to determine whether there is a question as to the status of a debtor's home loan at the conclusion of the Chapter 13 case. This was done by requiring the trustee to file an initial statement and the creditor file a response. This response is not a pleading, it is a supplement to the creditor's proof of claim and is filed on the claims registry, not on the Court's docket. It is simply a statement by the creditor as to the status of the loan at the conclusion of the Chapter 13 plan. This can be derived simply and quickly from the creditor's records and poses no significant burden on the creditor. This is a business function that can be done by a claims administrator in the creditor's own office. It is akin to issuing a receipt for payments received under the Chapter 13 plan and during the course of the Chapter 13 case or providing an annual escrow statement." *Id.* at 930338.

Similarly, other courts have determined that a mortgage creditor is not entitled to recover attorney fees for filing a notice of a change in the amount of the Chapter 13 debtor's monthly mortgage payment. *See In re Adams*, Case No. 8:12-bk-553 (Bankr. E.D. N.C., May 3, 2012) and *In re White*, Case No. 8:10-bk-1628 (Bankr. E.D. N.C., April 30, 2012). The courts found filing the required notices under the rules to be ministerial and did not require the assistance of an attorney.

C. Are creditors waived from the requirements of Bankruptcy Rule 3002.1 when stay relief has been granted or the property is surrendered in a plan?

With the enactment of Rule 3002.1, one question that mortgage creditors face is when relief from the automatic stay is granted by an order —are creditors required to file notices for post-petition fees and costs and payment change letters until the property is foreclosed upon? Prior to Rule 3002.1, when a mortgage creditor obtained relief from the automatic stay all bankruptcy monitoring ceased and the loan was subsequently moved to collection departments if the debtor was delinquent at discharge. Courts are divided on whether creditors are required to continue filing these notices after the automatic stay has lifted.

Northern District of Georgia creditor attorneys filing Motions of Relief from Stay included waiver language which stated that once the automatic stay was lifted on the property,

creditors were waived from Rule 3002.1 requirements. The majority of judges from this District conveyed that they were not inclined to "waive" the federal rule requirements and that creditors are required to comply with Rule 3002.1 notices until the completion of foreclosure proceedings. These judges opined that the debtors should continue to receive notices until the foreclosure sale to ensure adequate disclosure of all the fees and costs assessed on their mortgage loans.

A minority of judges in this District require that the Order lifting stay contain a provision that the Debtor's plan is modified to no longer provide for the payment of mortgage creditor's claim pursuant to 11 U.S.C. § 1322(b)(5). The Order also instructs the trustee to cease funding of mortgage creditor's claim until further notice from the court.

In the *In re Kraska* case, a creditor requested a waiver from the Rule 3002.1 requirements when a debtor surrendered their property in the plan. *In re Kraska*, Memorandum of Opinion, 2012 WL 1267993 (N.D. Ohio April 13, 2012). The creditor filed a Motion for Relief from the Stay and the Co-Debtor Stay and requested that the court waive any requirements under Rule 3002.1 for creditor and the Chapter 13 trustee. In the Memorandum of Opinion, Judge Russ Kendig denied creditor's request for a waiver stating:

> [a]t first blush, Rule 3002.1 may seem inapplicable to cases where a debtor intends to surrender real estate. Undisputedly, the bulk of the rule is intended to address the cure of arrearage claims. However, the absence of an arrearage claim does not obviate the need for the protections the rule provides. *Id.* at 12677995.

The court pointed out that there may be situations in which payment changes may occur between the petition filing and the foreclosure sale and the debtor has the right to examine the basis for the amounts due and challenge the figures.

Courts are not waiving compliance with Rule 3002.1 notice requirements. Whether the automatic stay is lifted or the debtor's primary real property is surrendered, the majority of judges are requiring mortgage lenders to provide adequate disclosure to debtors until properties are foreclosed upon.

465 B.R. 671, 23 Fla. L. Weekly Fed. B 252
(Cite as: 465 B.R. 671)

United States Bankruptcy Court,
M.D. Florida,
Tampa Division.
In re Tahisia L. SCANTLING, Debtor.

No. 8:11–bk–00369–MGW.
Feb. 24, 2012.

Background: Junior mortgagee objected to Chapter 13 debtor's proposed "strip off" of its lien, on ground that debtor had filed for Chapter 7 relief and obtained discharge less than four years prior to commencement of Chapter 13 case, so as not to be eligible for Chapter 13 discharge.

Holdings: The Bankruptcy Court, Michael G. Williamson, J., held that:
(1) eligibility for discharge is not prerequisite to debtor's being able to "strip off" a wholly unsecured junior mortgage in Chapter 13 case;
(2) court still had to determine whether "strip off" plan was proposed in "good faith"; and
(3) "strip off" would become permanent only on debtor's completion of plan.

Objection overruled.

West Headnotes

[1] Bankruptcy 51 ⚿2235

51 Bankruptcy
51III The Case
51III(B) Debtors
51k2235 k. Simultaneous or successive proceedings. Most Cited Cases

Bankruptcy 51 ⚿2575

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2575 k. Liens securing claims not allowed. Most Cited Cases

Bankruptcy 51 ⚿3708(9)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(9) k. Security interests in principal residences. Most Cited Cases

Eligibility for discharge is not prerequisite to debtor's being able to "strip off" a wholly unsecured junior mortgage in Chapter 13 case filed within four years of previous Chapter 7 filing in which debtor received discharge.

[2] Bankruptcy 51 ⚿2235

51 Bankruptcy
51III The Case
51III(B) Debtors
51k2235 k. Simultaneous or successive proceedings. Most Cited Cases

There is nothing in the Bankruptcy Code that prohibits the successive filing of Chapter 7 and Chapter 13 cases, i.e., "**Chapter 20**" filings.

[3] Bankruptcy 51 ⚿2235

51 Bankruptcy
51III The Case
51III(B) Debtors
51k2235 k. Simultaneous or successive proceedings. Most Cited Cases

Bankruptcy 51 ⚿3708(8)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(8) k. Modification of claim, right, or debt in general. Most Cited Cases

As long as debtor meets eligibility requirements for Chapter 13 relief, debtor may propose

plan that modifies in rem rights of holder of a secured claim, even after debtor's personal liability on that debt has been extinguished in a prior Chapter 7 case.

[4] Bankruptcy 51 ⚿2575

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2575 k. Liens securing claims not allowed. Most Cited Cases

Bankruptcy 51 ⚿3708(9)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(9) k. Security interests in principal residences. Most Cited Cases

While Chapter 13 debtor cannot "strip down" a junior residential mortgage which is partially secured by at least some equity in debtor's residence over and above amount of senior mortgage debt, a wholly unsecured junior mortgage may be "stripped off" without violating antimodification provision of Chapter 13. 11 U.S.C.A. § 1322(b)(2).

[5] Bankruptcy 51 ⚿2235

51 Bankruptcy
51III The Case
51III(B) Debtors
51k2235 k. Simultaneous or successive proceedings. Most Cited Cases

Bankruptcy 51 ⚿3708(2)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(2) k. Lien retention. Most Cited Cases

Bankruptcy 51 ⚿3708(9)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(9) k. Security interests in principal residences. Most Cited Cases

Bankruptcy statute governing the rights, under Chapter 13 plan, of creditors holding allowed secured claims, and requiring that such creditors retain their liens until they are paid in full in accordance with nonbankruptcy law or until debtor receives a discharge, applied only to creditors holding allowed secured claims, and did not protect holder of wholly unsecured junior mortgage lien to prevent "**Chapter 20**" debtor, who was ineligible for discharge in Chapter 13, from modifying creditor's state law lien rights, given that creditor did not hold an allowed secured claim. 11 U.S.C.A. § 1325(a)(5).

[6] Bankruptcy 51 ⚿3411

51 Bankruptcy
51X Discharge
51X(E) Effect of Discharge
51k3411 k. In general. Most Cited Cases

While Chapter 7 discharge does extinguish debtor's personal liability on secured claim, it does not extinguish the underlying debt. 11 U.S.C.A. § 524(a).

[7] Bankruptcy 51 ⚿3413.1

51 Bankruptcy
51X Discharge
51X(E) Effect of Discharge
51k3413 Effect as to Securities and Liens
51k3413.1 k. In general. Most Cited Cases

Chapter 7 discharge, by itself, does not extinguish any liens securing the debt; lien rights survive bankruptcy and are unaffected by debtor's discharge. 11 U.S.C.A. § 524(a).

[8] Bankruptcy 51 ⚿3411

51 Bankruptcy
51X Discharge
51X(E) Effect of Discharge
51k3411 k. In general. Most Cited Cases

Chapter 7 discharge extinguishes only one mode of enforcing a claim, namely, an action against debtor in personam. 11 U.S.C.A. § 524(a).

[9] Bankruptcy 51 ⚿2851

51 Bankruptcy
51VII Claims
51VII(B) Secured Claims
51k2851 k. In general. Most Cited Cases

There is difference between the term of art "secured claim," on the one hand, and notion that creditor has security interest or lien outside of bankruptcy, on the other hand.

[10] Bankruptcy 51 ⚿2233(1)

51 Bankruptcy
51III The Case
51III(B) Debtors
51k2222 Who May Be a Debtor
51k2233 Individual Debt Adjustment Cases
51k2233(1) k. In general. Most Cited Cases

Eligibility for discharge is not requirement for relief under Chapter 13. 11 U.S.C.A. §§ 109, 1328(f).

[11] Bankruptcy 51 ⚿3701

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3701 k. In general. Most Cited Cases

Central purpose of Chapter 13 is to save homes.

[12] Bankruptcy 51 ⚿2575

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2575 k. Liens securing claims not allowed. Most Cited Cases

Bankruptcy 51 ⚿3706(1)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3706 Good Faith in General
51k3706(1) k. In general. Most Cited Cases

Bankruptcy 51 ⚿3708(8)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(8) k. Modification of claim, right, or debt in general. Most Cited Cases

Chapter 13 debtors do not have absolute right to "strip off" wholly unsecured junior liens in no-discharge case; bankruptcy court must still determine whether Chapter 13 plan is proposed in "good faith." 11 U.S.C.A. § 1325(a)(3).

[13] Bankruptcy 51 ⚿3706(1.5)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3706 Good Faith in General
51k3706(1.5) k. Factors considered in determining presence of good faith. Most Cited Cases

Debtor's filing of Chapter 13 case solely for purpose of lien avoidance, without more, is not necessarily evidence of bad faith, such as will preclude confirmation of plan. 11 U.S.C.A. § 1325(a)(3, 7).

[14] Bankruptcy 51 ⚿2575

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2575 k. Liens securing claims not allowed. Most Cited Cases

465 B.R. 671, 23 Fla. L. Weekly Fed. B 252
(Cite as: 465 B.R. 671)

Bankruptcy 51 3708(9)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(9) k. Security interests in principal residences. Most Cited Cases

"Strip off" of wholly unsecured junior mortgage lien on Chapter 13 debtor's residence will become permanent only upon debtor's completion of Chapter 13 plan. 11 U.S.C.A. § 1327(a–c).

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ORDER AND MEMORANDUM OPINION ON STRIP OFF IN CHAPTER 20 CASES

MICHAEL G. **WILLIAMSON**, Bankruptcy Judge.

The Debtor in this **chapter 20** [FN1] case seeks to strip off wholly unsecured junior mortgages encumbering her principal residence. The creditor objects because the Debtor previously received a discharge of her debts in a chapter 7 case filed within four years of her chapter 13 case, and therefore, she is not eligible for a discharge. For the reasons set forth below, the Court overrules this objection and concludes that eligibility for a discharge is not a requirement to strip off of a wholly unsecured junior mortgage in a **chapter 20** case.

FN1. A "**Chapter 20**" is a chapter 13 case filed on the heels of a chapter 7 case in which the debtor obtained a discharge of all of the debtor's debts.

Factual and Procedural Background

The Debtor moved to determine the secured status of second and third mortgages on her homestead.[FN2] Those mortgages, currently held by Wells Fargo Bank, N.A., secure approximately $104,000 in debt. Wells Fargo also holds a first mortgage on the Debtor's homestead. That mortgage secures approximately $122,000 in debt. According to the Debtor's motion to determine secured status, the value of the her homestead is $118,000. That means Wells Fargo's second and third mortgages are wholly unsecured, and as a consequence, the Debtor seeks to strip off those mortgages.

FN2. Doc. No. 43.

Wells Fargo, however, claims that the Debtor cannot strip its second and third mortgages because she is not eligible to receive a discharge in this case.[FN3] Under Bankruptcy Code § 1328(f), a chapter 13 debtor is not eligible for a discharge if the debtor received a discharge in a chapter 7 case filed within four years of the chapter 13 case. Here, the Debtor filed a previous chapter 7 case on November 27, 2009—less than fourteen months before she filed this case. The Debtor received a discharge in that case. So she is not eligible for a discharge in this case.

FN3. Doc. No. 45 at ¶ 2.

At the preliminary hearing on the Debtor's motion to determine secured status, the Court decided to bifurcate the final hearing on the Debtor's motion so that it can first determine as a matter of law whether the Debtor can strip off Wells Fargo's second and third mortgages. The sole issue before the Court, then, is whether a debtor can strip off a wholly unsecured junior mortgage in a **chapter 20** case.[FN4] Courts are currently split on this ***674** issue.[FN5] And as of yet, the Eleventh Circuit has not addressed this specific issue.

FN4. The order following the preliminary hearing further provided that, if necessary, the Court would conduct an evidentiary hearing on any remaining factual issues, including the value of the subject property, resulting from the Court's ruling in this Memorandum Opinion. Doc. No. 58 at ¶ 3.

FN5. Even within this District, the bankruptcy courts are divided on the issue. For example, Judge Arthur B. Briskman, in *In re Judd,* 2011 WL 6010025

(Bankr.M.D.Fla. Dec. 1, 2011), held that a lien strip in a **chapter 20** is not permitted. *Id.* at *4 (citing *In re Gerardin,* 447 B.R. 342 (Bankr.S.D.Fla.2011) and *In re Quiros–Amy,* 456 B.R. 140(Bankr.S.D.Fla.2011)). Judge Catherine Peek McEwen has expressed the contrary view in tentative rulings made on December 14, 2011 and February 8, 2012, in the case of *In re William & Susan Claburn,* Case No. 8:11–bk–11381–CPM, citing *Fisette v. Keller (In re Fisette),* 455 B.R. 177 (8th Cir.BAP2011) in support of the proposition that a lien strip is permitted in a **chapter 20** –a view adopted in this Opinion.

Conclusions of Law

This Court has jurisdiction over this matter under 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (L).

[1] In analyzing whether a **chapter 20** debtor can strip off a wholly unsecured junior mortgage, the Court first looks to Supreme Court and circuit court cases that have addressed either **chapter 20** cases or lien stripping since the early–1990's. Although none of those cases directly address the issue currently before the Court, they do provide certain principles to guide the Court's analysis. The Court must then consider the applicable Bankruptcy Code provisions in light of those guiding principles. Finally, the Court must also consider the reasoning underlying the opinions by courts ruling that strip offs in **chapter 20** cases are not permitted under the Bankruptcy Code. Based on this analysis, the Court concludes that a debtor may strip off a wholly unsecured junior mortgage in a **chapter 20** case even though the debtor is not eligible for a discharge.

Supreme Court and Circuit Court Precedent
Johnson v. Home State Bank

There are three Supreme Court cases that relate either to strip off or **chapter 20** cases. The first case is *Johnson v. Home State Bank.*[FN6] In *Johnson,* the Supreme Court considered whether a debtor can include a mortgage lien in a chapter 13 plan if the personal obligation secured by the mortgaged property had been discharged in a prior chapter 7 case. The Supreme Court concluded that such relief was available.

FN6. 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991).

Johnson involved a mortgage on farm property owned by the debtor. When the debtor defaulted under a promissory note secured by the farm property, the bank sued to foreclose in state court. The debtor then filed for chapter 7, and his personal liability on the promissory note was ultimately discharged. As is typical, the bank obtained stay relief to continue with the state court foreclosure proceeding. The bank eventually obtained an *in rem* foreclosure judgment against the debtor, but before the foreclosure sale took place, the debtor filed for chapter 13. The debtor scheduled the bank's mortgage as a claim and proposed to pay the bank over the five-year term of the plan.

In concluding that such relief was available to the debtor, the Supreme Court held that, "[s]o long as a debtor meets the eligibility requirements for relief under Chapter 13 ... he may submit for the bankruptcy court's confirmation a plan that 'modif[ies] the rights of holders of secured claims ... or ... unsecured claims,' ... and that 'provide[s] for the payment of all or any part of any [allowed] claim.' " [FN7] Because the debtor's personal ***675** liability under the note was extinguished in the prior chapter 7, what remained intact was whatever *in rem* rights continued to exist against the debtor's property. It was these *in rem* rights that were subject to administration in the subsequent chapter 13 case.

FN7. *Id.* at 82, 111 S.Ct. 2150 (citing 11 U.S.C. § 1322(b)(2) & (6)) (internal citations omitted) (alteration in original).

The *Johnson* Court also dealt with the serial filing aspects of a **chapter 20** case. The bank conten-

ded in *Johnson* that allowing successive filings would "evade the limits that Congress intended to place on these remedies." FN8 In considering this argument, the Court noted that Congress expressly prohibited various forms of serial filings. For instance, Bankruptcy Code § 109(g) prohibits filings within 180 days of dismissal, and § 727 limits the right to a discharge in successive filings. FN9 "The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief." FN10 So *Johnson* recognized a debtor's right to file a **chapter 20** case.

FN8. *Id*. at 87, 111 S.Ct. 2150.

FN9. *Id*.

FN10. *Id*.

Dewsnup v. Timm

The second case is *Dewsnup v. Timm*. FN11 In *Dewsnup,* a chapter 7 debtor sought to strip down a creditor's lien on real property to the value of the collateral. The debtor argued that this could be accomplished by valuing the collateral under § 506(a) and then voiding the lien under § 506(d). Bankruptcy Code § 506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." Section 506(a), of course, provides that a claim is secured only to the extent of the value of the collateral.

FN11. *Dewsnup v. Timm,* 502 U.S. 410, 411–12, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

The Supreme Court rejected this approach because it was based solely on § 506(d). According to the Court, § 506(d), when read "term-by-term," refers to any claim that is first "allowed" and second "secured." Since there was no question that the claim in *Dewsnup* was allowed under § 502 and was secured by a lien on the underlying collateral, it did not come within the scope of § 506, which only voids liens securing claims that have "*not* been allowed." FN12

FN12. *Id*. at 415, 112 S.Ct. 773 (emphasis in original).

Viewed in context, it appears that the debtor in *Dewsnup* was attempting to reorganize her secured debt in a chapter 7 case without the benefit of the reorganization provisions in chapters 11, 12, or 13. FN13 If the debtor were able to strip down a lien in a chapter 7 case to the value of the collateral without the ability to reorganize the remaining secured claim, the debtor would then either have to pay off the full amount of the claim or lose the collateral to the secured creditor in foreclosure. While not discussed in *Dewsnup,* this is, in effect, a similar result to that already provided for in Bankruptcy Code § 722, which allows a debtor to redeem tangible personal property. This provision—the only provision***676** in chapter 7 that allows a debtor to retain collateral by simply paying the amount of the secured claim—is limited by its terms to personal property. Thus, *Dewsnup* recognized that § 506(d), by itself, is insufficient to strip a lien on a debtor's homestead. Section 506(d) must operate in tandem with another Bankruptcy Code provision to strip a lien.

FN13. 11 U.S.C. §§ 1322, 1325, 1222, 1225, 1123 & 1129; *see also Dewsnup,* 502 U.S. at 418–19, 112 S.Ct. 773 ("Apart from reorganization proceedings, no provision of the pre-code statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt.") (internal citations omitted).

Nobelman v. American Savings Bank

The third case is *Nobelman v. American Savings Bank*. FN14 The question before the Supreme

Court in that case was whether § 1322(b)(2) prohibits a chapter 13 debtor from relying on § 506(a) to reduce an undersecured homestead mortgage to the fair market value of the mortgaged residence. Bankruptcy Code § 1322(b)(2) provides that a chapter 13 plan may not modify the "rights of holders of secured claims ... secured only by a security interest in ... the debtor's principal residence." The debtor in *Nobelman* argued that § 1322(b)(2)'s anti-modification provision applies only to the extent the mortgagee holds a "secured claim" in the debtor's residence. Under this argument, the court would first look to § 506(a) to determine the value of the mortgagee's "secured claim." The secured claim would then be stripped down to the value of the collateral.

FN14. *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).

The Supreme Court rejected this interpretation because it failed to take into account § 1322(b)(2)'s focus on "rights." FN15 Simply put, a mortgage holder's rights, which are protected by § 1322(b)(2) , are not limited by the value of its secured claim. Rather, the creditor's rights, including the right to retain the lien until the debt is paid off, are derived from the creditor's mortgage instruments. It is these rights, bargained for by the mortgagor and the mortgagee, that are protected from modification by § 1322(b)(2). FN16 And these rights are contained in a "unitary note" that applies to the bank's overall claim, which includes its secured and unsecured components. FN17

FN15. *Id.* at 328, 113 S.Ct. 2106.

FN16. *Id.* at 330, 113 S.Ct. 2106 (citing *Dewsnup,* 502 U.S. at 417, 112 S.Ct. 773).

FN17. *Id.* at 331–32, 113 S.Ct. 2106.

In re Tanner

But *Nobelman* only dealt with a claim that was partially undersecured. In *Nobelman,* it was the existence of some collateral for the bank's claim that made the bank a "holder" of a "secured claim" that brought into play § 1322(b)(2)'s anti-modification provision protecting the "rights" of the holders of even partially secured claims. FN18 This left open the issue of whether *Nobelman's* holding extends to wholly unsecured junior mortgages. While the Supreme Court has never addressed this precise issue, a number of circuit courts of appeal and bankruptcy appellate panels have weighed in since *Nobelman.* These courts—including the Eleventh Circuit in *In re Tanner* —have held that § 1322(b)(2)'s anti-modification provision does not bar a chapter 13 debtor from stripping off a wholly unsecured lien on the debtor's principal residence. FN19

FN18. *Id.* at 329, 113 S.Ct. 2106.

FN19. *See, e.g., Zimmer v. PSB Lending Corp. (In re Zimmer),* 313 F.3d 1220, 1222–23 (9th Cir.2002); *Lane v. W. Interstate Bancorp (In re Lane),* 280 F.3d 663, 669 (6th Cir.2002); *Pond v. Farm Specialist Realty (In re Pond),* 252 F.3d 122, 127 (2d Cir.2001); *Tanner v. First–Plus Fin., Inc. (In re Tanner),* 217 F.3d 1357, 1359–60 (11th Cir.2000); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee),* 212 F.3d 277, 288–91 (5th Cir.2000); *McDonald v. Master Fin. Inc. (In re McDonald),* 205 F.3d 606, 609–612 (3d Cir.2000); *Griffey v. U.S. Bank (In re Griffey),* 335 B.R. 166, 167–70 (10th Cir. BAP 2005); *Domestic Bank v. Mann (In re Mann),* 249 B.R. 831, 840 (1st Cir. BAP 2000); *Fisette v. Keller (In re Fisette),* 455 B.R. 177, 181–83 (8th Cir. BAP 2011).

***677** These opinions recognize that where a junior mortgage is determined to be wholly unsecured under § 506(a) because the amount of the senior mortgage exceeds the value of the collateral, then the debtor has the right under § 1322(b)(2) to modify the "rights" of the holder of the secured claim by extinguishing the *in rem* lien rights that would otherwise exist under nonbankruptcy law. As dis-

cussed in *Tanner,*

> [a]n analysis of the state law "rights" afforded a holder of an unsecured "lien," if such a situation exists, indicates these rights are empty rights from a practical, if not a legal, standpoint. A forced sale of the property would not result in any financial return to the lienholder, even if a forced sale could be accomplished where the lien attaches to nothing.[FN20]

FN20. *In re Tanner,* 217 F.3d at 1360 (citing *Lam v. Investors Thrift (In re Lam),* 211 B.R. 36, 40 (9th Cir.BAP1997), appeal dismissed, 192 F.3d 1309 (9th Cir.1999)).

Summary of Relevant Precedent

[2][3][4] So what guidance do these Supreme Court and circuit court cases provide in deciding the issue in this case? Those cases can be distilled down to four principles. First, *Johnson* instructs us that there is nothing in the Bankruptcy Code that prohibits a **chapter 20** case. So long as the debtor meets the eligibility requirements for relief under chapter 13, the debtor may propose a plan that modifies the *in rem* rights of a holder of a secured claim, even after the debtor's personal liability on that debt has been extinguished in a prior chapter 7.[FN21] Second, under *Dewsnup,* the rights of holders of secured claims cannot be modified in a chapter 7 case because § 506(d) does not operate by itself to strip a lien; it must operate in tandem with another provision to strip a lien.[FN22] Third, *Nobelman* makes clear that § 1322(b)(2) cannot be used to modify the rights of a holder of secured claim where any portion of the claim is secured by the debtor's principal residence. Even one dollar of collateral value in excess of the superior mortgage debt brings into play the anti-modification provision prohibiting a debtor from modifying a claim secured by the debtor's principal residence.[FN23] Fourth, all of the circuit courts of appeal and bankruptcy appellate panels that have considered the issue, including the Eleventh Circuit in *Tanner,* have held that *Nobelman's* holding does not extend to wholly unsecured homestead mortgages.[FN24] Section 1322(b)(2) does allow a debtor to strip off a wholly unsecured lien on the debtor's principal residence. While these four principles provide guidance, they do not specifically address the issue before the Court in this case. So the Court must now look to the applicable Bankruptcy Code provisions in light of these guiding principles.

FN21. *Johnson v. Home State Bank,* 501 U.S. 78, 87, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991).

FN22. *Dewsnup v. Timm,* 502 U.S. 410, 418–19, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

FN23. *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 329–30, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).

FN24. *See, e.g., In re Zimmer,* 313 F.3d at 1222–23; *In re Lane,* 280 F.3d at 669; *In re Pond,* 252 F.3d at 127; *In re Tanner,* 217 F.3d at 1359–60; *In re Bartee,* 212 F.3d at 288–91; *In re McDonald,* 205 F.3d at 609–612; *In re Griffey,* 335 B.R. at 167–70; *In re Mann,* 249 B.R. at 840; *In re Fisette,* 455 B.R. at 181–83.

Application of the Bankruptcy Code

As the circuit courts and bankruptcy appellate panels permitting lien stripping ***678** recognize, the right to lien strip arises out of—and, indeed, those courts focus exclusively on—the interplay between § 506(a) and § 1322(b)(2). Section 1322(b)(2) permits a debtor to modify the rights of the holder of a secured claim so long as the claim is not secured by the debtor's principal residence. Under § 506(a), a wholly unsecured junior mortgage is not a claim secured by the debtor's principal residence. Accordingly, a debtor can modify the rights of a wholly unsecured junior mortgage in a chapter 13 case. And the same ought to be true in a **chapter 20** case absent some prohibition to the contrary.

Courts holding that a **chapter 20** debtor may not strip off a wholly unsecured junior mortgage—such as *In re Gerardin*[FN25] and *In re Quiros–Amy*[FN26]—believe they have identified such a prohibition: Bankruptcy Code § 1325(a)(5). That section requires, as is relevant to this case, that a chapter 13 plan provide that a secured creditor retain its lien until the earlier of the payment of the underlying debt under nonbankruptcy law or entry of a discharge. Because **chapter 20** debtors are not eligible for a discharge, those courts reason that **chapter 20** debtors cannot confirm a plan that strips off a wholly unsecured junior mortgage.[FN27] But that reasoning is unpersuasive for two reasons: (i) strip off does not implicate § 1325; and (ii) relief under chapter 13 is not contingent on eligibility for a discharge.

FN25. *In re Gerardin,* 447 B.R. 342, 349 (Bankr.S.D.Fla.2011).

FN26. *In re Quiros–Amy,* 456 B.R. 140, 146–47 (Bankr.S.D.Fla.2011).

FN27. *In re Gerardin,* 447 B.R. at 349; *In re Quiros–Amy,* 456 B.R. at 146–47.

Strip Off Does Not Implicate § 1325

[5] Section 1325(a)(5), by its terms, only applies to "allowed secured claims." And as *Tanner* and the other circuit courts have made clear, the holder of a wholly unsecured junior mortgage does not have a "secured claim."[FN28] A mortgage holder's lien is extinguished under § 1322(b)(2). Courts refusing to permit lien stripping in **chapter 20** cases, however, protest that § 1325(a)(5) must be applicable because, according to those courts, the holder of a wholly unsecured mortgage cannot have anything other than an "allowed secured claim."[FN29] After all, the **chapter 20** debtor's personal liability on the mortgage was extinguished in the chapter 7 case.[FN30]

FN28. *See, e.g., In re Zimmer,* 313 F.3d at 1222–23; *In re Lane,* 280 F.3d at 669; *In re Pond,* 252 F.3d at 127; *In re Tanner,* 217 F.3d at 1359–60; *In re Bartee,* 212 F.3d at 288–91; *In re McDonald,* 205 F.3d at 609–612; *In re Griffey,* 335 B.R. at 167–70; *In re Mann,* 249 B.R. at 840; *In re Fisette,* 455 B.R. at 181–83.

FN29. *In re Quiros–Amy,* 456 B.R. at 146–47.

FN30. *Id.*

[6] But that approach reflects a misunderstanding of the effect of a chapter 7 discharge. To be sure, the chapter 7 discharge does extinguish a debtor's personal liability on a secured claim. But it does not extinguish the underlying debt.[FN31] Rather, the effect of the discharge is to void any judgment on the debt to the extent the judgment is a determination of the debtor's personal liability. The discharge also operates as an injunction—***679** commonly called the "discharge injunction"—against the commencement or continuation of any action to collect on the debt.[FN32] A creditor violating the discharge injunction may be subject to contempt sanctions.[FN33]

FN31. *In re Green,* 310 B.R. 772 (Bankr.M.D.Fla.2004); *see also In re R.J. Reynolds–Patrick Cnty. Mem'l Hosp., Inc.,* 305 B.R. 243, 248 (Bankr.W.D.Va.2003) (explaining that "[w]hile a discharge enjoins a creditor from attempting to collect the discharged debt as a personal liability of the debtor, it does not extinguish the debt"); *In re Dabrowski,* 257 B.R. 394, 413 (Bankr.S.D.N.Y.2001) (holding that landlord was entitled to pursue *in rem* remedies because chapter 7 discharge only limits enforceability but does not extinguish underlying debt).

FN32. 11 U.S.C. § 524(a)(2).

FN33. *Espinosa v. United Student Aid Funds, Inc.,* 553 F.3d 1193, 1205 n. 7 (9th Cir.2008) (explaining that a "party who

knowingly violates the discharge injunction can be held in contempt under section 105(a) of the Bankruptcy Code") (quoting *ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.),* 450 F.3d 996, 1007 (9th Cir.2006)); *In re Nicholas,* 457 B.R. 202, 224 (Bankr.E.D.N.Y.2011) (observing that " '[t]here is no serious question that a violation of the discharge provided in § 524(a)(2) is punishable by contempt' ") (quoting *In re Nassoko,* 405 B.R. 515, 520 (Bankr.S.D.N.Y.2009)).

To the extent a debtor does not seek relief in bankruptcy court for violation of the discharge injunction, the debtor may raise the discharge as an affirmative defense to any asserted claim based on the discharged debt. FN34 In fact, state courts have concurrent jurisdiction to consider whether some types of debts were discharged in a prior bankruptcy. FN35 State courts, for example, have concurrent jurisdiction over claims by unscheduled creditors FN36 and claims for domestic support obligations. FN37 So the discharge does not extinguish the underlying debt.

FN34. *See, e.g., Rhodes Life Ins. Co. v. Mendy Props., LC,* 2009 WL 1212476, at *3 n. 12 (E.D.La. Apr. 30, 2009) (explaining that a debtor may assert the discharge as an affirmative defense in a pending state court case); *In re Hitt,* 2008 WL 924528, at *1 (Bankr.E.D.N.C. Apr. 3, 2008) (explaining that after a case has been closed, the debtor can litigate the dischargeability of a debt by "assert[ing] the bankruptcy discharge as an affirmative defense in order for the court with jurisdiction over the lawsuit to determine dischargeability"); *In re Cheely,* 280 B.R. 763, 765 (Bankr.M.D.Ga.2002) (explaining that if a "creditor pursues a lawsuit on the claim, the debtor can assert the bankruptcy discharge as an affirmative defense").

FN35. *See, e.g., In re Hamilton,* 540 F.3d 367, 373 (6th Cir.2008) (observing that "courts have interpreted 28 U.S.C. § 1334(b) as granting concurrent jurisdiction to state courts to determine the nondischargeability of debts"); *Eden v. Robert A. Chapski, Ltd.,* 405 F.3d 582, 586 (7th Cir.2005) (explaining that "state courts have concurrent jurisdiction with the bankruptcy courts to determine whether or not a debt is dischargeable in bankruptcy"). On the other hand, bankruptcy courts have exclusive jurisdiction to determine the dischargeability of debts specified in paragraphs (2), (4), and (6) of 11 U.S.C. § 523(a). 11 U.S.C. § 523(c).

FN36. *See, e.g., In re McGhan,* 288 F.3d 1172, 1181 (9th Cir.2002) (holding that "[s]tate and federal courts have concurrent jurisdiction over actions brought under § 523(a)(3)" to extend the discharge to creditors who were not scheduled but had actual notice of the bankruptcy); *In re Christensen,* 2011 WL 2185854, at *4 (Bankr.N.D.Ala. Feb. 18, 2011) (holding that "a determination of dischargeability under § 523(a)(3) may be made by state courts as well as bankruptcy courts—those courts have concurrent jurisdiction").

FN37. *Swartling v. Swartling (In re Swartling),* 337 B.R. 569, 572 (Bankr.E.D.Va.2005) (holding that state court had concurrent jurisdiction with bankruptcy court to determine whether chapter 7 debtor's obligations to his former wife were in nature of "support" and whether they were excepted from discharge.)

[7][8] Nor does the discharge affect the lien. FN38 A chapter 7 discharge, by itself, does not extinguish any liens securing the debt. FN39 Any lien rights survive bankruptcy and are unaffected by the discharge. FN40 In reality, the chapter 7 discharge

"extinguishes***680** 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*." FN41 A secured creditor's lien continues as an *in rem* claim against the debtor's property.

FN38. *Fisette v. Keller (In re Fisette),* 455 B.R. 177, 184 (8th Cir. BAP 2011).

FN39. *See, e.g., Isom v. IRS (In re Isom),* 901 F.2d 744, 745 (9th Cir.1990).

FN40. *Long v. Bullard,* 117 U.S. 617, 620–21, 6 S.Ct. 917, 29 L.Ed. 1004 (1886).

FN41. *Johnson v. Home State Bank,* 501 U.S. 78, 84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991).

[9] And that leads to a second critical point: there is a difference between the term of art "secured claim," on the one hand, and the notion that a creditor has a security interest or lien outside of bankruptcy, on the other hand. FN42 Having a security interest or lien outside of bankruptcy is translated under bankruptcy laws as having the "rights" of a secured creditor, not necessarily as being the holder of a secured claim. FN43 Once a determination has been made under § 506 that the remaining *in rem* claim is wholly unsecured and that the creditor holds no secured claim in the bankruptcy case, the creditor is left with its nonbankruptcy rights. The debtor may then modify those "rights" under § 1322(b)(2) by voiding the security interest.

FN42. *In re Jennings,* 454 B.R. 252, 254 (Bankr.N.D.Ga.2011) (citing *In re Okosisi,* 451 B.R. 90, 93(Bankr.D.Nev.2011)).

FN43. *In re Jennings,* 454 B.R. at 254.

This is the point that the courts in *In re Gerardin* and *In re Quiros–Amy* overlook. Those courts suggest that pro-lien stripping courts—such as the court in *In re Fisette*—are effectively resurrecting the unsecured claim that was discharged in the previous chapter 7 case. FN44 But that is not the case. Nor does the reasoning of the pro-lien stripping courts hinge on the existence of an unsecured claim. In fact, the pro-lien stripping courts recognize that upon confirmation of a plan in a **chapter 20** case, the holder of a wholly unsecured junior mortgage lien holds neither a secured claim—by virtue of the § 506 valuation—nor an unsecured claim enforceable against the debtor—by virtue of the prior discharge. Confirmation of the plan in such cases, instead, implements the debtor's right under § 1322(b)(2) to modify—*not the claim*—but the "rights" that the holder of the previously discharged claim has under applicable nonbankruptcy law. As noted in *Nobelman,* those " 'rights' ... are reflected in the relevant mortgage instruments, which are enforceable under [state] law." FN45 As described by the Supreme Court, those rights include "the right to retain the lien until the debt is paid off." FN46 It is this right that can be modified by strip off in a **chapter 20** case.

FN44. *In re Quiros–Amy,* 456 B.R. 140, 146–47 (Bankr.S.D.Fla.2011).

FN45. *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 330, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).

FN46. *Id.* at 330, 113 S.Ct. 2106.

This is exactly what *Tanner* and the other circuit court cases recognized in holding that debtors may strip off wholly unsecured junior mortgages. Yet, *Gerardin* disregards the holding in *Tanner* as "inapposite" even though *Tanner* is the sole Eleventh Circuit precedent for allowing a debtor to strip off of a wholly unsecured junior lien on a principal residence. *Gerardin* disregards *Tanner* because *Tanner* "did not consider how § 1325(a) and a prior bankruptcy discharge might impact the treatment of the lien." FN47

FN47. *In re Gerardin,* 447 B.R. 342, 346 (Bankr.S.D.Fla.2011).

Tanner, of course, did not deal with the issue the Court confronts in this case. And it is also true that the Bankruptcy ***681** Abuse Prevention and Consumer Protection Act ("BAPCPA") did amend § 1325(a)(5) to require, at least as is relevant in this case, a chapter 13 plan to provide that a secured creditor retain its lien until discharge. BAPCPA also amended § 1328 to add subsection (f), which provides that the court shall not grant a discharge to a chapter 13 debtor who received a discharge in a chapter 7 case filed within four years of the chapter 13 case.

But neither of those additions in BAPCPA did anything to affect the rationale of *Tanner*. After all, Congress added the new provision in § 1325(a)(5)(B) to secure the right to deferred payments under the chapter 13 plan to the extent of the amount of the allowed secured claim. There is nothing in BAPCPA's legislative history to suggest—nor has any court ever held—that the new provision in § 1325(a)(5)(B) was intended to abrogate the court's analysis in *Tanner*. Nor is there anything in BAPCPA's legislative history that suggests Congress added § 1328(f) to limit a debtor's right to strip off a wholly unsecured junior mortgage, as enunciated in *Tanner* and the other circuit court decisions. Given that, it is hard to see how *Tanner* is not pertinent.

To the contrary, *Tanner* is pertinent because it follows the same analysis employed by the Supreme Court in *Nobelman*—albeit with respect to a wholly unsecured junior mortgage. For these reasons, the Court disagrees that *Tanner* is not pertinent here and that § 1325 is the operative provision.[FN48] Section 1325 would only apply where the debtor was attempting to restructure the payment terms of an allowed secured claim. Section 1325 does not apply where the debtor is simply modifying the state law lien rights of a creditor that does not hold an allowed secured claim under § 506. The power to modify comes from § 1322(b)(2)—not § 1325.

FN48. The Court, however, does agree with *Gerardin's* conclusion that § 506(d) is not a "miracle lien remover" and is not "self-executing." As noted by *Gerardin,* if § 506 alone authorized a strip off in these circumstances, then it would be applicable in chapter 7. But *Dewsnup* makes clear that § 506 can only be effective when operating in tandem with another section of the Bankruptcy Code.

Eligibility for a Discharge is not a Requirement for Relief Under Chapter 13

[10] Section 1328(f)(1) merely precludes a chapter 13 debtor from receiving a discharge if the debtor received a discharge in a chapter 7 case filed within four years of the chapter 13 case. But that section in no way limits any other rights available to the debtor under the Bankruptcy Code, such as the right to strip off unsecured junior liens under § 506(a) and § 1322.[FN49] In fact, nowhere in the Bankruptcy Code is eligibility for a discharge a condition for filing or maintaining a bankruptcy case or receiving the various forms of relief that may flow from that case. Simply put, Congress provided no limitation on a debtor's eligibility to be a chapter 13 debtor after receiving a chapter 7 discharge.[FN50]

FN49. *See, e.g., In re Fair,* 450 B.R. 853, 856–57 (Bankr.E.D.Wis.2011).

FN50. *In re Jennings,* 454 B.R. 252, 258 (Bankr.N.D.Ga.2011).

To start with, Bankruptcy Code § 109—entitled "Who may be a debtor"—contains express limitations on eligibility for chapter 13 relief.[FN51] Eligibility for a discharge is not included among those limitations. Similarly, the operation of the automatic stay under § 362 is not dependent upon ***682** the debtor's eligibility for a discharge. And the limitations imposed under BAPCPA for repetitive filers are based solely on the timing of a dismissal of a previously filed case within one year. And even in a case where the previous chapter 7 was filed within one year, courts routinely extend the automatic stay

under § 362(c)(3) if the court finds that the subsequent case was filed in good faith.

FN51. 11 U.S.C. § 109(e).

[11] A central purpose of chapter 13 is to save homes.[FN52] It is not uncommon for a debtor, even after discharging various unsecured debts in a chapter 7, to suffer new financial problems leading the debtor to default on their home mortgage. Chapter 13 is available to allow the debtor to cure any such default within a reasonable time and reinstate payments to save the home.[FN53] The ineligibility of the debtor for a discharge is not implicated in such cases. As succinctly described by the Fourth Circuit, 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.' "[FN54]

FN52. *In re Whitlock,* 308 B.R. 917, 923 (Bankr.M.D.Ga.2004) (explaining that "[o]ne of the primary reasons why Congress created Chapter 13 of the Bankruptcy Code was to afford debtors an opportunity to save their residences"); *In re Smith,* 1999 WL 33582223, at *2 (Bankr.C.D.Ill. Oct. 5, 1999) (observing that the "primary purpose of Chapter 13 is to allow debtors to save their homes from foreclosure").

FN53. 11 U.S.C. § 1322(b)(5).

FN54. *In re Bateman,* 515 F.3d 272, 283 (4th Cir.2008).

Good Faith Is Still a Requirement for Confirmation

[12][13] But debtors do not enjoy an absolute right to strip off unsecured liens in a no-discharge chapter 13 case. Courts allowing **chapter 20** strip offs have consistently noted that the bankruptcy court must still determine whether the chapter 13 plan was filed in good faith.[FN55] Some courts have suggested that 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. This Court is not prepared to make such a leap absent other evidence.[FN56] This is an issue that must still be addressed in the context of plan confirmation.

FN55. 11 U.S.C. § 1325(a)(3).

FN56. *In re Fair,* 450 B.R. 853, 858 (E.D.Wis.2011) (citing *In re Hill,* 440 B.R. 176, 183 (Bankr.S.D.Cal.2010)).

Effectiveness of Strip off Requires Plan Completion

[14] Importantly, courts that allow strip offs in **chapter 20** cases typically still require that all plan payments be completed in the case as a condition to the strip off.[FN57] While this could be required simply as a matter of satisfying the good-faith requirement for plan confirmation,[FN58] the better rationale for this conclusion is that it is only after a debtor has successfully completed all plan payments required by the chapter 13 plan that the provisions of the plan—including any lien avoidance—become permanent.[FN59] That rationale is supported by § 1327, which provides that the confirmed plan is binding on all creditors regardless of whether the creditor has accepted, rejected, or objected to the ***683** plan.[FN60] And even more importantly, confirmation of the plan vests all property of the estate in the debtor free and clear of any claims of any creditor provided for by the plan.[FN61] Accordingly, it is only appropriate to provide for a permanent lien avoidance if the debtor has fully performed under the plan.[FN62]

FN57. *See, e.g., In re Okosisi,* 451 B.R. 90, 99 (Bankr.D.Nev.2011); *In re Miller,* 462 B.R. 421, 433 (Bankr.E.D.N.Y.2011).

FN58. 11 U.S.C. § 1325(a)(3).

FN59. *In re Okosisi,* 451 B.R. at 100.

FN60. 11 U.S.C. § 1327(a); *see also In re Okosisi,* 451 B.R. at 100.

FN61. 11 U.S.C. § 1327(b) & (c).

FN62. *In re Okosisi,* 451 B.R. at 99.

Conclusion

It is well established that a **chapter 20** case is permitted under the Bankruptcy Code. Equally clear is that a debtor in a chapter 13 case may strip off a wholly unsecured mortgage on the debtor's principal residence. This strip off is accomplished, first, through a determination under § 506(a) that the creditor does not hold a secured claim and, second, by modifying the creditor's "rights" under § 1322(b)(2), by avoiding the lien that the creditor would otherwise be entitled to under nonbankruptcy law. As such § 1325(a)(5) does not come into play, and the debtor's ineligibility for a discharge is irrelevant to a strip off in a **chapter 20** case.

Accordingly, for these reasons, it is

ORDERED:

1. The objections to the Debtor's motion to determine secured status and to confirmation of the Debtor's chapter 13 plan are overruled to the extent they are based on the Debtor's ineligibility for a discharge in this chapter 13 case.

2. The Court will consider any remaining issues with respect to the motion to determine secured status and confirmation of the chapter 13 plan at the confirmation hearing currently scheduled for April 2, 2012.

DONE and **ORDERED.**

Bkrtcy.M.D.Fla.,2012.
In re Scantling
465 B.R. 671, 23 Fla. L. Weekly Fed. B 252

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-11352
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 11, 2012
JOHN LEY
CLERK

D. C. Docket Nos. 1:10-cv-01612-TCB; 09-BKC-78173-PWB

In Re:

LORRAINE MCNEAL,

Debtor.

LORRAINE MCNEAL,

Plaintiff-Appellant,

versus

GMAC MORTGAGE, LLC,
HOMECOMINGS FINANCIAL, LLC,
a GMAC company,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(May 11, 2012)

Before TJOFLAT, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

Lorraine McNeal appeals the district court's affirmance of the bankruptcy court's denial of McNeal's "Motion to Determine the Secured Status of Claim." In her motion, McNeal sought to "strip off"[1] a second priority lien on her home, pursuant to 11 U.S.C. § 506(a) and (d). Reversible error has been shown; we reverse and remand for additional proceedings.

McNeal filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In her petition, McNeal reported that her home was subject to two mortgage liens: a first priority lien in the amount of $176,413 held by HSBC and a second priority lien in the amount of $44,444 held by Homecomings Financial, LLC, a subsidiary of GMAC Mortgage, LLC (collectively, "GMAC").

[1]In bankruptcy terms, a "strip down" of an undersecured lien reduces the lien to the value of the collateral to which it attaches and a "strip off" removes a wholly unsecured lien in its entirety.

McNeal also reported that her home's fair market value was $141,416. The parties do not dispute these factual allegations.

McNeal then sought to "strip off" GMAC's second priority lien, pursuant to sections 506(a) and 506(d). McNeal contended that, because the senior lien exceeded the home's fair market value, GMAC's junior lien was wholly unsecured and, thus, void under section 506(d). The bankruptcy court denied the motion, concluding that section 506(d) did not permit a Chapter 7 debtor to "strip off" a wholly unsecured lien. The district court affirmed.

When the district court affirms the bankruptcy court's order, we review only the bankruptcy court's decision on appeal. Educ. Credit Mgmt. Corp. v. Mosley, 494 F.3d 1320, 1324 (11th Cir. 2007). And we review the bankruptcy court's legal conclusions de novo. Hemar Ins. Corp. of Am. v. Cox, 338 F.3d 1238, 1241 (11th Cir. 2003).

That GMAC's junior lien is both "allowed" under 11 U.S.C. § 502 and wholly unsecured pursuant to section 506(a) is undisputed.[2] To determine whether

[2] 11 U.S.C. § 506(a) provides in pertinent part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

such an allowed -- but wholly unsecured -- claim is voidable, we must then look to section 506(d), which provides that "[t]o the extent that a lien secures a claim against a debtor that is not an allowed secured claim, such lien is void." See 11 U.S.C. § 506(d).

Several courts have determined that the United States Supreme Court's decision in Dewsnup v. Timm, 112 S. Ct. 773 (1992) -- which concluded that a Chapter 7 debtor could not "strip down" a partially secured lien under section 506(d) -- also precludes a Chapter 7 debtor from "stripping off" a wholly unsecured junior lien such as the lien at issue in this appeal. See, e.g., Ryan v. Homecomings Fin. Network, 253 F.3d 778 (4th Cir. 2001); Talbert v. City Mortg. Serv., 344 F.3d 555 (6th Cir. 2003); Laskin v. First Nat'l Bank of Keystone, 222 B.R. 872 (B.A.P. 9th Cir. 1998). But the present controlling precedent in the Eleventh Circuit remains our decision in Folendore v. United States Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989). In Folendore, we concluded that an allowed claim that was wholly unsecured -- just as GMAC's claim is here -- was voidable under the plain language of section 506(d).[3] 862 F.2d at 1538-39.

[3]Although Folendore addressed the 1978 version of the Bankruptcy Code, the 1984 amendments to the Code did not alter the pertinent language in section 506(a) or (d).

A few bankruptcy court decisions within our circuit -- including the decision underlying this appeal -- have treated Folendore as abrogated by Dewsnup. See, e.g., In re McNeal, No. A09-78173, 2010 Bankr. LEXIS 1350, at *9-12 (Bankr. N.D. Ga. Apr. 9, 2010); In re Swafford, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993); In re Windham, 136 B.R. 878, 882 n.6 (Bankr. M.D. Fla. 1992). But Folendore -- not Dewsnup -- controls in this case.

"Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'" Atl. Sounding Co., Inc. v. Townsend, 496 F.3d 1282, 1284 (11th Cir. 2007). Because Dewsnup disallowed only a "strip down" of a partially secured mortgage lien and did not address a "strip off" of a wholly unsecured lien, it is not "clearly on point" with the facts in Folendore or with the facts at issue in this appeal.

Although the Supreme Court's reasoning in Dewsnup seems to reject the plain language analysis that we used in Folendore, "'[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding.'" Atl. Sounding Co., Inc., 496 F.3d at 1284 (citing Crawford-El v. Britton, 118 S. Ct. 1584, 1590 (1998)). "[T]hat the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel

to depart from our prior decision." Id. "As we have stated, '[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." Id. In fact, the Supreme Court -- noting the ambiguities in the bankruptcy code and the "the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations" -- limited its Dewsnup decision expressly to the precise issue raised by the facts of the case. 112 S. Ct. at 778.

Because -- under Folendore -- GMAC's lien is voidable under section 506(d), we reverse and remand for additional proceedings consistent with this decision.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
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May 11, 2012

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 11-11352-CC
Case Style: Lorraine McNeal v. GMAC Mortgage, LLC, et al
District Court Docket No: 1:10-cv-01612-TCB
Secondary Case Number: 09-BKC-78173-PWB

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, costs taxed against appellees.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joe Caruso, CC at (404) 335-6177.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs