Cramdown, Lien-Stripping and Chapter 13 Issues

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Real Property Lien Stripping/Cramdown

Practical Considerations in Lien Stripping

Selected Cases Under Rule 3002.1

Cramdowns and Lien Stripping as Applied to Personal Property

Plan Completion, Discharge Injunction, and Debtor's Ability to Obtain Credit

REAL PROPERTY LIEN STRIPPING/CRAMDOWN

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Basic Terms:

"Cramdown" - Refers to a debtor's ability to reduce an undersecured creditor's secured claim to the present value of its collateral through claim valuation under 11 U.S.C. § 506(a) and (d).

"Strip off' -Refers to a debtor's ability to render an otherwise valid lien on the debtor's principal residence void through claim valuation under 11 U.S.C. § 506(a) and 11 U.S.C. § 1322(b)(2).

Statutory Basis -

11 USCS § 506

§ 506. Determination of secured status

(a) (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless-

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 USCS § 1322

§ 1322. Contents of plan

(b) Subject to subsections (a) and (c) of this section, the plan may –

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure *sale* that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

Case law –

- *Dewsnup v. Timm,* 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992) - In a Chapter 7 bankruptcy proceeding, the Supreme Court considered § 506(d) and concluded that the term "allowed secured claim" meant a claim "allowed" under § 502 and "secured" by a lien enforceable under state law. The court held that the value in real property had no bearing on the lien-voiding language of § 506(d). Based on *Dewsnup,* most courts have limited lien strip off to chapter 13 cases and have held that chapter 7 debtors may not strip off wholly unsecured liens.

- *Nobelman v. American Savings Bank*, 508 U.S. 324, 124 L. Ed. 2d 228, 113 S. Ct. 2106 (1993) – In a Chapter 13 bankruptcy proceeding, the Supreme Court held that § 1322(b)(2) prohibited a debtor from relying on § 506(a) to cramdown an undersecured first mortgage on the debtor's principal residence to the fair market value. The Debtor's residence was valued at $23,500.00 with a claim amount of $71,335.00. The Debtors, relying on § 506(a), proposed to make payments pursuant to the mortgage contract only up to the value, plus prepetition arrears, and to treat the remainder of the claim as unsecured (which would receive no distribution under the plan). The court held that bifurcation of a claim secured by the debtors' residence in this manner violated the "anti-modification provision in § 1322(b)(2) because it modified the "rights" of the mortgagee (which, under state law, included the right to repayment on principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until paid off, and the right to accelerate the loan upon default and foreclose). Even if the principal residence mortgagee was undersecured, it was, under § 1322(b)(2), a "holder" of a "secured claim" and could not be crammed down to value.

- Post-*Nobleman* Circuit Court Decisions -Even though the Supreme Court would not allow cramdowns of mortgages secured by debtors' principal residence under the facts of that case, *Nobelman* left open the possibility of modifying the rights of holders of such claims if *no* value supported the mortgagee's claim such as is often the case of multiple mortgages on the same property. When a senior mortgage on a debtor's principal residence exceeds the property's value, a junior mortgagee on the property would not be the "holder of a secured claim" under § 506(a) and would not be entitled to the protection of § 1322(b)(2). As summarized by the 6th Circuit in *In re Lane*, 280 F.3d 663 (6th Cir. 2002):

    1. Section 1322(b)(2) prohibits modification of the rights of a holder of a secured claim if the security interest consists of a lien on the debtor's principal residence;
    2. Section 1322(b)(2) permits modification of the rights of an unsecured claimholder;
    3. Whether a lien claimant is a holder of a "secured claim" or an "unsecured claim" depends, thanks to § 506(a), on whether the claimant's security interest has an actual "value;"
    4. If a claimant's lien on the debtor's homestead has a positive value, no matter how small in relation to the total claim, the claimant holds a "secured claim" and the claimant's contractual rights under the loan documents are not subject to modification by the Chapter 13 plan;
    5. If the claimant's lien on the debtor's homestead has no value at all, on the other hand, the claimant holds an "unsecured claim" and the claimant's contractual rights are subject to modification by the plan.

A majority of courts have held that a junior mortgagee whose lien is supported by no equity can be treated as an unsecured creditor and its lien "stripped off" by the debtor's Chapter 13 plan. The Second, Third, Fifth, Sixth, Ninth, and Eleventh Circuits have ruled that strip off is permissible.[i] The First, Seventh and Eighth Circuits do not have any decisions on the issue. Only the Tenth Circuit has disallowed a proposed lien strip of a junior mortgage unsupported by any equity, although the court made clear that the result may have been different if the debtors had pursued the legal theory set out in *In re Lane*. Instead, the debtors argued that in the context of a Chapter 13 case, the second mortgage was not a "secured claim" and was, therefore, void under § 506(d). The court, following *Dewsnup*, held that the value of the collateral had no bearing on § 506(d) and that any lien secured under state law was protected against removal. The court declined to give the statutory term "secured claim" in § 506(d) a different meaning in chapter 13 cases than the term had in Chapter 7 cases (see In re Woolsey, 696 F.3d 1266 (10th Cir. 2012)).

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[i] *In* re *Pond,* 252 F.3d 122 (2d Cir. 2001); *In* re *McDonald,* 205 F.3d 606 (3d Cir. 2000); *First Mariner Bank v. Johnson,* 2011 U.S. App. Lexis 402 (4th Cir. Md. 2011); *In* re *Bartee,* 212 F.3d 277 (5th Cir. 2000); *In* re *Lone,* 280 F.3d 663 (6th Cir. 2002); *In* re *Zimmer,* 313 R.3d 1220 (9th Cir. *2003) In* re *Tonner,* 217 F.3d 1357 (11th Cir. 2000).

PRACTICAL CONSIDERATIONS IN LIEN STRIPPING

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Procedure For Lien Stripping –

The bankruptcy code and the Federal Rules of Bankruptcy Procedure (FRBP) currently do not address the proper procedure for stripping off a wholly unsecured mortgage based on the application of § 1322(b)(5) and § 506(a). The most common methods used are:

- Adversary Proceeding – Several court have held that debtors must file an adversary proceeding against the mortgagee in order to strip off a lien (*see, e.g., In re Forrest*, 424 B.R. 831 (Bankr. N.D. Ill. 2009)). Using an adversary proceeding may better address due process concerns because of the more formality of the process with a summons issued and the complaint served in accordance with FRBP 7004.

- Plan Provision and/or Motion to Value – Many courts prefer that the issue be raised in a plan provision and/or a related motion since lien stripping is essentially seeking a determination of the amount of the creditor's claim. If a plan provision and/or a motion to value is used, service of the plan/motion should comply with FRBP 7004 and the language in the plan/motion should be as explicit as possible to avoid a possible due process challenge from the mortgagee whose lien was to be avoided. If the mortgagee holding the junior lien is an insured depository institution, service generally will not be effective unless an officer of the institution is served by certified mail (*see* FRBP 7004(h)). For an example of a plan designed to strip off a wholly unsecured junior mortgage, see the Appendix for the Model Chapter 13 Plan used in the Middle District of Tennessee.

Timing of Lien Stripping –

Most courts have held that a confirmed plan's binding effect based on § 1327(a) does not allow a debtor from modifying a plan to strip off a mortgage (*see, e.g., In re Shook*, 278 B.R. 815 (B.A.P. 9th Cir. 2002). These courts conclude that § 1329 does not permit a debtor to reclassify as unsecured a claim previously treated as secured at confirmation (*see In re Nolan*, 232 F.3d 528 (6th Cir. 2000).

Determination of Whether Junior Mortgage is Wholly Unsecured –

- Amount of Senior Mortgage - Determination of whether the amount of the senior mortgage is greater than the value of the property is not based on the impairment of the debtor's exemption, so any homestead exemption or other exemption is not considered in the calculation. Under FRBP 3001, mortgagees are required to provide the balance

owed at the petition date in their proof of claim. The balance owed should include all amounts owed under the loan documents, including the remaining principal balance, accrued and unpaid interest (so, the more delinquent the senior mortgage, the higher the debt and, perhaps, the greater the opportunity to strip off a junior mortgage), foreclosure fees and costs, escrow advances for taxes and insurance, etc. FRPB 3001(f) provides that the proof of claim filed in accordance with the rules is *prima facie* evidence of the validity and amount of the claim.

- Valuation - The amount of the claim of the senior mortgagee is initially measured against the value provided by the debtor in Schedule A of the petition. For this, the debtor may rely on a recent loan-related appraisal, a broker price opinion or a current plan is filed or the strip off action is filed, especially if the mortgagee disputes the debtor's valuation and obtains its own valuation. The debtor and mortgagee must be prepared to present expert testimony by way of an appraiser in support of opinion of value.

- Timing of Valuation – § 506(a) states that "value shall be determined in light of the purposes of the valuation and of the proposed use or disposition of such property …" This language does not specify valuation dates and courts have used three different approaches as to when the valuation for purposes of a mortgage strip off is determined: (1) some courts use the petition date on the logic that the debtors typically use the property as their residence throughout the bankruptcy beginning with the petition date (*see, e.g., In re Dean*, 319 B.R. 474 (Bankr. E.D. Va. 2004)); (2) other courts use the effective date of the plan because the valuation is being done in the context of determining the amount of the mortgagee's allowed secured claim for purposes of plan confirmation (*see, e.g., In re Crain*, 243 B.R. 75 (Bankr. C.D. Cal. 1999)); (3) some courts use a flexible approach, rather than a single fixed method (*see, e.g., In re Aubain*, 296 B.R. 624 (Bankr. E.D. N.Y. 2003)).

- Burden of Proof As To Value - It appears that the debtor has the initial burden as the moving party to show that senior liens exceed the value of the property, but the mortgagee has the ultimate burden of persuasion as to the extent of its lien and the value of the property securing the claims (*see, e.g., In re Flores*, 2012 Lexis 289 (Bankr. N.D. Cal. 2012)); but compare *In re Weichey*, in which the court held that the debtor bears the burden of proof on the issue of valuation under 11 U.S.C. § 506(a). 405 B.R. 158, (Bankr. W.D. Pa. 2009).

Release of Lien Upon Completion of Plan –

- The bankruptcy code and FRBP do not address procedure to require mortgagees to file release of liens in state register of deeds offices upon completion of chapter 13 plan with a strip off provision/order. Debtors may be left with the practical issue of clearing title to their residence after completion of the plan and face obstacles with mortgagees who may well have charged off the loans from its books because of the strip off. To avoid difficulty with a recalcitrant mortgagee, debtors should seek an order in the

confirmation order or separate bankruptcy order that the lien is void and specifically identify the voided mortgage by instrument number and seek an order requiring the mortgagee to release its lien. S*ee In re Dendy*, 396 B.R. 171 (Bankr. SD S.C. 2008) for a case regarding difficulties a debtor faces upon successful lien strip in a Chapter 13 case.

Dismissal or Conversion – A mortgage lien is reinstated under 349(b)(1)(c) upon dismissal of a Chapter 13 case. Conversion of a Chapter 13 case to another chapter results in the mortgagee's retention of its lien if the full mortgage claim has not been paid under applicable nonbankruptcy law. *See* § 348(f)(1)(C).

Ability of Debtor Who is Ineligible for Discharge to Strip off Mortgage - There is a split of authority as to whether a debtor who is ineligible to receive a discharge in a Chapter 13 case may strip off a mortgage. A debtor may not receive a discharge in a Chapter 13 case if the debtor has received a discharge in a Chapter 7 case filed within 4 years prior to the current Chapter 13 case (a so called "Chapter 20" case), or if the debtor has received a discharge in a Chapter 13 case filed within the 2 year period prior to the current Chapter 13 case. *See* § 1328(f). A debtor who has obtained a prior discharge is eligible for Chapter 13 relief. Courts not allowing a strip off have concluded that § 506(d) alone cannot be used to strip a lien because they view it as circumventing the decision in *Dewsnup v. Timm,* 502 U.S. 410 (1992), prohibiting application of § 506(d) in Chapter 7 cases and/or the only way to make a strip off "permanent" under § 506(d) is to obtain a discharge. *See In re Victorio*, 454 B.R. 759 (SD Cal. 2011). Courts concluding that a debtor may strip off a lien focus not on § 506(d), but on § 1322(b)(2) alone or in combination with § 1327(c) as providing authority and point out that § 1328(a) discharge only addresses the debtor's personal liability and not lien avoidance. Even if allowed to propose a strip off in a Chapter 13 plan following a Chapter 7 discharge, the debtors must show that the plan was filed in good faith. *See In re Okosis,* 491 B.R. 90 (D. Nev. 2011) for factors to show a debtor's good faith in a plan in a no-discharge lien stripping case.

APPENDIX TO PRACTICAL CONSIDERATIONS IN LIEN STRIPPING

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE

In re:	)	Bankruptcy Case No.
	)	Judge
	)	
	)	☐ **Original Chapter 13 Plan**
	)	
	)	☐ **Amended Chapter 13 Plan**
	)	Dated _____
	)	
	)	
Debtor(s)	)	
	)	
	)	
	)	

☐ This plan contains special provisions, set out in Section 10.01. If this box is blank, the plan includes no provision deviating from the model plan.

☐ This plan contains motion(s) to value collateral. ☐ This plan contains motion(s) to void liens.

NOTICE: Absent timely objection, this plan and any included motions may be approved without further notice or hearing at the conclusion of the Meeting of Creditors. To be timely, objections to the plan or motions:

(a) Must be in writing and must be filed and served prior to the Meeting of Creditors; or

(b) Must be stated orally at the Meeting of Creditors.

If objections are timely filed or stated orally at the Meeting of Creditors, a hearing on confirmation will be held at the contested confirmation hearing date indicated on the Notice of Meeting of Creditors and Deadlines.

Commitment Period and Plan Payments

1.01 Commitment Period. The applicable commitment period is ___3 years or ___5 years. The estimated length of this plan is _____ months.

1.02 Monthly Payments. Debtor shall pay to the Trustee the sum of $_____ per _____ for _____ months commencing _____, totaling $_____.
Joint Debtor shall pay to the Trustee the sum of $_____ per _____ for _____ months commencing _____, totaling $_____.

The Debtor(s) requests an order requiring the withholding of money from income to fund this plan.

1.03 Other Payments. In addition to periodic payments from future earnings, Debtor(s) will make other payment(s) as follows:

Amount of Payment	Date	Source of Payment
$		
$		

1.04 Tax Refunds. Debtor(s) shall _____/shall not_____ turn over to the Trustee and pay into the plan annual tax refunds for all tax years ending during the plan.

Claims and Expenses

A. Proofs of Claim

2.01 Filing of Proofs of Claim Required for Payment. Except as provided in 2.02, a Proof of Claim must be filed before any secured, unsecured or priority creditor will be paid pursuant to this plan. Only allowed claims will be paid.

2.02 Retirement Loans. Payments on loans from retirement or thrift savings plans described in § 362(b)(19) falling due after the petition shall be paid by Debtor(s) directly to the entity entitled to receive payments without regard to whether a Proof of Claim is filed.

2.03 Proof of Claim Controls Amount. Absent objection, a Proof of Claim, not this plan or the schedules, determines the amount of a claim.

2.04 Plan Controls Everything Else. If a claim is provided for by this plan and a Proof of Claim is filed, the classification, treatment and payment of that claim—everything except amount—shall be controlled by this plan.

2.05. Claims Not Provided for by the Plan. If a claim is not provided for by this plan and a Proof of Claim is filed, until the plan is modified to provide otherwise, the claim will receive no distribution.

B. Fees and Administrative Expenses

3.01 Fees to the Attorney for the Debtor(s) and Filing Fees. The fees to the attorney for the Debtor(s), costs and filing fees shall be paid as follows:

(a) ☐ The filing fee and notice fee established by 28 U.S.C. § 1930 shall be paid by the Trustee as soon as practicable.

☐ The filing fee and notice fee have been paid by the Debtor(s).

(b) The attorney for the Debtor(s) shall be paid $_____ as follows: _____.

(c) No fees were paid to the attorney for the Debtor(s) prior to filing the petition except $_____.

C. Priority Claims Including Domestic Support Obligations

4.01 Post-Petition Domestic Support Obligations.

☐ The Debtor(s) has no Domestic Support Obligation.

☐ The Debtor(s) has Domestic Support Obligations which are current and will be paid directly by the Debtor(s).

☐ The Debtor(s) has Domestic Support Obligations which will be paid by the Trustee as follows:

Recipient	Monthly Ongoing Support	When Terminates

4.02 Arrears on Domestic Support Obligations. The Trustee shall pay in full the arrears on Domestic Support Obligations as follows:

Recipient	Total Arrears Due	Last Mo. Included in Arr.	Plan Treatment

4.03 Other Priority Claims. The Trustee shall pay in full other priority claims as follows:

Creditor Name	Type of Priority	Estimated Amount	Plan Treatment

D. Secured Claims

5.01 Curing Default and Maintaining Payments Including Long-Term Debts.

(a) Maintaining Payments. Mortgage creditors are also directed to § 9.06 of this plan. Post-confirmation payments listed below shall be maintained consistent with the underlying agreement, commencing with the first payment due after confirmation. If the Trustee disburses these payments, any payment may be adjusted by the Trustee as necessary to reflect changes in interest rates, escrow payments or other matters pursuant to § 9.06. The Trustee shall notify the Debtor(s) and the attorney for the Debtor(s) of any change at least seven days prior to effecting such change.

Creditor Name	Property Description	Mthly Pymt.	When Terminates	Paid By Debtor or Trustee?

(b) Curing Default. Arrears on debts provided for pursuant to § 5.01(a) above shall be paid by the Trustee as follows:

Creditor Name	Property Description	Estimated Arrears	Last Month in Arrears	Plan Treatment

5.02 Secured Claims Paid Per § 1325(a)(5). This section is also used to specify pre-confirmation adequate protection payments (see § 9.01), and to provide for claims secured by real property not provided for in § 5.01.

(a) Secured Claims Not Subject to § 506 ["Hanging Sentence" claims]. The following claims are treated as fully secured, to be paid in full by the Trustee:

Creditor Name	Collateral Description	Est. Claim Amt.	Int. Rate	Mthly. Pymt.	Pre-Conf. APP*

*Adequate Protection Payment, if applicable

(b) Secured Claims Not Subject to § 506, Modified by Acceptance. The claims listed below shall be paid only to the extent of the offer by the Debtor(s) unless the listed creditor timely objects to confirmation. **ACCEPTANCE OF THE PLAN WILL BE PRESUMED UNLESS THE AFFECTED CREDITOR TIMELY OBJECTS TO CONFIRMATION IN WRITING OR ORALLY AT THE MEETING OF CREDITORS.**

Creditor Name	Collateral Description	Debtor Offer to Pay	Int. Rate	Mthly.Pymt.	Pre-Conf. APP*

*Adequate Protection Payment, if applicable

(c) Secured Claims Subject to § 506. DEBTOR(S) MOVES TO DETERMINE THE VALUE OF THE CLAIMS LISTED BELOW. The claims listed below are secured claims only to the extent of the value of the collateral pursuant to § 506(a). The claims listed below shall be treated as secured and paid by the Trustee only to the extent of the value stated unless the creditor timely objects to confirmation.

Creditor Name	Collateral Description	Value	Int. Rate	Mthly. Pymt.	Pre-Conf. APP*

*Adequate Protection Payment, if applicable

(d) Secured Claims Provided for by Surrender of Collateral. Debtor(s) shall surrender the following collateral not later than 7 days after confirmation. Creditors listed below are granted relief from the codebtor stay under § 1301 and relief from the § 362 stay to permit recovery and disposition of property upon the later of entry of the confirmation order or 21 days following the filing of a Proof of Claim. The provisions of Bankruptcy Rule 4001(a)(3) are waived.

Creditor Name	Collateral Description	Estimated Deficiency

5.03 Motion To Avoid Liens. DEBTOR(S) MOVES TO AVOID THE LIENS LISTED BELOW:

Creditor Name	Collateral Description	Authority to Avoid Lien

5.04 Lien Retention. Allowed secured claim holders retain liens until the earlier of payment of the underlying debt determined under non-bankruptcy law or discharge under § 1328; or, if the case is dismissed or converted without completion of the plan, such liens shall be retained to the extent recognized by applicable non-bankruptcy law.

E. Unsecured Claims

6.01 Non-Priority Unsecured Claims. Allowed non-priority unsecured claims, not separately classified below, shall be paid, pro rata, not less than _____%. If applicable, unsecured claims will be paid interest at the rate of _____%.

6.02 Separately Classified Unsecured Claims. The unsecured claim(s) listed below are separately classified.

Creditor Name	Description of Debt	Treatment

6.03 Postpetition Claims. Claims allowed pursuant to § 1305 shall be paid in full, but subordinated to distributions to allowed unsecured claims.

F. Executory Contracts and Leases

7.01 Assumption and Rejection of Leases and Executory Contracts. All executory contracts and leases are rejected by confirmation of the plan except the leases and contracts listed below are assumed by the Debtor(s) and shall be paid as indicated.

Lessor/Contract	Property Leased	Amt. of Monthly Pymt.	Paid By	Maturity Date

7.02 Arrears on Leases and Executory Contracts. The arrears on assumed leases and executory contracts shall be paid by the Trustee as follows:

Lessor/Contract	Property Leased	Estimated Arrears	Treatment

7.03 Other Provisions Related to Leases and Executory Contracts.

(a) Leases and executory contracts assumed in this plan shall be paid only upon the filing of a Proof of Claim.

(b) The payment amounts specified above are the estimate by the Debtor(s) of the required payments. The monthly payment and total amount due on any assumed lease or executory contract shall be as specified on the Proof of Claim.

(c) Debtor(s) shall surrender the following leased property not later than 7 days after confirmation. Creditors listed below are granted relief from the codebtor stay under § 1301 and relief from the § 362 stay to permit recovery and disposition of the leased property upon the later of entry of the confirmation order or 21 days following the filing of a Proof of Claim. The provisions of Bankruptcy Rule 4001(a)(3) are waived.

Creditor	Property

Order of Distribution

8.01 ☐ **Regular Distribution**. The Trustee shall pay as funds are available, in the following order:

- Filing fees and notice fees (§ 3.01(a))
- Trustee commission
- Domestic Support Obligations that become due after the petition (§ 4.01)
- Attorney's fees (§ 3.01(b))
- Secured claims and mortgages with fixed monthly payments (§ 5.01 and § 5.02)
- Arrearages cured through the plan (§ 5.01(b))
- Domestic Support Obligations due at the petition date (§ 4.02)
- Other priority claims without a specified monthly payment (§ 4.03)
- Separately classified unsecured claims (§ 6.02)
- General unsecured claims (§ 6.01)
- Claims allowed pursuant to § 1305 (§ 6.03)

8.02 ☐ **Alternate Distribution of Plan Payments.** If the regular distribution of plan payments is not selected, then the alternate distribution of payments shall be as specified in Section 10.01 below, "Additional and Non-Conforming Plan Provisions."

Miscellaneous Plan Provisions

9.01 Adequate Protection Payments. Prior to confirmation the Trustee shall pay on account of allowed secured claims as specified in § 5.02(a), (b) and (c) adequate protection payments as required by § 1326(a)(1)(C) commencing the month after the petition is filed provided that a Proof of Claim has been filed. Adequate protection payments shall be disbursed by the Trustee in the customary disbursement cycle beginning the month after the petition is filed.

9.02 Vesting of Property. All property of the estate remains property of the estate notwithstanding confirmation and shall not revest in the Debtor(s) until dismissal or discharge.

9.03 Duties of the Debtor(s). In addition to the duties imposed by the Bankruptcy Code, Bankruptcy Rules and Local Bankruptcy Rules, this plan imposes the following additional duties on the Debtor(s):

(a) Transfers of Property and New Debt. Debtor(s) is prohibited from transferring, encumbering, selling or otherwise disposing of any property of the estate with a value of $1,000 or more without first obtaining court authorization. Except as provided in § 364 and § 1304, Debtor(s) shall not incur new debt without first obtaining court authorization or obtaining Trustee consent pursuant to § 1305.

(b) Insurance. Debtor(s) shall maintain insurance protecting all property of the estate to the extent of any value in excess of the liens and exemptions on such property.

9.04 Effective Date of the Plan. The date the confirmation order is entered shall be the Effective Date of the Plan.

9.05 Preservation and Retention of Causes of Action. Trustee and/or Debtor(s) retain the right to pursue any causes of action for the benefit of the Debtor(s) and/or the estate.

9.06 Provisions Relating to Claims Secured by Real Property Treated Pursuant to § 1322(b)(5).
Confirmation of this Plan imposes upon any claimholder treated under § 5.01 and, holding as collateral, the residence of the Debtor(s), the obligation to: (i) Apply the payments received from the Trustee on pre-confirmation arrearages only to such arrearages. For purposes of this plan, the "pre-confirmation" arrears shall include all sums designated as pre-petition arrears in the allowed Proof of Claim plus any post-petition pre-confirmation payments due under the underlying mortgage debt not specified in the allowed Proof of Claim. (ii) Deem the mortgage obligation as current at confirmation such that future payments, if made pursuant to the plan, shall not be subject to late fees, penalties or other charges.

Additional and Nonconforming Plan Provisions

10.01 Except as provided immediately below, the preprinted language of this form has not been altered. Debtor(s) proposes additional or different plan provisions or specifies that any of the above provisions will not be applicable as follows:

_____

_____

_____

_____

Respectfully submitted,

_____
Attorney for Debtor(s)

Selected Cases Under Rule 3002.1

Prepared by Philip F. Counce, Esq., and Joel W. Giddens, Esq.

Application of Rule 3002.1

In re Garduno, 2012 Bankr. LEXIS, US Bankr Ct, SD Florida, 6/26/12

Following the language of rule 3002.1(a), the court held that a notice of payment change filed by mortgagee under this rule did not trigger a need for debtor to respond where the property was not debtor's principal residence and where the plan was not curing and maintaining payments under §1322(b)(5). Therefore, debtor's attorney was denied fees in objecting to the notice.

In re Merino, 2012 Bankr. LEXIS 3331, US Bankr Ct, MD Florida, 7/16/12

Court found that rule 3002.1 does not clearly state, either that it applies to claims being paid through the chapter 13 trustee's office (inside the plan) or claims paid directly by debtor (outside the plan). However, the court said an inference may be drawn that the rule does not apply to claims being paid by outside the plan. Therefore the court denied debtor's attorney fees in opposing notice of payment change on a claim being paid outside the plan.

In re Sheppard, 2012 Bankr. LEXIS 1696, US Bankr Ct, ED Virginia, 4/18/12

Court exempted mortgagee from filing a notice of postpetition fees, expenses and charges where an order had previously been entered providing for the payment of these same charges through the plan. It was noted that the notices required under these rules are neither a pleading nor a claim but simply a statement to inform debtor. Duplicative notices through both a rule 3002.1 notice and an order create uncertainty as to the total sums for which debtors will be liable.

In re Weigel, 485 B.R. 327, US Bankr Ct, ED Virginia, 12/6/12

Court granted Chapter 13 Trustee's objection to mortgagee's claim filed by the mortgagee in an effort to comply with the notice requirements of rule 3002.1. The case was filed before the effective date of rule 3002.1 (12/1/11) and the mortgagee did not file a proof of claim because there was no pre-petition arrearage owed. The mortgagee asked the court to grant an exception to the bar date so it could file a proof of claim so it could comply with rule 3002.1 notice requirements. The court found that 3002.1 did not apply in this case. It found that the rule only applies to lenders who are secured by a lien on real property under two conditions: (1) the claim must be secured by a lien on the debtor's principal

residence; and (2) the claim be "provided for" in the debtor's plan under §1322(b)(5). While the plan provided for the mortgagee's claim by providing that the debtor would continue to make direct payments to the mortgagee, it was not provided for under §1322(b)(5) because there was no plan provision to pay an arrearage. Another example of a claim being provided for in the plan but not under §1322(b)(5) is the surrender of a residence.

In re Kozak, 2013 Bankr. LEXIS 1263, US Bankr Ct, MD Pennsylvania, 3/19/13

Debtor's plan provided for a cure of a pre-petition arrearage by payments to be made by the trustee and for payment of post-petition ongoing payments directly by the debtors to the mortgagee (outside of the plan). At the end of the plan, the trustee filed a Notice of Payment Completion and the mortgagee filed a timely response stating that the pre-petition arrearage had been satisfied, but that the debtor owed a delinquency on the post-petition obligation. A hearing was scheduled on a motion to determine status of mortgage at which time the mortgagee did not appear. The mortgagee argued in its brief filed with its response that rule 3002.1 did not apply because the post-petition delinquency was not "provided for" in the plan as required in rule 3002.1. The Court disagreed quoting the Supreme Court's language in *Rake v. Wade,* 508 U.S., 464, 474-475 (1993), that "§1328(a) unmistakably contemplates that a plan 'provides for' a claim when the plan cures a default *and* allows for the maintenance of regular payments on that claim, as authorized by §1322(b)(5)." Because the mortgagee failed to appear at the hearing on the motion for a determination of mortgage status, it failed to carry its burden to establish the post-petition arrearage existed and the loan was declared current.

Rule 3002.1 Notice of postpetition fees, expenses and charges as automatically amending claim

In re Sheppard, 2012 Bankr. LEXIS 1696, US Bankr Ct, ED Virginia, 4/18/12

Court held that trustee has no obligation, and indeed has no authority, to pay fees, expenses or charges identified in a notice filed in accordance with Rule 3002.1.

Noticing requirements

In re Tuneberg, 2012 Bankr. LEXIS 3955, US Bankr Ct, SD Texas, 8/29/12

Notice of a hearing on debtor's motion objecting to postpetition charges contained in a rule 3002.1 notice must be given to both the creditor at the address shown on the proof of claim and on the attorney who made an appearance in the case for the claimant.

Waiver of Rule 3002.1 requirements

In re Adkins, 2012 Bankr. LEXIS 4112, US Bankr Ct, ND Ohio, 8/10/12

HELOC lender requested to be excused from the application of Rule 3002.1 because of the difficulty in complying where the payments vary from month to month.

Court held that it does not have authority to excuse compliance with rule 3002.1 or any rule unless the rule so provides.

In re Kraska, 2012 Bankr. LEXIS 1647, US Bankr Ct, ND Ohio, 4/13/12

Court initially held on the mortgagee's motion for relief that it could not waive the requirements of Rule 3002.1, even where the plan surrendered the realty, observing that this rule provides notice of the post-petition charges enabling debtor to examine the basis of any deficiency claim. Upon rehearing of the motion for relief, the Court allowed the waiver of rule 3002.1 as to the mortgagee and the Chapter 13 Trustee, but limited the waiver to this case at the request of the United States Trustee.

In re Beckman, 2012 Bankr. Lexis 5917, US Bankr Ct, Maryland, 12/27/12

Court entered an agreed order terminating automatic stay with an agreed repayment plan outside of bankruptcy and, upon default under the repayment terms and failure to cure, the mortgagee to exercise its state remedies. Upon default, the mortgage would be excused from filing notices of payment changes under rule 3002.1.

Attorney fees to file rule 3002.1 notice

In re Wallet, 2012 Bankr. LEXIS 4274, US Bankr Ct, D Vermont, 9/14/12

Denied mortgagees attorney fees for filing a rule 3002.1 notice, as well as for review of the plan and preparation of a claim where the mortgage on nonresidential property is current on the date the petition was filed, the plan provided for the continuation of mortgage payments outside the plan, and loan was not secured by debtor's principal residence, even though the property was worth more than the claim, (fully secured).

Court reasoned that no fee should be allowed to file a rule 3002.1 notice when it is not required. Furthermore mortgagee was not entitled to fees to review the plan and file a claim where the mortgage was current and therefore not needed to protect the mortgagee.

In re Adams, 2012 Bankr. LEXIS, US Bankr Ct, ED NC, 5/3/12

Court denied mortgagees attorney fees for preparing a rule 3002.1 notice. Court found that while rule did change which parties must be served with notice and provided new official forms, it had no effect on the underlying services required of a lender.

Attorney fees to file response to Notice of Final Cure Payment

In re Carr, 468 B.R. 806, US Bankr Ct, ED Virginia, 3/19/12

Debtor completed plan and both the prepetition and postpetition amounts due mortgagee were paid.

Mortgagee was not permitted an attorney fee to prepare a Response to the Notice of Final Cure Payment under Rule 3002.1(g). Held this is not a pleading but a supplement to creditor's proof of claim. The court noted that it is simply a statement by the creditor as to the status of the loan that can be derived simply and quickly from the creditor's records and can be done by the claims administrator in the creditor's own office.

Mortgagee might be entitled, however, to an attorney fee in connection with a hearing contesting the response.

Burden of Proof in Contested Matters Brought Under 3002.1

In re Creggett, 2012 Bankr. LEXIS 5925, US Bankr Ct, SD Texas, 12/28/12

Notice of Mortgage Payment Change filed under rule 3002.1(b) does not enjoy presumption of validity pursuant to rule 3002.1(d) and 3001(f). Upon objection to notice of payment change by debtor, mortgagee has burden of proof to show that payment change is correct and to provide documentation supporting change. Mortgagee failed to respond to debtor's objection and failed to appear at hearing. Court determined that notice was incorrect.

In re Taylor, 2013 Bankr. LEXIS 1189, US Bankr Ct, ND Mississippi, 3/27/13

Unlike a proof of claim, a Notice of Payment Change filed under rule 3002.1(d) does not enjoy a *prima facie* presumption of validity. Upon objection to a Notice of Payment Change, the debtor has no evidentiary burden to overcome (unlike when the debtor objects to a properly filed proof of claim) because the burden of proof remains with the mortgagee to establish the allowability of the amounts changed.

In re Lopez, 2012 Bankr. LEXIS 5950, US Bankr Ct, SD Texas, 12/31/12

Notice of Post-Petition Mortgage Fees, Expenses and Charges filed under 3001(d) does not enjoy a presumption of validity. Debtor objected to notice and mortgagee failed to appear at evidentiary hearing. No sanctions were awarded to debtor because objection raised substantive and procedure arguments against the fees listed in the notice and not a failure to provide information as provided by rule 3002.1(i).

In re Kreidler; In re Kozak, 2013 Bankr LEXIS 1263, US Bankr Ct, MD Pennsylvania, 3/29/13

In order for a mortgagee to prevail on its claim for post-petition defaults detailed in a response to a Notice of Final Cure filed pursuant to rule 3002.1(f) by the trustee, the mortgagee is required to appear and establish the fact with competent evidence. Mortgagee failed to appear at the hearing on Debtor's motion for a determination of the status of the mortgage filed within 21 days of the mortgagee's response and did not meet its burden to establish the existence of the alleged post-petition default.

Effect on Local Bankruptcy Rules/Practice

In re Soto, 2012 Bankr LEXIS 5834, US Bankr Ct, ND California, 1/26/13

Debtors included in their chapter 13 plan language requiring secured creditors, including the mortgagee, to provide debtors with certain periodic information as to the status of their obligations and the mortgagee objected, arguing that the provisions in the plan were inconsistent with the rule 3002.1 notice requirements. Prior to the effective date of rule 3002.1, the Ninth Circuit Court of Appeals approved confirmation of a plan incorporating the additional requirements in a plan pursuant to 11 U.S.C. §1322(b)(11), which allows a plan "to include any other appropriate provision not inconsistent" with the code or the FRBP. The court in *Soto* found that the issue was whether, pursuant to 11 U.S.C. §1322(b)(11), a plan can place additional burdens on a creditor over and above the provisions of the FRBP addressing the same problem. The court found that debtors bear the burden of proof of showing that their plan meets the requirements of law and the need for the additional reporting requirements and, in this case, the debtors had not made the required showing.

Extent of Required Response to Notice of Final Cure

In Re Abbiehl; In re Sims, 2012 Bankr LEXIS 5551, US Bankr Ct, ND Indiana, 9/25/12

In these two cases, the trustee filed her Notice of Final Cure and the mortgagee filed timely responses pursuant to rule 3002.1(g) asserting that (1) the debtor had paid in full the amount required to cure the default and (2) the debtor was otherwise current on all payments consistent with §1322(b)(5). The trustee filed a reply to the response and a Motion for Court Determination of Final Cure and Payment because she had information that both accounts were, in fact, paid ahead. The trustee wanted the mortgagee to acknowledge that fact in its response and acknowledge that the debtors were not responsible for another mortgage payment for several months. The court concluded that mortgagee's response complied with the language of Rule 3002.1(g) and did not require the mortgagee to disclose the exact status of the debtors' mortgages.

CRAMDOWNS AND LIEN STRIPPING AS APPLIED TO PERSONAL PROPERTY

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Cramdown of Personal Property:

What is the effect of a cramdown?

- The amount of the secured claim is reduced to the value of the property; thereby bifurcating the secured and unsecured portions of the claim.
- Allows the debtor more time to pay the loan
- Reduces the interest rate. See Till v. SCS Credit Corp., 541 U.S. 465 (2004).

Value of personal property is determined:

- "based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing". See 11 U.S.C. 506(a)(2).
- "With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." Id. See generally Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997).

When can you cramdown? See 11 U.S.C. 1325(a)(9)

1. Creditor must have a purchase money security interest in the collateral that is the subject of the claim.

AND

2. The debt was incurred more than the 910 day period preceding the date of the filing of the petition

AND

3. The collateral must be a motor vehicle as defined by 49 U.S.C. 30102: "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, road, and highways, but does not include a vehicle operated only on a rail line."

AND

4. The motor vehicle must be acquired for the Debtor's personal use.

OR

5. if the collateral for that debt consists of any other thing of value, you can cramdown the value of the personal property if the debt was incurred more than the one year period preceding that filing.

How can you cramdown personal property?

- In the proposed plan

-List the value as the amount of the replacement value of the vehicle at the Till rate.

Lien Stripping of Personal Property

Lien Stripping in the Proposed Plan Pre-Confirmation:

- Special Provision such as: "The confirmation of this plan shall constitute an order of the court avoiding the non-purchase money lien claimed in certain personal property owned by the debtor as defined in 11 U.S.C. 522(f)."
  - Examples of personal property in 522(f)
    1. clothing
    2. furniture
    3. appliances
    4. 1 radio
    5. 1 TV
    6. 1 VCR (technically not a DVD player)
    7. linens
    8. china
    9. crockery
    10. kitchenware
    11. educational materials for the debtor's minor dependant children
    12. medical equipment and supplies
    13. furniture used by minor children, elderly or disabled dependents of the debtor
    14. personal effects such as toys and wedding rings
    15. 1 computer and related quipment
    16. Jewelry with a fair market value of less than $600
    17. Antiques with a fair market value of less than $600
- Or in a specified section of the Model Chapter 13 Form pursuant to the Local Rules.

Lien Stripping by Motion Post-Confirmation:

- Motion to Avoid Lien
  - Check Local Rules to determine whether Passive Notice is acceptable.
  - Must state description of collateral for which the lien is to be stripped
  - Must state the value of said collateral and how the value was derived.
  - Some jurisdictions may require testimony of the debtor as to value and condition.

Plan Completion, Discharge Injunction, and Debtor's Ability to Obtain Credit

Hon. Jennie D. Latta
U.S. Bankruptcy Judge
Western District of Tennessee

Rhoda H. Smith, Esq.
Law Clerk to Hon. Jennie D. Latta

1. Section 524(a)(2).

> [A] credit report that continues to show a discharged debt as "outstanding," "charged off," or "past due" is unquestionably inaccurate and misleading, because end users will construe it to mean that the lender still has the ability to enforce the debt personally against the debtor, that is, that the debtor has not received a discharge, that she has reaffirmed the debt notwithstanding the discharge, or that the debt has been declared non-dischargeable. . . . A credit report entry that reflects a past due account is treated differently by prospective creditors in evaluating credit applications than an entry that reflects a debt that has been discharged in bankruptcy. The essential difference is that a discharged debt represents a historical fact, that the prospective borrower filed bankruptcy in the past and was relieved from the obligation. Nothing is now due. A past due debt represents a delinquent but legally enforceable obligation that must be resolved.

In re Torres, 367 B.R. 478, 487-488 (Bankr. S.D. N.Y. 2007), citing, *In re Helmes*, 336 B.R. 105, 107 (Bankr. E.D. Va. 2005) and *Turner v. J.V.D.B . & Assocs., Inc.,* 330 F.3d 991, 995 (7th Cir. 2003).

When the inaccurate characterization of a discharged debt on a credit report disqualifies former debtors from obtaining loans or refinancing existing debt, many turn to the bankruptcy court for a remedy. The weight of authority is that the discharge injunction effected by Code section 524(a)(2) does not provide a private right of action against a creditor who violates the discharge injunction but that debtors may pursue contempt proceedings against such a creditor. *See In re Joubert*, 411 F.3d 452 (3d Cir. 2005); *Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502 (9th Cir. 2002); *Cox v. Zale Delaware, Inc.*, 239 F.3d 910 (7th Cir. 2001); *Pertuso v. Ford Motor*

Credit Co., 233 F.3d 417 (6th Cir. 2000). Bankruptcy courts may use their contempt powers to impose sanctions consisting of monetary relief in the form of actual damages, attorneys' fees, and even punitive damages, when creditors have engaged in conduct that violates section 524(a). *See, e.g*., *Bessette v. Avco Financial Services*, *Inc*., 230 F.3d 439, 445 (1st Cir. 2000); *In re Adams,* 2010 WL 2721205 (Bankr. E.D. N.C. July 7, 2010) (Creditor held in contempt of discharge injunction and the court's Order Declaring Mortgage Payments Current for its prolonged failure to correct reported status of mortgage loan in credit report in the face of repeated requests by debtor, the court imposed sanctions equal to compensatory damages to the debtor and chapter 13 trustee, and punitive damages of $100 per day from the date that the creditor was served with the debtor's motion to show cause until entry of the court's order totaling, $66,300.).

Before bringing a motion for contempt, it is important to remember that a discharge operates as an injunction against any "action, . . . employment of process, or an act, to collect, recover or offset . . . [a] debt as a personal liability of the debtor." 11 U.S.C. §524(a)(2). Accordingly, absent evidence of a connection between the reported status of a discharged debt on a credit report and an attempt to coerce payment of the debt as a personal liability of the debtor, no cause of action for violation of the discharge injunction is available. *In re Dendy,* 396 B.R. 171 (Bankr. D.S.C. 2008); *In re Mahoney*, 337 B.R. 293 (Bankr. W.D. Tex. 2007); *In re Torres,* 367 B.R. 478, 487-488 (Bankr. S.D. N.Y. 2007), *In re Irby,* 337 B.R. 293 (Bankr. N.D. Ohio 2005). A creditor's deliberate refusal to correct information previously supplied to credit reporting agencies can, however, constitute an act to extract payment of a debt in violation of section 524(a)(2) where it can be assumed that the creditor knows that its refusal adversely affects the debtor's credit score and ability to obtain new credit. *In re Russell*, 378 B.R. 735

(Bankr. E.D. N.Y. 2007); *In re Torres,* 367 B.R. 478 (Bankr. S.D. N.Y. 2007); *In re Winslow*, 391 B.R. 212 (Bankr. D. Me. 2008); In re Lohmeyer, 365 B.R. 746 (Bankr. N.D. Ohio 2007).

2. Section 524(i).

Section 524(i) was added to the Bankruptcy Code in 2005 by BAPCPA. It provides that it shall be a violation of the discharge injunction of section 524(a)(2) if a creditor willfully fails to credit payments received under a confirmed plan in the manner required by the plan, and such failure causes material injury to the debtor. At least one court has concluded that section 524(i) is intended to provide a remedy for failure to credit payments on debts not discharged under the plan, namely non-dischargeable arrearages, costs and fees incurred post confirmation. *In re Pompa,* 2012 WL 2571156 (Bankr. S.D. Tex. 2012). According to the court, "[d]eeming willful misapplication of plan payments a violation of the discharge injunction under § 524(i) does not impermissibly modify home mortgage lenders' rights in violation of §1322(b)(2); it simply enforces the plan provisions and ensures that the completion of the plan will actually result in a fresh start for the debtor." *Id*. at *8.

3. Non-Bankruptcy Remedies.

A debtor injured by a creditor's failure to correct or update the status of a discharged debt on a credit report may have remedies under the Fair Credit Reporting Act (15 U.S.C. §1681, *et seq*) and/or the Fair Debt Collection Act (15 U.S.C. § 1592, *et seq*). The bankruptcy courts lack jurisdiction over such actions when pursued by debtors post discharge, however, because they are not related to the estate and any recovery would benefit the debtors rather than the estate. See, e.g., *In re Torres,* 367 B.R. 478, 487-488 (Bankr. S.D. N.Y. 2007).

Cramdown, Lien-stripping, and other Chapter 13 issues

Judge Jennie D. Latta
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Lien Stripping/Cramdown

Section 506(a) provides that 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 the creditor's interest in the estate's interest in such property … and is an unsecured claim to the extent that the value of such creditor's claim … is less than the amount of such secured claim.

Lien Stripping/Cramdown

Section 506(d) provides:

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

Lien Stripping/Cramdown

Section 1322(b)(2) provides:

(b) Subject to subsections (a) and (c) of this section, the plan may—

(2) Modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

Lien Stripping/Cramdown

Section 1322(b)(5) provides:

(b) Subject to subsections (a) and (c) of this section, the plan may —

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

Lien Stripping/Cramdown

Section 1325(b) hanging paragraph provides:

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists in a motor vehicle … acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

Lien Stripping/Cramdown

Dewsnup v. Timm, 502 U.S. 410, 112. S.Ct. 773 (1992).

Chapter 7 debtor cannot "strip down" creditors' lien on real property to judicially determined value of collateral.

Lien Stripping/Cramdown

Nobelman v. American Savings Bank, 508 U.S. 324, 113 S.Ct. 2106 (1993).

Section 1322(b)(2), barring chapter 13 debtors from modifying "rights" of holders of claims secured only be debtors' principal residence prohibits chapter 13 debtors from bifurcating undersecured homestead mortgagee's claim into secured claim and unsecured claim and reducing mortgage to fair market value of mortgaged residence.

Lien Stripping/Cramdown

In re Lane, 280 F.3d 663 (6th Cir. 2002).

Bankruptcy Code's antimodification provision permits modification of the rights of totally unsecured homestead mortgagees.

Rule 3002.1

(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.

Rule 3002.1

(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.

Rule 3002.1

(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).

Rule 3002.1

(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.

Rule 3002.1

(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.

Rule 3002.1

(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).

Rule 3002.1

(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.

Rule 3002.1

(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.

Discharge Injunction

Section 524(a)(2) provides:

(a) A discharge in case under this title—

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

Discharge Injunction

Section 524(i) provides:

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a) (2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

Discharge Injunction

In re Torres, 367 B.R. 478 (Bankr. S.D.N.Y. 2007).

In separate Chapter 7 cases, debtors commenced adversary proceedings alleging that creditor violated discharge injunction, violated Fair Credit Reporting Act (FCRA), and committed defamation by refusing to update its disclosures to credit reporting agencies to note effect of debtors' discharges. Creditor moved for judgment on pleadings and to dismiss complaint.

The Bankruptcy Court, held that:

(1) court lacked subject matter jurisdiction over debtors' FCRA and defamation claims;

(2) creditor's failure to update information could violate discharge injunction; and

(3) fact issues remained as to whether creditor's refusal to update its disclosures was for specific purpose of coercing debtors into paying debts.

Discharge Injunction

In re Dendy, 396 B.R. 171 (Bankr. D.S.C. 2008).

Chapter 13 debtors moved to impose sanctions on second mortgagee whose lien had been stripped off, for allegedly violating terms of debtors' confirmed plan and discharge injunction.

The Bankruptcy Court held that:

(1) second mortgagee whose lien was "stripped off" pursuant to provisions of debtor-mortgagors' confirmed plan, simply by failing to take any action to release, satisfy or cancel its mortgage after debtors were discharged of any personal liability on their unsecured debt to it, did not thereby violate discharge injunction;

(2) second mortgagee did not thereby violate terms of debtors' confirmed plan or plan confirmation order; and

(3) mere existence of discharged debt on credit reports for Chapter 13 debtors, when reported prior to entry of discharge injunction and not combined with evidence of any actions by creditor to collect debt after discharge injunction arose, did not rise to level of action violating discharge injunction.

Discharge Injunction

In re Russell, 378 B.R. 735 (Bankr. E.D.N.Y. 2007).

Debtor brought adversary proceeding against creditor, asserting claims for violation of discharge injunction and defamation and seeking actual and punitive damages. Creditor moved to dismiss.

The Bankruptcy Court held that:

(1) defamation claim did not fall within bankruptcy court's "related to" jurisdiction;

(2) debtor stated claim for violation of discharge injunction; and

(3) allegations set forth sufficient bases for award of damages.

Discharge Injunction

In re Pompa, 2012 WL 2571156 (Bankr. S.D. Tex. 2012).

The Court concludes that under § 524(i), willful failure to credit payments received under a plan constitutes a violation of the discharge injunction, regardless of whether the debt at issue was discharged. Section 524(i) does not discharge all debts dealt with under the plan, but nothing in its language restricts its application to discharged debts....The Court concludes that § 524(i) was intended to provide a remedy for failure to credit payments on debts not discharged under the plan. Deeming willful misapplication of plan payments a violation of the discharge injunction under § 524(i), does not impermissibly modify home mortgage lenders' rights in violation of § 1322(b)(2); it simply enforces the plan provisions and ensures that the completion of the plan will actually result in a fresh start for the debtor.