

Consumer Track

Lien-Stripping in Chapter 7 and Chapter 13

Nancy J. Whaley, Moderator

Office of Nancy J. Whaley, Standing Chapter 13 Trustee; Atlanta

Ashley D. Bruce

Berger Singerman LLP; Fort Lauderdale, Fla.

Isley M. Gostin

WilmerHale; Washington, D.C.

Hon. John T. Laney, III

U.S. Bankruptcy Court (M.D. Ga.); Columbus

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Lien-Stripping Summary

Submitted by

*Isley M. Gostin
Wilmer Cutler Pickering Hale and Dorr LLP*

Edited by:

*Craig Goldblatt
Danielle Spinelli
Wilmer Cutler Pickering Hale and Dorr LLP*

LIEN-STRIPPING SUMMARY

By Isley M. Gostin, WilmerHale

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BRIEF OVERVIEW

- Chapter 7 debtors have argued that they may strip liens pursuant to 11 U.S.C. § 506(d), which provides in relevant part 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.” In *Dewsnup v. Timm*, 502 U.S. 410 (1992), however, the Supreme Court held that a chapter 7 debtor could not “strip down” a partially underwater lien because Section 506(d) does not void a lien securing an allowed claim. Following *Dewsnup*, lower courts—including the Fourth, Sixth, and Seventh Circuits—have almost uniformly concluded that Section 506(d) also does not allow a chapter 7 debtor to “strip off” a wholly underwater junior lien. The only exception is the Eleventh Circuit, which—notwithstanding *Dewsnup*—continues to follow an earlier decision holding that a chapter 7 debtor may strip off a wholly underwater lien pursuant to Section 506(d). See *In re Folendore*, 862 F.2d 1537 (11th Cir. 1989); see also *In re McNeal*, 735 F.3d 1263 (11th Cir. 2012) (concluding that *Dewsnup* did not displace *Folendore* due to the Eleventh Circuit’s internal “prior panel precedent rule”).
- In chapter 13 cases, strip downs are forbidden for liens encumbering the debtor’s principal residence, but strip offs of such liens have been generally permitted. Chapter 13 includes a provision authorizing a debtor’s plan to “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.” 11 U.S.C. § 1322(b)(2) (emphasis added). The Supreme Court, in *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), concluded that the so-called “anti-modification” clause in Section 1322(b)(2) prohibits a chapter 13 debtor from reducing the balance due on a home mortgage to the value of the collateral. But lower courts have generally concluded that *Nobelman*’s reasoning permits a chapter 13 debtor to strip off a creditor’s wholly underwater junior lien because the creditor does not have a “secured” claim, as determined under Section 506(a), and is thus not protected by the anti-modification clause. There is, however, a potential argument to the contrary: As *Nobelman* emphasized, Section 1322(b)(2) preserves all the “rights” of a creditor holding a mortgage on the debtor’s principal residence, including the right to exercise a lien in case of nonpayment. That logic arguably applies even if the creditor’s lien is wholly underwater.
- In “chapter 20” cases—that is, a chapter 13 petition filed soon after the debtor has completed a chapter 7 case—courts are split on whether the debtor may strip off a wholly underwater junior lien. Many courts have held that a chapter 20 debtor may do so because he is a chapter 13 debtor and, under prevailing precedent, may thus employ

Section 1322(b)(2) to void a completely underwater lien. But some courts have concluded that a chapter 20 debtor may not do so because, having received a discharge in his chapter 7 case, he is not eligible for a chapter 13 discharge. Notably, even the courts that allow strip offs in a chapter 20 case require that the debtor's filing be in "good faith" and not simply for the purpose of stripping a wholly underwater junior lien.

LIEN-STRIPPING IN CHAPTER 7

Chapter 7 debtors have historically argued that they may strip off or strip down an underwater lien pursuant to 11 U.S.C. § 506, which governs the treatment of undersecured claims. Section 506(a) provides, as relevant here, that "[a]n allowed secured claim of a creditor secured by a lien on [estate] property ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim." 11 U.S.C. § 506(a). In essence, Section 506(a) bifurcates a creditor's undersecured claim into a "secured claim" for the present value of the collateral and an "unsecured claim" for the remainder. In turn Section 506(d) provides—with exceptions not relevant here—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." According to debtors' interpretation of Section 506(d), a secured creditor's claim is "not an allowed secured claim" to the extent it is underwater, and accordingly the corresponding portion of the lien can be stripped.

Courts have almost uniformly rejected that view and have held that Section 506(d) provides no authority to strip liens. In the landmark case of *Dewsnup v. Timm*, 502 U.S. 410 (1992), the Supreme Court held that a chapter 7 debtor could not strip down a *partially* underwater lien because Section 506(d) does not void a lien securing an allowed claim. And almost all lower courts—including the Fourth, Sixth, and Seventh Circuits—have concluded that, under *Dewsnup*'s reasoning, Section 506(d) also forbids strip offs of *wholly* underwater liens in a chapter 7 case. Only the Eleventh Circuit has ruled otherwise.

I. IN *DEWSNUP V. TIMM*, THE SUPREME COURT HELD THAT SECTION 506(D) ALLOWS VALID LIENS TO PASS THROUGH BANKRUPTCY UNAFFECTED AND THUS DOES NOT PERMIT A CHAPTER 7 DEBTOR TO STRIP DOWN A PARTIALLY UNDERWATER LIEN

In *Dewsnup*, the creditor had issued a pre-bankruptcy loan to the debtor secured by a lien on the debtor's real property. When the debtor filed for bankruptcy, the lien was partially underwater because the outstanding balance on the loan exceeded the then-current value of the property. The debtor moved, pursuant to Section 506(d), to void the portion of the lien that was underwater, arguing "that §§ 506(a) and 506(d) are complementary and to be read together. Because, under § 506(a), a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed, a debtor can void a lien on the property pursuant to § 506(d) to the extent the claim is no longer secured and thus is not an 'allowed secured claim.'" 502 U.S. at 414.

The Court rejected the debtor's reading of the statute and held that Section 506(d) does not permit a debtor to void a lien securing an allowed claim. Adopting the statutory construction advocated by the United States, the Court reasoned that "the words 'allowed secured claim' in

§ 506(d) need not be read as an indivisible term of art defined by reference to § 506(a).” 502 U.S. at 415. “Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and second, secured.” *Id.* Where a claim “has been ‘allowed’ ... and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d).” *Id.* That construction, the Court explained, gives Section 506(d) “the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed,” and “ensures that the Code’s determination not to allow the underlying claim against the debtor personally is given full effect by preventing its assertion against the debtor’s property.” *Id.* at 415-416.

In reaching that conclusion, the Court emphasized the fundamental and longstanding principle that “liens pass through bankruptcy unaffected.” 502 U.S. at 417. As the Court explained, under well-established practice prior to the 1978 enactment of the Bankruptcy Code, “involuntary reduction of the amount of a creditor’s lien” was not permitted “for any reason other than payment on the debt.” *Id.* at 419. “Congress must have enacted [Section 506(d)] with a full understanding of this practice.” *Id.* Indeed, Section 506(d)’s legislative history specified that the provision was intended to “permit[] liens to pass through the bankruptcy case unaffected.” *Id.* (quoting H.R. Rep. No. 95-595, at 357 (1977)).

The debtor’s reading of the statute would have contradicted that basic principle. The “practical effect” of the debtor’s approach would have been “to freeze the creditor’s secured interest at the judicially determined valuation,” depriving the creditor of “the benefit of any increase in the value of the property by the time of the foreclosure sale,” and giving the debtor a potential “windfall.” *Dewsnup*, 502 U.S. at 417. But, the Court recognized, the basic bargain of a mortgage requires that “the creditor’s lien stays with the real property until the foreclosure,” and any appreciation in the property’s value “rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors.” *Id.* Read against that backdrop, Section 506 does not permit a debtor to strip a creditor’s lien simply because it is undersecured in light of the current value of the collateral.

II. THE VAST MAJORITY OF LOWER COURTS HAVE HELD THAT, UNDER *DEWSNUP*’S REASONING, SECTION 506(D) ALSO DOES NOT PERMIT A CHAPTER 7 DEBTOR TO STRIP OFF A WHOLLY UNDERWATER LIEN

Because *Dewsnup* involved a strip down, chapter 7 debtors around the country subsequently argued that its reasoning did not apply to strip offs and that Section 506(d) still allows them to void a wholly underwater junior lien. Nearly every court to have addressed the issue—including the Fourth, Sixth, and Seventh Circuits—has concluded that *Dewsnup*’s reasoning plainly extends to strip offs and that Section 506(d) does not allow any sort of lien-stripping.

The Fourth Circuit became the first court of appeals to reach this conclusion in *Ryan v. Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001). The debtor in *Ryan* contended that the creditor’s wholly underwater lien could be stripped off under Section 506(d) because “*Dewsnup* controls only a ‘strip down’ of a partially secured lien, not a ‘strip off’ of a wholly unsecured lien.” *Id.* at 781. The Fourth Circuit rejected that argument, explaining:

Whether the lien is wholly unsecured or merely undersecured, the reasons articulated by the Supreme Court for its holding in *Dewsnup*—that liens pass through bankruptcy unaffected, that mortgagee and mortgagor bargained for a consensual lien which would stay with real property until foreclosure, and that any increase in the value of the real property should accrue to the benefit of the creditor, not the debtor or other unsecured creditors—are equally pertinent.

Id. at 783 (quoting *In re Laskin*, 222 B.R. 872 (B.A.P. 9th Cir. 1998) (brackets omitted)). Concluding that “[t]he Court’s reasoning in *Dewsnup* is equally relevant and convincing in a case like ours where a debtor attempts to strip off, rather than merely strip down, an approved but unsecured lien,” the Fourth Circuit held that a debtor may not strip off a lien securing an allowed claim under Section 506(d) even if the lien is wholly underwater. *Id.* at 782.

The Sixth Circuit subsequently reached the same conclusion, holding that *Dewsnup* “applies with equal force and logic” to strip-offs. *In re Talbert*, 344 F.3d 555, 556 (6th Cir. 2003). As in *Ryan*, the debtors in *Talbert* argued that “the secured status of a claim is determined by the security-reducing provision of § 506(a), and that pursuant to this provision, their junior lien is completely unsecured, and thus, according to § 506(d), may be ‘stripped off.’” *Id.* at 558 (footnotes omitted). The Sixth Circuit noted that a “similar argument was rejected [by *Dewsnup*] in the analogous context of a debtor’s attempt to ‘strip down’ an under-collateralized creditor’s lien in a Chapter 7 case” and explained that *Dewsnup*’s reasoning “applie[d] with equal validity to a debtor’s attempt to effectuate a Chapter 7 strip off”:

As in the case of a “strip down,” to permit a “strip off” would mark a departure from the pre-Code rule that real property liens emerge from bankruptcy unaffected. Also, as in the case of a “strip down,” a “strip off” would rob the mortgagee of the bargain it struck with the mortgagor, i.e., that the consensual lien would remain with the property until foreclosure. ... Finally, as was true in the context of “strip downs,” Chapter 7 “strip offs” also carry the risk of a “windfall” to the debtors should the value of the encumbered property increase by the time of the foreclosure sale.

Id. at 560-561.

The Seventh Circuit recently reached the same conclusion in *Palomar v. First American Bank*, 722 F.3d 992 (7th Cir. 2013) (Posner, J.). The Seventh Circuit first explained that Section 506(d) is “best interpreted as confirming the venerable principle ... that bankruptcy law permits a lien to pass through bankruptcy unaffected, provided that it’s a valid lien and secures a valid claim.” *Id.* at 993. It then concluded that *Dewsnup* defeated the debtor’s attempt to strip off the creditor’s wholly underwater lien: “*Dewsnup* ... holds that section 506(d) does not allow the bankruptcy court to squeeze down a fully valid lien to the current value of the property to which it’s attached. That’s the relief the debtor in this case is seeking. The only difference between this case and *Dewsnup* is that our debtors want to reduce the value of the lien to zero”—a difference, the Seventh Circuit determined, that is immaterial in light of *Dewsnup*’s reasoning. *Id.* at 994 (citation omitted).

Numerous district and bankruptcy courts have also held that *Dewsnup*'s reasoning forbids both strip-downs and strip-offs in chapter 7. See, e.g., *Laskin*, 222 B.R. 872; *Wachovia Mortgage v. Smoot*, 478 B.R. 555 (E.D.N.Y. 2012); *In re Cook*, 449 B.R. 664 (D.N.J. 2011); *In re Richins*, 469 B.R. 375 (Bankr. D. Utah 2012); *In re Bowman*, 304 B.R. 166 (Bankr. M.D. Pa. 2003); *In re Fitzmaurice*, 248 B.R. 356 (Bankr. W.D. Mo. 2000). Like the Fourth, Sixth, and Seventh Circuits, these courts reject a distinction between strip-offs and strip-downs. "Rather, what is controlling is the Supreme Court's construction of § 506(d)." *Smoot*, 478 B.R. at 568.¹

III. THE ELEVENTH CIRCUIT, FOLLOWING PRE-*DEWSNUP* PRECEDENT, HAS HELD THAT SECTION 506(D) PERMITS A CHAPTER 7 DEBTOR TO STRIP OFF A WHOLLY UNDERWATER LIEN

Before *Dewsnup*, some courts, including the Eleventh Circuit, had held that Section 506(d) permitted a debtor to strip a secured creditor's lien down to the value of the collateral securing the creditor's claim. See, e.g., *Folendore v. Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989). In *Folendore*, the creditor held a junior mortgage on the debtors' property. The creditor's claim was conceded to be valid and had been allowed. See *id.* at 1538. But its lien was completely underwater because the property's value was less than the outstanding debt on the two senior mortgage loans. See *id.* The Eleventh Circuit reasoned that because Section 506(a) treats the portion of a secured claim in excess of the value of the security as unsecured, the creditor had no "allowed secured claim" within the meaning of Section 506(d), and its lien could thus be stripped off. See *id.* at 1539.

After *Dewsnup*, however, district and bankruptcy courts within the Eleventh Circuit concluded that *Dewsnup* had displaced *Folendore*'s reading of Section 506(d) and that *Folendore* was no longer good law. As one court explained, "*Dewsnup* compels the Court to hold that Chapter 7 debtors . . . may not 'strip off' their respective wholly-unsecured junior mortgage liens under § 506(d)." *In re Hoffman*, 433 B.R. 437, 440 (Bankr. M.D. Fla. 2010); see also *In re Armstrong*, 2011 WL 768080 (M.D. Fla. Feb. 28, 2011); *In re Cater*, 240 B.R. 420, 421 (M.D. Ala. 1999); *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 in *McNeal v. GMAC Mortgage, LLC*, 735 F.3d 1263, (11th Cir. 2012), the Eleventh Circuit held that the Court's pre-*Dewsnup* decision in *Folendore* continues to be binding circuit precedent notwithstanding *Dewsnup*. The Eleventh Circuit recognized that other courts of appeals had determined that *Dewsnup* precluded such a strip off. *Id.* at 1265. It also acknowledged that *Dewsnup* "seems to reject the plain language analysis that we used in *Folendore*." *Id.* The court nonetheless concluded that, in light of the Eleventh Circuit's "prior panel precedent" rule (under which "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point'"), "*Folendore*—not *Dewsnup*—controls in this case." *Id.* The Eleventh Circuit reasoned that *Dewsnup* was not

¹ Although a handful of lower courts outside the Eleventh Circuit initially ruled that *Dewsnup* did not apply to strip-offs, those decisions have been overruled or reversed. See, e.g., *In re Farha*, 246 B.R. 547 (Bankr. E.D. Mich. 2000), overruled by *Talbert*, 344 F.3d 555; *In re Zempel*, 244 B.R. 625 (Bankr. W.D. Ky. 1999), overruled by *Talbert*, 344 F.3d 555; *In re Yi*, 219 B.R. 394 (E.D. Va. 1998), overruled by *Ryan*, 253 F.3d 778; *In re Smoot*, 465 B.R. 730 (Bankr. E.D.N.Y. 2011), rev'd sub nom. *Wachovia Mortgage v. Smoot*, 478 B.R. 555 (E.D.N.Y. 2012).

“clearly on point” because it “disallowed only a ‘strip down’ of a partially secured mortgage lien and did not address a ‘strip off’ of a wholly unsecured lien.” *Id.*

A petition for rehearing en banc in *McNeal* is currently pending in the Eleventh Circuit. More than twenty others cases challenging the Eleventh Circuit’s decision in *McNeal* are currently pending in that court as well.

LIEN-STRIPPING IN CHAPTER 13

Unlike chapter 7, chapter 13 does include a general provision allowing a debtor to alter the terms of secured debt: the debtor’s plan may “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.” 11 U.S.C. § 1322(b)(2). Chapter 13 debtors have argued that this provision allows them to strip underwater liens on their homes (and other real property). By contrast, home mortgage creditors have contended that Section 1322(b)(2)’s safe harbor for mortgages on a principal residence—commonly known as the “anti-modification” clause—precludes any such lien-stripping.

In *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), the Supreme Court held that the anti-modification clause forbids a chapter 13 debtor from altering the terms of a partially underwater home mortgage. The Court reasoned that because Section 1322(b)(2) protects the “rights” of a creditor holding a mortgage on the debtor’s principal residence, a debtor may not impair such a creditor’s right to foreclose on the property, even if the lien is partially underwater. Many circuit courts, however, have subsequently held that a chapter 13 debtor may strip off a wholly underwater lien because a creditor holding such a lien is not “secured” for purposes of Section 1322(b)(2) and thus cannot rely on the anti-modification clause. While that is currently the consensus view in the lower courts, there is nonetheless at least a plausible argument that the anti-modification clause should apply even to such liens because—as *Nobelman* emphasized—Section 1322(b)(2) forbids a chapter 13 debtor from modifying *any* of the “rights” of a creditor holding a mortgage on the debtor’s principal residence, which should include the right to exercise its lien in case of nonpayment.

I. IN *NOBELMAN V. AMERICAN SAVINGS BANK*, THE SUPREME COURT HELD THAT SECTION 1322(B)(2) DOES NOT ALLOW A DEBTOR TO MODIFY THE TERMS OF A PARTIALLY UNDERWATER MORTGAGE

In *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), the Supreme Court addressed “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 mortgage residence.” *Id.* at 325-326.² The debtors’ principal residence was worth \$23,500 but was encumbered by a mortgage of \$71,335. The debtors therefore proposed to bifurcate the creditor’s claim pursuant to Section 506(a), treating it as a secured claim up to the value of the collateral property and the remainder as an unsecured claim. The debtors argued that Section 1322(b)(2)’s anti-modification clause did not prohibit this plan because the clause “applies only to the extent the

² As noted above, Section 506(a) bifurcates an underwater secured claim into “secured” and “unsecured” portions.

mortgagee holds a ‘secured claim’ in the debtor’s residence” and, accordingly, a court “must look first to § 506(a) to determine the value of the mortgagee’s ‘secured claim.’” *Id.* at 328. Under the debtors’ view, “the bank is the holder of a ‘secured claim’ only in the amount of \$23,500—the value of the collateral property,” and “[b]ecause the plan proposes to make \$23,500 worth of payments pursuant to the monthly payment terms of the mortgage contract . . . , the plan effects no alteration of the bank’s rights as the holder of that claim.” *Id.* at 328.

The Court disagreed, reasoning that the debtors’ interpretation “fails to take adequate account of § 1322(b)(2)’s focus on ‘rights.’” *Nobelman*, 508 U.S. at 328. “That provision does not state that a plan may modify ‘claims’ or that the plan may not modify ‘a claim secured only’ by a home mortgage. Rather, it focuses on the modification of the ‘rights of holders’ of such claims.” *Id.* The Court noted that because of its mortgage contract with the debtors, “the bank is indisputably the holder of a claim secured by a lien on [the debtors’ home].” *Id.* The Court acknowledged that the debtors “were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank’s secured claim,” *id.* at 328-329, but the Court went on to declare that “even if we accept petitioner’s valuation, the bank is still the ‘holder’ of a ‘secured claim’ because petitioners’ home retains \$23,500 of value as collateral,” *id.* at 329. While the Court acknowledged that the portion of the bank’s claim exceeding \$23,500 was “unsecured,” it explained that such a determination “does not necessarily mean that the ‘rights’ the bank enjoys as a mortgagee, which are protected by § 1322(b)(2), are limited by the valuation of its secured claim.” *Id.* Because the term “rights” is not defined anywhere in the Bankruptcy Code, the Court decided that the bank’s “rights” with respect to the mortgage had to be determined under state law. *Id.* Those rights were “reflected in the relevant mortgage instruments, which are enforceable under [state] law,” including “the right to the repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against [the debtors’] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure.” According to the Court, these were “the rights that were ‘bargained for by the mortgagor and mortgagee’ and are rights protected from modification by § 1322(b)(2).” *Id.* at 329-330.

The debtors in *Nobelman* had argued in favor of the “rule of the last antecedent,” under which “the operative clause ‘other than a claim secured only by a security interest in . . . the debtor’s principal residence’ must be read to refer to and modify its immediate antecedent, ‘secured claims.’” 508 U.S. at 330. According to that reading, “§ 1322(b)(2)’s protection would then apply only to that subset of allowed ‘secured claims,’ determined by application of § 506(a), that are secured by a lien on the debtor’s home—including, with respect to the mortgage involved here, the bank’s secured claim for \$23,500.” *Id.* While the Court deemed this reading “quite sensible as a matter of grammar,” it concluded that the reading was “not compelled.” *Id.* The Court emphasized that “Congress chose to use the phrase ‘claim secured . . . by’ in § 1322(b)(2)’s exception, rather than repeating the term of art ‘secured claim.’” *Id.* at 331. The Court noted that “[t]he unqualified word ‘claim’ is broadly defined under the Code to encompass any ‘right to payment, whether . . . secure[d] or unsecured.’” *Id.* The Court therefore found it “plausible . . . to read ‘a claim secured only by a [homestead lien]’ as referring to the lienholder’s entire claim, including both the secured and unsecured components of the claim.” *Id.* “Indeed, § 506(a) itself uses the phrase ‘claim . . . secured by a lien’ to encompass both portions of an undersecured claim.” *Id.*

The Court also found its reading “more reasonable” because “we cannot discern how § 1322(b)(2) could be administered under [the debtors’] interpretation” without modifying the bank’s rights under the mortgage. *Id.* at 331. “The bank’s contractual rights are contained in a unitary note that applies at once to the bank’s overall claim, including both the secured and unsecured components. [The debtors] cannot modify the payment and interest terms for the unsecured component . . . without also modifying the terms of the secured component.” *Id.* at 331. In sum, the Court concluded that “to give effect to § 506(a)’s valuation and bifurcation of secured claims through a Chapter 13 plan in the manner [the debtors] propose would require a modification of the rights of the holder of the security interest,” which is prohibited by Section 1322(b)(2) for a claim “secured only by a lien on the debtor’s principal residence.” *Id.* at 332.

II. MANY CIRCUIT COURTS HAVE HELD THAT, UNDER *NOBELMAN*, SECTION 1322(B)(2) AUTHORIZES STRIP OFFS OF WHOLLY UNDERWATER LIENS ON A PRINCIPAL RESIDENCE

Several circuit courts have addressed whether, under *Nobelman*’s reasoning, Section 1322(b)(2) also forbids a chapter 13 debtor from stripping off a wholly underwater lien on his principal residence. They have all decided that it does not and, accordingly, that such a lien may be voided entirely. *See In re Davis*, 716 F.3d 331 (4th Cir. 2013); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *cf. In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012) (dicta).

According to these circuit courts, *Nobelman*’s analytical structure leads to a different result with respect to a wholly underwater mortgage. These courts have relied on the portion of the *Nobelman* opinion in which the Court first considered the home mortgage under Section 506(a)’s bifurcation scheme before determining whether Section 1322(b)(2)’s anti-modification clause applied. *See Nobelman*, 508 U.S. at 328-329 (noting that the debtors were “correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank’s secured claim”). A wholly underwater lien is completely “unsecured” under Section 506(a) and thus does not implicate the anti-modification clause in Section 1322(b)(2), which—as a matter of grammar—applies only to “holders of secured claims” and not to “holders of unsecured claims.” *See* 11 U.S.C. § 1322(b)(2) (a plan may “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”). For example, as the Sixth Circuit explained in *Lane*:

The Supreme Court’s recognition of § 506(a) as the starting point in the analysis means that it must make a difference whether the overall claim belongs in the pigeonhole marked “secured claims” or the pigeonhole marked “unsecured claims,” as those terms are defined in § 506(a). The proper classification under § 506(a) obviously makes a difference even where the creditor has “a claim secured only by a security interest in real property that is the debtor’s principal residence,” as the bank did in *Nobelman* and as [the creditor] does here. And the only apparent reason why the classification could make a difference is that the special protection accorded by the antimodification provision extends to the rights

of holders of “secured claims” and does not extend to the rights of holders of “unsecured claims.” To interpret § 1322(b)(2) otherwise, we believe, would be to subvert the text of the code. Section 1322(b)(2) says, without qualification and in the plainest of English, that a Chapter 13 plan “may” modify the rights “of holders of unsecured claims.” For us to hold that the plan may not modify the rights of such a claimholder would be to thumb our noses at Congress’ carefully chosen words.

Lane, 280 F.3d at 667-668 (indentations omitted); *see also McDonald*, 205 F.3d at 611 (“Once we accept that courts must apply § 506(a), then it follows, even under *Nobelman*, that a wholly unsecured mortgage holder does not have a secured claim. . . . If a mortgage holder’s claim is wholly unsecured, then after the valuation that Justice Thomas said that debtors could seek under § 506(a), the bank is not in any respect a holder of a claim secured by the debtor’s residence. The bank simply has an unsecured claim and the antimodification clause does not apply.”); *Bartee*, 212 F.3d at 290 (“If it is correct to ‘look[] to § 506(a) for a judicial valuation of the collateral to determine the status of the bank’s secured claim,’ then it stands to reason that valuation will control the determination of the mortgagee’s security interest—i.e., whether it is a secured or unsecured claim. . . . In the case of a wholly undersecured junior mortgage, the valuation function of § 506(a) obviates the need to even consult § 1322(b)(2).”); *Pond*, 252 F.3d 126 (“In *Nobelman*, the Supreme Court began its analysis by noting that it is ‘correct [to] look[] to § 506(a) for judicial valuation of the collateral to determine the status of [a creditor’s] secured claim.’ . . . We conclude from this language, as well as the language of the statute, that the antimodification exception of Section 1322(b)(2) protects a creditor’s right in a mortgage lien only where the debtor’s residence retains enough value—after accounting for other encumbrances that have priority over the lien—so that the lien is at least partially secured under Section 506(a).” (quoting *Nobelman*, 508 U.S. at 328)); *Tanner*, 217 F.3d at 1360 (“[T]he only reading of sections 506(a) and 1322(b)(2) that renders neither a nullity is one that first requires bankruptcy courts to determine the value of the homestead lender’s secured claim under section 506(a) and then to protect from modification any claim that is secured by any amount of collateral in the residence. Any claim that is wholly unsecured, however, would not be protected from modification under section 1322(b)(2).”); *Zimmer*, 313 F.3d at 1227 (“In order to give effect to the definitions of secured and unsecured claims under § 506(a), we must conclude that the rights of a creditor holding only an unsecured claim may be modified under § 1322(b)(2).”); *Davis*, 716 F.3d at 335 (“section 506(a), which classifies valueless liens as unsecured claims, operates with section 1322(b)(2) to permit a bankruptcy court, in a Chapter 13 case, to strip off a lien against a primary residence with no value”).

Notwithstanding the predominate view that *Nobelman* only prohibits strip downs of partially underwater liens, an argument can be made that *Nobelman* also prohibits strip offs of wholly underwater liens in chapter 13. Section 1322(b)(2)—the anti-modification clause—precludes a debtor from modifying “a claim secured only by a security interest in real property that is the debtor’s principal residence.” 11 U.S.C. § 1322(b)(2). As the Supreme Court noted in *Nobelman*, a home mortgage creditor is, “[b]y virtue of its mortgage contract,” “indisputably the holder of a claim secured by a lien on the [debtor’s] home.” *Nobelman*, 508 U.S. at 328. As the Court also explained, the “rights” of such a creditor—including the right to exercise the security interest on the property in case of nonpayment—are “reflected in the relevant mortgage instruments,” were “bargained for by the mortgagor and mortgagee,” and are thus “protected

from modification by § 1322(b)(2).” *Id.* at 329-330. Although *Nobelman* made those statements in the context of a partially underwater home mortgage, they are equally true for a wholly underwater lien. In either case, the mortgage creditor retains the “right” under nonbankruptcy law to exercise its lien, and that right is protected by Section 1322(b)(2)’s anti-modification clause.

The circuit courts holding that a chapter 13 debtor may strip off a wholly underwater lien reason that the anti-modification clause protects only the “holders of *secured* claims.” In light of Section 506(a)’s valuation process, they reason, a creditor with a wholly underwater mortgage does not have a “secured claim” at all and thus cannot benefit from the anti-modification provision. That is arguably incorrect because it relies on the “rule of the last antecedent,” which *Nobelman* itself rejected. As *Nobelman* suggests, the anti-modification clause stands alone and must be read independently: “Congress chose to use the phrase ‘claim secured . . . by’ in § 1322(b)(2)’s exception, rather than repeating the term of art ‘secured claim.’ The unqualified word ‘claim’ is broadly defined under the Code to encompass any ‘right to payment, whether . . . secure[d] or unsecured.’” 508 U.S. at 331. The Court therefore found it “plausible . . . to read ‘a claim secured only by a [homestead lien]’ as referring to the lienholder’s entire claim, including both the secured and unsecured components of the claim.” *Id.* That logic should apply even when the mortgage is wholly underwater. Indeed, one court of appeals panel has suggested precisely that: As noted above, the Eleventh Circuit has ruled that Section 1322(b)(2) allows a debtor to strip off a wholly underwater lien on his principal residence. *See Tanner*, 217 F.3d at 1357. But a subsequent Eleventh Circuit panel explained that—although it was bound by *Tanner*—it would have ruled the other way had it considered the question first because of the wording of the anti-modification clause. *See In re Dickerson*, 222 F.3d 924, 926 (11th Cir. 2000). “[W]e believe that Congress’s use of the phrase ‘a claim secured only by’ instead of the term ‘secured claim’ to describe those claims which could not be modified in a Chapter 13 bankruptcy plan supports the conclusion that the ‘anti-modification’ protection of § 1322(b)(2) should extend to all claims secured solely by the debtor’s principal residence, not just those junior homestead mortgages where there is sufficient equity in the subject property to support both the entire senior and part of the junior homestead mortgages.” *Id.*

LIEN-STRIPPING IN “CHAPTER 20”

Debtors will often file a chapter 13 bankruptcy petition soon after successfully completing a chapter 7 filing. These bankruptcies are colloquially known as “chapter 20” filings. If the debtor has home mortgage debt, the chapter 7 bankruptcy would have discharged his personal liability on such debt, but the “creditor’s right to foreclose on the mortgage survives or passes through the [chapter 7] bankruptcy.” *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991). While debtors can use a chapter 20 filing to address unsecured or secured debt accumulated after their chapter 7 case, they also routinely use it to strip off an existing wholly underwater junior lien on their home pursuant to Section 1322(b)(2), which—as explained above—they could not have done in a chapter 7 case outside of the Eleventh Circuit. Lower courts have split on whether a chapter 20 debtor may strip off a wholly underwater junior lien.

Some courts have held that a chapter 20 debtor may not strip off a wholly underwater junior lien because he is not eligible for a discharge. *See* 11 U.S.C. § 1328(f)(1) (denying discharge to a chapter 20 filer if he received a chapter 7 discharge within the last four years).

These courts have primarily relied on Section 1325(a)(5)(B)(i)(I), which provides that a chapter 13 plan must, with respect to “each allowed secured claim,” “provide[] that the holder of such claim retain the lien securing such claim until the earlier of the payment of the underlying debt determined under nonbankruptcy law; or discharge under section 1328.” Since a chapter 20 debtor is ineligible for a discharge, these courts have held that lien-stripping cannot possibly be an option in a chapter 20 case. *In re Gerardin*, 447 B.R. 342, 348-351 (Bankr. S.D. Fla. 2011); *In re Quiros-Amy*, 456 B.R. 140, 147 (Bankr. S.D. Fla. 2011); *In re Erdmann*, 446 B.R. 863, 868 (Bankr. N.D. Ill. 2011); *In re Lindskog*, 451 B.R. 863, 866 (Bankr. E.D. Wis. 2011); *In re Sadowski*, 473 B.R. 12, 19 (Bankr. D. Conn. 2011); *In re Fenn*, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010); *Victorio v. Billingslea*, 470 B.R. 545, 552-556 (S.D. Cal. 2012); *In re Jarvis*, 390 B.R. 600, 605-606 (Bankr. C.D. Ill. 2008).

Many courts—including the Fourth Circuit—have concluded lien stripping in chapter 20 is permissible. The courts reason that a claim that is completely “unsecured” for purposes of Section 506(a) is also not an “allowed secured claim” for purposes of Section 1325(a)(5)(B)(i)(I). See *In re Davis*, 716 F.3d 331, 338 (4th Cir. 2013) (“Because the liens in these cases have no value, they are wholly unsecured claim, which leaves no role in the analysis for section 1325(a)(5).”); see also *In re Fisette*, 455 B.R. 177, 186 (B.A.P. 8th Cir. 2011); *In re Waterman*, 469 B.R. 334, 339 (D. Colo. 2012); *In re Fair*, 450 B.R. 853, 857 (E.D. Wis. 2011); *In re Hill*, 440 B.R. 176, 183 (Bankr. S.D. Cal. 2010); *In re Dolinak*, 497 B.R. 15, 22 (Bankr. D.N.H. 2013); *In re Wapshare*, 492 B.R. 211, 215-216 (Bankr. S.D.N.Y. 2013); *In re Wong*, 488 B.R. 537, 550 (Bankr. E.D.N.Y. 2013); *In re Scantling*, 465 B.R. 671, 681 (Bankr. M.D. Fla. 2012); *In re Okosisi*, 451 B.R. 90, 97-98 (Bankr. D. Nev. 2011); *In re Miller*, 462 B.R. 421, 430 (Bankr. E.D.N.Y. 2011); *In re Dang*, 467 B.R. 227, 235-236 (Bankr. M.D. Fla. 2012); *In re Gloster*, 459 B.R. 200, 206 (Bankr. D.N.J. 2011). Accordingly, these courts explain that nothing in the Bankruptcy Code expressly forbids a chapter 20 debtor from taking advantage of the right, under prevailing precedent, to strip a wholly underwater lien in a chapter 13 case. As the Fourth Circuit explained, “the analysis permitting lien-stripping in Chapter 20 cases is no different than that in any other Chapter 13 case.” *Davis*, 716 F.3d at 338; see also, e.g., *Dolinak*, 497 B.R. at 22 (same); *In re Wapshare*, 492 B.R. at 214 (“[T]he plain language of the Bankruptcy Code does not prohibit the use of § 1322(b)(2) in a chapter 20 case[.]”); *Scantling*, 465 B.R. at 678 (“[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.”);³ *In re Jennings*, 454 B.R. 252, 258 (Bankr. N.D. Ga. 2011) (“Given chapter 13 debtor eligibility, nothing in [the Code] limits a chapter 20 debtor’s ability to take advantage of the protections chapter 13 provides. Lien-stripping is one of the tools in the chapter 13 toolbox.”). These courts have also reasoned that Congress—which augmented the Code’s safeguards against abusive bankruptcy filers in the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)—almost certainly would have included an express prohibition in BAPCPA if it intended to preclude chapter 20 lien stripping. See, e.g., *Okosisi*, 451 B.R. at 101 (“If Congress’ goal was to limit the operation of section[] 1322(b)(2) [in a chapter 20] . . . , it could have explicitly drafted the statute to achieve this goal.”); *Gloster*, 459 B.R. at 205 (“Given the wide-ranging changes effected by BAPCPA, and its emphasis on

³ *Scantling* is currently on appeal in the Eleventh Circuit, and oral argument in the appeal was held on April 10, 2014.

ensuring that abusive use of bankruptcy protections not be permitted, it is significant that no changes were made to the Bankruptcy Code to disallow strip-off of liens in chapter 20 cases.”).

Notably, however, even the courts that allow chapter 20 debtors to strip off wholly underwater liens from their principal residence require that such a plan be proposed in “good faith” under Sections 1325(a)(3) and (7) in order to be confirmed. While the good-faith test is necessarily fact-intensive, it may not be satisfied if a chapter 20 case is filed “solely for the purposes of avoiding [a junior lien] where such avoidance was not available to [the debtor] in chapter 7, and where no independent reason exists for [the] subsequent chapter 13 filing.” *In re Tran*, 431 B.R. 230, 237 (Bankr. N.D. Cal. 2010); *see also, e.g., Davis*, 716 F.3d at 338 (“bankruptcy courts are bound to carefully scrutinize filings for good faith and dismiss cases where the debtor attempts to use a Chapter 20 procedure solely to strip off a lien”); *Waterman*, 469 B.R. at 341 (“The filing of a chapter 13 bankruptcy on the heels of receiving a chapter 7 discharge should raise a red flag as to whether the chapter 20 plan is proposed primarily as an end-run around chapter 7, or a second bite at the bankruptcy apple.”); *Fair*, 450 B.R. at 858 (“Filing a chapter 13 case [after receiving a discharge under chapter 7] solely for the purpose of the lien avoidance suggests manipulation of the bankruptcy code and is evidence of bad faith.”); *In re Crone*, 2012 WL 6212856, at *2 (Bankr. N.D. Cal. 2012) (“Where there is an interval of years between the Chapter 7 filing and the subsequent Chapter 13 and a significant change of circumstances, the Chapter 13 might well be found to be filed in good faith even though not enough time has elapsed for the debtor to be eligible for another discharge. On the other hand, a Chapter 13 filing right on the heels of a Chapter 7, with no changed circumstances, indicates a bad faith manipulation.”).

Finally, some courts have concluded that even if a lien is properly stripped in a chapter 20, the creditor is left with an unsecured claim and must be paid its pro rata share by the plan. *See Jennings*, 454 B.R. at 258; *Dang*, 467 B.R. at 237 (Bankr. M.D. Fla. 2012); *Frazier v. Real Time Solutions, Inc.*, 469 B.R. 889, 901 (Bankr. E.D. Cal. 2012); *Gloster*, 459 B.R. at 206; *Okosisi*, 451 B.R. at 96; *Hill*, 440 B.R. at 184. This view is arguably in tension with the principle that “the mortgage interest that passes through a chapter 7 liquidation is enforceable only against the debtor’s property” and “has the same properties as a nonrecourse loan.” *Johnson*, 501 U.S. at 86. Accordingly, some courts have concluded that allowing a creditor that has its lien stripped in a chapter 20 to retain an unsecured claim would impermissibly “convert[] a nonrecourse debt into a recourse debt.” *In re Sweitzer*, 476 B.R. 468, 472 (Bankr. D. Md. 2012); *see also Scantling*, 465 B.R. at 681 (“[U]pon 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 section 506 valuation—nor an unsecured claim enforceable against the debtor—by virtue of the prior discharge.”); *Quiros-Amy*, 456 B.R. at 147 (Bankr. S.D. Fla. 2011) (explaining that in a chapter 20 case, due to chapter 7 discharge, “the junior lienholder’s claim cannot be an unsecured claim”).

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Case Timeline: *Bank of America, N.A. v. Sinkfield*

Submitted by

Isley M. Gostin

Wilmer Cutler Pickering Hale and Dorr LLP

Edited by:

Craig Goldblatt

Danielle Spinelli

Wilmer Cutler Pickering Hale and Dorr LLP

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By Isley M. Gostin, WilmerHale

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1989: In *Folendore v. Small Business Administration*, 862 F.2d 1537 (11th Cir. 1989), the Eleventh Circuit held that § 506(d) permits a debtor to “strip off” a wholly underwater lien. In *Folendore*, the creditor held an allowed claim secured by a junior mortgage on the debtors’ property. *Id.* at 1538. Its lien was completely underwater because the property’s value was less than the outstanding debt on the senior mortgage loans. *Id.* The Eleventh Circuit reasoned that because § 506(a) treats the portion of a secured claim in excess of the value of the security as unsecured, the creditor had no “allowed secured claim” within the meaning of § 506(d), and its lien could thus be stripped off entirely. *Id.* at 1539.

1992: In *Dewsnup v. Timm*, 502 U.S. 410 (1992), the Supreme Court held that § 506(d) does not permit a chapter 7 debtor to “strip down” a partially underwater lien securing an allowed claim. In seeking to strip down the creditor’s underwater lien to the value of the collateral, the debtor in *Dewsnup* expressly relied on *Folendore* and made the same statutory argument that the Eleventh Circuit had accepted in *Folendore*. Reply Br. 13, *Dewsnup*, No. 90-741 (U.S. July 26, 1991). The Supreme Court rejected that argument. The Court reasoned that that “the words ‘allowed secured claim’ in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a).” 502 U.S. at 415. “Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and second, secured.” *Id.* Where a claim “has been ‘allowed’ ... and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d).” *Id.* That construction, the Court explained, gives § 506(d) “the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed.” In reaching that conclusion, the Court emphasized the longstanding principle that “liens pass through bankruptcy unaffected.” 502 U.S. at 417. It explained that the basic bargain of a mortgage requires that “the creditor’s lien stays with the real property until the foreclosure,” and any appreciation in the property’s value “rightly accrues to the benefit of the creditor, not to the benefit of the debtor [or] of other unsecured creditors.” *Id.*

May 11, 2012: In *McNeal v. GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012)—originally an unpublished, non-precedential opinion—the Eleventh Circuit held that its prior decision in *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989), controlled analysis of the question of whether a junior lien that is completely underwater is “voidable under the plain language of section 506(d).” *McNeal*, 735 F.3d at 1265 (quoting *Folendore*, 862 F.2d at 1538-39). The *McNeal* panel acknowledged the Supreme Court’s intervening decision in *Dewsnup* and that “[s]everal courts,” including the Fourth and Sixth Circuits, had determined that *Dewsnup* precluded such a strip-off. *Id.* at 1265. But, relying on the Eleventh Circuit’s “prior panel precedent rule”—which states that “‘a later panel may depart from an earlier panel’s decision only when the intervening Supreme Court decision is clearly on point,’” *id.* (quoting *Atl. Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir.

2007))—the *McNeal* panel concluded that it was bound by *Folendore* notwithstanding *Dewsnup*: “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.” *Id.*

December 18, 2012: David Lamar Sinkfield filed a chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of Georgia.

February 26, 2013: Sinkfield filed a motion to “strip off” Bank of America’s junior lien on his property pursuant to § 506(d). The motion alleged that Sinkfield had two mortgage liens on his house—the first securing a senior mortgage of \$102,000 and the second (Bank of America’s lien) securing a junior mortgage of \$21,300. It also alleged that Sinkfield’s house was worth \$90,000, and therefore, Bank of America’s second lien was wholly underwater.

April 29, 2013: In light of *McNeal*’s conclusion that *Folendore* remained binding precedent, and to obtain prompt resolution of the issue, the parties agreed to resolve the motion by stipulated order. The bankruptcy court entered a “Stipulated Order Resolving Contested Matter Subject to Right of Appellate Review.” The order stated that the Bank’s lien could be stripped off under *McNeal*, but expressly reserved the Bank’s right to appeal.

April 30, 2013: Bank of America filed a notice of appeal to the U.S. District Court for the Northern District of Georgia.

May 8, 2013: On appeal in the District Court, the parties filed a “Joint Motion for Summary Affirmance Subject to Appellate Review.” The motion (a) acknowledged that “a challenge to *McNeal* and *Folendore* in [the district court] would be futile, and that such a challenge would appropriately be heard in the Court of Appeals or the Supreme Court;” (b) asked the District Court to summarily affirm the decision of the Bankruptcy Court to allow Bank of America “to seek review in the Court of Appeals for the Eleventh Circuit and/or in the U.S. Supreme Court in the most efficient manner;” and (c) reserved Bank of America’s right to appeal.

May 10, 2013: The District Court entered an order and judgment granting the joint motion for summary affirmance and affirming the decision of the Bankruptcy Court.

May 10, 2013: Bank of America filed a notice of appeal to the U.S. Court of Appeals for the Eleventh Circuit.

May 16, 2013: On appeal in the Eleventh Circuit, the parties filed a joint motion for summary affirmance asking the court of appeals to summarily affirm the judgment below. As explained in the motion, the parties appreciated that, in light of the Eleventh Circuit’s “prior panel precedent rule,” any panel of the Eleventh Circuit would—like the panel in *McNeal*—be bound to follow the holding of *Folendore*. The parties’ motion therefore requested that the court either summarily affirm the judgment below to permit Bank of America promptly to seek en banc review and/or review in the U.S. Supreme Court, or if the court concluded that a panel would be free to disregard *Folendore*, set an expedited schedule for briefing and argument.

May 28, 2013: The Court of Appeals issued jurisdictional questions to Bank of America, asking the Bank to address (1) whether Bank of America had standing to “challenge the bankruptcy

court order which it invited and to which it stipulated for the express purpose of reaching a final judgment and challenging this Court's prior, unpublished and non-precedential opinion in *McNeal*"; and (2) "whether immediate review of the legal issue could have been obtained by direct certification to the court of appeals pursuant to 28 U.S.C. § 158(d)(2)(A)."

July 12, 2013: Bank of America filed a response to the Eleventh Circuit's jurisdictional questions. With respect to the first question, Bank of America explained that it had Article III standing to challenge an order stripping its lien because all of the stipulated orders (and motions) below expressly preserved the Bank's right to appeal. The Bank further explained the non-precedential nature of *McNeal* did not call into question the court's jurisdiction over the appeal: Bank of America was entitled to appeal the district court's final judgment to the Eleventh Circuit as a matter of right under 28 U.S.C. § 158(d)(1), and the district court's reasoning, or the nature of the precedent it relied on in reaching its decision, could not take away that right or deprive the Court of Appeals of jurisdiction. With respect to the second question, Bank of America explained that it could have sought to certify a direct appeal of the Bankruptcy Court's judgment to the Court of Appeals under 28 U.S.C. § 158(d)(2)(A), but that it was not required to do so, and its choice not to seek direct appeal did not affect its ability to appeal as a matter of right.

July 12, 2013: Bank of America filed a petition for hearing en banc, explaining that en banc review was warranted because only the Eleventh Circuit sitting en banc could decide whether *Folendore* should be overruled in light of *Dewsnup*.

July 30, 2013: The Eleventh Circuit issued a finding of "probable jurisdiction" based on Bank of America's response to the court's jurisdictional questions.

July 30, 2013: The Eleventh Circuit panel issued an order granting the parties' motion and summarily affirming the district court, noting that the parties "jointly request[ed] summary disposition of this appeal to allow [Bank of America] to seek *en banc* review in this Court and/or petition the Supreme Court for a writ of certiorari regarding the continued viability of *Folendore*." The panel also deemed the petition for hearing en banc to be moot.

August 2, 2013: The Eleventh Circuit ordered that its decision in *McNeal* be published.

August 9, 2013: Bank of America filed a petition for rehearing en banc, requesting that the en banc court of appeals reconsider and overrule *Folendore* and *McNeal*.

September 9, 2013: The Eleventh Circuit construed the petition for rehearing en banc as a motion for reconsideration of the summary affirmance order and referred it to the panel, which denied the motion for reconsideration without explanation.

December 9, 2013: Bank of America filed a petition for a writ of certiorari in the Supreme Court, asking the Court to resolve the circuit split between the Eleventh Circuit on the one hand and the Fourth, Sixth, and Seventh Circuits on the other on the issue of whether § 506(d) permits a chapter 7 debtor to "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.

January 29, 2014: After Sinkfield failed to file a response to the cert petition, the Supreme Court requested that such a response be filed.

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February 29, 2014: Sinkfield filed a response to Bank of America's cert petition. The National Association of Consumer Bankruptcy Attorneys filed an amicus brief in opposition to certiorari.

March 11, 2014: Bank of America filed a reply brief in support of certiorari.

March 31, 2014: The Supreme Court denied Bank of America's petition for a writ of certiorari.

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Lien Stripping in Consumer Bankruptcy Cases

Submitted by

Ashley Dillman Bruce
Berger Singerman, LLP, Fort Lauderdale, Florida

Lien Stripping in Consumer Bankruptcy Cases

I. LIEN STRIPPING IN CHAPTER 7

In *Dewsnup v. Timm*, 502 U.S. 410 (1992), the United States Supreme Court held that 11 U.S.C. § 506(d) does not permit a chapter 7 debtor to “strip down” or “cram down” a mortgage lien to the current value of the collateral. The question presented to many courts is whether § 506(d) permits a chapter 7 debtor to “strip off” a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral. The answer to that question turns on the construction of § 506, which governs the treatment of undersecured claims. Section 506(d) provides in part 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) then bifurcates a creditor’s undersecured claim into a secured claim for the present value of the collateral and an unsecured claim for the remainder.

The Fourth, Sixth, and Seventh Circuits have held that a debtor may not strip off a lien securing an allowed claim under § 506(d) even if the lien is wholly unsecured. The Eleventh Circuit has held the opposite.

A. Eleventh Circuit

Three years before the Supreme Court’s decision in *Dewsnup*, the Eleventh Circuit held that § 506(d) permits a debtor to cram a secured creditor’s lien down to the value of the collateral securing the creditor’s claim. In *Folendore v. Small Business Administration.*, 862 F.2d 1537 (11th Cir. 1989), the creditor held a junior mortgage on the debtors’ real property that was unsecured because the property’s value was less than the outstanding debt on the senior mortgage loan. *Id.* at 1538. The Eleventh Circuit held that because § 506(a) treats the portion of a secured claim in excess of the value of the security as unsecured, the creditor had no “allowed

Lien Stripping in Consumer Bankruptcy Cases

secured claim” within the meaning of § 506(d). *Id.* Therefore, the creditor’s lien could be stripped off. *Id.* at 1539.

Certain lower courts in the Eleventh Circuit understood *Dewsnup* had abrogated *Folendore* but the Eleventh Circuit recently reaffirmed its holding in *Folendore* in *McNeal v. GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012). While recognizing that other courts of appeals have determined that *Dewsnup* precluded such a strip-off and that *Dewsnup* “seems to reject the plain language analysis that we used in *Folendore*,” the Eleventh Circuit concluded that, in light of its “prior panel precedent” rule under which a later panel may depart from an earlier panel’s decision only when the intervening Supreme Court decision is clearly on point, *Folendore* controlled the case. *Id.* at 1265. The Eleventh Circuit reasoned that *Dewsnup* was not “clearly on point” because it “disallowed only a ‘strip down’ of a partially secured mortgage lien and did not address a ‘strip off’ of a wholly unsecured lien.” *Id.* This position was again reaffirmed in April 2014 by Judges Holcombe Pryor, Beverly Baldwin Martin, and James Larry Edmondson in *Bank of America, N.A. v. Bello*, No. 14-10062, 2014 WL 1492738 (11th Cir. Apr. 17, 2014) and in numerous other unpublished opinions.¹

Lower courts throughout the circuit have obeyed *McNeal* as it is now a published opinion and rehearing has been denied. Until the court rehears this issue *en banc* (several petitions of which have already been denied) this is the law of the circuit. Indeed, my recent article traced the following of *McNeal* by the Bankruptcy judges in the Southern District of Florida prior to *McNeal*’s publication and prior to denial of *en banc* review.

1. Bruce & Popowitz, Get Busy Stripping until the Eleventh Circuit Says Otherwise, 2 Bankruptcy Bar Association Journal (2013).

¹ See *Bank of America, N.A. v. Toledo-Cardona*, No. 13-15855, 2014 WL 1924640 (11th Cir. May 15, 2014); *Bank of America, N.A. v. Malone*, No. 13-13688, 2014 WL 1778982 (May 6, 2014); *Bank of America, N.A. v. Caulkett*, No. 14-10803, 2014 WL 2109054 (11th Cir. May 21, 2014).

Get Busy Stripping until the Eleventh Circuit Says Otherwise

By Ashley Dillman Bruce and Ashley Prager Popowitz



Ashley Dillman
Bruce



Ashley Prager
Popowitz

Last year, in *In re McNeal*,¹ the U.S. Court of Appeals for the Eleventh Circuit held that second-priority mortgage liens may be eliminated completely (*i.e.*, “stripped off”) in chapter 7 bankruptcy proceedings when the underlying collateral is worth less than the amount of the first-priority mortgage. While this practice has been commonplace in chapter 13 cases since 2000,² this ruling in a chapter 7 case represents a significant change in how judges in the Southern District of Florida will view motions to strip off second-priority mortgages.

The facts in *McNeal* were simple and the analysis was concise. The chapter 7 debtor listed her home as subject to two mortgage liens. The first mortgage lien consumed all of the equity in the property, such that the second lien was left completely unsecured. The debtor argued that, because the second-priority lien was wholly unsecured, it was void and should therefore be stripped off pursuant 11 U.S.C. § 506(d).

As noted in the opinion, a majority of other courts faced with this issue have held that a chapter 7 debtor cannot strip off a wholly unsecured junior lien. These courts have relied on the U.S. Supreme Court decision *Dewsnup v. Timm*,³ which held that a chapter 7 debtor

ABOUT THE AUTHORS

Ashley Dillman Bruce, Esq. is an associate in Berger Singerman’s Fort Lauderdale office and focuses on complex business reorganization and dispute resolution matters. Dillman Bruce can be reached at ADBruce@bergersingerman.com. **Ashley Prager Popowitz, Esq.** is an associate at Leiderman Shelomith and concentrates on individual and small business bankruptcies. Prager Popowitz can be reached at APopowitz@slawfirm.net.

cannot “strip down” a partially secured lien under section 506(d). While a majority of courts have extended the prohibition in *Dewsnup* to

“Practitioners should get busy stripping unsecured liens until the Eleventh Circuit says otherwise.”

situations where chapter 7 debtors try to strip off wholly unsecured second-priority liens, the Eleventh Circuit distinguished *Dewsnup* on that ground that it involved the strip down of a lien that was partially secured. For this reason,

the Eleventh Circuit held that *Dewsnup* did not control the facts present in *McNeal*.

Instead, the Eleventh Circuit cited *Folendore v. United States Small Business Administration*⁴ as the proper controlling authority. In *Folendore*, the Eleventh Circuit determined that an allowed claim that is wholly unsecured is voidable under section 506(d). Since *Dewsnup*, bankruptcy courts in the Eleventh Circuit have treated *Folendore* as abrogated by *Dewsnup*. For example, Judge Karen S. Jennemann held in *In re Hoffman*,⁵ that Congress did not intend to provide chapter 7 debtors with the right to avoid an allowed secured claim, even if that claim was not secured by any value in the collateral. Likewise, in *In re Gerardin*,⁶ Judges Robert A. Mark, Laurel M. Isicoff, and A. Jay Cristol applied this same reasoning in interpreting *Dewsnup* to prohibit

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Get Busy Stripping until the Eleventh Circuit Says Otherwise

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strip offs in a Chapter 7 case.⁷ Thus, notwithstanding contrary authority in several U.S. Courts of Appeals and trial courts in the Eleventh Circuit, the Eleventh Circuit saw it differently. In declaring *Folendore* as the governing law, the Eleventh Circuit ignored the majority view and held simply that the debtor could strip off the junior unsecured lien.

The significance of *McNeal* can hardly be understated, especially in this depressed real estate market. Practitioners are aware that numerous properties subject to multiple mortgage liens are worth less than the amount of the first-priority mortgage. The *McNeal* decision has left courts and practitioners in the Eleventh Circuit without much direction, as the opinion is unpublished and subject to a motion for rehearing *en banc*. Nevertheless, practitioners have now geared up to file strip off motions in pending chapter 7 cases. Some practitioners have even reopened old cases to file these “*McNeal* Motions.” What the judges in the Southern District will ultimately do remains uncertain. In the meantime, judges have been making decisions while awaiting further direction.

Judge Mark, an advocate of disallowing stripping in chapter 7 cases,⁸ has taken the lead on this issue. In a recent case, Judge Mark permitted the debtor to strip off a junior lien but only on the basis that the creditor did not object.⁹ It is notable that Judge Mark allowed this after the debtor had received a discharge and after the case had been closed for over two years. In another case, Judge Mark scheduled a final evidentiary hearing and set a briefing schedule.¹⁰ The briefing order stated that if the Eleventh Circuit grants rehearing *en banc*, then Judge Mark would defer ruling on the motion until an opinion was issued. As such, Judge Mark allowed for the lien to be stripped off because, he reasoned, *McNeal* provides a basis for granting the relief requested and the motion proceeded unopposed.

Other judges in the Southern District have followed Judge Mark’s lead. Two recent *McNeal* Motions have been granted by Judge Raymond B. Ray. The first motion was granted without an evidentiary hearing and without an objection by the lender.¹¹ In another, Judge Ray set the motion for an evidentiary hearing and has since granted the motion without any objection by the lender.¹² Judge Isicoff has also followed suit. In a recent case, Judge Isicoff allowed a debtor to strip off the junior lien because the creditor failed to raise any objection.¹³ Likewise, Judge Paul G. Hyman recently ruled that a chapter 7 debtor was allowed to strip off a second and third lien on homestead property under the *McNeal* decision.¹⁴ He is also of the opinion that the debtor has the right to this relief if the creditor does not object. Judges Erik P. Kimball and John K. Olson have also granted similar requests.¹⁵

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NOTES

¹ 477 Fed.Appx. 562, 2012 WL 1649853, at *1 (11th Cir. May 11, 2012).

² See *Tanner v. FirstPlus Fin., Inc.* (*In re Tanner*), 217 F.3d 1357 (11th Cir. 2000).

³ 502 U.S. 410 (1992).

⁴ 862 F.2d 1537 (11th Cir. 1989).

⁵ 433 B.R. 437 (Bankr. M.D. Fla. 2010).

⁶ *In re Gerardin*, 447 B.R. 342 (Bankr. S.D. Fla. 2011).

⁷ *Id.* at 345.

⁸ See *id.*

⁹ *In re Aragon*, Case No. 09-27916-RAM (Bankr. S.D. Fla. Sept. 17, 2012).

¹⁰ *In re Martin*, Case No. 11-42725-RAM (Bankr. S.D. Fla. Nov. 9, 2012).

¹¹ *In re Scialabba*, Case No. 12-29829-RBR (Bankr. S.D. Fla. Oct. 9, 2012).

¹² *In re Wollen*, Case No. 12-25993-RBR (Bankr. S.D. Fla. Dec. 11, 2012).

¹³ *In re Sasso*, Case No. 08-25034-LMI (Bankr. S.D. Fla. Jan. 11, 2013).

¹⁴ *In re McGunagle*, Case No. 12-26187-PGH (Bankr. S.D. Fla. Oct. 10, 2012).

¹⁵ See *In re Ribeiro*, Case No. 12-22151-EPK (Bankr. S.D. Fla. Nov. 27, 2012) (agreeing with *In re Gerardin* but granting the *McNeal* Motion because the relief requested was unopposed); *In re Froehlich*, Case No. 12-36634-JKO (Bankr. S.D. Fla. March 6, 2013).

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Judge Cristol has gone farther. In *In re Riera-Bertan*¹⁶ Judge Cristol granted the debtors' strip-off motion over the creditor's objection. There, the debtors obtained a \$200,000 home equity line of credit on their homestead property from a third mortgagee in 2006. They filed for relief under chapter 7 in September 2008 and were granted a discharge. In July 2012, the debtors reopened their case and filed a motion to determine the secured status of the home equity line. The value of their property was \$291,557 and according to the debtors, no equity supported the home equity line. Thus, the debtors wanted to declare the lien wholly unsecured and strip it off pursuant to *McNeal*. The creditor filed an objection, citing Supreme Court precedent and prior decisions by the Southern District. The creditor did not, however, dispute the value of the property or that there was no equity in the property securing the home equity line.

Before ultimately following *McNeal*, Judge Cristol recognized that "such a ruling seems to make good sense."¹⁷ He explained that the creditor is not prejudiced because there is no equity in the property.¹⁸ Accordingly, Judge Cristol granted the *McNeal* Motion. The *Riera-Bertan* case is significant because it is the first case in the Southern District of Florida where a judge has granted this type of relief over a creditor's pursued objection.

Another notable decision by Judge Cristol is *In re Lynch*.¹⁹ There, chapter 7 debtors, acting pro se, attempted to strip off a junior lien using the chapter 13 local form.²⁰ The local form requires that an objection be filed with the court no later than within two business days prior to the scheduled hearing. The creditor filed an opposition based on valuation of the property but the opposition was not timely filed pursuant to the local form. After considering the totality of the circumstances, Judge Cristol found the

creditor's objection was timely filed because there was no local form for such a chapter 7 motion. Because the matter involved a disputed property value, the court set the matter for a status conference and may wait for the ultimate *McNeal* outcome.²¹

The impact of *McNeal* is still unclear as we continue to wait for whether the Eleventh Circuit will grant *en banc* review. Thus far, the cases being handed down by the bankruptcy judges in the Southern District of Florida seem to imply, but do not state, that *McNeal* was improperly decided. Until *McNeal* is reversed,²² the judges will continue to find a basis for the relief requested by debtors provided there is no dispute as to a property's value. Accordingly, practitioners should get busy stripping unsecured liens until the Eleventh Circuit says otherwise. ■

NOTES

¹⁶ *In re Riera-Bertan*, Case No. 11-27057-AJC, 2013 WL 216231, at *1 (Bankr. S.D. Fla. Jan. 18, 2013).

¹⁷ *Id.* at *2.

¹⁸ *Id.*

¹⁹ *In re Lynch*, Case No. 12-27731-AJC, ECF No. 9, 35 (Bankr. S.D. Fla. 2012).

²⁰ Local Form 77 ("Chapter 13 Motion to Value").

²¹ The parties entered into an agreed order thus negating the necessity for Judge Cristol to rule on this issue. See *In re Lynch*, Case No. 12-27731-AJC, ECF No. 82.

²² The most recent developments in *McNeal* started on January 30, 2013, when the Debtor asked the Eleventh Circuit to publish its opinion. On February 22, 2013, the Eleventh Circuit entered an order staying the proceedings due to lender's ongoing bankruptcy proceedings. The order states in pertinent part:

In this appeal, Lorraine McNeal challenged the district court's affirmation of the bankruptcy court's denial of her motion to "strip off" a wholly unsecured second-priority lien on her home. After we announced a decision and opinion reversing the district court's decision and remanding for additional proceedings, [GMAC] filed voluntary petitions for Chapter 11 bankruptcy. Subject to exceptions not applicable here, the filing of a bankruptcy petition operate as an automatic stay of the "continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was . . . commenced before" the bankruptcy petition was filed. 11 U.S.C. 362(a)(1). So, this case must stand still for a while, and we will not rule on motions or substitutions of parties while the stay exists. It is therefore confirmed and ORDERED that all proceedings in this appeal are stayed. The parties are directed to inform the court when the bankruptcy court either grants relief from the automatic stay or when the automatic stay expires.

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B. Fourth, Sixth, and Seventh Circuits

While *Dewsnup* addressed a “strip down” or “cram down”—where a creditor’s lien is only partially unsecured, every court of appeals to address the issue, other than the Eleventh Circuit, has concluded that *Dewsnup*’s reasoning is equally applicable to “strip offs.”

The Fourth Circuit held that “[t]he Court’s reasoning in *Dewsnup* is equally relevant and convincing in a case like ours where a debtor attempts to strip off, rather than merely strip down, an approved but unsecured lien” in *Ryan v. Homecomings Financial Network (In re Ryan)*, 253 F.3d 778, 782 (4th Cir. 2001). The Sixth Circuit subsequently reached the same conclusion, holding that *Dewsnup* “applies with equal force and logic” to strip-offs. *Talbert v. City Mortg. Servs (In re Talbert)*, 344 F.3d 555, 556 (6th Cir. 2003). The Seventh Circuit reached the same conclusion in *Palomar v. First American Bank (In re Palomar)*, 722 F.3d 992 (7th Cir. 2013) where the court explained that § 506(d) is “best interpreted as confirming the venerable principle . . . that bankruptcy law permits a lien to pass through bankruptcy unaffected, provided that it’s a valid lien and secures a valid claim.” *Id.* at 993. Many lower courts that have addressed the issue has also held that *Dewsnup*’s reasoning forbids both strip downs and strip offs in chapter 7.

The circuit split appears destined to continue as the United States Supreme Court recently denied certiorari in *Bank of America, N.A. v. Sinkfield*, No. 13-700 (Mar. 31, 2014) which involved this very issue. Another petition for certiorari was filed in *Bank of America, N.A. in In re Caulkett* on May 23, 2014 and we await the Court’s determination of review.

II. LIEN STRIPPING IN CHAPTER 13

It is well settled that a Chapter 13 debtor cannot strip down a partially unsecured residential mortgage lien secured by the debtor’s principal residence. §§ 506(a) and 1322(b)(2); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993). But the issue of whether *Nobelman*’s holding

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extends to wholly unsecured junior liens was left open. While the Court has never addressed this precise issue, a number of circuit courts of appeal and bankruptcy appellate panels have weighed in since *Nobelman*. Every circuit court—including the Eleventh Circuit in *Tanner v. Firstplus Fin., Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000) and the Fourth Circuit in *TD Bank, N.A. v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013)—that has addressed the issue has held that § 1322(b)(2)'s anti-modification provisions do not bar a Chapter 13 debtor from stripping off wholly unsecured liens on the debtor's principal residence.² The real question arises whether a debtor may avoid a completely unsecured lien in a Chapter 13 case following a Chapter 7 case where the debtor has received a discharge.

A. Chapter 7 filing followed by Chapter 13 – “Chapter 20”

Sections 1328(f)(1) and 1325(a)(5) were added by BAPCPA and have forced courts to reconsider lien avoidance in Chapter 20. Under § 1328(f), a debtor is ineligible for a discharge if she received a discharge in a Chapter 7 case filed within the four-year period preceding the filing of the current Chapter 13 case. Although a Chapter 20 debtor cannot receive a discharge in the second case, she is nevertheless eligible to be a Chapter 13 debtor. Because a debtor cannot receive a discharge, questions arise with regard to the ability to “strip down” or “strip off” a lien in view of BAPCPA's amendments.

In the case of a strip down, some courts have concluded that a Chapter 20 debtor who cannot receive a discharge cannot eliminate the lien by paying the allowed amount of the secured claim. However other courts find that the provision in subclause (I) of § 1325(a)(5)(B)(i) that

² See *First Mariner Bank v. Johnson (In re Johnson)*, 407 Fed. Appx. 713 (4th Cir. 2011); *Suntrust Bank v. Millard (In re Millard)*, 404 Fed. Appx. 804 (4th Cir. 2010); *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606, 611-12 (3d Cir. 2000); *Bartee v. Tara Colony Homeowners Assoc. (In re Bartee)*, 212 F.3d 277, 291-93 (5th Cir. 2000); *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122, 126 (2d Cir. 2001); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002); see also *Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166, 167-68 (10th Cir. BAP 2005); *Domestic Bank v. Mann (In re Mann)*, 249 B.R. 831, 836 (1st Cir. BAP 2000).

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the creditor must retain its lien until payment of the “underlying debt determined under nonbankruptcy law.” Because of the discharge of personal liability in the previous case, the underlying debt is limited to what the creditor can recover from the encumbered property, which is its value. Alternatively, subclause (II) of § 1325(a)(5)(B)(i) provides that the lien is retained if the Chapter 13 case is “dismissed or converted without completion of the plan.” The idea is that, by negative implication, this provision does not require retention of the lien when the debtor completes plan payments.

Colbourne v. Ocwen (In re Colbourne), 550 Fed. Appx. 687 (11th Cir. 2013) is a recent unpublished opinion by Judges Beverly Baldwin Martin, Peter T. Fay, and James Larry Edmondson, where the Eleventh Circuit addressed a Chapter 13 debtor’s attempt to strip down the value of partially secured mortgage liens on investment properties. The court began with an analysis of § 1325(a)(5)(B)(i)(I) and concluded that “[a]bsent a discharge, any modifications to a creditor’s right imposed in the plan are not permanent and have no binding effect once the term of the plan ends.” *Id.* at 689. Because the claims were secured by first-priority liens that attached to value in the non-residential real estate properties, the creditor held two “allowed secured claim[s]” for purposes of §§ 506(a) and 1325(a)(5). As a result, § 1325(a)(5)(B)(i)(I) required the debtor's chapter 13 plan to provide that the creditor retain its liens until discharge or repayment of the underlying debts as determined by nonbankruptcy law. *Id.* at 690.

In the case of a strip off, many courts have disagreed as to whether a strip off is permissible in a Chapter 20 case. A minority of courts have held that any modifications to secured creditors’ rights through cram down or strip off are not effective unless and until the debtor receives a Chapter 13 discharge.³ A majority of courts, including the only circuit court of

³ *In re Pierre*, 468 B.R. 419, n.19, n.22 (Bankr. M.D. Fla. 2012); *In re Gerardin*, 447 B.R. 342 (Bankr. S.D. Fla. 2011); *In re Victorio*, 454 B.R. 759 (Bankr. S.D. Cal. 2011); *In re Lindskog*, 451 B.R. 863, 866 (Bankr. E.D. Wis.

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appeals to have, to date, addressed the issue, have held that under the bifurcation principle of § 506(a), the wholly unsecured creditor does not have an allowed secured claim, therefore subclause (I) of § 1325(a)(5)(B)(i) does not apply, and strip-off may occur notwithstanding the debtor’s inability to receive a discharge.⁴ Courts have adopted varying arguments by creditors and debtors to support their holdings:

<u>Debtor</u>	<u>Creditor</u>
<p><i>Nobelman</i> holds that § 506(a) is the correct starting point for the analysis. Section 506(a) indicates that the holder of a junior valueless lien (<i>i.e.</i>, one where the amount of the debt exceeds the value of the home) only has an allowed unsecured claim, and therefore § 1322(b)(2) acts to modify the unsecured mortgagee's rights. Treating the unsecured claim in accord with § 1325(a)(4), the lien is permanently avoided once the debtor completes the Chapter 13 plan and the case is administratively closed. Section 1327 then binds the junior mortgagee who is now left without security. Thus, the mechanism that voids the lien is plan completion and the administrative closing of the case. Creditors are also protected by § 349(b)(1)(C), which</p>	<p><i>Nobelman</i> is distinguishable and § 506 only focuses on allowed, secured, claim as dictated by <i>Dewsnup</i> and progeny. Allowing strip off without a discharge or payment of the debt would result in a <i>de facto discharge</i>.⁵ The junior lien must be treated under § 1325(a)(5)(B) which requires payment in full if a discharge is not available.</p> <p>A lien cannot be avoided until a discharge occurs and upon completion of the plan, otherwise the creditor's pre-bankruptcy rights, including its lien, are reinstated. Because subclause (I) of § 1325(a)(5)(B)(i) requires the plan to provide for the creditor to retain the lien until the debtor pays the debt or receives a discharge, strip off is not permissible when the</p>

2011); *In re Sadowski*, 473 B.R. 12, 19 (Bankr. D. Conn. 2011); *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008); *In re Amy-Quiros*, 456 B.R. 140 (Bankr. S.D. Fla. 2011).

⁴ *TD Bank, N.A. v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013); *Fisette v. Keller (In re Fisette)*, 455 B.R. 177 (B.A.P. 8th Cir. 2011); *Frazier v. Real Time Resolutions, Inc.*, 469 B.R. 889 (E.D. Cal. 2012); *In re Dolinak*, 497 B.R. 15 (Bankr. D. N.H. 2013); *In re Wapshare*, 492 B.R. 211 (Bankr. S.D.N.Y. 2013); *Wong v. Green Tree Servicing, LLC (In re Wong)*, 488 B.R. 537 (Bankr. E.D. N.Y. 2013); *In re Scantling*, 465 B.R. 671 (Bankr. M.D. Fla. 2012); *In re Okosisi*, 451 B.R. 90 (Bankr. D. Nev. 2011); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010), *aff'd*, 814 F. Supp. 2d 946 (N.D. Cal. 2011); *Grandstaff v. Casey (In re Casey)*, 428 B.R. 519 (Bankr. S.D. Cal. 2010), *subsequent determination*, 2010 WL 2679931 (Bankr. S.D. Cal. 2010); *In re Miller*, 462 B.R. 421 (Bankr. E.D. N.Y. 2011); *In re Gloster*, 459 B.R. 200 (Bankr. D. N.J. 2011); *In re Scotto-DiClemente*, 459 B.R. 558 (Bankr. D. N.J. 2011), *adhered to on denial of reconsideration*, 463 B.R. 308 (Bankr. D. N.J. 2012); *In re Waterman*, 447 B.R. 324 (Bankr. D. Colo. 2011), *aff'd*, 469 B.R. 334 (D. Colo. 2012).

⁵ Under the *de facto* discharge, the lien is: (i) characterized as an unsecured claim per § 506(a), (ii) modified per § 1322(b)(2), (iii) treated in the plan according to § 1325(a)(4), and (iv) avoided when the case is administratively closed. See §§ 1327 and 350(a). Several courts, including the Eighth Circuit BAP in *In re Fisette*, reject the *de facto* discharge argument, explaining that the discharge of *in personam* debt—the one and only thing that § 1328(f) provides for—has nothing whatsoever to do with lien stripping, that is, they are separate and distinct concepts. The best evidence of this dichotomy is the complete absence of any language in § 1328(f) that addresses lien stripping. Nothing in § 1328(f) in any way limits a chapter 13 debtor’s ability to strip off valueless lines regardless of the fact that such a debtor is statutorily ineligible for a discharge (due to the timing of the filing of the case vis-à-vis a prior discharge in chapter 7).

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<p>provides that a lien springs back if the case is dismissed.</p> <p>Allowing chapter 13 debtors—there is no such thing as a “Chapter 20” debtor—including one statutorily ineligible for a discharge to strip off valueless liens does not work a <i>de facto</i> discharge because the concept of a discharge of in personam liability is a separate and distinct concept from a debtor’s ability to strip off such liens, and nothing in § 1328(f) limits (or even addresses) a Chapter 13 debtor’s ability to do so.</p>	<p>debtor cannot receive a discharge. After plan consummation, without a discharge, the parties’ pre-bankruptcy rights are reinstated.</p>
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An ever present consideration is the good faith inquiry. Pursuant to §§ 1325(a)(3) and (7), courts have an independent responsibility to determine if the debtor’s plan is filed in good faith. Courts have taken varying views on a debtor’s good faith when a Chapter 20 debtor has filed a Chapter 13 petition with the purpose of stripping off an unsecured lien. If a debtor has filed solely for the purpose of lien avoidance, then some courts view this as evidence of bad faith and as an attempt to sidestep the *Dewsnup* holding. Others are of the view that a lien strip attempt, standing alone, is not dispositive in the analysis. Most courts apply a totality of the circumstances approach, so an assessment of good faith is fact specific and requires the court to consider a debtor’s objectives in filing the Chapter 13. If a creditor or trustee raises arguments related to a debtor’s good faith then practitioners should be ready for an evidentiary hearing on the good faith issue.

1. Eleventh Circuit

Many lower courts within the Eleventh Circuit have considered this very issue--the most notable to date is *In re Scantling*, 465 B.R. 671 (Bankr. M.D. Fla. 2012) as it is currently pending before the Eleventh Circuit in a direct appeal from the Bankruptcy Court. In *Scantling*, Judge Michael G. Williamson recognized that the right to lien strip arises out of the interplay between

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§§ 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. This is because, according to the Eleventh Circuit, the term "allowed secured claim" in § 1325(a)(5) has the same meaning as in § 506(a), *see In re Paschen*, 296 F.3d 1203, 1206 (11th Cir. 2002), and as explained below, a claim is "secured" only to the extent of the value of the underlying collateral. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239 (1989). Accordingly, a debtor can modify the rights of a wholly unsecured junior mortgage in a Chapter 13 case absent some prohibition to the contrary.

Judge Williamson examined § 1325(a)(5) as a basis to prohibit a Chapter 20 debtor from effectuating a strip-off, and concluded that a strip-off does not implicate § 1325 and relief under Chapter 13 is not contingent on eligibility for a discharge. The strip-off is effectuated through § 1327 which provides that the confirmed plan is binding on all creditors regardless of whether the creditor has accepted, rejected, or objected to the plan. 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.

Judges Gerald Tjoflat, K. Michael Moore, and Harvey E. Schlesinger, sitting for the Eleventh Circuit, heard argument in *Scantling* on April 10, 2014.⁶ The panel barraged counsel for Wells Fargo with questions related to § 506, *Nobelman*, and the practical effect of Wells Fargo retaining its unsecured lien, and how Wells Fargo was getting around *In re Tanner* in which the Eleventh Circuit, as discussed above, held that the anti-modification provisions of § 1322(b)(2) do not prevent a chapter 13 debtor from stripping off valueless liens. Interestingly,

⁶ For disclosure purposes, Berger Singerman, LLP served as appellate counsel for Ms. Scantling before the Eleventh Circuit, and attorney Paul A. Avron presented oral argument.

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the panel did not ask Ms. Scantling’s counsel a single question. The outcome of the Eleventh Circuit’s opinion is greatly anticipated and will likely end the differing views of the lower courts within the circuit.

2. Fourth Circuit

Just last year, Judges Albert Diaz and Paul V. Niemeyer on the Fourth Circuit in *Davis v. TD Bank, N.A. (In re Davis)*, 716 F. 3d 331 (4th Cir. 2013) reaffirmed Judge Wendelin I. Lipp’s opinion at 447 B.R. 738 holding that the Code does not bar the stripping off of valueless liens in a Chapter 20 case. The Fourth Circuit is the first circuit court to address this issue—which is the very issue before the Eleventh Circuit in *Scantling*. The majority started with §§ 506 and 1322(b) and reaffirmed its earlier view that Code permits the stripping off of valueless liens in Chapter 13 proceedings and moved to the question of whether any Code provision precludes the stripping off of valueless liens by Chapter 20 debtors. The majority held that “the unavailability of a discharge in the Chapter 20 context is not determinative” because “a bankruptcy discharge alters *in personam* rights, precluding an action against the debtor for personal liability.” *Id.* at 338. Lien stripping in a Chapter 20 case alters only the *in rem* liability where the creditor’s lien has no value. *Id.*

Judge Barbara Keenan dissented and relied on §§ 1325(a)(5)(B)(i) and 1328(f) in support of her view that a Chapter 20 debtor should be unable to strip off a valueless junior mortgage. *Id.* at 339. She reasoned that mere completion of a Chapter 13 plan with no accompanying discharge is not enough for a permanent modification of rights, rather the debtor’s status with his creditors is returned to the status quo ante. *Id.* at 341. Judge Keenan used the example of a debtor’s personal liability for the remaining balances on credit cards--this debt “is not eliminated by discharge and those unsecured creditors can seek payment on the outstanding debt upon plan

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completion, outside of bankruptcy.” *Id.* Thus, Judge Keenan concluded that it is counterintuitive that Congress would provide a creditor with fewer rights in a Chapter 20 case than in a normal Chapter 13 case in which liens have historically been retained until discharge. One of the bases for Judge Keenan’s view was that the term “allowed secured claim” in § 1352(a)(5) did not have the same meaning as the same term in § 506(a); however, the Eleventh Circuit has held otherwise in *In re Paschen*, 296 F.3d at 1203. Basic principles of statutory construction teach that the same language in different statutes in the same statutory scheme should be given the same meaning. *See, e.g., Barnhill v. Johnson*, 503 U.S. 393, 406 (1992) (“Normally, we assume that the same terms have the same meaning in different sections of the same statute.”).

III. CHAPTER 11

Prior to the 1994 amendments, Chapter 11 debtors could strip a home mortgagee's lien down to the value of the collateral. However, the Bankruptcy Reform Act of 1994 added § 1123(b)(5), providing in pertinent part that a plan may 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 personal residence.” Section 1123(b)(5) adapts the treatment of residential mortgages in Chapter 11 to that in Chapter 13 in accordance with the Supreme Court’s decision in *Nobelman*. *In re Silva*, No. 09-29226-AJC, 2010 WL 431771, at *2 (Bankr. S.D. Fla. Feb. 2, 2010); *Scarborough v. Chase Manhattan Mortg. Corp. (In re Scarborough)*, 461 F.3d 406, 413 (3d Cir. 2006). This provision is intended to apply only to home mortgages when the debtor is an individual and does not apply to any transaction in which the creditor acquired a lien on property other than real property used as the debtor's residence. *See In re Kendel*, No. 09-17611-AJC, 2012 WL 5723088, at *1 (Bankr. S.D. Fla. Nov. 15, 2012).

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Case Law Update on Lien Stripping in Chapter 20s and Chapter 7s

Submitted by

*Nancy J. Whaley
Standing Chapter 12 and 13 Trustee
Northern District of Georgia*

*Edited by:
Maria Joyner Kirtland
Office of Nancy J. Whaley
Standing Chapter 13 Trustee
Northern District of Georgia*

CONTRIBUTIONS TO THIS PROJECT MADE BY:

Abigail Castleberry, J.D. Candidate University of Alabama Law School

Annie Chang, J.D. Emory School of Law 2013

Robert Clark, J.D. Candidate University of Alabama Law School

Bill Knorr, J.D. Candidate University of Alabama Law School

LIEN STRIPPING CHAPTER 20 AND CHAPTER 7 CASES

I. SUPREME COURT

Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993). A chapter 13 Debtor motioned to value his second mortgage secured by his residence pursuant to § 506(a) and bifurcate the mortgage claim into secured and unsecured portions. The Debtor argued that the protection of § 1322(b)(2) applies only to the secured portion of his mortgage. The Debtor proposed no payments to the unsecured creditors. Rather than focusing on the value of the property and the claim, the Supreme Court stated that the lien holder was “indisputably the holder of a claim secured by a lien.” The lien holder’s rights are reflected in its mortgage instruments, which are enforceable under state law. The Debtor’s proposal would modify the rights of the lien holder, which is prohibited by § 1322(b)(2) where, as here, the lien holder’s interest is secured by the principal residence of the debtor.

Dewsnup v. Timm, 502 U.S. 410 (1992). A Chapter 7 Debtor commenced an adversary proceeding to determine the validity and extent of a note and trust deed held on the Debtor’s real property. The Supreme Court considered the issue of whether a debtor may strip down a creditor’s lien on real property to the value of the collateral when that value is less than the amount of the claim secured by the lien. The Court held that § 506(d) does not allow debtors to strip down a lien to the judicially determined value of the collateral, because the claim was secured by a lien and was fully allowed pursuant to § 502, and thus could not be “classified as ‘not an allowed secured claim’ for purposes of the lien-voiding provision of § 506(d).” Congress enacted the Code with the understanding that liens on real property pass through bankruptcy unaffected. A mortgagee cannot be compelled to relinquish property to a mortgagor free of a lien unless the debt is paid in full. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 579 (1935).

Johnson v. Home State Bank, 501 U.S. 78 (1991). The Supreme Court held that a mortgage debt discharged in a chapter 7 case is still a claim in a subsequent chapter 13 case even though personal liability for the claim was discharged. Applying § 502(b)(1), the court must allow the claim if it is enforceable against the debtor or debtor’s property; therefore, the in rem claim is allowed and not subject to § 506(d). Justice Marshall also noted that Congress did not intend to categorically foreclose the benefit of chapter 13 reorganization to a debtor who previously filed chapter 7 relief.

Local Loan v. Hunt, 292 U.S. 234 (1934). In September of 1930 the debtor borrowed \$300 from a loan agency that was secured by the debtor’s future earnings. In March of 1931, the debtor filed voluntary bankruptcy and an order was entered in October of 1932 discharging all provable debts and claims. The lender challenged whether the assignment of future earnings constituted a lien. The Supreme Court held that it did.

The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors.

II. FIRST CIRCUIT

A. Bankruptcy Courts

In re Dolinak, 497 B.R. 15 (D. N.H. 2013). Chapter 20 Debtor sought to modify a junior mortgage holder’s status to unsecured and to strip off the lien. The Court held that, under §506(a)(1), the Creditor was wholly unsecured. The Court also held that, as the Creditor’s claim was unsecured, §1325(a)(5) did not apply. Therefore, the Debtor was able to void the lien pursuant to §1322(b)(2). Finally, the good faith requirement is separate from the ability of the debtor to avoid the lien, and the court determined that the Chapter 13 plan was filed in good faith.

In re Hague, 331 B.R. 524 (Bankr. D. Mass. 2005). In this case, the pertinent issue was whether a Chapter 20 Debtor may avoid a judicial lien that was not avoided in a prior chapter 7. The

Court found that, because the personal liability was discharged in the chapter 7 case, the claim was a nonrecourse claim against the estate. The Court determined that the Creditor's lien could be avoided, because if the court treated a Chapter 20 debtor with fewer rights than a Chapter 13 debtor, then it would be creating two classes of chapter 13 debtors. This is not supported by the Bankruptcy Code. The Court concluded by stating that liens do not survive bankruptcy where the debt is provided for in the plan and paid in full. However, where the debt is not paid in full, a secured creditor's lien is not extinguished. In this case, the plan was ultimately not confirmed because the plan as proposed did not adequately treat the unsecured claim that resulted from the stripping of the lien. The Court also noted that the lien would be reinstated if the debtor's plan was not confirmed or full payments were not made according to the plan.

In re Quiles, 262 B.R. 191 (Bankr. D.R.I. 2001). Debtors filed a chapter 13 petition three weeks after receiving a discharge under chapter 7. The Chapter 13 Trustee objected to confirmation of the plan on grounds that the plan was not proposed in good faith. The Debtors admitted that their only purpose in filing chapter 13 was to strip off their second mortgage. The Trustee argued that the Debtors' plan was an abuse of process; in violation of the aim of chapter 13 and that the Debtors should have followed the good faith route of filing a chapter 13 case in the beginning and used some of their net disposable income to pay unsecured and undersecured creditors. The Court found that the plan was not proposed in good faith and denied confirmation of the plan.

III. SECOND CIRCUIT

A. District Courts

Rogers v. Eastern Savings Bank (In re Rogers), 489 B.R. 327 (D. Conn. 2013). The Chapter 20 Debtor appealed the decisions of the Bankruptcy Court which denied plan confirmation and the Motion for valuation of the her second mortgage lien. The motion proposed to bifurcate the Debtor's primary mortgage holder's claim into a secured claim, equal to the market value of the property, and an unsecured claim, equal to the remainder of the claim. The plan also proposed that once bifurcated the Creditor would receive no payout for the unsecured portion of the claim due to the prior discharge. The holding of the Bankruptcy Court relied on 11 U.S.C. § 1325(a)(5)(B)(i)(I) lien retention requirement and the Debtor's inability to receive a discharge. The District Court affirmed the lower Court's ruling but for the reason that cram down of the under secured rather than unsecured mortgage lien was prohibited by the anti-modification provision of 11 U.S.C. § 1322 and thus the inability for discharge was irrelevant. The Court noted that an attempt to modify the in rem lien in a Chapter 13 plan, after having received a Chapter 7 discharge of the in personam liability was not properly characterized as a successive action filed to circumvent Chapter 7 because the in rem lien is separate from the personal liability and that a discharge is not necessary to the avoidance of a lien.

B. Bankruptcy Courts

In re Saric, 2013 WL 6536752 (Bankr. N.D. N.Y. 2013). A Chapter 7 Debtor sought to void the lien of a junior mortgage holder who was wholly unsecured. The Court refused to extend the holding from In re Pond to Chapter 7 cases due to the lack of any parallel provision to §1322(b)(2) for Chapter 7 cases. Pond v. Farm Specialist Realty (In re Pond), 252 F.3d 122 (2nd Cir. 2001) (holding that the Chapter 13 anti-modification exception does not protect junior lienholder from having their lien stripped, when the lien is valueless and therefore wholly unsecured). As there is nothing in the statutory scheme granting Chapter 7 debtors the right to strip off liens, such debtors are not entitled to void liens when the claim is wholly unsecured or under secured.

In re Wapshare, 492 B.R. 211 (Bankr. S.D. N.Y. 2013). The Chapter 13 Debtor proposed to avoid a junior, wholly unsecured lien. The Court held that §1322(b)(2) did not apply to wholly unsecured claims. Additionally that, in a no-discharge Chapter 13 case, the Debtor may void the lien so long as the plan is confirmed and he completes all payments of the plan. The Court found that §1325(a)(5) did not apply because the claim was wholly unsecured claim.

In re Wong, 488 B.R. 537 (Bankr. E.D. N.Y. 2013). Chapter 20 Debtor proposed to avoid two junior wholly unsecured liens on his principal residence. The junior liens were unsecured on the basis that the primary lien was under secured, meaning there was no remaining value in the property to secure the claims of the holders of the two junior liens. The court held that, because the claims were unsecured under §506(a), they were also unsecured under §1322(b)(2) and §1325(a)(5). As such, the Debtor may

use §1322(b) to avoid the wholly unsecured liens and treat the claims as unsecured under the Chapter 13 plan.

In re Renz, 476 B.R. 382 (Bankr. E.D. N.Y. 2012). Chapter 20 Debtors filed a proof of claim on behalf of their junior mortgage holder. Additionally, the Debtors initiated an adversary proceeding in which they obtained a judgment. The judgment stated that the creditor's claim was wholly unsecured and that the creditor's lien would be avoided upon the completion of the Chapter 13 plan. All of this was done without any action by the creditor. The Debtors then attempted to have the claim withdrawn. The Court held that only the Creditor could withdraw a properly filed claim. The Trustee did not object to the Motion for Summary Judgment in the adversary proceeding which allowed the lien avoidance. However, the Trustee successfully argued that the plan was not filed in good faith at confirmation based on the fact that, the Debtors proposed to pay their primary mortgage holder outside of the plan and pay the remaining unsecured creditors 100% of their claims with no funds paid to the junior mortgage holder. Additionally, the Debtors did not propose to contribute all of their disposable income to the plan. The Court held that the plan was not filed in good faith and that the Debtors filed for bankruptcy in an attempt to abuse and unfairly manipulate the Bankruptcy Code. The Court denied Confirmation of the plan.

In re Sadowski, No. 10-21894, 2011 WL 4572005 (Bankr. D. Conn. Sept. 30, 2011). Chapter 20 debtors proposed to avoid a second mortgage lien on their home. The Court considered the issue of whether BAPCPA prohibits the avoidance of a wholly unsecured junior lien in a chapter 20 case and found that a Chapter 20 plan which attempts to strip off a wholly unsecured lien does not satisfy the lien retention requirements of § 1325(a)(5)(B)(i). The Court concluded that "the amendments to §§ 1328(f) and 1325(a)(5)(B)(i) supplement the discretionary 'good faith' requirements of § 1325(a)(3) and (7) with an objective test to prevent debtors from using Chapter 13 as a way to circumvent *Dewsnup's* prohibition against lien stripping in Chapter 7; debtors are not precluded from filing a Chapter 13 plan after receiving a Chapter 7 discharge, "but may not avoid an under secured or 'wholly unsecured' lien in doing so."

In re Miller, 462 B.R. 421 (Bankr. E.D.N.Y. 2011). Chapter 20 Debtors in two separate cases filed motions to void liens held by junior mortgage lenders on debtors' residences. Debtors argued that the junior liens were wholly unsupported by any equity in the mortgage property. Trustee objected on the ground that the debtors were ineligible to receive a chapter 13 discharge. The Court concluded that a chapter 13 debtor may strip off a wholly unsecured mortgage lien and treat the claim as unsecured under a plan, whether or not the debtor is eligible to receive a discharge. The strip off becomes effective when payments required under the plan are completed. Once administered, the case is closed, not dismissed.

Orkwis v. MERS (In re Orkwis), 457 B.R. 243 (Bankr. E.D.N.Y. 2011). Chapter 13 Debtors who were eligible for discharge sought an order from the Court in an Adversary proceeding that rendered the lien of their second mortgage holder null and void upon the entry of a default judgment order in the adversary rather than upon discharge. The Court denied the request of the Debtors' reasoning under *Dewsnup*, section 506(a) and (d) have no powers standing alone to modify the rights of mortgage lien holders. Agreeing with the reasoning of the *Fenn* and *Gerardin* courts, the Court held that the Debtors could only strip the junior mortgage lien by (1) completing their payments under their plan and by (2) obtaining a discharge. The Court noted that resolution of the "Chapter 20" issue could affect the resolution of cases which "are closed without entry of the discharge for failure to obtain a personal financial management certificate."

In re Robert, 313 B.R. 545 (Bankr. N.D.N.Y. 2004). The issue raised in this case is whether or not an adversary proceeding is required to strip off a creditor's wholly unsecured lien or if a motion is sufficient. The Court found that a Debtor may motion the Court pursuant to §506 unless the debtor challenges the validity, priority, and extent of the lien. Validity, priority, and extent of the lien refer to the (1) enforceability (existence or legitimacy of the claim itself), (2) superiority in rank and position, and (3) identification of the property encompassed by or subject to the lien. If the court values the security interest at zero, the lien shall be stripped off upon completion of the chapter 13 plan and issuance of discharge pursuant to § 506(d) without further litigation. Proper notice is required to strip off a mortgage. A debtor attempting to strip off a lien must affect service upon the mortgagee in compliance with Rule 7004. Additionally, the debtor must, in its related motion, comply with the fundamental principles of due process making clear and conspicuous the proposed treatment of the creditor's claim and the factual basis of the treatment. The Bankruptcy Court thereby granted the Debtor's Motion.

IV. THIRD CIRCUIT

A. Bankruptcy Courts

In re Cusato, 485 B.R. 824 (Bankr. E.D. Penn. 2013). An order was entered in the Chapter 13 case stating that a claim of the mortgage holder was totally unsecured. Subsequently Confirmation was denied and the case was converted to Chapter 7. The Court held that the Order stating the claim was unsecured did not strip the lien because there was no order that avoided the lien. As the Chapter 13 plan was not confirmed, the lien was never stripped, and it passed through the Chapter 13 case unaffected. Although the claim was unsecured in the bankruptcy proceeding, the lien survived. Finally, no action was taken during the subsequent Chapter 7 case to avoid the lien. The Chapter 7 discharge did not avoid the lien.

In re Scotto-DiClemente, 459 B.R. 558 (Bankr. D.N.J. 2011). Mortgage lender moved to dismiss, on bad faith grounds, the chapter 13 case filed by a chapter 20 debtor. The mortgage lender objected to the debtor's plan to strip off the second and third mortgages on his primary residence. Like the court in In re Gloster, the bankruptcy court held that "a debtor's strip-off of a wholly unsecured mortgage lien on his principal residence is not contingent upon the debtor's receipt of a chapter 13 discharge, and instead becomes effective upon completion of the debtor's obligations under his plan." The debtor's case was dismissed on other grounds: he exceeded jurisdictional limits under § 109(e). Under § 109(e), secured *in rem* claims are subject to the lien retention provisions of § 1325(a)(5). Unsecured *in rem* claims must overcome § 109(e) restraints.

In re Gloster, 459 B.R. 200 (Bankr. D.N.J. 2011). A Chapter 13 Debtor proposed a plan that provided to strip-off a wholly unsecured junior lien while the Debtor was ineligible for discharge based on a prior Chapter 7 filing. The Trustee objected to confirmation on grounds that the Debtor was ineligible for discharge and that the plan was filed in bad faith. The Court held that a chapter 13 debtor who is ineligible for discharge may strip off a wholly unsecured junior lien on the debtor's property as long as good faith is met and the plan is completed. Per the Court, the strip-off becomes effective when the debtor completes his plan payments. The Court noted that no changes were made to the Bankruptcy Code to disallow the strip-off of liens in chapter 20 cases. The Court adopted the statutory analysis applied in Hill and Okasisi that § 1325(a)(5) applies only to allowed secured claims. In addition, after consideration of the Okasisi factors, the Court found that the Debtor's case was filed in good faith.

Wells Fargo Home Mortg., Inc. v. Borkowski (In re Borkowski), 446 B.R. 220 (Bankr. W.D. Pa. 2011). The mortgage creditor motioned to vacate the Debtor's discharge and reopen the case in order to reinstate a mortgage lien on the debtor's property. The creditor argued that the debtor failed to comply with a mortgage amendment filed by the creditor that increased the mortgage payments by 2/3. The bankruptcy court reiterated Espinosa's holding, which stated that no violation of due process exists where a creditor had an opportunity to challenge an issue but slept on its rights. Furthermore, the chapter 13 trustee did not violate the due process rights of the creditor by failing to move for an adversary proceeding.

V. FOURTH CIRCUIT

A. Court of Appeals

In re Davis, 716 F.3d 331 (4th Cir. 2013). The Chapter 13 Debtor sought to void a junior mortgage lien that was not secured by any equity in real property. The Court reasoned that, given that the claim was unsecured under §506(a), as the lien had no value, §1325(a)(5) was not applicable. As BAPCPA did not modify §1322(b), the debtor has the ability to void a valueless lien in a Chapter 20 case, just as he would in a Chapter 13 case where a discharge was available. The Court also held that the good faith requirement in filing the Chapter 20 is not met when the debtor files for the sole purpose of stripping off a lien.

Dissent: The dissent in this case argued that §1325(a)(5) does not refer to §506(a) with regards to its reference to "allowed secured claims." As such, the claim need not meet the §506(a) analysis in order to remain an "allowed secured claim" under §1325(a)(5). The dissent relies on §1325(a)(5)(B)(i), which "protects the rights of such holders by providing that they retain their lien until the earlier of 'payment of the underlying debt as determined under non-bankruptcy law' or 'discharge' under Section 1328." Quoting Nobelman v. Am. Sav. Bank, the dissent also relies on the basic bankruptcy principle

stating that secured creditors are treated more favorably than unsecured creditors, and the majority's holding ignores that principle.

Ryan v. Homecomings Financial Network, 253 F.3d 778 (4th Cir. 2001). In a Chapter 7 case where the senior lienholder's claim against the Debtor was under secured the Debtor filed a complaint under § 506 (a) and (d) requesting the bankruptcy court to "strip off" the second deed of trust as wholly unsecured and void the lien. The Creditor did not respond to the complaint and thus the Bankruptcy clerk entered a default judgment in favor of the Debtor. However, the Bankruptcy Court then declined to enter a default judgment and entered an order denying the Debtors' motion holding that §506(d) does not confer on the Debtor any ability to strip off an allowed, wholly unsecured lien. The lien therefore passes through the bankruptcy unaffected. The Bankruptcy Court Judgment was affirmed by the District Court.

B. Bankruptcy Courts

In re Mulhern, 2013 WL 3992458 (Bankr. D. Md. 2013). Following the reasoning in In re Davis. The Court held that Chapter 20 debtors may strip off liens that are wholly unsecured, but the debtor may not file for Chapter 13 for the sole purpose of stripping the lien because it would not fulfill the good faith requirement of the Bankruptcy Code.

In re Sweitzer, 476 B.R. 468 (Bankr. D. Md. 2012). Chapter 13 Debtors objected to the proof of claim filed by Creditor after the Debtor received a discharge of their personal liability in a prior Chapter 7 case and then received a "strip off" order in the Chapter 13 case. The Court held that as the Creditor's "in personam rights and claims against the Debtors were discharged in their prior Chapter 7 case," those "in personam rights and claims cannot now be resurrected and allowed as an unsecured claim in this case in contravention of that discharge simply because [creditor's] in rem rights were stripped off in this case." Therefore, the Creditor had neither an in rem nor an in personam claim against the Debtor, meaning no claim could be asserted against the Debtor that would have entitled the Creditor to receive distributions in the Chapter 13 case. The Court sustained the Debtors' objection and disallowed the Creditor's claim.

Pollard v. SunTrust Bank (In re Pollard), No. 10-17396 PM, 2010 Bankr. LEXIS 3348, 2010 WL 3779096 (Bankr. D. Md. Sept. 15, 2010). The Chapter 13 Debtors proposed a Chapter 13 Plan with a provision to strip a lien. The chapter 13 trustee objected to confirmation of the plan as proposed.. The Court had already entered an order, without opposition, granting Debtors' motion to avoid the lien. The Court overruled the trustee's objection and upheld the previous order as final, noting that the holding of In re Tran "was particularly insightful."

In re Khan, No. 09-20056-SSM, 2010 Bankr. LEXIS 1965, 2010 WL 2507031 (Bankr. E.D. Va. June 16, 2010). The Court raised on its own motion the question of whether a the plan of a Chapter 20 Debtor could be confirmed when it contemplates stripping off a wholly unsecured second deed of trust against his residence. Deferring resolution of the strip-off issue, the Court concluded that a ruling on the issue would be premature since the strip-off would not be accomplished by plan confirmation. However, the court expressed its doubts on the appropriateness of such a strip-off where the debtor is not entitled to a discharge.

VI. FIFTH CIRCUIT

VII. SIXTH CIRCUIT

A. District Courts

In re Lane, 2890 F.3d 665 (6th Cir. 2006). Appellee loan servicer objected to confirmation of Appellant Debtors' Chapter 13 plan. The debt in question was a second mortgage loan on the Debtors' principal residence. The unpaid amount of the first mortgage loan exceeded the value of the property. The Debtors filed a repayment plan proposing that the servicer would be paid only as an unsecured claimant. On appeal, the question before the Court was whether modification of the servicer's rights was prohibited under the anti-modification clause under 11 U.S.C.S. § 1322(b)(2). The Court answered in the affirmative. Though the servicer's loan was secured by the Debtors' principal residence, because the first mortgage exceeded the value of the residence, the second mortgage debt could be treated as wholly unsecured for purposes of the bankruptcy case pursuant to 11 U.S.C.S. § 506(a). The servicer thus could not invoke the anti-modification clause, and its claim was subject to modification under the debtors' plan as an unsecured claim.

B. Bankruptcy Courts

In re Callander, 263 B.R. 567 (Bankr. S.D. Ohio 2001). A Creditor holding a second mortgage on the Debtor's residential real estate objected to the proposed Chapter 13 plan. The value of the real estate was less than the claim of the first mortgage holder. The Bankruptcy Court held that where a §506(a) valuation establishes that there is no equity to secure the lien, a plan of reorganization proposing to treat the creditor as wholly unsecured may be confirmed.

VIII. SEVENTH CIRCUIT

A. District Courts

In re Fair, 450 B.R. 853 (E.D. Wis. 2011). The District Court overruled the Bankruptcy Court and disagreeing with the Jarvis decision, the District Court held that a wholly unsecured junior lien on the chapter 13 debtor's principal residence could be stripped off despite ineligibility for a discharge, pursuant to § 1328(f)(1). Congress understood the distinction between modification and discharge when drafting § 1328(f)(1); therefore, the section only places limits on debtors who have received discharges within the previous four years and not lien modification or stripping. Denying discharges under § 1328(f) did not change the generally allowed practice of lien stripping under chapter 13. Additionally, § 1325(a)(5) does not apply to unsecured claims. The district court remanded the debtor's case to the bankruptcy court to determine whether the chapter 13 proceedings were conducted in good faith pursuant to § 1325(a)(3) and (7). Bad faith is evidenced by a debtor filing a chapter 13 case "solely for the purpose of the lien avoidance." Hill (citing Tran).

B. Bankruptcy Courts

Lindskog v. M&I Bank FSB (In re Lindskog), 451 B.R. 863 (Bankr. E.D. Wis. 2011). The Bankruptcy Court held that a Chapter 13 debtor may not strip a wholly unsecured second mortgage lien, because the debtor was ineligible pursuant to §1328, for a discharge. The Creditor had an allowed secured claim within the meaning of §1325(a)(5)(B)(i)(I), regardless of the fact that the creditor's secured lien had no equity. Such creditors may be treated as general unsecured creditors for dividend purposes during the bankruptcy. However, pursuant to §§ 348(f)(1)(C) and 349(b)(1)(C), the liens will "spring back" upon conversion or dismissal of the chapter 13 case. Permitting lien strips in chapter 20 cases creates a windfall and an "end run" around § 1328(f) for debtors.

Erdmann v. Charter One Bank (In re Erdmann), 446 B.R. 861 (Bankr. N.D. Ill. 2011). Chapter 13 Debtors, a husband and wife, brought an adversary proceeding to lien strip a junior mortgagee's lien. Husband and wife held the property as tenants by the entirety. The husband had previously filed for and received a discharge under chapter 7. The Court found that a lien cannot be avoided prior to discharge entered under §1328, given the best reading of § 1325 in conjunction with §§ 502 and 506. Thus, the husband's ineligibility for a chapter 13 discharge also made him ineligible to strip a lien. The Court held "Tenancy by the entirety creates a single tenancy in the marital unity. As such, neither spouse may have an ownership in the tenancy that is burdened more than the other. Only when spouses act as one may they strip the Defendant's lien." The husband's ineligibility for discharge therefor prevented either Debtor from the lien avoidance action.

In re Davis, 439 B.R. 863 (Bankr. N.D. Ill. 2010). Chapter 13 debtor moved to modify her confirmed plan to reduce her current monthly payment and shorten the term of her plan. The trustee objected on "projected disposable income" grounds. The court held that §1325(b) does not apply to a motion to modify a confirmed chapter 13 plan, and that the plan complied with applicable requirements. The court noted that the enactment of §1325 "set out detailed standards for minimum plan payments and length, removing [the *Kull*] factors from the good faith inquiry applicable to plan confirmation."

In re Fenn, 428 B.R. 494 (Bankr. N.D. Ill. 2010). Chapter 20 debtors attempted to value a wholly unsecured junior mortgage and strip the lien. The court concurred with Jarvis, holding that while a "junior lien can be valued at zero for plan confirmation purposes . . . the lien cannot be held to be unenforceable and void until the plan ends and the debtors receive a §1328 discharge." The court rejected the debtors' argument that a junior mortgage lien should be classified as void under §506(d) of the Bankruptcy Code simply because the claim is valued at zero. Rather, the court concluded that §506(a) "determines the

amount of funds a plan has to provide for the payment of a second claim; it does not by its terms or operation disallows claims.” The court held that §§1322(b)(2), 1325(a)(5) and 506(d) can be reconciled to mean that § 506(d) allows lien avoidance where the claim secured by the lien has been disallowed, and that § 1325(a)(5) governs the subject of lien retention in chapter 13 plans.

Blosser v. KLC Fin., Inc. (In re Blosser), No. 07-28223-svk, 2009 Bankr. LEXIS 1049, 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2009). A Chapter 13 Debtor, who was ineligible for a discharge due to a recent chapter 7 discharge, filed a motion to strip a wholly unsecured junior mortgage on his residence. Denying the Debtor’s motion, the Court chose instead to follow the reasoning of Jarvis and did not allow the lien avoidance. The Court reasoned that allowing a debtor to file chapter 7, discharge all dischargeable debts, and then immediately file chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the chapter 7 itself. Avoidance of a lien is contingent on a chapter 13 discharge. The Court found that lien stripping when ineligible for discharge does not comport with congressional intent, as evidenced by (1) the four-year bar of § 1328(f) and (2) the provisions in §§ 348(f)(1)(C) and 349(b)(1)(C) allowing avoided liens to “spring back” upon conversion or dismissal of a chapter 13 case.

In re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008). The debtor’s plan proposed to strip off a wholly unsecured junior mortgage pursuant to §506(d) upon confirmation of the chapter 13 plan. The debtor had previously received a chapter 7 discharge and was therefore ineligible for a chapter 13 discharge. The bankruptcy court held that a debtor’s inability to receive a chapter 13 discharge precluded the debtor from stripping off the lien. In arriving at this decision, the court noted that “a no-discharge Chapter 13 case may certainly be utilized to obtain the protections of the automatic stay for the purpose of proposing a plan to make payments on debts. A no-discharge Chapter 13 case may not, however, result in a permanent modification of a creditor’s rights where such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted. This Court can find no evidence that, by adding new §1328(f), Congress intended to expand debtors’ remedies in the way that the Debtor here proposes.” Though the effects of lien avoidance may begin at confirmation, actual lien avoidance occurs upon completion of the plan and the receipt of a discharge. The court denied confirmation of the plan, with leave to file an amended plan.

In re Lilly, 378 B.R. 232 (Bankr. C.D. Ill. 2007). A creditor objected to the confirmation of the debtor’s chapter 13 plan. The plan proposed to cram down the interest rate of an automobile purchased within 910 days of filing. The court overruled the creditor’s objection to the interest rate modification. The lien retention provision of §1325(a)(5)(B)(i) does not override or cancel out a debtor’s power to modify the terms of the contract under § 1322(b)(2) and cram down a secured claim at the Till rate. Nonetheless, the court held that where a debtor does not receive a discharge, any modifications to a creditor’s rights imposed in the plan are not permanent and have no binding effect once the term of the plan ends. The amount of the debt under nonbankruptcy law is the full amount of the obligation owed to the creditor. The collectability of that debt, whether from the debtor or the collateral, does not impact the amount of the underlying obligation.

In sum, the debtor, while in bankruptcy, “is permitted to exercise her right to modify and pay the claim using the lower *Till* rate. . . . [H]owever, the debtor remains liable for, and the collateral continues to secure, the remaining balance determined with interest at the contract rate, after she exits bankruptcy.”

In re King, 290 B.R. 641 (Bankr. C.D. Ill. 2003). Junior mortgagee moved for relief from stay in order to foreclose on its mortgage. Chapter 13 Debtors, who had received a chapter 7 discharge within the previous year, objected on the ground that the lien had been stripped off as part of the plan confirmation process. The Bankruptcy Court held that chapter 13 debtors could strip off a wholly unsecured, junior residential mortgage lien. It also held that the “lien-avoiding effect of the confirmed plan, while established at confirmation, is contingent upon a discharge.” The creditor had no duty to release its mortgage until discharge. Thus, the creditor’s mortgage lien would remain in effect if the debtor did not receive a discharge.

IX. EIGHTH CIRCUIT

A. Bankruptcy Appellate Panel

Fisette v. Keller (In re Fisette), 455 B.R. 177 (B.A.P. 8th Cir. 2011). Debtor was ineligible for a chapter 13 discharge because he had received a chapter 7 discharge within the previous year. The debtor’s plan proposed to avoid two junior liens on his principal residence. The trustee objected. The

panel held that a chapter 13 debtor may strip off a wholly unsecured lien on his principal residence without violating the Code's antimodification provision. Strip off does not depend on the debtor's eligibility to receive a chapter 13 discharge, and is effective once the debtor completes his obligations under the plan. Section 1325 does not include eligibility for discharge as a requirement for plan confirmation. The requirements under § 1325(a)(5) only apply when the collateral has value to support the lienholder's claim. Otherwise, the requirements do not apply.

In addition, the court argued that a strip off of a wholly unsecured junior lien does not equate to a "de facto discharge." Rather, the panel stated that the debtor "avoids[s] the lien[s]."

X. NINTH CIRCUIT

A. Court of Appeals

Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002). A Chapter 13 Debtor proposed to avoid the wholly unsecured junior mortgage lien on their principal residence. The Court of Appeals held that anti-modification protection is available only to holders of secured claims, and that a wholly unsecured lien on a primary residence may be avoided in a chapter 13 proceeding. The Ninth Circuit adopted the majority view that § 1322(b)(2) did not prohibit the modification of the wholly unsecured lien that was secured by a security interest in real property. Utilizing the Supreme Court's three-part rationale from Nobelman, the Ninth Circuit held that courts should first determine the value of the claim using § 506(a), and then determine whether the party has a secured claim for purposes of § 1322(b)(2). The claim holder was not the holder of a secured claim under the definitions provided in the Bankruptcy Code, and therefore its rights could be modified under § 1322(b)(2). In this case, the lender was a holder of a claim secured only by a security interest in real property that was the debtor's home. Nonetheless, because the lender was still not a holder of a secured claim, it could not qualify for antimodification protection.

Lam v. Investors Thrift (In re Lam), 211 B.R. 36 (B.A.P. 9th Cir. 1997). Chapter 13 Debtors filed an adversary proceeding against a creditor holding a fourth deed of trust on their primary residence, seeking to have the lien stripped off as a wholly unsecured lien. The Bankruptcy Appellate Panel held that the Code's antimodification provision does not extend to "secured" creditors holding completely unsecured claims. The panel concluded that the Nobelman decision, barring chapter 13 plans from modifying the rights of holders of claims secured only by the debtor's principal residence, does not apply to holders of totally unsecured claims. While the creditor in Nobelman was partially secured, the creditor here was completely unsecured. There was no value to which the security interest could attach.

B. Bankruptcy Appellate Panel

Downey Sav. & Loan Ass'n v. Metz (In re Metz), 67 B.R. 462 (B.A.P. 9th Cir. 1986) (Elliot, J., dissenting). Within six months of receiving a chapter 7 discharge, the Debtor filed two consecutive chapter 13 cases. The Court held that this fact alone was insufficient evidence of bad faith on the debtor's part. Good faith is tested on a case-by-base basis, with a review of the totality of the circumstances. The court noted in dicta that "Chapter 20's are generally undesirable."

C. District Courts

Frazier v. Real Time Resolutions, Inc. (In re Frazier), 469 B.R. 889 (E.D. Cal. 2012). The Court affirmed the holding of the Bankruptcy Court. Under §1322(b)(2), a wholly unsecured junior lien on the debtor's principal residence may be removed in chapter 20 despite the operation of § 1328(f)(1). Section 1328(f)(1) only prohibits discharge, not lien stripping. No discharge is required. A lien strip becomes permanent upon completion of all plan payments.

"Lien avoidance becomes permanent upon completion of all payments under the plan. However, confirmation of a chapter 13 plan is subject to findings that the plan (1) was filed in good faith, (2) meets the best efforts test, (3) meets the best interests of creditors test, and (4) is feasible. The court, in accord with other Ninth Circuit courts, generally considers four factors in determining good faith."

B. District Court

In re Grignon, No. 10-34196-tmb13, 2010 Bankr. LEXIS 4279, 2010 WL 5067440 (Bankr. D. Or. Dec. 7, 2010). The bankruptcy court held that a debtor who is ineligible for a chapter 13 discharge

due to §1328(f) can strip a wholly unsecured lien from real estate. The court rejected the analysis of Blosser, Jarvis, and Mendoza, and agreed with Tran, concluding that “nothing in the Bankruptcy Code precludes a debtor that is not eligible for a discharge from filing a chapter 13 case, obtaining confirmation, and with the exception of discharge, from enjoying all of the rights of a chapter 13 debtor, including the right to strip off liens.” The court also noted that the debtor must proceed in stripping the lien with an adversary proceeding due to the local rules stipulating that a “motion to avoid a lien is only available to debtors who are eligible for discharge.”

C. Bankruptcy Court

In re Frazier, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *aff'd*, Frazier v. Real Time Resolutions, Inc. (In re Frazier), 469 B.R. 889 (E.D. Cal. 2012). Debtors filed a case under Chapter 13 nine days after receiving their discharge in a Chapter 7 case and were thus ineligible for a chapter 13 discharge. Among the debts still in existence was a junior mortgage on their principal residence. The junior mortgage holder objected to the confirmation of the debtors’ plan. It argued that pursuant to § 1325(a)(5), the plan was not filed in good faith and the mortgage was secured. The bankruptcy court reviewed the secured interest of the claim holder and the good faith intention of the debtors. After a § 506(a) evaluation, the court held that the junior lienholder was unsecured, because there was no value to which the creditor’s interest could attach. Further, the lienholder had no sufficient basis for asserting rights under §1325(a)(5), leaving it with a lien and an unsecured claim. The Court then applied the totality of the circumstances test, holding that the plan was proposed in good faith. The court confirmed the plan with the value of the junior mortgage holder’s claim at zero, since it was wholly unsecured.

“By the §506(a) valuation the court does not remove or ‘strip’ the lien from the property. Rather, upon the completion of the chapter 13 plan and payment of the value in the collateral securing the claim, there is no obligation remaining to be secured by the lien. With the obligation satisfied, the creditor is required under the terms of the note, deed of trust, and applicable state law to reconvey the deed of trust. In addition, § 506(d) provides that to the extent that a claim against the debtor is not an ‘allowed secured claim’ and the lien securing the claim is void.”

In re Okosisi, 451 B.R. 90 (Bankr. D. Nev. 2011). Debtors filed Chapter 13 after having received a discharge in a Chapter 7 case, and were thus ineligible to receive a Chapter 13 discharge. The Debtors proposed a plan, which sought to incorporate a previously granted motion to avoid a wholly unsecured lien on their primary residence. The Chapter 13 Trustee objected to the plan on the ground that the plan was not proposed in good faith. The court held that lien avoidance is permanent upon the debtor’s completion of the plan in a no-discharge chapter 13. The Court held that unsecured creditors’ rights are subject to modification. In characterizing mortgage debt in a chapter 20, the court found that a creditor with an unsecured claim—such as a creditor whose lien has been avoided—is “entitled to participate in the pro-rata distribution made to general unsecured creditors.”

Prior to the enactment of BAPCPA, chapter 13 cases could end in only one of three ways: (1) conversion, (2) dismissal, or (3) discharge. The court noted that the addition of § 1328(f) under BAPCPA added a fourth possibility to this list: completion of all plan payments without discharge. Because this type of case ends in closure without discharge, rather than dismissal, the sections of the code addressing lien reversal upon conversion or dismissal are inapplicable. Furthermore, the court argued that § 1327 favors this result. Under § 1327(a), confirmation vests the property of the estate in the debtor “free and clear” of any creditors’ interests or claims contained in the plan.

The Court held that the plan was proposed in good faith. The Court found four factors to be determinative: (1) the debtors had a need for bankruptcy outside of avoiding the lien; (2) the debtors acted equitably in proposing the plan (i.e., significant repayment and valid reorganization purpose); (3) the debtors devoted all of their income to the plan; and (4) the debtors did not use serial filings to avoid payment.

In re Hill, 440 B.R. 176 (Bankr. S.D. Cal. 2010). The court held that nothing in 11 U.S.C. §§ 506, 1322, 1325, 1328(f), or any other section of the Bankruptcy Code provides that a chapter 13 debtor’s right to modify or strip off liens is conditioned on the debtor’s eligibility for a discharge. The court established that §506(d) does not authorize lien strips, but found that § 1322 does authorize lien strips. See Nobelman v. American Savings Bank, 508 U.S. 324, 327-29 (1993). The creditor did not oppose the lien strip motion or object to the plan, which valued the creditor’s secured and unsecured claim at zero. Chapter 13 trustee objected to confirmation on bad faith grounds. Court rejected the argument of bad faith because the debtors had a need for the bankruptcy other than the lien strip. In addition, the debtors acted equitably and with good intentions, devoted all of their income to the plan, and did not use serial

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filings to avoid payment to creditors. The court granted the motion to void the lien and confirmed the plan. However, the court would not allow the claim in the amount of zero.

In re Jazo, No. 09-16609-JM13, 2010 Bankr. LEXIS 3534, 2010 WL 3947303 (Bankr. S.D. Cal. Sept. 28, 2010). Debtors moved to strip off junior lien on debtor's principal residence. No opposition, but court took it under submission because of previous chapter 7 discharge. Court agreed to sign the lien strip order so long as it does not purport to permanently avoid or grant a de facto discharge of the underlying debt when the debtors are not eligible for a discharge. The court stated that it would not sign a lien strip order in a chapter 20 case containing language that would seem to permanently alter a creditor's rights other than by payment in full without eligibility for discharge. The court left the issue as to whether the plan could be confirmed for the confirmation hearing.

In re Kelley, No. 09-17318-LA13, 2011 Bankr. LEXIS 2887, 2011 WL 3107720 (Bankr. S.D. Cal. July 19, 2011). Chapter 20 debtors' plan proposed to avoid a wholly unsecured second trust deed. The court held that the plan could not be confirmed because debtors could not avoid the lien without a chapter 13 discharge. Basing its order on the decision in In re Victorio, the bankruptcy court found that administrative closing without discharge "seek[s] to evade the restoration of the otherwise avoided lien that Congress intended, as set out in 11 U.S.C. §§ 348, 349. . . . [T]his Court is not persuaded that at the same time that Congress enacted § 1328(f) to limit the previously unlimited availability of discharges in serially filed cases, the Congress also intended to grant a *de facto* discharge of junior lien liability when no discharge is available by statute."

In re Tran, 431 B.R. 230 (Bankr. N.D. Cal. 2010). The Bankruptcy Court combined two chapter 13 cases into one opinion: In re Tran and In re Bennett. Both Tran and Bennett filed chapter 7 and received discharges within the previous four years; therefore, neither debtor was eligible for a chapter 13 discharge. The chapter 13 trustee objected to the plan filed by the debtors. She requested dismissal of Tran's case and objected to the lien stripping within Bennett's plan. The trustee argued that the debtors could not strip off the wholly unsecured junior mortgage, because the debtors were ineligible for a chapter 13 discharge. The court reasoned that §109 "does not condition a debtor's eligibility for relief under chapter 13 on the debtor's eligibility for a discharge. Nor does § 109 preclude Chapter 13 relief to a debtor that has recently received a discharge in Chapter 7."

Pursuant to §§506(a) and (d), the Court held that a chapter 13 debtor may strip off a lien on the "principal residence if the lien is completely unsecured based on the value of the residence and the amount of the senior loans." The court agreed with Hart v. San Diego Credit Union, 449 B.R. 783 (S.D. Cal. 2010), and In re Casey, holding that nothing in §§506, 1322, or any other section in title 11 condition a "chapter 13 debtor's right to strip off a wholly unsecured junior lien on the debtor's eligibility for a discharge." The right to strip off the lien is conditioned on 1) a good faith plan filing, 2) chapter 13 plan confirmation, and 3) full performance under the plan.

Pursuant to §1325(a)(3), the court may not confirm a plan absent a finding that the plan was proposed in good faith. Because Tran proposed only nominal repayment, the court dismissed her case as an unfair manipulation of the Bankruptcy Code.

Grandstaff v. Casey (In re Casey), 428 B.R. 519 (Bankr. S.D. Cal. 2010). The creditor moved for relief from stay to foreclose on her third position trust deed. Under the Bankruptcy Code there are only two ways to make an enforceable debt go away permanently. One is to pay it in full. The other is to obtain a permanent discharge of any remaining obligation. In a chapter 20, there can be no discharge and conversion is not an option. Without discharge, dismissal is the necessary result when a plan leaves one or more debts wholly or partially unpaid. Any other outcome would give the debtor a de facto discharge when by statute no discharge is available. Where a debtor does not receive a discharge, any modifications to a creditor's rights imposed in a plan are not permanent and have no binding effect once the term of the plan ends. Even if not eligible for a discharge, a debtor may file a chapter 13 petition and invoke lien-strip mechanisms, subject to § 1325 and the rest of the Code. Without a discharge, the only way to erase a debt is to pay it in full at the amount it would be under nonbankruptcy law.

In re Burnett, 427 B.R. 517 (Bankr. S.D. Cal. 2010). Following entry of an order granting a chapter 13 debtor's motion to value collateral and avoid a junior trust deed on the debtor's home, the trustee alleged a requirement of discharge. The court found that "the availability of discharge is not a requirement for eligibility to file a chapter 13 case or, within that case to seek a lien avoidance pursuant to § 1322(b)(2)." However, the court held that should the debtor not complete her plan and earn a discharge, then "all her less than fully paid obligations spring back as on-going liabilities, with all accruals under applicable non-bankruptcy law of interest and the like, as if no bankruptcy had been filed."

Hart v. San Diego Credit Union, 449 B.R. 783 (S.D. Cal. 2010). Chapter 13 Debtors moved to value collateral and avoid liens on the debtors' residence. The district court held that the avoidance of a wholly unsecured claim pursuant to §506(d) is appropriate. However, the court did not address whether avoidance under §1322(b)(2) is per se inappropriate. Furthermore, the court held that under §506, there is no discharge requirement prior to avoidance or stripping of a lien. "[T]he Court will not impose [a requirement] absent more guidance from this district or the Ninth Circuit in the absence of plain language in the Bankruptcy Code."

In re Winitzky, No. 1:08-bk-19337-MT, 2009 Bankr. LEXIS 2430 (Bankr. C.D. Cal. May 7, 2009). No party opposed the Debtor's motion to avoid a lien on debtors' primary residence and no party objected to confirmation of the plan. However, the court held that it has an independent duty to determine whether debtors meet all requirements for confirmation. Where a chapter 13 case does not afford a discharge and its main purpose is to work out a repayment plan for debts not discharged in the chapter 7, a lien strip would allow a debtor to simply do indirectly what the Supreme Court has ruled he may not do directly. The Court concluded that the Bankruptcy Code does not allow for the lien strip because a discharge is required to lien strip in a chapter 13 case.

In re Gounder, 266 B.R. 879 (Bankr. E.D. Cal. 2001). A Chapter 13 Debtor argued that the creditor's claim should not be an allowed claim against her chapter 13 estate, because it was discharged in her chapter 7 case. The Court held, pursuant to §506(a), that the undersecured claim would be treated as an allowable unsecured claim against the estate even though her personal liability was discharged. The unsecured claim, now a claim against the estate, would receive the same percentage in the plan as proposed to be received by other similarly situated unsecured creditors. The claim holder is "entitled to be paid whatever sections 1325(a)(4) . . . and 1325(b) . . . require be paid to unsecured creditors." That is, the creditor was entitled to be paid on a pro rata basis with other general unsecured creditors. The Debtor's objection to the creditor's unsecured claim was overruled.

In re Akram, 259 B.R. 371 (Bankr. C.D. Cal. 2001). Debtors who had previously received a chapter 7 discharge of personal liability for their debts filed a motion to strip two completely underwater junior mortgage liens. The Bankruptcy Court held that Chapter 20 Debtors may strip off underwater junior mortgage liens, but the strip off has no res judicata effect in the event that the Debtors do not propose a confirmable plan and complete the plan. The motion filed by the Debtors also requested the Court to determine that the claims had no value as secured or unsecured in the Chapter 13 case. The Court denied that part of the Motion and held the amount the Creditor was owed at the time of filing would be allowed as an unsecured claim.

XI. TENTH CIRCUIT

A. Bankruptcy Appellate Panel

Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885 (B.A.P. 10th Cir. 2010). After receiving a chapter 7 discharge, Debtors filed chapter 13 in order to strip off a partially unsecured second mortgage. The Debtor's plan proposed Debtors offered to pay the secured portion of the second mortgage, and then strip off the unsecured balance. The Bankruptcy Court confirmed the plan and the creditor appealed. The Court held that because the Debtors' chapter 13 case did not comply with §1325(a)(5), the Bankruptcy court erred in confirming the plan. Under § 1325(a)(5), a plan cannot be confirmed unless for each allowed secured claim one of three situations applies. First, if all secured creditors accept their treatment in the plan, § 1325(a)(5) is satisfied. Second, a plan will satisfy §1325(a)(5) if it provides that the debtor will surrender the collateral to the secured creditor. Third, a plan may be confirmed over the objection of a secured creditor if it meets the three-part test of §1325(a)(5)(B). The Debtors' plan violated the lien retention provision of §1325(a)(5)(B)(i), which requires that the holder of a claim retain the lien securing the claim until "the payment of the underlying debt determined under nonbankruptcy law." §1325(a)(5)(B)(i)(I)(aa). Under §1325(a)(5)(B)(i)(I), the two conditions under which a plan may require a creditor to release its lien are (1) full payment or (2) discharge. The panel read §1325(a)(5)(B)(i)(II) to require that the plan expressly provide that a lien will be retained to the full extent allowed under nonbankruptcy law upon dismissal or conversion if the plan is not completed. Thus, §1325(a)(5)(B)(i)(II) should not be read to supplement by negative implication the two conditions of §1325(a)(5)(B)(i)(I). If no discharge is entered, the lien is retained until payment of the debt under nonbankruptcy law.

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The Bankruptcy Appellate Panel also noted that Congress, in enacting §1328(f) under BAPCPA, “was attempting to prevent the perceived abuse of the bankruptcy system arising from debtors seeking successive Chapter 7 and Chapter 13 discharges.”

B. District Courts

Zeman v. Waterman (In re Waterman), 469 B.R. 334 (D. Colo. 2012). The Court Affirmed the holding of the Bankruptcy Court finding that Chapter 20 lien stripping does not violate §1325(a). Due to the junior lien being wholly unsecured, §1325(a) does not preclude a debtor from stripping off a lien. Allowing lien stripping in Chapter 20 cases does not constitute a de facto discharge. By stripping off a wholly unsecured junior lien from their principal residence, a debtor removes the lien from the property, i.e., the *in rem* liability. Discharge of personal liability is a result of a Chapter 7 discharge. Congress did not completely foreclose the availability of chapter 13 debtors who had previously received relief in chapter 7 and the Court refused to read additional restrictions into §1328(f)(1). Although, the Court found the action was not precluded by the Bankruptcy Code they did note that bankruptcy courts still have a duty to determine whether a plan is proposed in good faith. The fact that some chapter 20 debtors may not propose their plans in good faith is not reason to bar every chapter 20 debtor from utilizing lien-stripping tools.

C. Bankruptcy Courts

In re Waterman, 447 B.R. 324 (Bankr. D. Colo. 2011). Less than four years after receiving a discharge in a chapter 7 case, Debtor filed a chapter 13 petition. Debtor sought to strip a wholly unsecured second lien on his residence because of a significant reduction in its value. The Chapter 13 Trustee filed an objection to confirmation. The Bankruptcy Court held that where the Debtor’s plan was otherwise confirmable and the Debtor completed the plan, the lien could be stripped off, in spite of the debtor’s ineligibility for a discharge under chapter 13. The Court noted that Congress has *not expressly* prohibited a debtor in a nondischargeable chapter 13 from receiving the benefits of a §506 lien strip.

In re Woolsey, 438 B.R. 432 (Bankr. D. Utah 2010). The Chapter 13 Trustee objected to confirmation of Debtors’ proposed plan. The Trustee argued that the plan had to contain language acknowledging the continuance of a junior mortgagee’s wholly unsecured lien on the Debtors’ residence until full payment or discharge, and that the plan had to provide for reinstatement of the lien if the Debtors did not receive a discharge. The Debtor’s plan proposed that because the second mortgage claim was a wholly unsecured claim due to the value of the real estate, the second mortgage lien was void at the time a judgment was entered in the adversary proceeding pursuant to §506(d). The Court agreed with the Trustee and found that the avoidance of a lien is only available upon discharge or full repayment of the underlying debt which the due to the Debtor’s ineligibility for discharge could not be accomplished in this case. The Court further found that lien avoidance pursuant to §506(d) was not available and even where a Debtor is eligible for discharge the lien avoidance happens at the conclusion of the plan and receipt of discharge not the date an order is entered pursuant to § 506(a).

In re Mendoza, No. 09-22395 HRT, 2010 Bankr. LEXIS 664, 2010 WL 736834 (Bankr. D. Colo. Jan. 21, 2010), *abrogated by Zeman v. Waterman (In re Waterman)*, 469 B.R. 334 (D. Colo. 2012). Debtors filed a motion pursuant to §506 proposing to strip off a wholly unsecured lien. The Trustee objected to confirmation arguing that trying to strip a completely unsecured consensual lien from their primary residence is not allowed because the Debtors are not entitled to a discharge. The Court followed Jarvis and Winitzky and held that lien avoidance of an unsecured lien prior to discharge does not comport with the Code. Under BAPCPA, debtors who already received a discharge in a chapter 7 case are precluded from receiving a discharge in a chapter 13 case filed within four years after the chapter 7 case. 11 U.S.C. §1328(f)(1). The issue of good faith was not decided as no one objected on those grounds, but the Court did raise it as a possible issue in future cases. The Debtors must either amend their plan or dismiss their case.

In re Richins, 469 B.R. 375 (Bankr. D. Utah 2012). Chapter 7 Debtors attempted to void a junior mortgage on their residence under §506(a) and (d). The Court relied on Dewsnup v. Timm to hold that §§ 506(a) and (d) did not permit stripping a wholly unsecured junior mortgage. The Court distinguished Chapter 7 from Chapter 13. Though Chapter 13 in the Court’s eyes generally permitted stripping of wholly unsecured liens, provided that the plan is completed and debtor receives a discharge,

the Court declined to extend the reasoning of Nobelman to the Chapter 7 context. It reasoned that the purpose of Chapter 13 that supports stripping wholly unsecured liens does not exist in Chapter 7 and that the statutory framework of Chapter 13 allowing such liens to be stripped is absent in Chapter 7.

XII. ELEVENTH CIRCUIT

A. Court of Appeals

Colbourne v. Ocwen (In re Colbourne), 2013 WL 5789159 (11th Cir. 2013) A Chapter 13 Debtor appealed the District Court's affirmation of the Bankruptcy Court's denial of his motion to value the under secured claims of the Debtor's first-priority mortgages on two investment properties. The Court affirmed the Bankruptcy Court's and District Court's denial of Debtor's motion. The Court reasoned that §1325(a)(5) required Chapter 13 plans to provide that the holder of each allowed secured claim retains the lien securing the claim until the earlier of either payment in full of the debt or discharge under §1328. The Debtor was ineligible for discharge under §1328 because he filed for Chapter 13 relief four months after receiving discharge in his Chapter 7 case. The Debtor's ineligibility for discharge meant that the creditor retained the lien until the debtor paid the amount owed in full. Additionally, because discharge was not available, the Court held that any modification to the creditor's rights in the Chapter 13 case was not binding once the term of the plan expired.

McNeal v. GMAC Mortg., LLC (In re McNeal), No. 11-11352, 2012 U.S. App. LEXIS 9589, 2012 WL 1649853 (11th Cir. May 11, 2012). A Chapter 7 Debtor appealed the Bankruptcy Court's denial of her motion to strip off a second priority lien on her home (and the District Court's affirmation of that denial). The Court of Appeals for the Eleventh Circuit reversed the Bankruptcy and District Courts and found that a wholly unsecured junior lien is voidable pursuant to §506(d). Section 506(d), 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. The Court found although a few bankruptcy court decisions in the Eleventh Circuit have treated Folendore as abrogated by Dewsnup, Folendore controls in this case. In Folendore, the court concluded that an allowed claim that was wholly unsecured was voidable under §506(d). See McNeal v. GMAC Mortg. Co. (In re McNeal), No. A09-78173-PWB, 2010 Bankr. LEXIS 1350, 2010 WL 1753376 (Bankr. N.D. Ga. Apr. 12, 2010).

Am. Gen. Fin., Inc. v. Paschen (In re Paschen), 296 F.3d 1203 (11th Cir. 2002). The Debtor submitted a chapter 13 plan proposing to modify a creditor's claim by bifurcating a short-term home mortgage loan into its secured and unsecured components, with only the secured portion to be paid back. The Court of Appeals for the Eleventh Circuit upheld the confirmation of the chapter 13 plan and thus, the modification of the undersecured home mortgage through bifurcation and cramdown. Section 1325(a)(5) is the source of a chapter 13 debtor's authority to bifurcate secured claims and to strip down the value of the claim to the value of the collateral. Taken together with §506(a), § 1325(a)(5) permits the bifurcation of an undersecured claim into its secured and unsecured parts, with creditors only assured of receiving full value for the secured portion.

Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357 (11th Cir. 2000). The Eleventh Circuit held that the Nobelman decision does not extend to wholly unsecured homestead lenders. A chapter 13 Debtor motioned to strip her wholly unsecured junior mortgage, and intended on treating the mortgage as a general unsecured creditor entitling the creditor to a 6% dividend. The Eleventh Circuit adopted the majority view, which held that §1322(b)(2) does not prohibit modification of wholly unsecured junior mortgages after a §506(a) valuation.

Am. Gen. Fin., Inc. v. Dickerson (In re Dickerson), 222 F.3d 924 (11th Cir. 2000). The Eleventh Circuit affirmed Tanner, stating that creditors whose liens are wholly unsecured after a § 506(a) valuation are not entitled to the protection of §1322(b)(2) even if the claim was secured solely by a lien against the debtor's principal residence. Section 1322(b)(2) of the Bankruptcy Code protects only those homestead mortgages that are secured by some existing equity in the debtor's principal residence according to §506(a). In addition, the court included in dicta that it would not allow a debtor to strip a lien off a wholly unsecured mortgage if the decision was made again, because the Nobelman decision and §506(a) places too much weight upon the inexact valuation process outside of the actual market place.

Folendore v. U.S. Small Bus. Admin. (In re Folendore), 862 F.2d 1537 (11th Cir. 1989). Debtors filed a motion, entitled "Complaint to Determine Extent of Lien," seeking to void a lien on real and personal property under §506. Debtors never formally made a request to disallow the debt secured by the lien under §502. The Court of Appeals for the Eleventh Circuit adopted the majority view that §506(d)

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allows the voiding of a lien when a court has not disallowed the claim. Section 506(d) requires debtors to request that a claim be disallowed under §502. The debtors' complaint should have been liberally construed as a request for disallowance of the claim under §502.

B. District Courts

In re Barrios, 257 B.R. 626 (Bankr. S.D. Fla. 2000). The court reviewed the case to determine whether (1) an unsecured creditor has standing to object to a debtor's direct payments to a wholly unsecured junior mortgage lender and (2) whether the unsecured creditor can file a motion to strip the junior mortgage, thereby making the mortgage holder unsecured and included within the pool of general unsecured creditors. The general unsecured creditor had standing to file the motion pursuant to § 506(c), because the creditor "had a colorable claim for expenses and was the only creditor that would zealously pursue that claim." In re McKeesport, 799 F.2d 91, 93 (3d Cir. 1986). Therefore, the unsecured creditor, in lieu of the trustee, had standing to force the modification of the wholly unsecured junior mortgage and the addition of the mortgage payments to his disposable monthly income.

C. Bankruptcy Courts

In re Pierre, 468 B.R. 419 (Bankr. M.D. Fla. 2012). The Chapter 13 Debtor moved to value a nonresidential mortgagee's claim for the purpose of stripping the lien. The Creditor objected because the Debtor's husband, a co-tenant-by-the-entireties of investment real estate, was not a party to her chapter 13 case and had recently received a discharge. The Court held that any modifications to secured creditors' rights through cram down or strip off are not effective unless the Debtor is able to receive a Chapter 13 discharge. Because allowing one co-Tenant by Entirety owner to strip liens unilaterally would affect the integrity of the bankruptcy process, the Court held that the Debtor could not strip down the lien.

In re Dang, 467 B.R. 227 (Bankr. M.D. Fla. 2012). Chapter 20 Debtor proposed a Chapter 13 plan seeking to strip off a junior lien that had passed through her chapter 7 case unaffected. The Trustee objected. The Bankruptcy Court held that under Tanner, a debtor may strip the junior lien from her homestead, regardless of her ineligibility for a Chapter 13 discharge. Tanner held that § 1322(b)(2) does not protect wholly unsecured residential liens from modification in chapter 13 plans. The Court found that a lien that survives chapter 7 is a claim against property in a chapter 13 case to which the debtor may apply § 506(a) when determining the secured or unsecured status of the claim. The Court found that § 1325(a)(5) does not apply to claims that are wholly unsecured pursuant to a determination made under § 506(a). Regardless, the chapter 13 plan remains subject to other requirements in the Code, namely (1) the good faith requirement under § 1325(a)(3), and (2) the requirement under § 1325(a)(4) that the distribution amount in the plan "on account of each allowed unsecured claim" must not be less than the amount generated in a chapter 7 liquidation.

In re Scantling, 465 B.R. 671 (Bankr. M.D. Fla. 2012). Chapter 20 Debtor proposed to strip off wholly unsecured junior mortgages on her residence. The Court held that eligibility for a chapter 13 discharge is not a requirement to strip off a wholly unsecured junior mortgage in a chapter 20 case. Johnson v. Home State Bank "recognized a debtor's right to file a chapter 20 case." Dewsnup recognized that §506 is insufficient by itself to strip a lien on a debtor's homestead. In re Tanner held that §1322(b)(2)'s anti-modification provision does not bar chapter 13 debtors from stripping off wholly unsecured liens. The Court concluded that 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." Therefore, §1325(a)(5) is inapplicable, and the debtor's ineligibility to receive a discharge is irrelevant. However, good faith is a requirement for plan confirmation and a strip off is permanent only if "the debtor has fully performed under the plan." (*This case is currently on appeal to the 11th Circuit Court of Appeals and oral argument was heard April 2014*)

In re Quiros-Amy, 456 B.R. 140 (Bankr. S.D. Fla. 2011). In separate cases, two Debtors who had recently obtained separate chapter 7 discharges filed chapter 13 petitions, seeking orders to strip off junior mortgages on their principal residences. The Bankruptcy Court held that debtors who are ineligible for chapter 13 discharges may not use chapter 13 to strip off wholly unsecured junior mortgage liens on their residences, even if the debtors successfully complete their plan payments. The junior lienholder's claim must be treated under § 1325(a)(5).

The junior lienholder has an “allowed secured claim” against the bankruptcy estate because: (1) the debtor’s *in personam* liability was discharged in the chapter 7 case; (2) the junior lienholder continues to have a claim, enforceable only against the debtor’s property, and this claim is a “claim against the debtor” which may be treated in a chapter 13 plan; (3) the junior lienholder’s claim in the chapter 13 case is enforceable against property of the debtor such that it cannot be disallowed under § 502(b)(1); and (4) since the junior lienholder’s claim cannot be an unsecured claim and cannot be disallowed under § 502(b)(1), it must be an “allowed secured claim” unless there is another basis for disallowance.

In re Jennings, 454 B.R. 252 (Bankr. N.D. Ga. 2011). The Chapter 13 Trustee objected to plan confirmation in two cases where Chapter 13 Debtors proposed to strip off unsecured second mortgages on their residences while not eligible to receive a discharge. The Bankruptcy Court held that lien stripping is permissible for chapter 20 debtors, despite ineligibility for discharge, where the debtors complete the chapter 13 plan and the plan is proposed in good faith. Good faith must be considered under the totality of the circumstances.

The Court notes that there are three approaches to chapter 20 lien stripping under the current split in authority. In the first approach, chapter 20 lien stripping is impermissible because it amounts to a de facto discharge. Debtors must treat the wholly underwater second mortgagee as a holder of a secured claim pursuant to § 1325(a)(5). In the second approach, chapter 20 debtors may strip the lien without a discharge. However, after plan consummation, the parties’ pre-bankruptcy rights are reinstated because discharge is the mechanism that voids the lien. In the third approach, chapter 20 debtors may strip the lien upon plan completion. Discharge is unnecessary. The Court sides with courts following the third approach.

In addition, Judge Mullins held that the debtors’ plans had to treat the second mortgagee’s allowed claims as unsecured claims because debtors may not disregard the claims completely. The claims are allowed per § 502 and unsecured per § 506(a). “With or without the liens securing the claims, the second mortgagees still have a ‘right to payment.’”

In re Gerardin, 447 B.R. 342 (Bankr. S.D. Fla. 2011). Seven Debtors filed chapter 13 bankruptcy cases soon after receiving discharge in a prior chapter 7 case. None of the Debtors were eligible to receive a chapter 13 discharge due to the prior filings. The Debtors sought to strip off their junior liens and motions to value had been filed in each case. The Chapter 13 Trustee and the mortgage holders opposed the Debtors’ position, arguing that none of the Debtors could satisfy the § 1325(a)(5) requirements, because (1) they were not paying the underlying debt in full and/or (2) they were not eligible to receive a discharge under § 1328. The Court held that chapter 13 debtors who, following their receipt of discharge in earlier chapter 7 cases, were ineligible to receive chapter 13 discharge, even if they successfully completed their plan payments, could not use their successive chapter 13 filings to strip off wholly unsecured junior mortgage liens.

The Bankruptcy Court rejected the analysis of jurisdictions that allow the stripping of wholly unsecured liens in chapter 20 cases. The court stated that the pro-stripping jurisdictions failed to include the complete language of §502(b)(1). Section 502(b)(1) states that the claim will not be allowed if it is unenforceable against both “the debtor and the debtor’s property”; however, the pro-stripping jurisdictions held that it was disallowed if it is unenforceable only against the debtor. These Debtors received a discharge in chapter 7 that relieved them of *in personam* liability. Therefore, the claims are still allowed and enforceable against the debtor’s property. In the absence of any basis to implement valuation by treating the unsecured claim, debtors may not use §506 to strip down or strip off a lien in a chapter 13 case where debtors have recently obtained chapter 7 discharge.

In re Trujillo, No. 6:10-bk-02615-ABB, 2010 Bankr. LEXIS 3834, 2010 WL 4669095 (Bankr. M.D. Fla. Nov. 10, 2010). A Chapter 13 Debtor sought to cram down a first-priority mortgage. He proposed to pay the mortgage lender zero on the unsecured portion of its claim, arguing that it was discharged in the debtor’s chapter 7 bankruptcy. The Bankruptcy Court denied the Debtor’s motion to cram down the claim, holding that the Debtor requires a discharge in his chapter 13 case to be able to permanently modify the mortgage lender’s claim. “Where a debtor is ineligible to receive a discharge in a Chapter 13, any modifications to the creditor’s rights are not permanent and have no binding effect once the plan ends.” See also In re Gomez, 456 B.R. 574 (Bankr. M.D. Fla. 2011) (prohibiting debtor from vacating her chapter 7 discharge to carry out cramdown and strip off of mortgage liens under chapter 13); In re Colbourne, 458 B.R. 598 (Bankr. M.D. Fla. 2010) (same order under similar facts); In re Perez Gomez, No. 6:09-bk-13656-ABB, 2010 Bankr. LEXIS 4501, 2010 WL 5289498 (Bankr. M.D. Fla. Dec. 7, 2010) (same order under similar facts).

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In re Sadala, 294 B.R. 180 (Bankr. M.D. Fla. 2003). The Court held that no adversary proceeding is required where a debtor moves to value collateral and to void an unsecured lien under §506 and Rule 3012, unless the dispute involves a determination of validity, priority, and extent of underlying lien. The Court addressed the point at which the lien would be stripped in case dicta. The secured claim will be valued at zero as an unsecured claim during the chapter 13 case. If the debtor completes the required payments and receives a discharge, then the lien related to this unsecured claim shall be declared void upon entry of discharge. “[B]ecause so many Chapter 13 cases fail and because it would be inappropriate to strip off a lien when the debtor later defaults and no discharge is granted,” the court will treat the claim at zero and if the debtor completes all payments and receives a discharge, then the lien related to this unsecured claim shall be declared void upon entry of discharge.

In re Gomez, 456 B.R. 574 (Bankr. M.D. Fla. 2011) The Chapter 13 Debtor filed a motion to reopen her previous Chapter 7 case. Debtor owned two parcels of real estate. The first was encumbered by a senior mortgage and a junior mortgage. The second was encumbered by one mortgage. Debtor sought to have the junior mortgage holder's claim stripped and to pay \$0.00 on the unsecured portion of the claim. The Court held that the Debtor was not eligible for a discharge in her Chapter 13 case because §1328(f) prohibits discharge in a Chapter 13 case filed within four years of receiving discharge in a Chapter 7 case. Moreover, a Chapter 13 debtor's general ability to modify the rights of holders of secured claims was not available where the debtor was ineligible for a Chapter 13 discharge.

In re Hoffman, 433 B.R. 437 (Bankr. M.D. Fla. 2010) In consolidated Chapter 7 cases, Debtors filed motions to avoid junior liens on their homesteads. In each case, the estimated value of the homesteads was less than the amount owed on the debtor's respective senior mortgages. The Court determined that §506(d), which provides that a lien is void to the extent that the lien secures a claim against the debtor that is not an allowed claim, does not allow the debtors to avoid or strip wholly unsecured junior mortgages. The Court reasoned that the Supreme Court's decision in Dewsnup v. Timm means that the valueless liens are still allowed claims under §502 and are secured by a mortgage lien. Thus, the liens are "allowed secured claims" and may not be avoided by §506(d).