Consumer Session: Part I: Residential Real Estate Issues in 7s and 13s (Sales to Third Parties, Sales to Lenders, HOA Liens, Updates on Chapter 7 and Chapter "20" Strip-Offs)

Hon. Caryl E. Delano
U.S. Bankruptcy Court (M.D. Fla.); Tampa

Lara Roeske Fernandez
Trenam Kemker; Tampa

Glenn E. Gallagher
Clark & Washington, PC; Tampa

Dennis J. LeVine
Dennis LeVine & Associates, PA; Tampa

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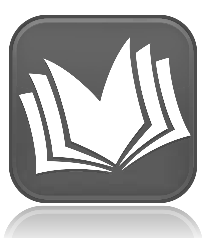

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38TH ANNUAL
ALEXANDER L. PASKAY
MEMORIAL BANKRUPTCY SEMINAR

CONSUMER SESSION PART I:

RESIDENTIAL REAL ESTATE ISSUES IN CHAPTER 7s AND CHAPTER 13s

Friday, March 14, 2014

PRESENTERS:

HON. CARYL E. DELANO

LARA ROESKE FERNANDEZ, ESQ.

GLENN E. GALLAGHER, ESQ.

DENNIS J. LEVINE, ESQ.

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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No.
Chapter 13

Debtors.
_________________________/

VERIFIED MOTION TO APPROVE SHORT SALE OF REAL PROPERTY

NOTICE OF OPPORTUNITY TO
OBJECT AND REQUEST FOR HEARING

Pursuant to Local Rule 2002-4, the Court will consider this motion, objection, or other matter without further notice or hearing unless a party in interest files an objection within [number] days from the date set forth on the proof of service attached to this paper. If you object to the relief requested in this paper, you must file your objection with the Clerk of the Court at [address] and serve a copy on the movant's attorney, [name and address, and any other appropriate persons].

If you file and serve an objection within the time permitted, the Court may schedule and notify you of a hearing, or the Court may consider the objection and may grant or deny the relief requested without a hearing. If you do not file an objection within the time permitted, the Court will consider that you do not oppose the relief requested in the paper, will proceed to consider the paper without further notice or hearing, and may grant the relief requested.

COME NOW the Debtors, by and through their undersigned counsel, and hereby file this Verified Motion to Approve Short Sale of Property and in support thereof state as follows:

1. Debtors filed their bankruptcy petition on January 1, 2014.

2. At the time of filing, the Debtors maintained an interest in real property known as:

[Address and Legal Description]

(the "Real Property"), with a fair market value of $100,000.00.

3. The Real Property is encumbered by one mortgage. ABC Mortgage, Inc., is the holder of the mortgage in the amount of $200,000.00.

4. Based upon the above, the sale price of the Real Property is less than the mortgage encumbering the Real Property, and, therefore, the proceeds from the sale of the Real Property are not property of the Debtors' estate.

5. The Debtors wish to short sale the Real Property to a third party in order to eliminate potential future liability.

6. The Debtors will forward to the Chapter 13 Trustee the proposed contract for sale of the Real Property.

7. The Debtors will not receive any proceeds from the sale of the Real Property.

8. No fees will be paid by or on behalf of the Debtors concerning the short sale of the Real Property.

9. The short sale is contingent upon approval by any mortgage holders or lienholders concerning the Real Property.

10. A copy of the HUD and/or closing statement will be provided to the Chapter 13 Trustee for review within 14 days of the sale closing.

11. No party will be prejudiced by the approval of a short sale of the Real Property.

WHEREFORE, the Debtors respectfully request an order approving the short sale of the Real Property known as [address].

VERIFICATION

The undersigned Debtors, being duly sworn under oath, certify that the foregoing is true and accurate to the best of their knowledge and belief under penalty of perjury.

____________________________ ______________________

Debtor Date

____________________________ ______________________

Debtor Date

3

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No.
Chapter 13

Debtors.
________________________/

ORDER GRANTING VERIFIED MOTION
TO APPROVE SHORT SALE OF REAL PROPERTY

THIS CASE came on for consideration of the Debtors' Verified Motion to Approve Short Sale of Real Property (Doc. No. XX) (the "Motion"), and having considered the Motion and the absence of any record objection to the relief requested in the Motion by any party in interest, the Court deems the Motion to be uncontested.

Accordingly, it is hereby:

ORDERED:

1. The Motion is GRANTED, and the sale of the real property known as:

[Address and Legal Description]

(the "Real Property") by the Debtors is hereby APPROVED.

2. The sale of the Real Property is contingent upon the approval of any lienholders.

3. A copy of the HUD and/or closing statement shall be provided to the Chapter 13 Trustee within 14 days of the sale closing.

Dated: ______________________ ___________________________________
Caryl E. Delano
United States Bankruptcy Judge

Attorney ______________ is directed to serve a copy of this order on interested parties and file a proof of service within three days after entry of the order.

Tampa Bay Times

Mortgage-forgiveness tax break expires, triggering new worries for distressed homeowners

Drew Harwell, Times Staff Writer

Tuesday, January 14, 2014 11:29am

It's deja vu all over again for struggling Florida homeowners: The massive tax break that saved them tens of thousands of dollars has once again expired.

Underwater homeowners whose lenders let them sell their home for less than they owed have not had to pay taxes on that debt thanks to a law passed shortly after the housing bubble burst.

The Mortgage Forgiveness Debt Relief Act has been extended twice since 2007, including last year. But its expiration Dec. 31 could mean a rude awakening for homeowners come tax time.

Florida houses more than a million of the 6 million underwater mortgages nationwide. Even with rising home prices, about 30 percent of Tampa Bay's 600,000 outstanding loans remain underwater.

Those homeowners, many of whom bought at inflated prices during the housing boom, could ask the bank for a short sale that would let them move and dodge their debt.

But even if the bank forgave the debt, they would still be responsible for paying taxes on what is effectively an increase in their income. A short sale of $100,000 less than the homeowner's mortgage debt could, in a 25 percent tax bracket, mean a $25,000 surprise in taxes.

"These are clients with true hardships who still don't have jobs, still aren't able to find work," said Beth Cromwell, a short-sale processor for Hillsborough Title. "They're running out of options."

And it's not just short sellers. Foreclosed homeowners would owe taxes on what they failed to pay on their mortgage. Even homeowners offered mortgage help, like loan modifications or principal forgiveness, would be on the hook for taxes on what was cut.

Lawmakers could discuss an extension later this month alongside dozens of other expired tax breaks. Pending bills now in Congress would extend the tax break through 2015.

Realtors short-sold 6,700 Tampa Bay homes, townhomes and condos last year, listing data show, and more than 1,500 are now listed for short sale.

Up to $2 million of a homeowner's forgiven debt qualifies for the tax break. The extension last year saved taxpayers across the country $1.3 billion, federal data show.

Housing advocates said the expired tax break will hurt those least able to afford more in taxes. Agents for some distressed homeowners attempted to rush through short sales last year to dodge the "phantom income" tax bill.

Many distressed homeowners can dodge the mortgage-debt taxes if they prove to the IRS they are insolvent, owing more in

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debts than what they own in assets. That can be a saving grace for short sellers today who are in deep financial trouble.

"Most people who are doing (short sales) now aren't the strategic defaulters," said Keller Williams agent Steve Capen. "They have true hardships, and they usually will be insolvent at the time of closing."

Florida Attorney General Pam Bondi and 41 other attorneys general last month called on lawmakers to extend the relief, saying that, even with improvements to home prices and equity, "we are still not where we need to be."

"This relief is crucial to both the homeowners struggling to regain their financial footing," they wrote, "and to the battered housing market whose recovery is slow and still uncertain."

Contact Drew Harwell at (727) 893-8252 or dharwell@tampabay.com.

Mortgage-forgiveness tax break expires, triggering new worries for distressed homeowners 01/14/14

© 2013 Tampa Bay Times

PROCEDURE FOR FILING MOTION TO DETERMINE SECURED STATUS
AND TO STRIP JUNIOR LIEN ON DEBTOR'S PRINCIPAL RESIDENCE
ON NEGATIVE NOTICE

1. Motions to value claims secured by junior liens on the debtor's principal residence and to strip off the liens may be filed on negative notice.

2. Motions to value claims secured by junior liens on the debtor's principal residence at $0 and to "strip off" such liens shall not be filed before the earlier of the time when: (a) the affected creditor has filed a proof of claim or (b) the expiration of the time to file claims (claims bar date). A premature motion to value will be denied without prejudice.

3. The motion shall

– clearly state (a) all known parties who may have an interest in the mortgage, (b) the loan number (formatted as xxxx1234) and recording information of all mortgage lien(s) affected by the Motion, (c) the legal description and street address of the subject property, and (d) the basis of the valuation – private appraisal, county valuation, or other, (e) the balance of the first mortgage;

– be verified, or supported by an affidavit or declaration (pursuant to 28 U.S.C. § 1746) of the debtor;

– include on the first page the "negative notice" legend (below) giving interested parties 30 days to file an objection/request for hearing;

– certify service on (i) the appropriate persons required by Rule 7004 (b) (note in particular the requirement to serve insured depository institutions by certified mail), (ii) on the person who filed the mortgagee's proof of claim, (iii) the attorney, if any, for such creditor, and (iv) the Chapter 13 trustee, Chapter 7 trustee or US Trustee, as appropriate; and

– be docketed in CM/ECF using the "Motion to Determine Secured Status (and strip lien if applicable)" docket event.

4. The movant shall submit the attached form of proposed order to the Clerk's Office through its e-orders program not later than ten (10) days after the expiration of the thirty (30) day objection period. If attorney's fees are sought in the motion, then the title of the motion should reflect that, and the title of the order should reflect the awarding of fees therein.

5. The negative notice legend should read substantially as follows:

NOTICE OF OPPORTUNITY TO
OBJECT AND REQUEST FOR HEARING

> Pursuant to Local Rule 2002-4, the Court will consider this motion, objection, or other matter without further notice or hearing unless a party in interest files an objection within thirty (30) days from the date set forth on the proof of service attached to this paper. If you object to the relief requested in this paper, you must file your objection with the Clerk of the Court at 801 N. Florida Avenue, Suite 555, Tampa FL 33602-3899, and serve a copy on the movant's attorney, [Insert name and address].
>
> If you file and serve an objection within the time permitted, the Court may schedule and notify you of a hearing, or the Court may consider the objection and may grant or deny the relief requested without a hearing. If you do not file an objection within the time permitted, the Court will consider that you do not oppose the relief requested in the paper, will proceed to consider the paper without further notice or hearing, and may grant the relief requested.

6. In Chapter 13 cases, the debtor's plan shall provide for the stripping off of the lien, conditioned on the debtor's obtaining a discharge or on further order of the Court.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 8:09-bk-00000-XXX
Chapter 13

John Doe,

Debtor.
____/

MOTION TO DETERMINE SECURED STATUS OF ABC MORTGAGE COMPANY AND TO STRIP LIEN EFFECTIVE UPON DISCHARGE

NOTICE OF OPPORTUNITY TO
OBJECT AND REQUEST FOR HEARING

Pursuant to Local Rule 2002-4, the Court will consider this motion, objection, or other matter without further notice or hearing unless a party in interest files an objection within thirty (30) days from the date set forth on the proof of service attached to this paper. If you object to the relief requested in this paper, you must file your objection with the Clerk of the Court at 801 N. Florida Avenue, Suite 555, Tampa FL 33602-3899, and serve a copy on the movant's attorney, [Insert name and address].

If you file and serve an objection within the time permitted, the Court may schedule and notify you of a hearing, or the Court may consider the objection and may grant or deny the relief requested without a hearing. If you do not file an objection within the time permitted, the Court will consider that you do not oppose the relief requested in the paper, will proceed to consider the paper without further notice or hearing, and may grant the relief requested.

COMES NOW John Doe (the "Debtor") by and through his undersigned counsel, and files this Motion to Determine Secured Status of ABC Mortgage Company and to Strip Lien and states as follows:

1. The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on February 1, 2009.

2. The Debtor owns real property (the "Real Property") located at 123 Maple Street, Tampa, Florida, and more particularly described as follows:

LEGAL DESCRIPTION

3. The Real Property is encumbered by two mortgages:

(a) Lucky Mortgage, account number XXXX1234, holds the first mortgage, recorded on April 1, 2002, at Book XXXX, Pages XXXX, Instrument No. XXXX of the official records of Hillsborough County and has filed Claim No. 1 in the amount of $250,000.00.

(b) ABC Mortgage Company, account number XXXX1234, holds a second mortgage, recorded on April 1, 2002, at Book XXXX, Pages XXXX, Instrument No. XXXX of the official records of Hillsborough County and has filed Claim No. 2 in the amount of $75,000.00.

4. Based on the appraisal attached hereto as Exhibit 1, the value of the Real Property is $200,000.00.

5. Accordingly, ABC Mortgage Company's second mortgage is completely unsecured.

Wherefore, the Debtor respectfully requests that the Court enter an order:

(a) granting the Motion; (b) determining the value of the Real Property to be $200,000.00; (c) determining that ABC Mortgage Company's claim shall be treated as an unsecured claim; (d) voiding the mortgage lien of ABC Mortgage Company effective upon discharge; and (e) granting such other and further relief as the Court deems appropriate.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 8:09-bk-00000-XXX
Chapter 13

Debtor.
____/

ORDER GRANTING DEBTOR'S MOTION TO DETERMINE SECURED STATUS OF ABC MORTGAGE COMPANY AND TO STRIP LIEN EFFECTIVE UPON DISCHARGE

THIS CASE came on for consideration on the Debtor's Motion to Determine Secured Status of **ABC Mortgage Company** and to Strip Lien (the "Motion") (Doc. No. **XX**) pursuant to negative notice provisions of Local Rule 2002-4. The Court, considering the Motion and the absence of any record objection to the relief requested in the Motion by any party in interest, deems the Motion to be uncontested.

The real property (the "Real Property") that is the subject of the Motion is located at **123 Maple Street, Tampa, Florida**, and more particularly described as follows:

LEGAL DESCRIPTION

Accordingly, it is hereby

ORDERED:

1. The Motion is GRANTED.

2. Claim No. **X** filed by **ABC Mortgage Company** shall be treated as an unsecured claim in this Chapter 13 case.

3. The mortgage on the Real Property held by **ABC Mortgage Company** recorded on **April 1, 2002**, at **Book XXXX, Pages XXXX, Instrument No. XXXX** of the official records of Hillsborough County, Florida, shall be deemed void, and shall be extinguished automatically, without further court order, upon entry of the Debtor's discharge in this Chapter 13 case, provided, however, that the Court reserves jurisdiction to consider, if appropriate, the avoidance of **ABC Mortgage Company's** mortgage lien prior to the entry of the Debtor's discharge.

4. This order does not prohibit **ABC Mortgage Company** from asserting, at any time prior to the time when the lien is avoided by this order upon entry of the Debtor's discharge, any rights it may have as a defendant in any foreclosure proceeding brought by a senior mortgagee, including the right to claim excess proceeds from any foreclosure sale.

DONE and **ORDERED** in Chambers at Tampa, Florida, on ________________.

____
[Insert Judge]
United States Bankruptcy Judge

Copies furnished to:

Attorney [Name of submitting attorney] is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 02 2013
JOHN LEY
CLERK

No. 11-11352

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

In Re:

LORRAINE MCNEAL,

Debtor.

LORRAINE MCNEAL,

Plaintiff-Appellant,

versus

GMAC MORTGAGE, LLC,
HOMECOMINGS FINANCIAL, LLC,
A GMAC company,

Defendants-Appellees.

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

Before CARNES, Chief Judge, TJOFLAT, and EDMONDSON, Circuit Judges.

ORDER:

Briefly stated, Lorraine McNeal challenges the district court's affirmance of the bankruptcy court's denial of her motion to "strip off" a wholly unsecured second-priority lien on her home. This appeal was stayed automatically under 11 U.S.C. § 362 when Defendants-Appellees filed their own petitions for Chapter 11 bankruptcy. The bankruptcy court presiding over Defendants-Appellees' bankruptcy proceedings has now entered a "Stipulation and Order" lifting expressly the automatic stay for purposes of continuing this appeal to a final resolution. Thus, we may now decide some outstanding matters.

McNeal has filed a "Motion for Reconsideration" informing this Court of the bankruptcy court's "Stipulation and Order" and seeking a determination that this appeal is no longer stayed. Because McNeal does not seek reconsideration of an earlier order from this Court and because the bankruptcy court has already lifted the automatic stay, we DISMISS McNeal's motion as unnecessary. We do acknowledge, however, that the automatic stay has been lifted and that we may proceed with this appeal.

After Defendants-Appellees filed for bankruptcy, we ordered the parties to show cause why the Court should not reconsider sua sponte its denial of McNeal's

earlier motion to substitute Defendants-Appellees' transferees as parties to this appeal. Because this appeal is no longer subject to an automatic stay and because neither party supports substituting parties, we will proceed with the current parties to this appeal.

We GRANT McNeal's motion to publish the decisive opinion (dated 11 May 2012) in this case.[*]

[*] We are aware that Defendants-Appellees' petition for rehearing en banc is still pending. No ruling will be made on that petition for at least 30 days after the date of publication of the opinion in this appeal.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 12, 2013

Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Bank of America, N.A.
v. David Lamar Sinkfield
No. 13-700
(Your No. 13-12141)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on December 9, 2013 and placed on the docket December 12, 2013 as No. 13-700.

Sincerely,

Scott S. Harris, Clerk

by

Jacob C. Travers
Case Analyst

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12141-EE

In Re:

DAVID LAMAR SINKFIELD,

Debtor.

BANK OF AMERICA, NA,

Plaintiff - Appellant,

versus

DAVID LAMAR SINKFIELD,

Defendant - Appellee.

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

BEFORE: HULL, MARCUS, and JORDAN, Circuit Judges.

BY THE COURT:

Now before the Court is the parties' joint motion for summary affirmance or, in the alternative, to expedite the appeal.

The parties have stipulated that, under the reasoning in McNeal v. GMAC Mortgage, LLC, No. 11-11352, 477 F. App'x 562, 564 (11th Cir. May 11, 2012) (unpubl.), Folendore v. United States Small Bus. Admin., 862 F.2d 1537 (11th Cir.1989), remains binding precedent in this Circuit notwithstanding Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773 (1992). They jointly request summary disposition of this appeal to allow Appellant 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 joint motion for summary affirmance is GRANTED. The district court's May 9, 2013, order summarily affirming the bankruptcy court's April 29, 2013, order is summarily AFFIRMED.

The parties' alternative motion to expedite the appeal is DENIED AS MOOT.

The Clerk is directed to close the file on this appeal.

H
Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.
In re Greg F. COLBOURNE, Debtor.
Greg F. Colbourne, Plaintiff–Appellant,
v.
Ocwen, Defendant–Appellee.

No. 12–14722
Non–Argument Calendar.
Oct. 29, 2013.

Background: Chapter 13 debtor moved to value claim of secured creditor, and secured creditor objected. The United States Bankruptcy Court for the Middle District of Florida, Arthur B. Briskman, J., 458 B.R. 598, denied motion. Debtor appealed. The District Court affirmed, and debtor appealed.

Holding: The Court of Appeals held that because debtor, having received a Chapter 7 discharge during the four-year period preceding entry of the order for relief under Chapter 13, was ineligible for discharge, he was unable to modify permanently secured creditor's claims through a cram-down.

Affirmed.

West Headnotes

Bankruptcy 51 3708(8)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(8) k. Modification of Claim, Right, or Debt in General. Most Cited Cases

Bankruptcy 51 3718(4)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3718 Discharge
51k3718(4) k. Successive Proceedings. Most Cited Cases

Where Chapter 13 debtor, having received a Chapter 7 discharge during the four-year period preceding entry of the order for relief under Chapter 13, was ineligible for discharge, he was unable to modify permanently secured creditor's claims through a cram-down. 11 U.S.C.A. §§ 506(a), 1325(a)(5), 1328(f)(1).

Shannon Lea Akins, Law Offices of Shannon L. Akins, PA, Andrew C. Baron, Law Office of Andrew Baron, Orlando, FL, for Plaintiff–Appellant.

Mizell Campbell, Jr., Elizabeth R. Wellborn, P.A., Taji S. Foreman, Elizabeth Redchuk Wellborn, Elizabeth R. Wellborn, P.A., Deerfield Beach, FL, for Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket Nos. 6:10–cv–01813–TJC; 6:10–bk–00983–ABB.

Before MARTIN, FAY, and EDMONDSON, Circuit Judges.

PER CURIAM:

***1** Greg F. Colbourne appeals the district court's affirmance of the bankruptcy court's denial of Colbourne's motions to value the claims of Deutsche Bank; claims asserted through Ocwen Loan Servicing, LLC ("Ocwen"). [FN1] In his motions, Colbourne sought to cram down Ocwen's

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first-priority mortgage liens on two investment properties, pursuant to 11 U.S.C. §§ 506(a) and 1325(a)(5). No reversible error has been shown; we affirm.

In August 2009, Colbourne filed a Chapter 7 bankruptcy case in which he listed both Ocwen claims. Colbourne received a discharge. The Chapter 7 case was closed as a "no asset" case in December 2009.

Colbourne filed this Chapter 13 bankruptcy case in January 2010. In his schedules, Colbourne listed Ocwen's mortgage liens: (1) a first-priority lien in the amount of $374,000 on Colbourne's Hopewell Drive property, which property is valued at $125,000; and (2) a first-priority lien in the amount of $226,800 on Colbourne's Grasmere Parkway property, which property is valued at $70,000. Colbourne then filed motions to value and cram down Ocwen's claims based on the current appraised values of the properties, both of which were substantially less than the amounts outstanding on the mortgages.

The bankruptcy court denied Colbourne's motions. The bankruptcy court concluded that, because Colbourne was ineligible to receive a Chapter 13 discharge—pursuant to 11 U.S.C. § 1328(f)(1) [FN2] —based on his recent Chapter 7 discharge, he was precluded from cramming down Ocwen's claims. [FN3] The district court affirmed.

Colbourne argues that the bankruptcy court erred in concluding that, because Colbourne was ineligible to receive a discharge under Chapter 13, he may not cram down Ocwen's mortgage liens.

When the district court affirms the bankruptcy court's order, we review only the bankruptcy court's decision on appeal.[FN4] *Educ. Credit Mgmt. Corp. v. Mosley,* 494 F.3d 1320, 1324 (11th Cir.2007). And we review the bankruptcy court's legal conclusions *de novo. Hemar Ins. Corp. of Am. v. Cox,* 338 F.3d 1238, 1241 (11th Cir.2003).

"Chapter 13 debtors enjoy 'broad power to modify the rights of the holders of secured claims.' " *In re Paschen,* 296 F.3d 1203, 1205 (11th Cir.2002). " Section 1325(a)(5) is recognized as the source of a Chapter 13 debtor's authority to bifurcate secured claims and to 'strip down' the value of the claim to an amount equal to the value of the collateral." *Id.* at 1206.

" Section 1325(a)(5) specifies the conditions under which Chapter 13 plans must address 'allowed secured claims' [FN5] if the plans are to be confirmed...." *Id.* at 1205–06. In pertinent part, section 1325(a)(5) requires Chapter 13 plans to provide that the holder of "each allowed secured 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." 11 U.S.C. § 1325(a)(5)(B)(i)(I).

***2** Although Ocwen's claims are undersecured, that Ocwen is a "holder" of two "allowed secured claims" for purposes of section 1325(a)(5) is undisputed.

Other courts have explained that, when a "creditor's claim is bifurcated into a secured component and an unsecured component, [section 1325(a)(5)(B)(i)(I)] makes clear that the creditor may not be forced to release its lien upon payment of only the secured component." *In re Lilly,* 378 B.R. 232, 235 (Bankr.Ct.C.D.Ill.2007). Thus, where a debtor is ineligible for a discharge—as Colbourne was in this case—the creditor retains its lien "until the entire amount of the debt, calculated without regard to the modifications permitted in bankruptcy, is paid." *Id.* at 236.

Absent 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." *Id.; see also In re Jarvis,* 390 B.R. 600, 605–06 (Bankr.Ct.C.D.Ill.2008) ("A no-discharge Chapter 13 case may not ... result in a permanent modification of a creditor's rights where

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such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted.").

Several courts—including the Middle District of Florida—have followed the reasoning in *In re Lilly* and *In re Jarvis* in concluding that debtors ineligible for discharge may not modify a secured creditor's rights through cram down or strip off. *See, e.g ., In re Pierre,* 468 B.R. 419, 423–24, n. 19 (Bankr.Ct.M.D.Fla.2012) (collecting cases and explaining that debtors who are ineligible for Chapter 13 discharge are unable to cram down a partially secured lien on investment property); *In re Judd,* 66 Collier Bankr.Cas.2d (MB) 1620, 6 (Bankr.Ct.M.D.Fla.2011) (denying Chapter 13 debtor's motion to strip off a partially secured second-priority mortgage lien on an investment property when the debtor was ineligible for a Chapter 13 discharge).

We are persuaded by the reasoning in these decisions.[FN6] Thus, because Colbourne is ineligible for discharge under section 1328, he is unable to modify permanently Ocwen's claims through a cram down. *See In re Lilly,* 378 B.R. at 236.

Colbourne also argues that, although he is ineligible for a Chapter 13 discharge, the Bankruptcy Code does not preclude him from filing for, or from receiving, Chapter 13 relief. Although Colbourne's argument may be correct as a matter of law, the bankruptcy court—in fact—made no ruling that Colbourne was ineligible for filing a Chapter 13 case or that Colbourne was ineligible for all forms of Chapter 13 relief. Instead, after denying Colbourne's motions to value, the bankruptcy court confirmed Colbourne's Chapter 13 plan pending resolution of this appeal. Thus, although Colbourne is unable to cram down Ocwen's claims, he has already filed for (and benefited from) other forms of Chapter 13 relief.

We see no reversible error. Colbourne's motions were denied properly.

***3** AFFIRMED.

FN1. On appeal, Colbourne does not challenge the bankruptcy court's denial of Colbourne's motion to value a claim filed by Wells Fargo Dealer Services, f/k/a Wachovia Dealer Services, Inc.

FN2. Section 1328(f)(1) provides that "the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge ... in a case filed under chapter 7 ... of this title during the 4–year period preceding the date of the order for relief under this chapter...." 11 U.S.C. § 1328(f)(1).

FN3. The bankruptcy court later confirmed Colbourne's Chapter 13 plan. Although the plan payments to Ocwen were calculated based on the proposed crammed down values, the bankruptcy court ordered Colbourne to pay all disposable income into the estate until this appeal was resolved. The bankruptcy court also ordered Colbourne to file a motion to modify the confirmed plan to pay Ocwen's claims in full if his appeal was unsuccessful.

FN4. The district court's order affirming the bankruptcy court's denial of Colbourne's motions is a final and appealable order. *See In re Donovan,* 532 F.3d 1134, 1136 (11th Cir.2008); *T & B Scottdale Contractors v. United States,* 866 F.2d 1372, 1375 (11th Cir.1989). The district court concluded definitively that Colbourne was not permitted to cram down Ocwen's claims.

Although the bankruptcy court must continue to oversee the administration of

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Colbourne's bankruptcy estate—including modification of the confirmed plan in accordance with the district court's ruling—the district court's order fully resolved the issue and left the bankruptcy court with no discretion in implementation.

FN5. The term "allowed secured claim" refers to section 506(a), which provides that "[a]n allowed claim ... secured by a lien on 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).

FN6. We acknowledge that courts have approached differently the issue of lien-stripping in "Chapter 20" cases. Because the majority of cases that permit lien-stripping, including each of the cases cited by Colbourne in his appellate brief, involve the stripping off of wholly unsecured second-priority liens on principal residences—not the cram down of undersecured first-priority liens on investment property—we see their guidance less applicable to the facts of this appeal.

C.A.11 (Fla.),2013.
In re Colbourne
--- Fed.Appx. ----, 2013 WL 5789159 (C.A.11 (Fla.))

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468 B.R. 419, 23 Fla. L. Weekly Fed. B 261
(Cite as: 468 B.R. 419)

United States Bankruptcy Court,
M.D. Florida,
Orlando Division.
In re Senayda PIERRE, Debtor[s].

No. 6:10–bk–21663–KSJ.
March 16, 2012.

Background: Chapter 13 debtor moved to value nonresidential mortgagee's claim for purpose of "strip down" in her individual Chapter 13 case, and mortgagee objected on ground that debtor's husband, a co-owner of this entireties property, was not party to bankruptcy case and had recently received a discharge in Chapter 7.

Holdings: The Bankruptcy Court, Karen S. Jennemann, Chief Judge, held that:
(1) spouse who owns property by the entireties with another spouse cannot "strip down" a partially secured lien, or "strip off" a totally unsecured lien, in Chapter 13 case, when the other spouse is not also a co-debtor in bankruptcy case, and
(2) even if this were not the case, debtor-wife could not "strip down" mortgage lien when her husband, the co-owner and non-debtor, was not entitled to similar relief due his recent discharge in Chapter 7.

Motion denied.

West Headnotes

[1] Bankruptcy 51 ⚷3718(1)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3718 Discharge
51k3718(1) k. In general. Most Cited Cases

Bankruptcy 51 ⚷3718(4)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3718 Discharge
51k3718(4) k. Successive proceedings. Most Cited Cases

Use of Chapter 13 plan to modify rights of secured creditors, whether through "strip down" of claim collateralized by nonhomestead property or "strip off" of wholly unsecured lien, is not effective unless and until debtor receives a Chapter 13 discharge, something which cannot occur in "Chapter 20" context, where debtor has recently received discharge under Chapter 7. 11 U.S.C.A. §§ 1325(a)(5)(B), 1328(f).

[2] Bankruptcy 51 ⚷3701

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

Bankruptcy 51 ⚷3711(1)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3711 Curing Defaults
51k3711(1) k. In general. Most Cited Cases

Bankruptcy 51 ⚷3713

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3713 k. Time for completion; extension or modification. Most Cited Cases

Chapter 13 was created to protect overextended individual wage earners that desired to voluntarily repay their debts, not as an instrument for protecting real property; while debtors may indeed use Chapter 13 to save their homes, legislative purpose of Chapter 13 was to maximize recovery to creditors by allowing debtors to cure arrears and make payments over period of up to 60 months.

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[3] Bankruptcy 51 🔑2575

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

Bankruptcy 51 🔑3708(8)

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

Spouse who owns property by the entireties with another spouse cannot "strip down" a partially secured lien, or "strip off" a totally unsecured lien, in Chapter 13 case, when the other spouse is not also a co-debtor in bankruptcy case.

[4] Husband and Wife 205 🔑14.2(1)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(1) k. Nature and incidents. Most Cited Cases

Under Florida law, entireties property belongs to neither spouse individually; rather, each spouse holds the whole or the entirety, and not a share, moiety, or divisible part.

[5] Husband and Wife 205 🔑14.2(4)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(4) k. Evidence. Most Cited Cases

Under Florida law, there is a presumption that real and personal property acquired by married couple is held by the entireties when all six unities are present: (1) unity of possession, because there is joint ownership and control; (2) unity of interest, because each spouse's interest is identical; (3) unity of title, because these interests originated in same instrument; (4) unity of time, because interests commenced simultaneously; (5) survivorship; and (6) unity of marriage, because the parties were married at the time the property became titled in their joint names.

[6] Husband and Wife 205 🔑14.2(2)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(2) k. Creation and existence in general. Most Cited Cases

Under Florida law, there is no entireties estate should any of the six unities of possession, interest, title, time, survivorship and marriage never have existed or be destroyed.

[7] Husband and Wife 205 🔑14.9

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.9 k. Separate contracts as to property. Most Cited Cases

Husband and Wife 205 🔑14.10

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.10 k. Separate conveyance or mortgage. Most Cited Cases

Under Florida law, neither spouse can sell, forfeit or encumber any party of entireties estate without consent of the other, nor can one spouse alone lease it or contract for its disposition.

[8] Husband and Wife 205 🔑14.11

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife

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205k14.11 k. Rights of creditors as to estate in entirety or in common. Most Cited Cases

Under Florida law, creditors cannot levy on entireties property to satisfy debt of individual spouse.

[9] Husband and Wife 205 ⚷14.2(7)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(7) k. Rights and liabilities of spouses. Most Cited Cases

One benefit, and perhaps sometimes burden, of entireties ownership under Florida law is that any type of ownership change requires joint action by both spouses.

[10] Bankruptcy 51 ⚷2575

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

Bankruptcy 51 ⚷3708(8)

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

Bankruptcy 51 ⚷3718(4)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3718 Discharge
51k3718(4) k. Successive proceedings. Most Cited Cases

Even assuming that the law allowed Chapter 13 debtor, as co-owner of investment property held by the entireties with her non-debtor husband, to independently strip an undersecured lien on that property in her individual Chapter 13 case, debtor could not "strip down" that lien in her own Chapter 13 case when her husband, the co-owner and non-debtor, was not entitled to similar relief due his recent discharge in Chapter 7. 11 U.S.C.A. §§ 1325(a)(5)(B), 1328(f).

***420** Andrew C. Baron, Orlando, FL, for Debtor.

Larry M. Foyle, Kass Shuler SolomonSpector Foyle, Tampa, FL, for Citimortgage Inc.

***421** *MEMORANDUM OPINION DENYING DEBTOR'S MOTION TO VALUE LIEN OF CITIMORTGAGE*

KAREN S. JENNEMANN, Chief Judge.

Debtor, Senayda Pierre, and her non-filing spouse, Maurince Pierre, jointly own as tenants-by-the-entireties investment real estate. The investment property [FN1] (the "Property") is located in Orlando, Florida, and is encumbered by a first mortgage payable to CitiMortgage. Debtor has filed a motion seeking to value (or strip down) CitiMortgage's lien.[FN2] Because Mr. Pierre, the co-owner of the Property, is not a joint debtor in this bankruptcy case, and also because he recently received a discharge in a separate Chapter 7 bankruptcy case, CitiMortgage objects to debtor's request. [FN3] The issue is whether the Court can strip down a partially unsecured mortgage in a Chapter 13 case when the collateral is jointly owned by husband and wife as tenants by the entireties and only one spouse is a debtor. The Court holds that a prerequisite to stripping down a secured lien under § 1322(b)(2) of the Bankruptcy Code [FN4] is that both co-owner spouses must be debtors in the same Chapter 13 case and that each joint debtor also must qualify for a Chapter 13 discharge.

FN1. The property is not debtor's homestead.

FN2. Doc. No. 32.

FN3. Doc. Nos. 36, 63.

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FN4. All references to the Bankruptcy Code are to 11 U.S.C. § 101, *et seq.*

CitiMortgage holds a partially unsecured lien on the Property. Although the parties do not agree as to the exact value of the real property at issue, debtor contends the value of the Property subject to CitiMortgage's lien is $77,000. CitiMortgage argues the value is higher but likely not to exceed the amount of the outstanding indebtedness of $148,962.[FN5]

FN5. For the purposes of this opinion, the parties do agree that the amount of CitiMortgage's lien is more than the value of its collateral.

Strip Off and Strip Down

A Chapter 13 debtor normally can bifurcate an under-secured mortgage claim encumbering non-homestead property into a secured portion and an unsecured portion pursuant to § 506(a).[FN6] "Section 506(a) defines the secured and unsecured components of debts according to the value of the underlying collateral." [FN7] Sections 506(a) and 1322(b)(2) work in tandem for claims valuation. [FN8] Section 1322(b)(2) allows a debtor to "modify the rights of holders of secured claims," but not where the underlying collateral is the debtor's principal residence.[FN9]

FN6. *Nobelman v. Am. Savs. Bank,* 508 U.S. 324, 328–29, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993); *Tanner v. FirstPlus Fin., Inc. (In re Tanner),* 217 F.3d 1357, 1360 (11th Cir.2000).

Section 506(a) provides:

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.

FN7. *In re Tanner,* 217 F.3d at 1358.

FN8. *Id.* at 1360.

FN9. Section 1322(b)(2) provides a plan may, subject to subsections (a) and (c):

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.

In addition to stripping down or stripping off a mortgage, modification of a claim pursuant to § 1322(b)(2) may include modifying the amount or timing of payments on the claim, reducing the interest rate, or deferring a balloon payment.

***422** The valuation of an under-secured mortgage claim is commonly referred to as a "strip down" or "cram down." Where the valuation of property indicates that a claim is partially secured, the secured portion of the claim is paid through the debtor's plan as an allowed secured claim, and the unsecured portion is "stripped down" to an allowed unsecured claim. The unsecured claim generally is paid on a pro rata basis along with all other general unsecured claims. If a mortgage claim is

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completely unsecured, a Chapter 13 debtor can eliminate or "strip off" the entire secured claim, leaving the creditor with only one claim, an unsecured claim, pursuant to § 506(d).[FN10] A wholly unsecured lien claim is void pursuant to § 506(d).

FN10. *In re Tanner,* 217 F.3d at 1360 (holding any claim that is wholly unsecured is not protected from modification under § 1322(b)(2)). Section 506(d) provides:

> 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.

The same is not true in a Chapter 7 case. A Chapter 7 debtor cannot strip off a totally unsecured lien because no Chapter 7 counterpart to § 1322(b)(2) exists.[FN11] Neither lien strip off nor lien cram down is available in Chapter 7. The issue is how these restrictions on modifying secured claims work in this particular case, where debtor seeks to strip down a partially unsecured claim on the Property, a remedy unavailable to her non-filing husband who owns the Property as a tenant by the entirety.

FN11. *Armstrong v. Regions Bank (In re Armstrong),* No. 6:10–cv–1316–Orl–31, 2011 WL 768080, at *3 (M.D.Fla. Feb. 28, 2011); *In re Hoffman,* 433 B.R. 437, 440 (Bankr.M.D.Fla.2010).

With the recent economic recession and the drastic devaluation of real property values, Mrs. Pierre and her husband stopped making payments to CitiMortgage and other lenders for the debt owed on their multiple investment properties. CitiMortgage and the other lenders instituted foreclosure actions to recover their collateral. On June 14, 2010, debtor and her husband jointly filed a Chapter 7 bankruptcy case to stop these foreclosures.[FN12] The debtors indicated they intended to surrender their interest in their jointly owned properties, including the Property subject to this dispute.[FN13] The Chapter 7 trustee submitted a report of no distribution declaring the case a no-asset case and abandoning all property.[FN14] Both debtors in the joint Chapter 7 case received a discharge pursuant to § 727(a) on October 5, 2010.[FN15]

FN12. *In re Maurince and Senayda Pierre,* Case No. 6:10–bk–10319–KSJ.

FN13. Case No. 6:10–bk–10319–KSJ, Doc. No. 1, Pages 36 and 37.

FN14. Case No. 6:10–bk–10319–KSJ, Doc. No. 1, administrative entry, August 17, 2010.

FN15. Case No. 6:10–bk–10319–KSJ, Doc. No. 18.

Shortly thereafter, on December 6, 2010, *only* Mrs. Pierre filed this Chapter 13 case. Contrary to the Statement of Intentions she and her husband filed in their ***423** joint Chapter 7 case, Mrs. Pierre now states that she wants to retain (not surrender) her jointly owned real property, including CitiMortgage's collateral. Because she wants to strip down or strip off various secured liens encumbering the investment properties she now seeks to retain, Mrs. Pierre sought, and was granted, a revocation of her Chapter 7 discharge.[FN16] Given the recent line of cases decided by Bankruptcy Judge Arthur B. Briskman, the revocation of Ms. Pierre's discharge was inadvertent and would not be granted today.[FN17] However, what was done was done, and this Court

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allowed Mrs. Pierre to revoke her discharge. Her husband, however, is still receiving the benefits of his Chapter 7 discharge.

FN16. Case No. 6:10–bk–10319–KSJ, Doc. No. 28.

FN17. *In re Poorvin,* No. 6:11–bk–01028–ABB, 2011 WL 5572607 (Bankr.M.D.Fla. Nov. 15, 2011); *In re Gomez,* 456 B.R. 574 (Bankr.M.D.Fla.2011); *In re Attaway,* No. 6:09–bk–17777–ABB (Bankr.M.D.Fla. Feb. 2011); *see, also, In re Stokes,* Case No. 6:09–bk–01126–ABB (Bankr.M.D.Fla. Feb. 9, 2011) (denying debtor's motion to waive his Chapter 7 discharge in converted case where he sought to recharacterize his home as investment property and permanently modify the secured claims encumbering the property). "The discharge injunction is permanent; it forever enjoins a debtor's creditors from pursuing the debtor for discharged debts. Debtors and their creditors rely upon the permanency of the discharge and the discharge injunction." *In re Gomez,* 456 B.R. at 577. To allow a debtor to vacate his discharge "would undermine the sanctity of the Chapter 7 discharge and the discharge injunction" and "lead to abuses of the bankruptcy system by debtors who seek to avoid the repercussions of Section 1328(f) ." *Id.*

[1] Mr. Pierre, who is not a debtor in this case, would not be entitled to receive a Chapter 13 discharge within four years of the petition date of his previous Chapter 7 case under § 1328(f)(1). Section 1328(f) was added to the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and prevents courts from issuing two discharges to a single debtor in rapid succession in so-called "Chapter 20" situations. [FN18] (A "Chapter 20" occurs where a debtor files a Chapter 13 case shortly after obtaining a Chapter 7 discharge). Therefore, even if he were to file a Chapter 13 case, Mr. Pierre still could not cram down CitiMortgage's claim because he cannot receive a discharge in the later Chapter 13 case. The vast majority of courts, including this one, uniformly 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. [FN19] Mr. ***424** Pierre will never receive such a discharge. This Court similarly has held that a lien valued at zero pursuant to § 506(d) is not void again unless and until the debtor receives a discharge.[FN20] The bright-line rule for extinguishment of a lien, as set forth in *In re Sadala,* was created to protect the creditor's interest in the event a debtor defaults prior to conclusion of his Chapter 13 case.[FN21]

FN18. Section 1328(f) provides:

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4–year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2–year period preceding the date of such order.

FN19. *In re Slate,* No. 6:11–15737–ABB, 2012 WL 293591 (Bankr.M.D.Fla. Feb. 2, 2012); *In re Rosa,* No. 6:10–bk–07799–ABB, 2011 WL 6257305 (Bankr.M.D.Fla. Dec. 15, 2011); *In re Judd,* No. 6:11–bk–04093–ABB, 2011 WL 6010025 (Bankr.M.D.Fla. Dec. 1, 2011); *In re Morrobel,* No. 6:10–bk–17417–ABB (Bankr.M.D.Fla. May 3, 2011); *In re Fleeton,* No. 6:10–bk–07391–ABB (Bankr.M.D.Fla. Apr. 12, 2011); *In re*

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Attaway, No. 6:09–bk–17777–ABB (Bankr.M.D.Fla. Feb. 18, 2011); *In re Stokes,* Case No. 6:09–bk–01126–ABB (Bankr.M.D.Fla. Feb. 9, 2011); *In re Daniel J. Vega,* No. 6:10–bk–11229–ABB (Bankr.M.D.Fla. Nov. 30, 2010); *In re Trujillo,* No. 6:10–bk–02615–ABB, 2010 WL 4669095 (Bankr.M.D.Fla. Nov. 10, 2010); *In re Colbourne,* 458 B.R. 598 (Bankr.M.D.Fla.2010).

FN20. *In re Sadala,* 294 B.R. at 185.

FN21. This decision was issued prior to the enactment of BAPCPA and §§ 1328(f) and 1325(a)(5). With the enactment of §§ 1328(f) and 1325(a)(5), the creditor's rights are protected in the situation where the Chapter 13 case fails.

Looking to the plain language of § 1328(f)(1), the confirmation requirements of § 1325(a)(5), and Congress' intent in enacting BAPCPA, the vast majority of courts have determined cram down and strip off are impermissible where a debtor is prohibited from receiving a discharge pursuant to § 1328(f).[FN22] Allowing cram down or a strip off of a lien without a discharge or payment of the debt would result in a " 'de facto discharge, a benefit to which [debtors who are prohibited from receiving a discharge pursuant to Section 1328(f)] are not entitled.' " [FN23] Put another way, allowing a debtor to discharge his debts in a Chapter 7 and then immediately filing a Chapter 13 to strip off or cram down a mortgage claim would be equivalent to modifying the mortgage in the Chapter 7, which a debtor cannot do.

FN22. Section 1325(a)(5) was enacted by BAPCPA and requires for confirmation that the plan provides the holder of an allowed secured claim retain its lien securing its lien until the earlier of the payment of the underlying debt determined under nonbankruptcy law or discharge under § 1328. Therefore, strip off or cramdown occurs at discharge. *In re Gerardin,* 447 B.R. 342, 350 (Bankr.S.D.Fla.2011) (en banc); *In re Jarvis,* 390 B.R. 600, 607 (Bankr.C.D.Ill.2008); *In re Lilly,* 378 B.R. 232, 236 (Bankr.C.D.Ill.2007).

FN23. *In re Gerardin,* 447 B.R. at 349 (*quoting In re Fenn,* 428 B.R. 494, 500 (Bankr.N.D.Ill.2010)).

[2] A minority of courts have allowed the cram down of mortgage claims in Chapter 20 situations, arguing the purpose of Chapter 13 is to protect debtors' homes.[FN24] Such contention contradicts Congress' clearly articulated intent in creating Chapter 13. [FN25] Senate Report 95–989 (Bankruptcy Reform Act of 1978) sets forth:

FN24. *See, e.g., In re Scantling,* 465 B.R. 671, 682 (Bankr.M.D.Fla.2012) ("A central purpose of chapter 13 is to save homes.").

FN25. Chapter 13, entitled "Adjustment of Debts of an Individual with Regular Income" and derived from Chapter XIII of the Bankruptcy Act of 1938, was enacted by Congress in the Bankruptcy Reform Act of 1978, Public Law No. 95–598.

The new Chapter 13 undertakes to solve these problems insofar as bankruptcy law can provide a simple yet precise and effective system for individuals to pay debts under bankruptcy court protection and supervision. The new chapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment based on that individual's exact circumstances.[FN26]

FN26. S. REP. No. 95–989, at 13 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5799.

The House of Representatives Report 95–595 sets forth:

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The purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his ***425** debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement.[FN27]

FN27. H.R. REP. No. 95–595, 95th Cong., 1st Sess. 118 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6079.

Chapter 13, as the legislative history sets forth, was created to protect overextended individual wage earners desiring to voluntarily repay their debts through the automatic stay and provide financial relief through a fresh start. To view Chapter 13 as an instrument for protecting real property, or as a panacea for the real estate recession, misconstrues Congress' intended purpose of Chapter 13. Although debtors indeed may use Chapter 13 to save their homes, the legislative purpose of Chapter 13 is to maximize recovery to creditors by allowing debtors to cure arrears and make payments over a period of up to 60 months.

The legislative history of BAPCPA also indicates Congress was much more interested in having debtors repay their debts than in saving their homes. The 2005 amendments, as established by the legislation's title "Bankruptcy Abuse Prevention and Consumer Protection Act," were intended to curb what was perceived to be abusive bankruptcy practices, and to ensure that debtors with the ability to repay their debts do so.[FN28] Sections 1328(f) and 1325(a)(5) were enacted as part of the 2005 overhaul to prohibit debtors from receiving two discharges within a four year period and to increase repayment obligations by debtors. BAPCPA certainly was not enacted to "save homes." These two new provisions, particularly when read in conjunction with Section 348(f), which is also a BAPCPA addition to the Bankruptcy Code, clearly posit that a discharge is fundamental to the modification of a secured claim. [FN29] Attempts to strip off or cramdown in a Chapter 20 no-discharge situation not only violate the plain language of the Bankruptcy Code, but violate Congress' clear intent in enacting BAPCPA.

FN28. H.R. REP. No. 109–31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89. "The purpose of the bill [S. 256] is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors ... The heart of the bills' consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford."

FN29. Section 348(f) provides that a lien modification is ineffective upon conversion of a Chapter 13 case to Chapter 7.

Returning to Mrs. Pierre's dilemma, she owns the Property at issue with her husband as tenants by the entireties. Mr. Pierre was discharged of his *in personam* liability to CitiMortgage in his previous Chapter 7 case and cannot now receive a Chapter 13 discharge. Mrs. Pierre, however, remains fully liable to CitiMortgage because she revoked her Chapter 7 discharge. Mrs. Pierre now would like strip or value down CitiMortgage's lien in this Chapter 13 case, even though her husband cannot.

Mrs. Pierre's request raises at least two issues. First, whether one spouse who owns property as a tenant by the entireties with another spouse can strip down a partially secured lien (or strip off a totally unsecured lien) in a Chapter 13 case, when the other spouse is not also a co-debtor in the bankruptcy case. Second, even if the law allows one co-owner as tenants by the entirety to

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independently strip a secured lien in an individual Chapter 13 case, ***426** whether Mrs. Pierre can strip a secured lien in her own Chapter 13 case when Mr. Pierre, the co-owner and non-debtor, is not entitled to similar relief due to a prior discharge. The Court here answers both questions in the negative.

Spouses Owning TBE Property Must File Joint Chapter 13 Cases to Value Secured Liens

[3][4][5][6][7][8] Here, Mrs. Pierre undisputedly owns the property at issue as a tenant by the entireties with her husband. Tenancy by the entireties (TBE) is a form of ownership of property unique to married couples.[FN30] Entireties property belongs to neither spouse individually, but each spouse holds "the whole or the entirety, and not a share, moiety, or divisible part." [FN31] In Florida, real and personal property acquired by a married couple is afforded a presumption of TBE ownership when all six unities are present: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests must be identical); (3) unity of title (the interest must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names.) [FN32]

FN30. *Beal Bank, SSB v. Almand & Assoc.,* 780 So.2d 45, 52 (Fla.2001).

FN31. *Bailey v. Smith,* 89 Fla. 303, 103 So. 833, 834 (1925).

FN32. *Beal Bank,* 780 So.2d at 52.

"Should one of these unities never have existed or be destroyed, there is no entireties estate. As long as all the unities remain intact, however, each spouse's interest comprises the whole or entirety of the property and not a divisible part; the estate is inseverable. 'Neither spouse can sell, forfeit or encumber any party of the estate without the consent of the other, nor can one spouse alone lease it or contract for its disposition. Creditors cannot levy on entireties property to satisfy the debt of an individual spouse.' " [FN33]

FN33. *U.S. v. One Single Family Residence With Out Buildings Located at 15621 S.W. 209th Ave., Miami, Fla.,* 894 F.2d 1511, 1514 (11th Cir.1990) (*citations omitted*).

The first issue is whether, in this Chapter 13 case, Mrs. Pierre can strip down CitiMortgage's lien, even though her spouse and co-TBE owner is not a debtor. With two exceptions,[FN34] every court addressing the issue has refused to allow a spouse in an individual Chapter 13 case to strip down or off a mortgage encumbering TBE property.[FN35]

FN34. *In re Janitor,* 2011 WL 7109363 (Bankr.W.D.Pa. January 4, 2011); *In re Strausbough,* 426 B.R. 243 (Bankr.E.D.Mich.2010).

FN35. *In re Hunter,* 284 B.R. 806 (Bankr.E.D.Va.2002); *Alvarez v. HSBC Bank USA, N.A.,* No. MJG–11–2886, 2011 WL 6491670 (D.Md. Dec. 28, 2011); *In re Erdmann,* 446 B.R. 861 (Bankr.N.D.Ill.2011); *see also In re Barra,* No. 09–16505–SSM, 2010 WL 2991028 (Bankr.E.D.Va. July 26, 2010) (stating the Court would follow *In re Hunter* if it had to rule on a TBE issue).

In *In re Hunter,* Judge Mayer carefully reviewed applicable TBE law and concluded that individual debtors simply are prohibited from stripping down or off a mortgage unless the other spouse also is a joint debtor in the Chapter 13 case. [FN36] Central to Judge Mayer's analysis was the treatment of a husband and wife as single entity pursuant to TBE law:

FN36. *In re Hunter,* 284 B.R. 806 (Bankr.E.D.Va.2002). *See also In re Barra,* 2010 WL 2991028 (Bankr.E.D.Va.

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July 26, 2010); *Alvarez v. HSBC Bank USA, Nat. Ass'n,* 2011 WL 6941670 (D.Md. Dec. 28, 2011).

***427** Fundamentally the estate rests on the legal unity of husband and wife. It is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to legal intendment one and the same.[FN37]

FN37. *In re Hunter,* 284 B.R. at 810.

Judge Mayer, looking to the applicable state TBE law, delineated the rights and responsibilities of spouses who own property as tenants by the entirety. An essential characteristic of TBE property is that each spouse owns an undivided and indivisible interest in the entire property. A spouse may not unilaterally sever an estate held TBE. Judge Mayer concluded allowing an individual debtor to lien strip or cramdown TBE property would constitute a unilateral severance of the estate, which violates the fundamentals of TBE law. [FN38]

FN38. *Id.* at 814.

[9] The Court agrees with this ruling and finds that nothing in Florida TBE law would posit a different result. Florida courts repeatedly have held that property owned as TBE "belongs to neither spouse individually, but each spouse is seized of the whole." [FN39] In concluding that no creditor of only one of the spouses can seize TBE property, the Florida Supreme Court held that TBE property is "an estate over which the husband and wife have absolute disposition and as to which each, in the fiction of the law, holds the entire estate as one person." [FN40] More pertinent to this analysis, the First District Court of Appeal held that any encumbrance or conveyance [of TBE property] would also require joint action of the selling parties under the contract, since "neither spouse can without the assent of the other, alien or forfeit any part of an estate by the entirety so as to defeat the rights of the other." [FN41] Simply stated, one benefit, and perhaps sometimes burden, of TBE ownership is that any type of ownership change requires joint action by both spouses. Mrs. Pierre simply cannot reduce or eliminate a mortgage encumbering real property she owns as TBE with Mr. Pierre, unless he is a debtor in this Chapter 13 case, and he is entitled to also receive a Chapter 13 discharge.

FN39. *Beal Bank,* 780 So.2d at 53 (quoting *Bailey v. Smith,* 103 So. at 834).

FN40. *Hunt v. Covington,* 145 Fla. 706, 200 So. 76, 77 (1941).

FN41. *Tingle v. Hornsby,* 111 So.2d 274, 277 (Fla. 1st DCA 1959). *But see, Gerson v. Broward County Title Co.,* 116 So.2d 455 (Fla. 2d DCA 1959) (holding that a husband may accept payment in discharging a note held by the entireties because possession by the husband *is* possession by the wife).

In the one decision allowing a sole spouse to strip a lien in a Chapter 13 case, *In re Strausbough,* the Michigan Bankruptcy Court assumed that a debtor's ability to strip a lien under § 506 is self-effectuating. [FN42] This reasoning is incorrect because, in a Chapter 13 case, modification of a lien is only possible upon the issuance of a Chapter 13 discharge under § 1328. As such, § 506 is only the beginning of the analysis, and unless and until a debtor complies with all provisions of Chapter 13, a debtor cannot modify a secured claim.

FN42. *In re Strausbough,* 426 B.R. 243, 247–250 (Bankr.E.D.Mich.2010).

In a Jointly–Filed Chapter 13 Case, Both Spouses Must Receive a Chapter 13 Discharge Before the Co–Debtors can Strip Off/Down a Secured Claim

[10] The next issue is whether, even if Mr. Pierre were a joint debtor in this Chapter 13 case, both spouses could strip down CitiMortgage's lien.

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The Court concludes***428** they could not because Mr. Pierre cannot receive a Chapter 13 discharge inasmuch as he received a Chapter 7 discharge within the applicable 4–year look-back period.[FN43] As previously discussed, a Chapter 13 debtor may strip a lien pursuant to § 506 and § 1322(b)(2) of the Bankruptcy Code. The strip off or cramdown is only effective, however, upon the issuance of a Chapter 13 discharge, which only occurs when all payments are completed under a confirmed plan of reorganization, and only if each debtor has complied with the provisions of § 1325. A debtor who has received a Chapter 7 discharge within the prior four years cannot receive a Chapter 13 discharge pursuant to § 1328(f). Here, because Mr. Pierre recently received a Chapter 7 discharge, he simply cannot receive a discharge in this Chapter 13 and, as such, neither he nor his wife, Mrs. Pierre, is entitled to strip down CitiMortgage's lien.

FN43. *In re Perez–Gomez,* Case No. 6:09–bk–13656–ABB, 2010 WL 5289498 (Bankr.M.D.Fla. December 7, 2010); *In re Gerardin,* 447 B.R. 342.

In the decision of *In re Erdmann,* the Bankruptcy Court for the Northern District of Illinois held that when one of the co-debtors is ineligible to receive a Chapter 13 discharge due to an earlier Chapter 7 discharge, neither spouse could strip a lien encumbering their jointly-owned property.[FN44] The Court rightfully established a black and white rule that both co-owners of TBE property must be joint debtors and each must be eligible to receive a Chapter 13 discharge before either can strip a lien.[FN45]

FN44. *In re Erdmann,* 446 B.R. 861, 865 (Bankr.N.D.Ill.2011).

FN45. *Id.* at 868–69 (noting that allowing one co-owner to strip a lien would result in confusion in state property records because the mortgage arguably is reduced or eliminated as to one spouse but not the other. Which would control?)

This Court also believes allowing one co-TBE owner to strip liens unilaterally would result in other types of mischief that could affect the integrity of the bankruptcy process and state property recordation procedures. This case is a perfect example. Here, Mr. Pierre has discharged his personal liability to CitiMortgage in his Chapter 7 case. Yet, rather than truly surrendering his interest in the Property, which is the normal result when one surrenders their interest in a Chapter 7 case, his co-TBE owner, Mrs. Pierre, is attempting to retain the property in this Chapter 13 case but substantially reduce or eliminate the amount of the secured claim. This places the secured creditor CitiMortgage in an untenable and unfair predicament. CitiMortgage cannot foreclose on the property hollowly surrendered in Mr. Pierre's Chapter 7 case, due to Mrs. Pierre's Chapter 13 case, nor can CitiMortgage sue Mr. Pierre for any deficiency judgment due. For all purposes, Mr. Pierre is receiving the full benefit of his wife's Chapter 13 discharge, even though he is not entitled to the benefits. For this, and the other reasons restricting debtors from benefitting from a Chapter 7 case rapidly followed by a Chapter 13 case, *i.e.,* Chapter 20 cases, the Court adopts the reasoning of *In re Erdmann* and sets a black and white rule: co-TBE owners must file a joint Chapter 13 case and both must receive Chapter 13 discharges before *either* can strip down/off a secured lien.

Here, Mrs. Pierre has failed on both prongs of this test. Her husband and co-TBE owner is not a joint debtor in this Chapter 13 case. Moreover, even if he were, he could not strip down the lien of CitiMortgage because he is not entitled to a discharge. Debtor's Motion to Value the Mortgage of CitiMortgage is denied. CitiMortgage's***429** claim is allowed in full as a secured claim. A separate order consistent with this Memorandum Opinion shall be entered.

DONE AND ORDERED.

Bkrtcy.M.D.Fla.,2012.
In re Pierre

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General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 13-10558	**Docketed:** 02/08/2013
Wells Fargo Bank, N.A. v. Tahisia Scantling	
Appeal From: BK - FLM Tampa	**Case Handler:** Caruso, Joe, CC
Fee Status: Fee Paid	(404) 335-6177

Case Type Information:
1) Direct Bankruptcy from BK
2) Direct Bank
3) -

Originating Court Information:
District: 113A-8 : 8:11-bk-00369-MGW
Civil Proceeding: Michael G. Williamson, U.S. Bankruptcy Judge
Date Filed: 01/11/2011
Date NOA Filed:
02/08/2013

06/07/2013	Reply to response to motion to file appellant's brief with excess pages and response to motion to strike appellant's brief filed by Appellant Wells Fargo Bank, N.A..--[Edited 06/11/2013 by JC] (ECF: Larry Foyle)
06/13/2013	ORDER: Appellant's motion for leave to file an opening brief in excess of the 14,000-word limit is GRANTED nunc pro tunc. Appellee's motion to strike Appellant's opening brief is DENIED. [6883758-2] (EEC)
07/24/2013	Assigned to tentative calendar number 8 in Jacksonville during the week of December 9, 2013.
10/18/2013	Calendar issued as to cases to be orally argued the week of 12/09/2013 in Jacksonville, Florida. Counsel are directed to electronically acknowledge receipt of this calendar by docketing the Calendar Receipt Acknowledged event in ECF.
10/18/2013	Attorney Larry M. Foyle for Appellant Wells Fargo Bank, N.A. hereby acknowledges receipt of a copy of the printed calendar for 12/11/2013. Larry M. Foyle, Esq. 813-229-0900 ext. 1353 will present argument. (ECF: Larry Foyle)
10/21/2013	Oral argument scheduled. Argument Date: Wednesday, 12/11/2013 Argument Location: Jacksonville, FL.
10/29/2013	Attorney Paul A. Avron for Appellee Tahisia L. Scantling hereby acknowledges receipt of a copy of the printed calendar for 12/11/2013. Paul A. Avron (561-241-9500) will present argument. [13-10558, 12-90040] (ECF: Paul Avron)
11/18/2013	Oral argument continued. To be rescheduled for a future date.
11/25/2013	Assigned to tentative calendar number 16 in Montgomery during the week of March 17, 2014.
12/11/2013	Assigned to tentative calendar number 18 in Atlanta during the week of April 7, 2014.

PACER Service Center			
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HOMEOWNERS ASSOCIATIONS AND BANKRUPTCY - STRATEGIES

DENNIS J. LeVINE, ESQ.
Fla. Bar No. 375993
Dennis LeVine & Associates, P.A.
P.O. Box 707
Tampa, Florida 33601
(813) 253-0777
(813) 253-0975 (fax)
dennis@bcylaw.com

Mr. LeVine attended Tulane University, and received his J.D. from George Washington University's National Law Center in 1983. Mr. LeVine, a Tampa native, has practiced law in Tampa since 1983. He is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification.

CREDITOR STRATEGIES IN REPRESENTING HOMEOWNERS ASSOCIATIONS

A. Condominium and Homeowners Associations and the Automatic Stay

The filing of the bankruptcy petition invokes the automatic stay. The first issue a creditor such as a condominium association faces involves what action can be taken to collect assessments, or to continue a foreclosure action. In each situation, we suggest filing a Notice of Appearance in the bankruptcy case so you will receive notice of filings made in the case. The following are common scenarios and suggested actions:

1. The owner files bankruptcy and is current with all assessments - Consider your client to be lucky. No need to file a proof of claim.

2. The owner files bankruptcy, but is in arrears on pre-petition assessments -

   Chapter 7 - File a Motion for relief from the stay in order to pursue foreclosure. No need to file a Proof of Claim unless the Court sets a claims bar date.

   Chapter 11 and Chapter 13 - File a Proof of Claim **as soon as possible**. Review the Plan to determine the treatment of the Association's claim. Determine whether the automatic stay in the Chapter 13 case continues in place (e.g. the debtor listed the property as exempt and the exemption is allowed, or a provision in the Plan, the Order Establishing Procedures, or Order confirming Plan provides stay relief). You may want to wait to see whether postpetition payments are made before filing a Motion to lift stay, since the Debtor is required to make adequate protection payments to secured creditors postpetition.

3. The owner files bankruptcy, was current at the time of filing, but now is in arrears on postpetition assessments -

   Chapter 7 - Determine whether the stay is still in effect by looking at the case docket. Where the stay continues in effect, consider whether to file a Motion for relief from the stay, or wait until the stay terminates as a matter of law under Section 362(c). If the stay has terminated as a matter of law (e.g. the case is closed, the debtor received a discharge and the Trustee filed a Report of No Distribution, or the debtor listed the property as exempt and the exemption is allowed), the Association can continue with an *in rem* foreclosure action. **As to whether the Association can pursue collection of the postpetition assessments (see discussion in Section B below**).

   Chapter 11 and Chapter 13 - File a Proof of Claim as soon as possible. Review the Plan to determine the treatment of the claim. File a Motion to obtain stay relief or adequate protection.

Associations may face the issue of whether to continue to provide services to an owner who has filed bankruptcy and is in arrears on assessments. **BE CAREFUL.** In In re Cohen, 279 626 (Bankr. N.D. N.Y. 2002), the Association had shut off the water to the debtor's unit. After being advised of the bankruptcy filing, the Association took 11 days to turn the water back on. The Court found that the Association's actions violated the automatic stay, and awarded the debtor over $3,000 in damages, plus attorney's fees. The Court noted that it understood the Association's frustration, but that did not excuse a clear violation of the stay.

B. Condominium Associations and the Discharge

A discharge in bankruptcy relieves the debtor of personal liability for all pre-petition debts except certain debts listed in the Bankruptcy Code. The discharge operates to permanently stay any attempt to hold the debtor personally liable for discharged debts.

Postpetition condominium assessments – are they discharged in bankruptcy?

The question of whether a bankruptcy discharge encompasses **postpetition** assessments by condominium and homeowners' associations has been addressed by Bankruptcy Courts with various results depending on the facts, and which version of the statute was in effect at the time. The arguments and holdings in these cases generally follow one of these three theories:

- postpetition assessments are non-dischargeable because the obligation to pay assessments arises from a covenant running with the land. Other Courts adopt the same position on the grounds that an association's claim for postpetition assessments do not arise until they are assessed.

- postpetition assessments are dischargeable because they arose from a pre-petition contract. Under these cases, the covenant to pay assessments is a contract. Under this view, an association's right to payment arises when the contract is made and is merely contingent on the debtor's continued ownership of the property. Thus, a claim for postpetition assessments arises pre-petition and is extinguished by the bankruptcy discharge.

- a third line of cases takes a compromise position – postpetition assessments are dischargeable unless the debtor resided in or leased the unit.

In In re Rosenfeld, 23 F.3d 833, 837 (4th Cir. 1994), the Fourth Circuit found that post- petition assessments were not discharged because the debtor had not transferred title to the property, either by a deed in lieu of foreclosure or otherwise. The Court specifically found that the debtor's consent to an order lifting the automatic stay did not end his ownership interest:

> "We find that River Place's right to payment for the assessments at issue did not arise until postpetition, and we affirm the district court's holdings that Rosenfeld's liability for the postpetition assessments was not discharged and that River Place did not violate the permanent stay by suing to collect the postpetition assessments."

In In re Rivera, 256 B.R. 828 (Bankr. M.D. Fla. 2000), Judge Briskman looked at the three different lines of case authority on the dischargeability of postpetition assessments to community associations. The Court pointed out that in 1994, Congress attempted to resolve this split of authority by enacting § 523(a)(16), which set out exceptions to discharge of certain assessments.[1] It is interesting that the 1994 statute did not make a direct reference to homeowners' associations. Nevertheless, some courts suggested that the legislative history implied coverage for homeowners' associations.[2]

Judge Briskman in In re Rivera did not reach this issue at all, and found it unnecessary to treat the obligation to pay postpetition homeowners' association assessments as an exception to discharge under § 523(a)(16), since the scope of the discharge pursuant to §§ 524(a) and 727(b) does not extend to this obligation. Judge Briskman held:

> "the obligation to pay postpetition assessments to homeowners' associations pursuant to a recorded declaration of covenants survives a Chapter 7 discharge, even without a reaffirmation agreement, unless the debtor timely relinquishes possession and ownership of the property subject to the obligation. A Chapter 7 debtor desiring relief of the personal obligation to pay assessments accruing postpetition to homeowners' associations, should follow the procedures for filing and carrying out the statement of intent to surrender the property within the time limits contemplated by Bankruptcy Code Section 521(2). The debtor should then cooperate with the Chapter 7 trustee, the homeowners' association or other creditors secured by the property to be surrendered, as appropriate, such that the debtor relinquishes possession and ownership of the property within a reasonable time. **The debtor may be held responsible for postpetition assessments, subject to further determination of the Bankruptcy Court, if the debtor deliberately engages in**

[1] Prior to being amended in 2005, Section 523(a)(16) provided:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt ... **for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership** or in a share of a cooperative housing corporation, **but only if such fee or assessment is payable for a period during which ... the debtor physically occupied a dwelling unit in the condominium or cooperative project; or ... the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,** but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case....

[2] In In re Stone, 243 B.R. 40 (Bankr. W.D. Wis. 1999), the Chapter 7 debtor sought to recover sanctions for condominium association's alleged violation of automatic stay. The association sought to collect condominium maintenance fees which accrued post-petition. The Court found that the automatic stay was in effect; nevertheless, the Court did not impose sanctions for creditor's alleged violation of stay in attempting to collect debt given widespread disagreement among courts as to whether the debt was in nature of post-petition debt or a dischargeable pre-petition debt that simply matured post-petition.

unreasonable delay. A party in interest may address the particular problem with the Bankruptcy Court as necessary or appropriate, if the facts of a particular case create uncertainty whether the debtor remains responsible for postpetition assessments. **The debtor's obligation to pay assessments ceases accruing no later than the debtor relinquishing ownership and possession of the property**. Based on the foregoing, Association does not need to obtain a reaffirmation agreement from Debtor to preserve the Association's rights under the Governing Documents to collect postpetition assessments as a personal and in rem obligation from the Debtor." (emphasis added)

The 2005 Change to Section 523(a)(16)

Whether the debtor lives in the property after bankruptcy is no longer the key consideration of dischargeability of postpetition association fees and assessments. While pre-petition assocation fees and assessments are still dischargeable, Section 523(a)(16) was amended in 2005 as part of BAPCPA, and now provides that homeowners' association assessments also are non-dischargeable unless the debtor ceases to hold a legal, equitable or possessory ownership interest in the property. 11 U.S.C. § 523(a)(16). In other words, this section was expanded to include postpetition condominium and homeowners association fees as nondischargeable by omitting any requirement that in order to be nondischargeable the debtor must reside in or be renting out the residence postpetition.[3]

The 2005 statutory change to Section 523(a)(16) was significant. Now, instead of limiting the discharge of fees and assessments only to those debtors who had tenants, or who were residing in the dwellings, Congress extended the exception from discharge to postpetition assessments to debtors who have a "legal, equitable or possessory ownership interest" in the real estate. Therefore, a debtor must do more in his bankruptcy case than simply express an intention to surrender the home in the bankruptcy case, since they may still be the "legal, equitable or possessory" owner of the property. Condominium owners who move out and file bankruptcy prior to any foreclosure on their property could be responsible for postpetition condo fees and assessments.

[3] As amended in 2005, this section now reads:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt ... for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership in a share of a cooperative corporation, **or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot,** but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case.... (emphasis added)

C. Proofs of Claim

An issue arises as to whether an Association should file a **secured** or **unsecured** claim. The answer depends on several factors:

Chapter 7 - the Trustee disburses funds to unsecured creditors. When a secured claim is filed, the Trustee generally will submit an Order allowing the claim as secured, but provide for no distribution on the claim. In a situation where it appears there is no equity in the property to the Association's lien, the Association can file an unsecured deficiency claim so the Association receives some distribution along with other unsecured creditors.

Chapter 11 and 13 - the claim should be filed as secured, and set out the amount of the pre- petition arrearage. The claim should contain a reservation of rights, allowing the creditor to file an amended (unsecured) claim in the event the stay is lifted or the property is surrendered.

D. Association Liens

Under state law, a claim of lien filed by an association in the public records acts as a lien on the debtor's real property. As such, an association is entitled to be treated as a secured creditor. What happens where the claim for past due assessments has accrued, but the claim of lien is not filed or perfected under state law at the time of the bankruptcy filing.

In general, unless a lien is perfected at the time of filing it is not enforceable and subject to avoidance by the trustee or debtor in possession. In some situations, however, Courts have allowed creditors to perfect their liens postpetition, notwithstanding the automatic stay. Section 362(b)(3) creates an exception to the automatic stay for "any act to perfect ... an interest in property to the extent that the trustee's rights and powers are subject to such perfection under § 546(b) of the title....". Under § 546(b)(1)(A), "[t]he rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection ..." Most Courts have found this relation-back provision inapplicable to Association liens.

In a 1986 Tampa case, a condominium association recorded a claim of lien postpetition with respect to pre-petition maintenance and special assessments. In re Maas, 69 B.R. 245 (Bankr. M.D. Fla. 1986)(Judge Paskay). The Court looked at the interplay between § 362(b)(3) and § 546(b), and found that, similar to mechanics liens, the postpetition recording of a lien against property of the debtor is not a violation of the automatic stay **if**, pursuant to applicable non-bankruptcy law, the lien relates back to a time pre-petition and would defeat the rights of a hypothetical lien creditor which is granted to the Trustee by § 544. *Id.* at 246-47. In In re Maas, Judge Paskay concluded, however, that filing the Association's lien had no retroactive effect under applicable Florida law, since the lien was only effective when recorded. *Contra*, In re Cohen, 279 B.R. 626, 635 (Bankr. N.D. N.Y. 2002)(applying New York law). Therefore, the postpetition recording of the lien by the association violated the automatic stay. The Court also found that even if violation of automatic stay by condominium association began innocently, the continuing violation of stay (i.e. not withdrawing the lien) was willful and warranted sanctions. The Court imposed sanctions of $500.

E. Lien Strip of Association liens

Following the 11th Circuit ruling in In re McNeal, 477 Fed. Apx. 562 (11th Cir. 2012), a wholly unsecured Association lien may be stripped under Section 506(d). Creditor arguments to avoid this result so far have been unsuccessful. Three recent Florida cases reviewed whether a Chapter 7 debtor can strip an Association's lien on homestead, and rejected creditor arguments. In In re Bustamante, 2013 WL 1110886 (Bankr. M.D. Fla. 2013)(C.J. Jennemann), the Court found that "condominium association liens do not enjoy any special status under the Bankruptcy Code". Courts also have rejected the argument by Associations related to Florida Statutes, §718.116, which provide a condominium association certain rights against the lender which forecloses the first mortgage, with the Courts holding that those rights do not include subordination of the lender's lien on the residence. In re Aliu-Otokiti, 2013 WL 1163782 (Bankr. M.D. Fla. 2013)(J. Briskman); In re Almeida, 2013 WL 1163777 (Bankr. M.D. Fla. 2013)(J. Briskman); In re Plummer, 484 B.R. 882 (Bankr. M.D. Fla. 2013)(J. Williamson).

F. Sale of Property - Can the Trustee sell property subject to an Association's lien

In the absence of any equity in the property that may benefit the estate, the trustee generally will not sell the property, but instead will surrender the property by either (a) filing a notice of abandonment, or (2) not opposing relief from the stay.

In recent years, many Chapter 7 trustees have been selling for a nominal amount the debtor's interest in real property, including condominiums, subject to existing liens. Under Section 363, the trustee or the debtor, after notice and a hearing, may sell property of the bankruptcy estate outside the ordinary course of business, including property in which a secured claimant has a security interest.[4]

Several issues have arisen in this context. One is whether the holder of a secured claim attaching to the property may credit bid, or otherwise offset the amount of the claim against the purchase price of the property sold.[5] Another argument relates to whether a "due on sale" clause in the mortgage would require payment in full of the mortgage in the event of a sale by the trustee.

G. Can the Debtor Transfer property to avoid postpetition liability for association assessments

Many debtors face the following situation – the debtor surrenders a condominium, and receives a discharge. The attorney for the association advises that while they will not be foreclosing on the property, they will move to collect future (postpetition) assessments from the debtor and the

[4] 11 U.S.C. §363(b).

[5] 11 U.S.C. §363(k). This provision permits a secured creditor to ensure that it will receive at least the lesser of the value of the property or payment in full.

discharge does not protect the debtor. The issue is what, if anything, a debtor can do to avoid this future, postpetition liability.[6]

As set forth above, the Section 523(a)(16) provides that as long as the debtor retains possession or legal title to the property, the debtor is personally liable for postpetition assessments. Counsel for debtors have come up with a number of theories and arguments. These will be discussed in detail at the session.

H. Administrative Expense Claims for Postpetition use of the Property

Under Section 503(b), where a debtor incurs a postpetition debt to a creditor which provides a benefit to the debtor's estate, this claim can be deemed an administrative claim which must be paid in full before unsecured claims are paid. Creditors can assert administrative expense claims for post-petition assessments, particularly in Chapter 11 and Chapter 13 cases where the debtor is residing in the property, or renting the property.

[6] This could apply not only to post-petition assessments, but to such things as liability and assessments for property tax liens, impairments to credit, and local health department fines for weeds, long grass, and vandalism board-ups. Also, liability for any tort or negligence actions associated with the premises (especially where the client stops paying the insurance).

<u>Lien Stripping in Chapter 7</u>

The ability of a chapter 7 debtor to "strip off" a wholly unsecured junior lien from real property via may use 11 U.S.C. § 506(d) has divided the bankruptcy and federal district courts. While the U.S. Court of Appeals for the Eleventh Circuit held that it is permissible to "strip off"—or completely avoid—second mortgage liens in chapter 7 where the subject property has a market value less than what is owed to the first lien holder. Obviously, this is beneficial to many debtors by allowing them to strip the negative equity from junior mortgages, whereas previously "lien stripping" was allowed only in chapter 13.

The matter was brought before the Eleventh Circuit in *McNeal v. GMAC Mortgage LLC*. In *McNeal* the debtor filed a voluntary petition under chapter 7. The debtor's homestead had two mortgages: a first mortgage in the amount of $176,413 and a second mortgage in the amount of $44,444 with an agreed value of $141, 416 for the subject property. Relying on the U.S. Supreme Court's ruling in *Dewsnup v. Timm,* the bankruptcy court denied the debtor's motion to strip off the second mortgage under § 506(d), having concluded that § 506(d) did not apply in chapter 7 cases. Bankruptcy courts have taken this position in chapter 7 cases as a result of in which the Court concluded that a chapter 7 debtor could not "strip down" a partially secured lien under § 506(d) to the value of the property. Subsequently, the Eleventh Circuit held that lien-stripping of a wholly unsecured lien or second mortgage is allowed in chapter 7. GMAC Mortgage has requested a rehearing *en banc*.

As the housing crisis has been so widespread, the issue in *McNeal* has surfaced all over the country. *In Re Frazier* is a case from the United States District Court for the Eastern District of California, and the case addresses the ability of a Debtor to strip second mortgages that have no value in a Chapter 13 proceeding after the Debtor has obtained a discharge in a Chapter 7 proceeding. The District Court's holding becomes another case in the Country where there is split authority whether the Debtor has the ability to strip a lien under these circumstances. The Courts rational is that the ability to strip the lien is not based upon the Debtor's lack of ability to obtain a discharge in the Chapter 13 due to the prior Chapter 7 discharge, but rather, is based upon the Debtor's completion of all the requirements in a Chapter 13 case.

In Re Talbert is a case out of the Sixth Circuit that addressed similar issues post *Dewsnup.* The *Talbert* Court relied heavily on the Fourth Circuit case, *Ryan v. Homecomings Fin. Network*, as it was the only federal appellate court at the time to discuss this debate after the *Dewsnup* decision. The Fourth Circuit sided with those courts that held that § 506 *does not* permit the "stripping off" of liens in chapter 7 proceedings. As such, the Fourth and Sixth Circuit Courts of Appeal were faced with whether to distinguish "strip off" of wholly unsecured junior liens vs. the "strip down" facts of *Dewsnup* and those courts did not distinguish "strip down" from "strip off." In *McNeal* , the debtor was attempting to "strip off" a wholly unsecured lien versus a *Dewsnup* "strip down." and the Eleventh

Circuit recognized the distinction: "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*." In *Folendore*, the Eleventh Circuit had held that lien- stripping was allowed in chapter 7. In sum, the Eleventh Circuit, § 506(d) allows debtors to strip off wholly unsecured junior liens in chapter 7. however, if you reside in the Fourth or Sixth Circuit, the strip off is not allowed. Additionally the Eleventh Circuit decision has resurrected the *Folendore* decision as good law despite being treated as abrogated by the *Dewsnup* decision. This circuit split certainly means that the Supreme Court will be called upon to revisit *Dewsnup* and possibly distinguish "strip off" from "strip down".

Lastly, considering the abuses in the housing market debacle where many second mortgages were issued with little or no equity, the Chapter "20" is still up for debate. A "Chapter 20" bankruptcy is the practice of filing for Chapter 13 bankruptcy immediately after completing a Chapter 7 case. A Chapter 20 bankruptcy can allow debtors to discharge their unsecured debts through a Chapter 7 and then file for Chapter 13 to catch up on mortgage payments or pay off nondischargeable priority debts. However, despite its benefits, a Chapter 20 also has many drawbacks and can be subject to bad faith filing objections. Both the Northern District of Georgia and the Southern District of Florida have considered these issues in *Jennings* and *Gerardin*, respectively. Whereas the Court in *Jennings* held that a "chapter 20 debtor may strip off the lien of a wholly underwater second mortgage in a chapter 13 plan, the Court in *Gerardin* concluded that " a debtor who is ineligible for a chapter 13 discharge may not strip down or strip off a lien. Clearly, the courts are divided on the issue.

McNeal v. GMAC Mortgage LLC (*In re McNeal*), 2012 WL 1649853 (11th Cir. May 11, 2012).

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

Real Time Resolutions v. Frazier, No. 11-290 (E.D. Cal. March 9, 2012)

Bank of America NA v. David Lamar Sinkfield, case number 13-700, U.S. Supreme Court.

In Re Talbert, 344 F. 3d 555 (6th Cir. 2003).

Ryan v. Homecomings Fin. Network, *558 253 F.3d 778 (4th Cir. 2001)

Folendore v. United States Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989)

In Re Jennings, 454 B.R. 252, Bkrtcy.N.D.Ga., July 11, 2011 (NO. 11-50570-CRM, 10-88514-CRM)

In Re Gerardin, 447 B.R. 342, 22 Fla. L. Weekly Fed. B 650, Bkrtcy.S.D.Fla., February 17, 2011 (NO. 10-16511-RAM, 10-13622-BKC-RAM, 10-12684-BKC-LMI, 09-33875-BKC-RAM, 10-11923-BKC-LMI, 09-36665-BKC-AJC, 10-14885-BKC-RAM)