

Everything You Need to Know about Lien-Stripping and Cramdown in Chapters 7 and 13

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**EVERYTHING YOU NEED TO KNOW ABOUT
LIEN-STRIPPING & CRAMDOWN
IN CHAPTERS 7 AND 13**

presented by

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I. INTRODUCTION

A. "Cram down" or "Strip down"

"Cram down" or "strip down" refer to a debtor's ability to modify an under-secured creditor's claim by bifurcating the claim into secured and unsecured portions through the claim valuation process under 11 U.S.C. § 506(a) and (d). The debtor is allowed to reduce the creditor's secured portion of its claim to the present value of its collateral. Secured claims are generally paid a reduced interest rate through the Chapter 13 plan. *See Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

B. "Strip off"

"Strip off" refers to a debtor's ability to completely remove a wholly unsecured, but otherwise valid, lien through the claim valuation process under 11 U.S.C. § 506(a) and (d). *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013).

II. RELEVANT STATUTES

A. 11 U.S.C. § 506(a) and (d)

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

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

....

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

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

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

B. 11 U.S.C. § 522(f)

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or

(B) a nonpossessory, nonpurchase-money security interest in any--

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

C. 11 U.S.C. § 1322(b) and (c)

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

....

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

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

....

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while

the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

....

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

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

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

D. 11 U.S.C. § 1325(a)

(a) Except as provided in subsection (b), the court shall confirm a plan if –

....

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

....

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

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

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

(bb) discharge under section 1328; and

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

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim;

E. Hanging paragraph of § 1325(a)

The “hanging paragraph” of § 1325 provides that a debtor may not “cram down”:

a claim . . . if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

III. REAL PROPERTY: MORTGAGE MODIFICATION AND LIEN STRIPPING

A. Mortgage Modification in Chapter 13

1. 11 U.S.C. § 1322(b)(2)

a. Fully Secured or Partially Secured Creditors

Section 1322(b)(2) is commonly referred to as the mortgage anti-modification provision. It prohibits the debtor from modifying the rights of a secured creditor whose “claim is secured only by a security interest in real property that is the debtor’s principal residence” In *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), the Supreme Court determined that this provision prevents a debtor from modifying the rights of (1) a fully secured home mortgage creditor and (2) an under-secured home mortgage creditor. *Id.* at 325-26.

b. Wholly Unsecured Junior Mortgages

If the debtor’s residence does not have any value over and above the first mortgage, the anti-modification provisions of § 1322(b)(2) do not apply and a debtor may strip off the wholly unsecured junior lien. *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002). If, however, the residence has ANY value over and above the first mortgage, the anti-modification provisions of § 1322(b)(2) apply and the debtor is prevented from modifying the junior mortgagee’s claim. *Id.* at 664 (citing *Nobleman*, 508 U.S. at 324).

i. Majority View

A majority of courts have held where there is no equity over and above the first mortgage, a debtor may strip off the junior lien in the Chapter 13 plan. The rationale for these decisions is as follows: When a senior mortgage on a debtor's principal

residence exceeds the property's value, a junior mortgagee on the property would not be the "holder of a secured claim" under § 506(a) and would not be entitled to the protection of § 1322(b)(2). The Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have ruled that strip off is permissible. *See Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122 (2d Cir. 2001); *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000); *First Mariner Bank v. Johnson (In re Johnson)*, 407 F. App'x 713 (4th Cir. 2011); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Tanner v. FirstPlus Fin., Inc.*, 217 F.3d 1357 (11th Cir. 2000). The First, Seventh and Eighth Circuits do not have any decisions on the issue.

ii. Minority View

Only the Tenth Circuit has disallowed a proposed lien strip of a junior mortgage unsupported by any equity, although the court made clear that the result may have been different if the debtors had pursued the legal theory set out in *In re Lane*. *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012). Instead, the debtors argued that in the context of a Chapter 13 case, the second mortgage was not a "secured claim" and was, therefore, void under § 506(d). The court, following *Dewsnup*, held that the value of the collateral had no bearing on § 506(d) and that any lien secured under state law was protected against removal. The court declined to give the statutory term "secured claim" in § 506(d) a different meaning in chapter 13 cases than the term had in Chapter 7 cases.

2. 11 U.S.C. §1322(b)(5)

Section 1322(b)(5) is the most frequently used section to effect a mortgage modification. This provision allows the mortgage modification, notwithstanding section 1322(b)(2), where the plan provides for the "curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured or secured claim on which the last payment is due after the date on which the final payment under the plan is due" These debts are often referred to as "long term debts." In order to determine "the amount necessary to cure the default," the court must look to "the underlying agreement and applicable nonbankruptcy law." § 1322(e). In *Rake v. Wade*, 508 U.S. 464 (1993), the Supreme Court held that a Chapter 13 debtor may make monthly payments on home mortgage arrearages under a Chapter 13 plan; however, the Court also concluded that § 506(b) requires

a debtor to pay interest if the home mortgage claim is oversecured.

3. 11 U.S.C. § 1322(c)(2)

Like subsection (b)(5), § 1322(c)(2) provides another exception to the anti-modification provisions of 11 U.S.C. §1322(b)(2). 11 U.S.C. §1322(c)(2) provides “notwithstanding section 1322(b)(2) and applicable non bankruptcy law—in a case in which the last payment on the original payment schedule for a claim secured only by the security interest in real property that the Debtor’s principal residence is due before the date on which the final payment under the plan is due, the plan may provide for payment of the claim as modified pursuant to section 1325(a)(5) of this title.” Thus, unlike 11 U.S.C. §1322(b)(2), which is based on valuation, 11 U.S.C. §1322(c)(2) provides for modification of secured claims in which the last payment due under the note is due within the life of the plan. These claims are often referred to as short-term debts. Although most chapter 13 debtors do not have 20 or 30 year mortgages that are maturing within the life of the plan, often they have home equity lines of credit that are subject to modification. A mortgage modification under this section would provide for the remaining balance of the claim be paid in full with an acceptable interest rate and a monthly installment sufficient to pay said claim within the life of the plan, which is a date after the original contractual payment became due. The chapter 13 plan would not provide for the ongoing mortgage and an amount necessary to cure the arrearage claim, thus reducing the payment on the claim. *First Union Mortg. Corp. v. Eubanks, (In re Eubanks)*, 219 B.R. 468 (B.A.P. 6th Cir. 1998); *In re Young*, 199 B.R. 643 (Bankr. E.D. Tenn 1996).

4. Interesting Cases

- a. *Shepherd v. EMC Mortg. Corp. (In re Shepherd)*, 381 B.R. 675 (E.D. Tenn. 2008)

District Court reversed bankruptcy court and held that §101(13A)(A), though applicable to § 1322(b), does not alter the requirement that the property in question be real property in order for the anti-modification provision of 11 U.S.C. § 1322(b)(2) to apply. The Court recognizing that the applicable state law being that of Tennessee, this court must determine whether Tennessee considers mobile homes to be real or personal property. Further, that “in Tennessee, mobile homes are generally considered personal property when not permanently affixed to land,” referencing *In re Estate of Burress*, 2003 WL 238820 (Tenn. Ct. App. 2003) (affirming trial court’s ruling that “the mobile home is personal property, and not an inseverable part of or permanently affixed to the realty”).

- b. *Davis v. Green Tree Servicing, Inc. (In re Davis)*, 386 B.R. 182

(B.A.P. 6th Cir. 2008)

BAP held that the addition of the defined term “debtor’s principal residence” in § 101(13A) did not change the scope of the anti-modification provision contained in 11 U.S.C. § 1322(b). The anti-modification provision remains applicable only to real property.

- c. *Reinhardt v. Vanderbilt Mortg. & Fin., Inc. (In re Reinhardt)*, 563 F.3d 558 (6th Cir. 2009)

Debtors purchased land via a mortgage financing agreement and purchased a mobile home via a retail installment contract. Specific contractual terms prevented the debtors from allowing the mobile home to be anything but personal property and not become part of the real estate absent consent of seller. Vanderbilt obtained a security interest in the real estate and the mobile home. Schedules indicated mobile home as personal property valued at \$12,000 and real estate valued at \$3,000. Debtors proposed cramming down Vanderbilt’s secured claim of over \$44,000 to \$15,000. Although the mobile home qualified as the “debtor’s principal residence,” the court concluded that it was not “real property” as that term is used in § 1322(b)(2). As a result, the debtors were allowed to modify Vanderbilt’s claim.

- d. *Strausbough v. Co-op Credit Union (In re Tomasi)*, 426 B.R. 243 (Bankr. E.D. Mich. 2010)

In an opinion entered in two separate cases, the bankruptcy court concluded that debtors who held property with their non-filing spouses as tenants by the entireties could strip off wholly unsecured junior mortgages pursuant to § 1322(b)(2). *But see Hunter v. Citifin., Inc. (In re Hunter)*, 284 B.R. 806 (Bankr. E.D. Va. 2002). In that case, the court concluded that a debtor who owned property with a non-filing spouse as tenants by the entireties could not avoid a lien that was either partially or wholly unsecured.

B. Mortgage Modification in Chapter 7

1. Fully Secured or Partially Secured Creditors

- a. *Dewsnup v. Timm*, 502 U.S. 410 (1991)

In a Chapter 7 bankruptcy proceeding, the Supreme Court considered 11 U.S.C. § 506(d) and concluded that the term “allowed secured claim” meant a claim “allowed” under 11 U.S.C. § 502 and “secured” by a lien enforceable under state law. Because the value in real property had no bearing on the lien-voiding language of 11 U.S.C.

§506(d), the Court concluded that a Chapter 7 debtor could not strip down an undersecured lien to the fair market value of the collateral.

2. Wholly Unsecured Junior Mortgages

a. Majority View

The majority of the courts that have ruled on this issue follow the reasoning in *Dewsnup* and do not allow the stripping off of a wholly unsecured junior mortgage lien in a Chapter 7. *Ryan v. Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *Talbert v. City Mortg. Servs.*, 344 F.3d 555(6th Cir. 2003); *Laskin v. First Nat’l Bank of Keystone (In re Laskin)*, 222 B.R. 872(9th Cir. BAP 1998). The First, Second, Third, Fifth and Tenth circuits have not weighed in on the issue; however, lower courts within those circuits have issued opinions adopting the majority view. *See Wachovia Mortg. v. Smoot*, 478 B.R. 555 (E.D.N.Y. 2012) (concluding that debtor could not strip off wholly unsecured junior mortgages)

b. Minority View

In *McNeal v. GMAC Mortgage, LLC (In re McNeal)*, 735 F.3d 1263 (11th Cir. 2012), the Eleventh Circuit determined that a Chapter 7 debtor may strip off a wholly unsecured junior mortgage. Relying on its pre-*Dewsnup* decision in *Folendore v. U.S. Small Business Administration (In re Folendore)*, 862 F.2d 1537 (11th Cir. 1989), the Eleventh Circuit reasoned that *Dewsnup* “disallowed only a ‘strip down’ of a partially secured mortgage lien and did not address a ‘strip off’ of a wholly unsecured lien” As such, the Circuit concluded that *Dewsnup* did not prevent strip off of a wholly unsecured junior lien.

On March 31, 2014, the Supreme Court denied a petition for writ of certiorari in the case of *Bank of America v. Sinkfield*, 2014 WL 1271326 (2014). In that case, the mortgagee appealed a decision from the Eleventh Circuit Court of Appeals in which the court concluded that a debtor can strip off a wholly unsecured junior lien. Bank of America argued that the Eleventh Circuit, and other circuits which have adopted the minority view, have misconstrued *Dewsnup v. Timm*. Interestingly, the National Association of Consumer Bankruptcy Attorneys (“NACBA”) submitted an amicus curiae brief in opposition to the writ for certiorari. In their brief, the NACBA argued that the Bankruptcy Code allows debtors to strip off wholly unsecured liens in Chapter 7 and, as such, the issue was not ripe for review.

IV. PERSONAL PROPERTY

A. Hanging paragraph of § 1325

The so-called “hanging paragraph” in § 1325(a) prevents a debtor from cramming down a claim secured by a motor vehicle purchased within 910 days of the bankruptcy petition date. This section was added by the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005. Prior to its addition, debtors were allowed to bifurcate such claims and strip down the secured claim to the value of the collateral pursuant to § 506.

B. 11 U.S.C. § 522(f)—avoiding liens that impair exemptions

1. a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5);
2. a nonpossessory, nonpurchase- money security interest in any—
 - a. household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are primarily held for the personal, family, or household use of the debtor or a dependent of the debtor;
 - b. implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
 - c. professionally prescribed health aids for the debtor or a dependent of the debtor.
3. definitions of and exclusions from “household goods”—see § 522(f)(4)(A) and (B).

C. Case law

1. *In re Thompson*, 2009 WL 1758757 (Bankr. N.D. Ohio 2009).

The court held that a vehicle used for business is not included in “any ‘other’ thing of value”, therefore the hanging paragraph in § 1325 did not apply. A vehicle can not be subject to the hanging paragraph unless it was purchased for the personal use of the debtor within the 910 days preceding the date of filing. *But see In re Tanguay*, 427 B.R. 663 (Bankr. E.D. Tenn. 2010) (holding that debtor’s semi-truck tractor which he purchased for non-personal use was included within hanging paragraph’s “any other thing of value.” As such, debtor was not permitted to cram down the claim.)

2. ***In re Pearson*, 2008 WL 687058 (Bankr. E.D.N.C. 2008)**

Debtor attempted to cram down a lien on a 910-day vehicle for which she had co-signed with her estranged husband. Debtor alleged that hanging paragraph did not apply because the vehicle was purchased for her husband's sole use. After the estranged husband stopped making payments, the debtor took possession of the vehicle and began making the payments. The Court agreed with the debtor and concluded that the vehicle was not purchased for "personal use of the debtor" within the meaning of the hanging paragraph. As such, the debtor was allowed to cram down the lien.

3. ***In re Beasley*, 2007 WL 2986124 (Bankr. M.D. Ga. 2007)**

Husband and wife filed separate Chapter 13 cases on the same day. The debtors had purchased a vehicle within 910 days of filing bankruptcy. Both debtors were listed on the sales contract. Debtors and lienholder agreed that car was purchased for the wife's use. The debtor husband attempted to cram down the lien in his case by asserting that the car was not purchased for his "personal use." The wife did not provide for the claim in her Chapter 13 case. Court agreed with husband and allowed him to cram down the claim.

4. ***In re LaDeaux*, 373 B.R. 48 (Bankr. S.D. Ohio 2007)**

Debtors purchased a larger vehicle within 910 days of filing bankruptcy for purposes of transporting their numerous foster children. The court determined that the debtors obtained the car for business use and, consequently, could bifurcate the claim.

5. ***Shaw v. Aurogroup Fin. Credit Union*, 552 F.3d 447 (6th Cir. 2009)**

Bankruptcy court has no discretion to confirm a Chapter 13 plan that bifurcates a claim secured by a 910 vehicle. 11 U.S.C. §1325(a) is a mandatory requirement.

6. ***Nuvel Credit Corp. v. Westfall (In re Westfall)*, 599 F.3d 498 (6th Cir. 2010)**

The portion of a debt owed to a seller of a 910 vehicle that represents the pay-off of negative equity in the debtor's trade-in vehicle is secured by a purchase money security interest in the new vehicle and, as such, cannot be bifurcated due to the hanging paragraph of § 1325(a).

7. ***AmeriCredit Fin. Servs., Inc. v. Long (In re Long)*, 519 F.3d 288 (6th Cir. 2008)**

Creditor retained unsecured deficiency claim of surrendered 910 vehicle as state law provided.

V. PRACTICAL CONSIDERATIONS IN LIEN STRIPPING

A. Procedure

The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure currently do not address the proper procedure for stripping off a wholly unsecured mortgage based on the application of §1322(b)(2) and § 506(a).

Procedurally, the typical issues that arise in relation to mortgage lien stripping are whether an adversary complaint must be filed, which party bears the burden of proof and the time for which the applicability of 11 U.S.C. §§506(a) and 1322(b)(2) is to be determined (date of loan or date of filing) and valuation to use, such as replacement value, fair market value and whether foreclosed properties are included in determining value, and the date to which the valuation is to be determined (purchase date, filing date or date of confirmation). Noting that the parties are bound by the confirmed plan pursuant to 11 U.S.C. §1327(a) and an adversary complaint is not necessary in some jurisdictions, it is considered best practice, that absent a consent order addressing the “stripped mortgage”, a complaint should be filed for purposes of clarification.

The most common methods used are:

1. Adversary Proceeding

- a. Several courts have held that debtors must file an adversary proceeding against the mortgagee in order to strip off a wholly unsecured lien. *SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin)*, 530 F.3d 230 (3d Cir. 2008); *Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995); *In re Forrest*, 424 B.R. 831 (Bankr. N.D. Ill. 2009). These courts have concluded that due process concerns dictate the commencement of an adversary proceeding because of the formality of the process, with a summons issued and the complaint served in accordance with Fed. R. Bankr. P. 7004.
- b. The majority of courts, however, hold that an adversary proceeding is not required in order for Chapter 13 Debtors to “strip off” a wholly unsecured junior lien on their principal residence. *Bivens v. M & I Bank FSB (In re Bivens)*, 2009 WL 9121302 (Bankr. S.D. Ohio 2009); *In re Bennett*, 312 B.R. 843, 845 (Bankr. W.D. Ky. 2004).

2. Plan Provision and/or Motion

Treating plan as a “de facto-motion.” See *In re Hoskins*, 262 B.R. 693, (Bankr. E.D. Mich. 2001).

Plan Provision and/or Motion to Value: Many courts prefer that the issue be raised in a plan provision and/or a related motion since lien stripping is

essentially seeking a determination of the amount of the creditor's claim compared to the value of the underlying property. If a plan provision and/or a motion to value is used, service of the plan/motion should comply with Federal Rule of Bankruptcy Procedure 7004 and the language in the plan/motion should be as explicit as possible to avoid a possible due process challenge from the mortgagee whose lien is to be avoided. If the mortgagee holding the junior lien is an insured depository institution, service generally will not be effective unless an officer of the institution is served by certified mail (see Fed. R. Bankr. P. 7004(h)). For an example of a plan designed to strip off a wholly unsecured junior mortgage, see the the Model Chapter 13 Plan used in the Middle District of Tennessee which is available at: www.tnmb.uscourts.gov/local-bankruptcy-forms

PNC Mortg. v. Rhiel, 2011 WL 1043949 (S.D. Ohio, March 18, 2011). Bankruptcy Rule 7004(h) requires service to an insured depository institution that must be made by certified mail addressed to an officer of the institution, absent certain exceptions that did not apply in that case. The service in this case was addressed to "Officer, Managing or General Agent." Default judgment was held void as a result of deficient service of an adversary complaint. Defendant's actual knowledge of the complaint was irrelevant.

3. Federal Rule of Bankruptcy Procedure 4003(d)

Rule 4003(d) provides that "A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014."

B. Valuation & Determining whether junior mortgage is wholly unsecured

1. Process for determining Amount of Senior Mortgage

Determination of whether the amount of the senior mortgage is greater than the value of the property is not based on the impairment of the debtor's exemption, so any homestead exemption or other exemption is not considered in the calculation. Under Federal Rule of Bankruptcy Procedure 3001, mortgagees are required to provide the balance owed at the petition date in their proof of claim. The balance owed should include all amounts owed under the loan documents, including the remaining principal balance, accrued and unpaid interest (so, the more delinquent the senior mortgage, the higher the debt and, perhaps, the greater the opportunity to strip off a junior mortgage), foreclosure fees and costs, escrow advances for taxes and insurance, etc. Rule 3001(f) provides that the proof of claim filed in accordance with the rules is prima facie evidence of the validity and amount of the claim.

The amount of the claim of the senior mortgagee is initially measured against the value provided by the debtor in Schedule A of the petition. For this, the debtor may rely on a recent loan-related appraisal, a broker price opinion at

the time the plan is filed or the strip off action is filed, especially if the mortgagee disputes the debtor's valuation and obtains its own valuation. The debtor and mortgagee must be prepared to present expert testimony by way of an appraiser in support of an opinion of value.

2. Timing of Valuation

Section 506(a) states that "value shall be determined in light of the purposes of the valuation and of the proposed use or disposition of such property ...". This language does not specify a valuation date and courts have used three different approaches as to when the valuation for purposes of a mortgage strip off is determined. For an overview of the disagreement among courts as to the proper valuation date see *Wood v. La Bank (In re Wood)*, 190 B.R. 788 (Bankr. M.D. Pa. 2004).

a. Petition date

Some courts use the petition date on the logic that the debtors typically use the property as their residence throughout the bankruptcy, beginning with the petition date. See, e.g., *Dean v. LaPlaya Investments, Inc. (In re Dean)*, 319 B.R. 474 (Bankr. E.D. Va. 2004).

b. Effective date of plan/date plan is confirmed

Other courts use the effective date of the plan because the valuation is being done in the context of determining the amount of the mortgagee's allowed secured claim for purposes of plan confirmation. See, e.g., *In re Fareed*, 262 B.R. 761 (Bankr. N.D. Ill. 2001).

c. Flexible approach

Some courts use a flexible approach, rather than a single fixed method. See, e.g., *Aubain v. LaSalle Nat'l Bank (In re Aubain)*, 296 B.R. 624 (Bankr. E.D.N.Y. 2003). The flexible approach uses equitable factors and takes into consideration the purpose of the valuation and the equities involved.

3. Burden of Proof As To Value

a. Creditor

Creditor bears burden of proof in valuing collateral under § 506(a). *In re Sneijder*, 407 B.R. 46 (Bankr. S.D.N.Y. 2009).

b. Party challenging value

The party challenging the value of a claim bears the burden of proof. *In re Henry*, 457 B.R. 402 (Bankr. E.D. Pa. 2011).

c. Shifting burden

It appears that the debtor has the initial burden as the moving party to show that senior liens exceed the value of the property, but the mortgagee has the ultimate burden of persuasion as to the extent of its lien and the value of the property securing the claims. *In re Heritage Highgate, Inc.*, 679 F.3d 132 (3d Cir. 2012).

4. Plan's binding effect

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

C. Release of Lien Upon Completion of Plan

Neither the Bankruptcy Code nor the Bankruptcy Rules require mortgagees to file release of liens in state register of deeds offices upon completion of a chapter 13 plan with a strip off provision/order. Debtors may be left with the practical issue of clearing title to their residence after completion of the plan and face obstacles with mortgagees who may well have charged off the loans from its books because of the strip off. To avoid difficulty with a recalcitrant mortgagee, debtors should seek a provision in the confirmation order or separate bankruptcy order that the lien is void and specifically identify the voided mortgage by instrument number and seek an order requiring the mortgagee to release its lien. *See In re Dendy*, 396 B.R. 171 (Bankr. D.S.C. 2008) for a case regarding difficulties a debtor faces upon successful lien strip in a Chapter 13 case.

VI. CHAPTER 20S AND BAPCPA

A. Relevant Statutes:

1. 11 U.S.C. §1328(f)(1): Filing date of Chapter 13 must be more than four years after filing date of Chapter 7 for the debtor to be eligible for discharge. Also applicable to Chapter 11 and 12. *Carroll v. Sanders (In re Sanders)*, 551 F.3d 397 (6th Cir. 2008).
2. 11 U.S.C. §1328(f)(2): Filing date of subsequent Chapter 13 case must be more than two years after filing date of prior discharged Chapter 13 for the debtor to be eligible for discharge. Also applicable to Chapters 11 and 12.
3. 11 U.S.C. §348(f)(1)(C):
 - (i) the claim of any creditor holding security as of the date of the

petition shall continue to be secured by that security unless the full amount of the claim determined by non bankruptcy law has been paid in full as of the date of conversion; and
(ii) pre bankruptcy default has been fully cured under the plan at the time of conversion

4. 11 U.S.C. §349(b)(1)(C): Effect of dismissal reinstates any lien voided under 11 U.S.C. §506(d) of this title.

B. Ability of Debtor Who is Ineligible for Discharge to Strip off Mortgage

There is a split of authority as to whether a debtor who is ineligible to receive a discharge in a Chapter 13 case based on a prior discharge in a previously filed Chapter 7 or Chapter 13 case pursuant to 11 U.S.C. §1328(f)(1) and (f)(2) may strip off a wholly unsecured junior mortgage pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2). These types of filings are often referred to as “Chapter 20s.”

Courts that do not allow Chapter 20 debtors to strip off wholly unsecured junior mortgages focus primarily on 11 U.S.C. § 1325(a)(5)(B). These courts conclude that allowing a debtor to avoid a lien based solely on 11 U.S.C. §506(d) circumvents the decision in *Dewsnup v. Timm* and 11 U.S.C. §1328(f), which defines when the debtor is ineligible to receive a discharge. Because liens pass through bankruptcy unaffected, these courts hold that the only way to make a “strip off” permanent under § 506(d) is to obtain a discharge or to pay the claim in full. See *In re Victorio*, 454 B.R. 759 (S.D. Cal. 2011).

Courts concluding that a debtor may “strip off” a wholly unsecured junior mortgage lien rely on the plain language of the Bankruptcy Code, recognizing that a discharge pursuant to 11 U.S.C. §1328(a) only addresses the debtor’s personal liability and not the debtor’s in rem liability. Section 1328 only restricts the ability of the debtor to receive a discharge. It does not prohibit the filing of the case or the advantages that are availed to honest, but unfortunate debtors seeking protection under the Bankruptcy Code. Pre-BAPCPA, the Supreme Court concluded that Congress had created an intricate system of limitations of who could file bankruptcy. *Johnson v. Home State Bank*, 501 U.S. 78 (1991). Relying on §§ 109(g), 727(a)(8), and 727(a)(9), the Court reasoned that where Congress chose to “expressly prohibit[] various forms of serial filings,” they did so. Accordingly, “[t]he absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously filed for Chapter 7 relief.” *Id.* at 87.

- a. Even if allowed to propose a strip off in a Chapter 13 plan following a Chapter 7 discharge, the debtors must show that the plan was filed in good faith. *In re Jennings*, 454 B.R. 252 (Bankr. N.D. Ga. 2011). See *In re Okosisi*, 451 B.R. 90 (Bankr. D. Nev. 2012) for factors required to show a debtor’s good faith in a plan in a no-discharge lien stripping case.

- b. In *In re Picht*, 428 B.R. 885, 892 (B.A.P. 10th Cir. 2010), the bankruptcy appellate panel concluded as follows:

We conclude that the debt to the Bank remained enforceable against the Picht's residence in an amount up to \$127,000, notwithstanding the Picht's Chapter 7 discharge. Although the Bank's § 506(a) "allowed secured claim" of approximately \$15,000 may have been properly provided for in the plan (again assuming that § 1322(b)(2) is not applicable in this case), the plan improperly discharged or extinguished the portion of the Bank's lien that exceeded the value of the residence as of the date of confirmation, even though the Picht's are not entitled to the benefit of a Chapter 13 discharge. Under nonbankruptcy law, the Bank's lien would encumber the Picht's residence regardless of whether the value of the residence exceeded the first mortgage at any point in time. Moreover, over the life of the plan, the value of the residence may increase, and the Picht's will be paying down the principal on their first mortgage, creating additional value to which the Bank is entitled under nonbankruptcy law.

Id. at 893.

- c. *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013): The first and only appellate decision on this issue. The Court found that BAPCPA had left unchanged §§ 506(a) and 1322(b), which is the Debtor's fuse and trigger to strip off the wholly unsecured liens and had amended 11 U.S.C. § 1325(a)(5)(B) which provides that the holder of a "secured claim" retains its lien until the earlier of discharge or payment of the non bankruptcy law balance. Applying *Nobleman*, the court looked to § 506 to conclude that there was no secured claim to be protected by 11 U.S.C. §1325(a)(5)(B). Thus, holding that a Debtor, despite being ineligible to receive a discharge, could strip the wholly unsecured mortgage lien in the Chapter 13. The focus being on the honest, but unfortunate debtor that under the particular facts and circumstances filed in "good faith." The *Davis* Court cited the Supreme Court's decision in *Johnson v. Home State Bank*, 501 U.S. 78 (1991).
- d. *In re Scantling*, 465 B.R. 681 (Bankr. M.D. Fla. 2012): Holding lien stripping is not contingent on the availability of discharge. The 11th circuit court granted direct appeal with oral arguments being continued from December 2013 to April 7, 2014.
- e. *Litton Loan v. Blenheim*, 9th Cir. case no. 13-35354: Holding lien stripping is not contingent on the availability of discharge. This appeal is still in the pleading stages.
- f. *In re Lavelle*, 2009 WL 4043089 (Bankr. E.D.N.Y. 2009). Allowed stripping of wholly unsecured second mortgage by a debtor who was ineligible for a discharge. This decision was followed by the Bankruptcy Appellate Panel for the Eighth Circuit in *Fisette v. Keller (In re Fisette)*, 455 B.R. 177 (B.A.P. 8th Cir. 2011). In this case, the bankruptcy appellate panel

concluded “that the strip off of a wholly unsecured lien on a debtor’s principal residence is effective upon completion of the debtor’s obligation under his plan, and it is not contingent on his receipt of a Chapter 13 discharge.” In so doing, the court reasoned that BAPCPA amended 11 U.S.C. §1325(a)(5) to provide that the holder of each allowed secured claim provided for by the plan shall retain the lien securing such claim until the earlier of payment of the underlying non bankruptcy balance or discharge under 11 U.S.C. §1328(a). Pursuant to 11 U.S.C. §§506(a) and (d) and 1322(b)(2), the wholly unsecured junior mortgage is not an “allowed secured claim” thus 11 U.S.C. §1325(a)(5) is inapplicable. Further, contrasting 11 U.S.C. §1322(b)(2) and 11 U.S.C. §1322(c)(2), the latter modification is subject to the restrictions of 11 U.S.C. §1325(a)(5), more specifically, 11 U.S.C. §1325(a)(5)(B)(i)(I), which requires the holder of the allowed secured claim, provided for in the plan, retains the lien securing such claim until the earlier of the payment of the underlying debt determined under non bankruptcy law or discharge under § 1328. By negative implication, Congress chose not to require a discharge as a prerequisite to having the ability to strip a lien.

At least one other Eastern District of New York bankruptcy court has disagreed with the *Lavelle* decision. *In re Pomilio*, 425 B.R. 11 (Bankr. E.D.N.Y. 2010).

VII. ADDITIONAL ISSUES

Additional issues that have arisen post BAPCPA, in regards to mortgage lien stripping are (1) the application of the anti-modification provisions and their effect on home owners associations (2) whether a non filing co-debtor can reap the benefits of lien stripping and (3) the effect of a conversion from a chapter 13 to a chapter 7.

A. Homestead Exemption and “Custody”

In re Allmon, 2011 WL 4053129 (Bankr. E.D. Tenn. 2011). Chief Bankruptcy Judge John C. Cook followed *In re Hogue*, 286 S.W.3d 890 (Tenn. 2009) which Judge Richard Stair found persuasive and cited *In re Dixon*, No. 09-32439, slip op. at 5 (Bankr. E.D. Tenn. Dec. 1, 2009), available at http://www.tneb.uscourts.gov/opinions/stair/12-01-2009;_Sharon_Dixon_09-32439.pdf. As a bright-line rule, Judge Stair held that a non-parent can only obtain “custody” within the meaning of Tennessee Code Annotated § 26-2-301(f) (\$25,000 homestead exemption) pursuant to court order. Judge Stair relied upon the definition of “custody” set forth in Tennessee Code Annotated § 37-1-102(b)(8), which provides, in pertinent part: “ ‘Custody’ does not exist by virtue of mere physical possession of the child.” Thus, a person is not entitled to the enhanced Tennessee homestead exemption unless a court of competent jurisdiction has placed a minor child under the care and control of the debtor.

B. Homestead exemption determined as of petition date

In re Wengerd, 453 B.R. 243 (B.A.P. 6th Cir. 2011) . The BAP reversed the lower court and determined that the Ohio homestead exemption statute imposed no requirement that the debtor have an intention to continue to occupy the homestead at the time the case is filed. Because exemptions are determined as of the petition date, the BAP concluded that the debtors were entitled to claim a homestead exemption for a residence that was their homestead on the date the bankruptcy petition was filed, despite the fact that, four days after filing their petition, the debtors sold their residence pursuant to a contract entered into prior to their bankruptcy filing. *But see In re Garland*, 98 B.R. 767 (Bankr. S.D. Ohio 1989) and *In re Pagan*, 66 B.R. 196 (Bankr. N.D. Ohio 1986).

C. Application of the Earmarking Doctrine: 11 U.S.C. § 547(e)(2) v. 547(c)(1)

Majority View: Fails to protect refinanced mortgages from lien avoidance. *Chase Manhattan Mortg. Corp. v. Shapiro (In re Lee)*, 530 F.3d 458 (6th Cir. 2008). Preference avoidance against lender of refinanced mortgage where refinanced mortgage was not recorded timely under 547(e).

D. Disallowance of Claim and Lien Avoidance

Shelton v. Citimortgage, Inc. (In re Shelton), 735 F.3d 747 (8th cir. 2013). Through a series of claim filings and pleadings by the case trustee and debtor, the claims of the mortgage holder were disallowed and the debtor then sought to avoid the mortgage liens that were associated with the real property, that was the subject of the claim disallowance. The Court reasoned the distinctions between claim disallowance and lien avoidance and the underlying policy that liens pass through bankruptcy unaffected.

Oudomsouk v. Bank of America (In re Oudomsouk), 483 B.R. 502 (Bankr. M.D. Tenn. 2012). The Middle District of Tennessee strictly enforces claim bar. In this case, the mortgagee failed to file a claim so the debtors filed one on its behalf. The debtors' claim was facially deficient. It did not include supporting documentation or include relevant information such as the balance, property address, etc. Consequently, the Chapter 13 Trustee objected to the claim. Neither the mortgagee nor the debtors responded to the objection and the claim was disallowed without a hearing and without any determination by the court about the claim's substance. After the claim was disallowed, the parties stipulated that the mortgagee was the holder of the lien and that, aside from the failure of the bank to file a claim and the debtors' facially defective claim, there was no basis for challenging the mortgagee's lien. The debtors then filed an adversary proceeding seeking to void the lien under § 506(d)(1) which provides for the avoidance of liens when the claim is disallowed. Given the parties' stipulation that the mortgagee held a valid lien against the property, the court avoided analyzing the debtors' § 506(d)(1) claim. Instead, it reconsidered the claim under § 502(j). The case contains a thorough discussion of how other courts have analyzed § 506(d)(1) proceedings in light of *Dewsnup*.

Sample 1322(b)(2) plan

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re: Valerie Smith
Debtor(s)

Case No. 12-33333-K
Chapter 13

CHAPTER 13 PLAN
(INDIVIDUAL ADJUSTMENT OF DEBTS)

Debtor: Valerie Smith Soc. Sec. No. XXX-XX-7777

Address: 2999 Phyllis Cove
Memphis, TN 38118

Plan Payment: \$523.00 per every two weeks beginning January 4, 2012.

Payroll Deduction: Sue's Restaurant
1226 Main St.
Southaven, MS 38671

Administrative: Pay filing fee, Trustee's fee, attorney fee pursuant to Court Order.

Auto Insurance: Private insurer-State Farm

Child Support: N/A

Priority Creditors: N/A

Home Mortgage:

(1st)PNC Bank: ongoing to resume 4/1/13 . . . \$434.03
Approx. Arrears: \$20,160.00 \$117.00

(2nd) BAC Loans: Wholly unsecured, no equity to support lien: Transfer to "F"
11 USC §§506, 1322(b)(2), 1325.

Secured Creditors: Adequate protection payment will be 25% of proposed creditor monthly payment.

Retain lien pursuant to Title 11 section 1325(a)(5).

	VALUE	INTEREST	MONTHLY PLAN PMT.
Carmax Financial	\$8,000.00	5.25	\$200.00

SPECIAL CLASS: PAY 100%: N/A

Estimated non priority unsecured debt: \$50,005.60 (includes wholly unsecured second mortgage owed to BAC Loans)

Termination: Plan terminates upon payment of the above, approximately 60 months.

Absent a specific court order otherwise, all claims, other than those specifically provided for above, shall be paid as general unsecured debts.

General unsecured creditors: 10 % of these claims after above claims are paid or pay all disposable income for term of the plan.

FAILURE TO FILE TIMELY WRITTEN OBJECTION TO CONFIRMATION WILL BE DEEMED ACCEPTANCE OF PLAN.

Sample § 1322(b)(2) complaint

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re: XYZ,
Debtors.

Case No. 14-xxxxx
Chapter 13

XYZ,
Plaintiff,

v.

Adv. Proc. No. 14-xxxx

Franklin Credit Management,
Defendant.

COMPLAINT TO DETERMINE EXTENT/VALIDITY OF LIEN

Comes now the plaintiff, XYZ, and in support of his Complaint and for Cause of Action states:

1. This is an adversary proceeding pursuant to Bankruptcy Rule 7001 and arises out of and is related to Debtor's bankruptcy case. This Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and by virtue of 11 U.S.C. §§ 506(a) and 1322(b)(2).
2. That on January 3, 2014, Debtor filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code.
3. That Debtor scheduled real estate located at 1234 Yokely Rd., Memphis, TN 38109 with a value of \$51,300.00 and a balance owed on the first mortgage held by GMAC Mortgage, LLC of \$75,299.79. GMAC Mortgage Services filed a proof of claim asserting a secured first mortgage in the amount of \$75,146.33 on January 31, 2014, with reference to the subject real estate (Please see Certified True Copy of Appraisal of Shelby County Assessor and True Attested Copy of Proof of Claim filed by first mortgage holder GMAC Mortgage Services attached).
4. That Debtor also scheduled Franklin Credit Management as a creditor holding a second mortgage against the same property with a balance owed of \$17,827.11.
5. Debtors allege the debt owed to Franklin Credit Management (The Huntingdon National Bank as Trustee for Franklin Mortgage Asset Trust 2009-A c/o Franklin Credit Management Corporation) is wholly unsecured and is thus not entitled to anti-modification protection afforded secured mortgage holders under 11 U.S.C. § 1322(b)(2).

WHEREFORE DEBTOR PRAYS AS FOLLOWS:

1. For the court to make a determination as to the extent and validity of the lien held by Franklin Credit Management (The Huntingdon National Bank as Trustee for Franklin Mortgage Asset Trust 2009-A c/o Franklin Credit Management Corporation). Specifically that the court determine that the claim is wholly unsecured.
2. For any such other relief to which Debtors may be entitled.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re: Honest Mary,
Debtor.

Case No. 14-xxxxx
Chapter 13
Adv. Proc. No. 14-xxxx

[Plaintiff v. Defendant]

MOTION FOR DEFAULT JUDGMENT

COMES NOW the plaintiff, Honest Mary, and moves the Court for a default judgment pursuant to F.R.B.P. 7055 and F.R.C.P. 55, and in support of this motion shows the court as follows:

1. This Adversary was filed on August 2, 2011.
2. That on August 10, 2011, counsel for plaintiff served copies of the complaint and summons on the defendants, [list Defendant's name] by pre-paid first class U.S. mail at the following addresses:

[insert addresses]

3. That the defendants failed to answer, move or otherwise plead.

WHEREFORE DEBTOR PRAYS AS FOLLOWS:

That the court grant a default judgment in favor of plaintiff and against defendant by declaring this debt to be wholly unsecured and thus not entitled to the anti-modification protection afforded secured mortgage holders pursuant to 11 U.S.C. § 1322(b)(2). Further, that defendants be directed to release the mortgage lien upon successful discharge of the Chapter 13 plan and to award plaintiff any such other relief to which she may be entitled.

Attorney for Debtor

Sample Order--Not Agreed

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re: Carl Kelly,
Debtor.

Case No. 12-33555
Chapter 13

[Plaintiff v. Defendant info]

Adv. Proc. No. 13-0555

**ORDER GRANTING MOTION FOR DEFAULT JUDGMENT AGAINST HFC AKA
HSBC MORTGAGE SERVICES AND AKA HOUSEHOLD FINANCIAL
CORPORATION AND DECLARING DEBT TO BE WHOLLY UNSECURED AND NOT
ENTITLED TO THE ANTI-MODIFICATION PROTECTION PURSUANT TO 11 U.S.C.
§ 1322(B)(2)**

THIS CAUSE came before the court on the 18th day of July 2013 upon notice and opportunity for hearing, upon no opposition, upon Defendant failing to answer or otherwise appear, from all of which it duly appeared that Plaintiff/Debtor's complaint is well founded and should be granted.

ALL OF WHICH IS HEREBY ORDERED AND ADJUDGED.

1. Chase Home Finance Holds a first mortgage lien on Debtor's principal residence located at 4100 Kimball, Memphis, TN 38111, with a secured debt in the approximate amount of \$37,783.65 that remains unaffected by this order.
2. The debt owed to HFC aka HSBC Mortgage Services and Household Financial Corp. Is wholly unsecured and is thus not entitled to the anti modification protection afforded secured mortgage holders under 11 U.S.C. § 1322(b)(2) and, as such, shall be treated as other non priority unsecured creditors. Further, HFC aka HSBC Mortgage Services and Household Financial Corp. shall file the necessary documentation with the appropriate governmental office to release the mortgage lien upon successful completion of plan payments under this Chapter 13 case.
3. The Bankruptcy Court Clerk is authorized to close this proceeding upon entry of this order.

APPROVED:

Debtor's Attorney

Chapter 13 Trustee

Sample § 522(f) Motion to Avoid Lien

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In Re: Susan Smith
Debtor.

Case No. 13-25000-E
Chapter 7

MOTION TO AVOID LIEN OF WORLD FINANCE CORPORATION

Debtor moves the Court, pursuant to 11 U.S.C. §522(f) and Bankruptcy Rules 4003 and 9014, to avoid lien of World Finance Corporation, 8019 US Hwy 52 N, Millington, TN 38053, in the sum of \$2,425.00; that said lien is non-possessory, non-purchase money security interest in items set out in 11 U.S.C. §522(f) as said lien impairs her interest in said personal property for which and exemption is claimed pursuant to Section 26-2-103 Tennessee Code Annotated on Schedule C of her petition.

WHEREFORE, PREMISES CONSIDERED, Movant move the Court:

1. To enter an Order Avoiding Lien of World Finance Corporation, as said lien impairs movant's claimed exemption.
2. For such and further relief to which movant may be entitled within the premises.

Respectfully submitted,

/s/ Holly Schumpert
Holy Schumpert #15658
Attorney for Debtor
2552 Poplar Ave., Suite 4F
Memphis, TN 38112
901-323-9000
holleyschumpert@att.net

Sample Motion to Avoid Judicial Lien

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

In Re:
ABC DEF,
Debtor.

Case No. 11-30000
Chapter 7

MOTION TO AVOID JUDICIAL LIEN ON REAL ESTATE

Comes now the above named Debtor, by and through counsel, and submits this Motion requesting the Court Avoid the Judicial Lien on Debtor's principal residence located at 1400 Poplace, Memphis, TN 38112. In support of this Motion, Debtor would show as follows:

1. This Chapter 7 voluntary petition was filed May 11, 2011 and the 341 Meeting of Creditors was conducted on June 3, 2011.
2. This Court has jurisdiction pursuant to 28 U.S.C. §§157 and 1334 and by virtue of 11 U.S.C. §§506 and 522(f)
3. Debtor's principal residence is encumbered by two mortgages, GMAC Mortgage in the approximate amount of \$114,400.99 and First Franklin Loan Services in the approximate amount of \$27,599.01.
4. The current value of Debtor's home is approximately \$145,000.00.
5. On January 28, 2009, American Investment Bank, by and through counsel, XYZ Firm, PLLC recorded a judicial lien against debtor's residence located at 1400 Poplace, Memphis, TN 38112. Such judicial lien is entered in the record as follows:

General Sessions Docket No. 136458
American Investment Bank, NA v. ABC DEF
Instrument: 52232, Record Book 1118, Page 411
Amount of Judgment: \$4,072.80
6. Debtor's interest in his principal residence referred to in the preceding paragraph and encumbered by the lien has been claimed as fully exempt in the instance bankruptcy case, and/or by virtue of tenancy by entirety.
7. American Investment Bank, NA's lien on the Debtor's real property impairs the exemption to which debtor is entitled pursuant to 11 U.S.C. §522(b).

WHEREFORE, Debtor respectfully moves for an Order of this Court avoiding and canceling the judicial lien attachment on the above-mentioned real property, and for additional or alternative relief as may be just and proper.

Respectfully Submitted,