Consumer Workshop IV

Home Issues: Mortgages and Rule 3002 Update

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2015

Bankruptcy Rule 3001 and 3002.1

Mortgage Claims and Supplements

Discussion by Deanna Lee Westfall and Stephen Berken

OVERVIEW:

One of the most important aspects of a chapter 13 reorganization is to allow a debtor an opportunity to cure and reinstate a mortgage loan. It's important for debtors counsel to carefully review the proof of claim.

As part of that review, lenders have an obligation to file the "Mortgage Proof of Claim Attachment" along with the proof of claim. F.R.Bankr.P. 3001(c)(2). Official Form 10. Debtor's counsel should look for inflated claims caused by miscalculation, misinterpretation of the underlying loan contract, the addition of unauthorized fees. *In re Bateman*, 435 B.R. 600 (Bankr. E.D. Arkansas 2010) (where in the claim reduced based on creditor's miscalculation prepetition late charges and miscalculation and mis-application of prepetition and post petition payments. Attorney's fees were awarded to the debtor for successful claim objection.")

Additional concerns include the method in which servicers apply the payments in chapter 13 cases. Curing arrears in a chapter 13 case is intended to negate the consequences of a pre-bankruptcy default. Thus, upon confirmation of a chapter 13 plan, the debtor's post petition and regular mortgage payments should be applied from the petition date forward, as if no default exists. Prepetition arrearages are paid separately under the plan as part of the mortgage servicers permitted and allowed claim. *Rake v. Wade*, 508 S.C. 464, 473 (1993) (as authorized by §1322(b)(5) (mortgage creditors' claims are effectively "split… into two separate claims-the underlying debt and the arrearages." *In re Hudak*, 2008 Westlaw 4850196, (Bankr. D. Colo. October 24, 2008) (bankruptcy code, not language of deed of trust, determines how ongoing payments will be applied while debtor cures defaulted chapter 13).

Unfortunately, certain mortgage lenders tend to treat timely tendered post petition payments as if they were late. Certain mortgage lenders software programs do not permit applying regular payments, tendered post petition, to anything but the oldest outstanding installment payment due. For the lenders, remedies have included manually overriding automated systems, but still, the method is fraught with error.

As a result, payments are often deemed later insufficient, incurring late fees and charges, as the servicer continues to treat payments as or applying them or to diverting them to "suspense accounts." Imposition of late fees and additional interest charges and other property inspections are often added to such post petition fees. *Wells Fargo v. Jones*, 391 B.R. 577 (E.D. La. 2008), wherein the mortgage creditor collected at closing on court-approved refinancing an additional $24,450 in unlawful post petition fees and interest charges imposed during the pendency of a

chapter 13 case). Mortgage lenders typically conduct a discharge audit to ensure the appropriate application of post-petition payments before releasing the file back into regular servicing.

Where a creditor fails to comply with the requirements of Bankr. R. 3002.1 for noticing post petition payment changes are fees, or if it fails to respond to a motion to deem current at the conclusion of the chapter 13 plan, the court may preclude the creditor from offering any evidence that would have been contained in the timely filed notices, that is, the precise amount of the payment changes, changes of other of interest payments of interest, fees, or any other amounts allegedly due and owing. Bankr. R. 3002.1(i)(1). The court is also authorized to award attorney's fees and any other expenses to the debtor for the additional proceedings required clarifying the issue. Bankr. R. 3002.1(i)(2).

One of the provisions of 3002.1 that has drawn attention of the courts is the requirement that a creditor "shall" respond to a notice of final cure issued by the trustee. Compliance with this section has been less than universal, giving rise to several interesting cases interpreting the rule.

RECENT CASES:

Sokoloski v. PNC Mortgage, 2014 WL 6473810 (E.D. Cal. 2014). Debtors completed his Chapter 13 plan payments and Trustee issued a notice of final cure. PNC Mortgage failed to respond to the notice of final cure. Bankruptcy case closed without discharge. Post- bankruptcy, PNC advised the Debtors they were in default, partly due to foreclosure fees and costs incurred pre-petition and partly because the Chapter 13 Trustee paid a reduced "trial payment" amount long after the trial period was over. In reviewing a motion to dismiss, the Court held that the Debtors were entitled to rely on the notice of final cure and failure to dispute the notice, based on court's interpretation of Rule 3002.1.

In fact, where a residential mortgage is at issue, a debtor may be entitled to sanctions even after the case has closed:

> If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under the rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim ....
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> Fed. R. Bankr.P. 3002.1 advisory committee's note. PNC is thus incorrect in their contention that their conduct was not unlawful. The Bankruptcy Code clearly required PNC to file a response to the Notice of Final Cure Payment, which PNC failed to do. PNC's violation of Rule 3002.1(g) may not only serve as a basis for a UCL claim, but also would

> have permitted plaintiffs to reopen their chapter 13 case to seek sanctions.

Curiously, the District Court refers to Rule 3002.1 as a requirement of the Bankruptcy Code.

In re Mason, 2014 WL 5502385 (Bankr. S.D. Miss. 2014): Mortgage creditor filed proof of claim with arrears. After arrears paid in full, Trustee issued notice of final cure. Mortgage creditor responded requesting that the matter be set for hearing. Mortgage creditor also filed an amended claim, increasing the arrears by approximately $12,000. The Court held that although amendments to proofs of claim should be freely allowed, in this case, the timing of the amendment was too prejudicial to the Debtor who had otherwise completed plan payments. The *Mason* court relied upon the Fifth Circuit case of *In re Kolstad*, 928 F.2d 171 (5th Cir. 1991) wherein it noted:

> [c]onsistent with our view of the comparative roles of bar dates and claims adjudication is the allowance of amended proofs of claim. Amendments to timely creditor proofs of claim have been liberally permitted to "cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim." *In re International Horizons, Inc*., 751 F.2d at 1216. Amendments do not vitiate the role of bar dates: indeed, courts that authorize amendments must ensure that corrections or adjustments do not set forth wholly new grounds of liability. *Matter of Commonwealth Corp*., 617 F.2d 415, 420 (5th Cir.1980).

In re Kolstad, 928 F.2d at 175.

In the North Eastern states and Mid-Western states, there have been numerous decisions on whether fees for filing proofs of claim and supplements under 3001; 3002.1, should be recoverable against the borrower. Most recently, a Bankruptcy Court in Pennsylvania ruled that they were recoverable, continuing the ongoing debate.

In re Susanek, 2014 WL 4960885 (Bankr. W.D. Pa. 2014). "The Court finds the language of both the note and the mortgage to be clear and unambiguous. The Debtors and the Bank expressly contracted to allow the Bank to recoup any reasonable attorneys' fees it may incur while pursuing its claims, including those in the current bankruptcy proceedings. Under these facts, the Court will not deprive the Bank of the benefit of its bargain. *See In re Wolfe,* 378 B.R. 96, 102 (Bankr.W.D.Pa.2007) (citing *Crawford Central School District v. Commonwealth of Pennsylvania,* 888 A.2d 616, 623 (Pa.2005)) ("When the language of [a] contract is clear and unambiguous, its meaning must be determined solely from the content of the contract itself"); *Lindstrom v. Pennswood Village,* 612 A.2d 1048, 1051 (Pa.Super.1992) (citing *Warren v. Greenfield,* 595 A.2d 1308, 1312 (Pa.Super.1991)) ("[The] court will not rewrite the contract or give it a construction that conflicts with the plain, ordinary, and accepted meaning of the words used"); *see also Matter of Schlag,* 60 B.R. 749 (Bankr.W.D.Pa.1986).[footnote omitted]. Since the reasonableness of the fees is not under challenge, the Objection is not well taken and will be overruled." (Footnotes omitted).

In re Thompson, --- B.R. ----, 2014 WL 5335738 (Bankr. E.D. Wis., Oct. 21, 2014), reconsideration denied, 2014 WL 6632966 (Bankr. E.D. Wis., Nov. 21, 2014) (case no. 2:05-bk-28262). Dealing with the effect of a proof of claim and standing, the bankruptcy court determined that Wells Fargo was not the holder of the Chapter 13 debtors' mortgage note and therefore lacked legal authority to enforce the note. Thus, Wells Fargo was not entitled to receive payments under the note. The court further found that Wells Fargo had been unjustly enriched by the payments received from the debtors and the Chapter 13 trustee during the pendency of the debtors' case. The bank was ordered to the $97,980 paid directly by the debtors and $11,717 paid by the trustee under the debtors' plan

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Rule 3001--Proof of Claim

(a) Form and content

A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

(b) Who may execute

A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

(c) Supporting information

(1) Claim based on a writing

Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional requirements in an individual debtor case: sanctions for failure to comply

In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(3) Claim based on an open-end or revolving consumer credit agreement

(A) When a claim is based on an open-end or revolving consumer credit agreement--except one for which a security interest is claimed in the debtor's real property--a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

(d) Evidence of perfection of security interest

If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

(e) Transferred claim

(1) Transfer of claim other than for security before proof filed

If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.

(2) Transfer of claim other than for security after proof filed

If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

(3) Transfer of claim for security before proof filed

If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(4) Transfer of claim for security after proof filed

If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(5) Service of objection or motion; notice of hearing

A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or

otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.

(f) Evidentiary effect

A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

(g) To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) In General

This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(b) Notice of payment changes

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) Notice of fees, expenses, and charges

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) Form and content

A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) Determination of fees, expenses, or charges

On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) Notice of final cure payment

Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) Response to notice of final cure payment

Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) Determination of final cure and payment

On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) Failure to notify

If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

In re Gordon

United States Bankruptcy Court for the District of Colorado

March 25, 2011, Decided

Bankruptcy Case No. 10-13885 EEB, Chapter 13

Reporter
2011 Bankr. LEXIS 3848

In re: EDWARD LEON GORDON, DORIS JEAN GORDON, Debtors.

Core Terms

confirmation, secured creditor, cases, notice, rights, requirements, arrearage, secured claim, modification, filing proof, res judicata effect, modify, courts, liens, proof of claim, allowance, mortgage, provides, binding, mailing, holder, bankruptcy court, due process, reorganization, creditor's lien, home mortgage, proposed plan, lien rights, set forth, objected

Case Summary

Procedural Posture

Bankruptcy debtors proposed a plan which provided that creditors, if they did not object to the plan's proposed treatment of their liens and/or the amount of arrearage stated in the plan, would have a res judicata effect as to both their liens and claim amounts. The bankruptcy court sua sponte considered whether requiring an objection to plan confirmation to challenge claim treatment was permissible under the Bankruptcy Code.

Overview

The debtors' plan required creditors to object to plan confirmation in order to dispute the amount or treatment of any claim, and provided that the amounts and treatment of claims in the plan was binding in the absence of any such objection. The bankruptcy court held that the plan properly expressed the binding effect of the plan. A final order confirming the plan was entitled to res judicata effect, and the debtors' plan unambiguously informed specific creditors that their claims would be affected, disallowed, or valued in a certain way. Under such circumstances, creditors could not ignore the plan confirmation process by failing to object to confirmation simply because the bar date for filing proofs of claim had not yet expired, and confirmation of the plan would create a binding statement of the creditors' rights.

Outcome

The debtors' plan was confirmed.

LexisNexis® Headnotes

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN1 *11 U.S.C.S. § 1325(a)*, which governs bankruptcy plan confirmation, instructs a bankruptcy court to confirm a plan only if the plan complies with the applicable provisions of the Bankruptcy Code. Similarly, *11 U.S.C.S. § 1322(b)* delineates what provisions are appropriate for inclusion in a plan, and *§ 1322(b)(11)* states that a plan may include any other appropriate provision not inconsistent with the Code. *§ 1322(b)(11)*. These sections put an obligation on a bankruptcy court to ensure that the bankruptcy debtor has conformed his plan to the requirements of the Code, regardless of whether anyone has filed a plan objection. The court's failure to perform this duty may have significant consequences. If notice is adequate and no one appeals the confirmation order, the plan will become final, regardless of whether its provisions violate the Code.

Bankruptcy Law > Claims > Allowance of Claims

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

HN2 The claims allowance process is a well-established process used in all chapters of the Bankruptcy Code for establishing allowed claims. It gives creditors the right to file a claim against a bankruptcy debtor's estate. *11 U.S.C.S. § 501(a)* states that a creditor may file a proof of claim. Once the creditor files a proof of claim under *§ 501*, the claim is deemed allowed, unless a party in interest objects.

11 U.S.C.S. § 502(a). If an objection is filed, the bankruptcy court will resolve it after a hearing. § 502(b); Fed. R. Bankr. P. 3007(a). Holders of allowed claims are then entitled to distributions under a confirmed Chapter 13 plan.

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

HN3 A hearing on confirmation of a Chapter 13 bankruptcy plan must be held not later than 45 days after the first meeting of creditors. 11 U.S.C.S. § 1324(b). The deadline for filing proofs of claim for unsecured claims is 90 days after the first meeting of creditors. Fed. R. Bankr. P. 3002(c). Taxing authorities have until 180 days after the order for relief or 60 days from the Chapter 13 debtor's filing of a tax return. Secured creditors have no deadline and are not required to file a proof of claim. Rule 3002(a). So, in the typical Chapter 13 case, a plan is proposed, any objections to it are resolved, and the plan is confirmed well prior to any deadline for filing proofs of claim.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN4 The Bankruptcy Code gives a Chapter 13 bankruptcy debtor the power to propose a plan for repayment of his creditors, with certain rights to modify allowed claims. The Code sets forth what a Chapter 13 plan must do and also what a plan may do. 11 U.S.C.S. §§ 1322, 1325. It prescribes three options for the treatment of secured claims: (1) the secured creditor accepts the plan; (2) the plan provides that the secured creditor retain its lien and be paid the full amount of the allowed claim; or (3) the debtor surrenders the property securing the claim to the creditor. The Code also allows the debtor to modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. 11 U.S.C.S. § 1322(b)(2). A Chapter 13 plan may provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending. § 1322(b)(5). The power to cure an arrearage on a home mortgage is important to many Chapter 13 debtors because it is often the inability to get current on a home mortgage that forces the debtor into bankruptcy in the first place. Of course, to cure a default, the debtor must be able to ascertain the amount of the arrearage.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN5 If a Chapter 13 bankruptcy plan is confirmed, the plan is binding on the bankruptcy debtor and all creditors, whether or not the plan provides for a creditor and whether or not a creditor has accepted or objected to the plan. 11 U.S.C.S. § 1327(a). Section 1327(a) is referred to as giving res judicata effect to a confirmed plan. Upon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is res judicata and its terms are not subject to collateral attack. Further, § 1327(b) provides that, except as otherwise provided in the plan, confirmation vests all property of the estate in the debtor. § 1327(b). The vesting of property, except as otherwise provided for in the plan, is free and clear of any claim or interest of any creditor provided for by the plan. § 1327(c). Courts interpret § 1327(c), combined with the power to alter the rights of secured creditors found in 11 U.S.C.S. § 1322(b)(2), as giving a Chapter 13 debtor the power to modify or extinguish liens on estate property via a confirmed plan.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN6 A bankruptcy debtor's ability to modify a secured creditor's lien in his plan raises the concept of protection of secured creditor lien rights. Liens pass through bankruptcy unaffected. A secured creditor is not required to file a proof of claim or otherwise participate in the bankruptcy in order to protect its lien. Rather, the secured creditor may ignore the proof of claim process altogether and look solely to its lien for satisfaction of the debt. The Bankruptcy Code specifically provides that a secured creditor's failure to file a proof of claim does not invalidate or extinguish a lien. 11 U.S.C.S. § 506(d)(2).

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Exemptions > General Overview

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

HN7 The Bankruptcy Code provides a bankruptcy debtor with several methods to modify or invalidate a lien. For example, certain types of secured claims can be crammed down to the value of the collateral pursuant to 11 U.S.C.S. § 506(a). In addition, if a secured claim is disallowed by the

bankruptcy court pursuant to 11 U.S.C.S. § 502, the lien securing the disallowed claim will be void. § 506(d). The debtor may initiate an adversary proceeding to determine the validity, priority, or extent of a lien. Fed. R. Bankr. P. 7001(2). 11 U.S.C.S. § 522(f) allows avoidance of liens on personal property impairing an exemption.

Bankruptcy Law > Procedural Matters > General Overview

HN8 The bankruptcy power to set local rules is provided for in Fed. R. Bankr. P. 9029. Under that rule, a local bankruptcy rule must be consistent with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Local bankruptcy rules may prescribe practice or procedure but may not enlarge, abridge, or modify any substantive right. A local rule which is inconsistent with the Code or attempts to limit a practice allowed by the Federal Rules of Bankruptcy Procedure is invalid.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

HN9 11 U.S.C.S. § 1329 governs Chapter 13 bankruptcy plan modifications. That section provides that a plan may be modified upon the request of the bankruptcy debtor, the trustee, or the holder of an allowed unsecured claim. § 1329(a).

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

HN10 11 U.S.C.S. § 1329(a) expressly limits the universe of persons who may propose or request modification of a confirmed Chapter 13 bankruptcy plan, and the bankruptcy court is statutorily excluded from that universe of persons.

Bankruptcy Law > Claims > Objections to Claims

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Procedural Matters > Contested Matters

HN11 The bankruptcy plan confirmation process and the claims adjudication process serve as alternative methods for resolving disputed claims. If procedural requirements are satisfied, both processes will afford a creditor with due process that its rights are being affected. In regard to claims, several rules ensure that the creditor is given due process. An objection to a proof of claim initiates a contested matter, and the objection and notice of the hearing must be served on the creditor, the bankruptcy debtor, and the trustee. Fed. R. Bankr. P. 3007, Bankr. D. Colo. R. 3007-1. Likewise, either party may separately initiate a contested matter to seek valuation of a secured claim. Fed. R. Bankr. P. 3012. In the case of valuing a lien on real property, Bankr. D. Colo. R. 3012-1 requires the debtor to file a separate motion asking for a valuation and determination of secured status under 11 U.S.C.S. § 506 and to reference the request in any plan.

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

HN12 The bankruptcy plan confirmation process itself requires service of process on any secured creditor whose rights will be affected by the plan. Fed. R. Bankr. P. 9014; Bankr. D. Colo. R. 3015-1(b)(3). This first assumes that the plan contains a clear description of how the bankruptcy debtor proposes to allow and treat a particular creditor's claim. It also requires compliance with the notice and service requirements of Fed. R. Bankr. P. 2002(b), 7004. If followed, the creditor will be deemed apprised that its rights will be affected by confirmation and will have been afforded an adequate opportunity to object.

Bankruptcy Law > Case Administration > Notice

Bankruptcy Law > Procedural Matters > General Overview

HN13 When a bankruptcy debtor files his plan with his bankruptcy petition, the bankruptcy court mails notice of the plan to all creditors listed on the debtor's mailing matrix. Since most mailing matrices list the creditors at post office boxes with no named representatives of the creditors, the court mailing may only satisfy the notice requirements of Fed. R. Bankr. P. 2002(b). Generally, it will not satisfy the additional service requirements of Fed. R. Bankr. P. 7004. While Rule 7004 allows for service to be effected by a first class mailing anywhere within the United States , it sets forth specific requirements as to whom the mailing must be addressed. For example, service on a corporation requires mailing to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Rule 7004(b)(3). Rule 7004(b)(4)-(7) contains special rules for service on a governmental agency. Unless the debtor's matrix includes addresses that meet these requirements, the court's mailing will not satisfy the service requirements. In addition, if the affected party is an insured depository institution, with certain exceptions, the service must be by certified mail addressed to a named officer of the institution. Rule 7004(h). The court's mailing will never suffice when certified mail is required.

Bankruptcy Law > Case Administration > Notice

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

Bankruptcy Law > Procedural Matters > General Overview

HN14 All creditors must receive notice of a bankruptcy plan. But service is only required as to those creditors whose rights will be specifically impacted by the plan, such as a secured creditor whose lien rights and/or arrearage amount is intended to be affected, or a tax claim that the bankruptcy debtor seeks to determine its amount and treatment. It could also involve the rights of a lessor or a party to an executory contract. In most cases, it will involve secured and priority creditors that are specifically mentioned in the plan.

Bankruptcy Law > Claims > Objections to Claims

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN15 To the extent that a bankruptcy debtor has complied with the rules, a bankruptcy court gives res judicata effect to any final order specifically addressing a creditor's claim, whether that is an order on a claim objection or a confirmation order. The confirmation order, if entered first, will be controlling as to those claims specifically addressed in the plan. If a proposed plan unambiguously informs a creditor that its claim will be affected, disallowed, or valued in a certain way, the creditor may not ignore the confirmation process just because the claims bar date has not expired. The confirmed plan is akin to a new contract between the debtor and its creditors, which defines the creditors' rights. Liens ride through bankruptcy unaffected, but the principle has limited application in a reorganization case.

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Trustee: Sally Zeman, Chapter 13 Trustee, Denver, CO.

Judges: Elizabeth E. Brown, United States Bankruptcy Judge.

Opinion by: Elizabeth E. Brown

Opinion

ORDER APPROVING PLAN LANGUAGE

This matter comes before the Court *sua sponte* on the Debtors' proposed Chapter 13 plan. The Debtors have added language to their plan, essentially warning secured creditors that, if they do not object to the plan's proposed treatment of their liens and/or the amount of arrearages stated, then the plan will have a *res judicata* effect as to both their lien and claim amount (the "Non-Standard Language"). The debtors' bar in this district has begun to add this language in many plans. Thus, the Court felt the need to question whether the Non-Standard Language is permissible under the Bankruptcy Code, despite the fact that no one had objected to it. Both the Debtors and the Chapter 13 Trustee have done an excellent job framing the issues in their briefs and oral arguments.[1] For the reasons set forth below, the Court concludes that the Debtors' Non-Standard Language does not violate the Code.

I. APPLICABLE PLAN LANGUAGE

Debtors' proposed plan is contained on the standard plan form required in this district, found at Local Bankruptcy Form 3015-1.1. Debtors have added extensive additional language under section V.G, "Other." Of concern to the Court is the following Non-Standard Language:

> *Fed. R. Bankr. P. 3002*, *3004*, and *3021* shall apply to distributions made by the trustee pursuant to this plan. A proof of claim for an unsecured or priority creditor must be filed within the time set forth by these rules in order to be allowed and for the creditor to receive [*3] the distribution set forth in the plan. Tardily filed unsecured or priority claimants will receive nothing, except by separate motion and order. This plan does not constitute a formal or informal proof of claim. Secured creditors set forth in the plan need not file a proof of claim in order to receive distribution; however, if a creditor files a proof of claim which does not assert a security interest, it will be deemed to be unsecured and will share, *pro rata*, as a Class four claim. **An objection confirmation of this plan must be filed in order to dispute the status or claim amount of any creditor as specifically set forth herein**. Pursuant to *11 U.S.C. sections 1326* and *1327*, this plan shall bind the parties, and the trustee shall distribute in accordance with the plan. . . .

[1] The identical Non-Standard Language is also at issue [*2] in plans submitted by Debtors' counsel in three other pending Chapter 13 cases before this Court: (1) *In re Pahs*, Case Number 10-15557 EEB; (2) *In re Osterman*, Case Number 10-11492 EEB; and (3) *In re Renner*, Case Number 10-17975 EEB. The Court originally ordered oral arguments and briefs in the *In re Pahs case*. Because the Court finds the facts in this case best suited to highlight the legal issues presented, the Court is deeming the briefs filed by Debtors' counsel and the Chapter 13 Trustee in the *Pahs* case as filed in this case. Separate orders in accordance with this Order will enter in each of the other three cases.

. . .

> 3. Note to any creditor holding a deed of trust secured by the Debtor(s)'s real property: the proposed plan provides for the Debtor(s)'s best estimate of the mortgage arrears owed to your company (if applicable), as set forth in Class II(a). **If you disagree with the amount provided, it is your obligation to file an objection to the plan. In the absence of an objection, the amount set forth in the plan is controlling,** [*4] **and will have a *res judicata* effect subsequent to the entry of the order of confirmation**.

Debtors' Proposed Plan, ¶ V.G (emphasis added).

If enforceable, this Non-Standard Language will directly impact the claims of two secured creditors in this case, Bank of America and Americredit. Bank of America holds the first mortgage on the Debtors' home, and has not filed a proof of claim nor objected to the plan. The plan asserts that the Debtors owe Bank of America no arrearages. Americredit holds a lien on the Debtors' car. It has filed a proof of claim, asserting that the car is worth $12,825 and, therefore, it holds a secured claim in this amount, with a deficiency claim for the balance of $1,791. The plan, however, values the car at only $5,000 and the Debtors propose to treat Americredit's claim as a secured claim only to the extent of $5,000. If the Non-Standard Language is allowed in this plan and is given *res judicata* effect, then these two secured creditors will be bound by the plan's assertions, despite the fact that Americredit has filed a contrary proof of claim and Bank of America is under no obligation as a secured creditor to file a proof of claim.

II. DISCUSSION

A. The Court's [*5] Duty to Police Plan Provisions

No creditor has objected to the Debtors' proposed plan or to its inclusion of the Non-Standard Language. Nevertheless, ***HN1*** *§ 1325(a)*,[2] which governs plan confirmation, instructs a bankruptcy court to confirm a plan only if the plan complies with the "applicable provisions" of the Code. Similarly, *§ 1322(b)* delineates what provisions are appropriate for inclusion in a plan, and the eleventh subparagraph of that section states a plan may "include any other appropriate provision *not inconsistent* with this title." *11 U.S.C. 1322(b)(11)* (emphasis added). The Supreme Court recently made clear that these sections put an obligation on bankruptcy courts to ensure that a debtor has conformed his plan to the requirements of the Bankruptcy Code, regardless of whether any one has filed a plan objection. *United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367, 1381, 176 L. Ed. 2d 158 & n.14 (2010)* ("*Section 1325(a)* . . . *requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.") (emphasis original). A court's failure to perform this duty may have significant consequences. If notice is adequate and no one appeals the confirmation [*6] order, the plan will become final, regardless of whether its provisions violate the Code. *See id. at 1380* (concluding plan enforceable and binding even though bankruptcy court's confirmation of it was legal error).

B. Competing Concepts of Claims Allowance, Plan Confirmation, and Lien Ride-Through

This case implicates three major concepts at work in a Chapter 13 case: claims allowance, plan confirmation and protection of lien rights. Unfortunately, these concepts do not always work in harmony. First, ***HN2*** the claims allowance process is a well-established process used in all chapters of the Code for establishing allowed claims. It gives creditors the right to file a claim against a debtor's estate. *11 U.S.C. § 501(a)* ("A creditor . . . may file a proof of claim."). Once a creditor files a proof of claim under *§ 501*, the claim is deemed allowed, unless a party in interest objects. *11 U.S.C. § 502(a)*. If an objection is filed, the court will resolve it after a hearing. *See 11 U.S.C. § 502(b)*; *Fed. R. Bankr. P. 3007(a)*. Holders of allowed claims are then entitled to distributions [*7] under a confirmed Chapter 13 plan.

While the claims allowance process seems straightforward, it becomes less so in the Chapter 13 context due to the overlapping requirements of plan confirmation. According to a new provision added to the Code by BAPCPA,[3] ***HN3*** a hearing on confirmation of the plan must be held not later than forty-five days after the first meeting of creditors. *11 U.S.C. § 1324(b)*. The deadline for filing proofs of claim for unsecured claims is ninety days after the first meeting of creditors. *Fed. R. Bankr. P. 3002(c)*. Taxing authorities have until 180 days after the order for relief or sixty days from the Chapter 13 debtor's filing of a tax return. Secured creditors have no deadline and are not required to file a

[2] Unless otherwise noted, all references to "§" or "section" are to 11 U.S.C. and "Code" refers to the Bankruptcy Code.

[3] Bankruptcy Abuse Prevention and Consumer Protection Act, ***Pub. L. No. 109-8, 119 Stat. 23 (2005)***.

proof of claim. Fed. R. Bankr. P. 3002(a) (by negative inference); In re Babbin, 160 B.R. 848, 849 (D. Colo. 1993). So, in the typical Chapter 13 case, a plan is proposed, any objections to it are resolved, and the plan is confirmed well *prior to* any deadline for filing proofs of claim.

To complicate matters further, ***HN4*** the Code gives a Chapter 13 debtor the power to propose [*8] a plan for repayment of his creditors, with certain rights to modify allowed claims. The Code sets forth what a Chapter 13 plan must do and also what a plan may do. 11 U.S.C. §§ 1322, 1325. It prescribes three options for the treatment of secured claims: ″(1) the secured creditor accepts the plan; (2) the plan provides that the secured creditor retain its lien and be paid the full amount of the allowed claim; or (3) the debtor surrenders the property securing the claim to the creditor.″ Universal Am. Mortg. Co. v. Bateman (In re Bateman), 331 F.3d 821, 829 (11th Cir. 2003) (citing 11 U.S.C. § 1325(a)(5)). The Code also allows a debtor to ″modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . .″ 11 U.S.C. § 1322(b)(2). A Chapter 13 plan may ″provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending . . . .″ 11 U.S.C. § 1322(b)(5). The power to cure an arrearage on a home mortgage is important to many Chapter 13 debtors because it is often the inability to get current on a home mortgage that forces the debtor into [*9] bankruptcy in the first place. Of course, to cure a default, the debtor must be able to ascertain the amount of the arrearage. This often proves difficult because, in many cases, the mortgage holder has not yet filed a proof of claim at the time of confirmation and fails to adequately communicate with the debtor.[4]

HN5 If the plan is confirmed, the plan is binding on the debtor and all creditors, whether or not the plan provides for a creditor and whether or not a creditor has accepted or objected to the plan. 11 U.S.C. § 1327(a). Section 1327(a) is often referred to as giving *res judicata* effect to a confirmed plan. As stated by the Tenth Circuit, ″[u]pon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack.″ In re Talbot, 124 F.3d 1201, 1209 (10th Cir. 1997) (citing 8 *Collier on Bankruptcy* [*10] ¶ 1327.02[1] (Lawrence P. King ed., 15th ed.1996)). Further, § 1327(b) provides that, except as otherwise provided in the plan, confirmation vests all property of the estate in the debtor. 11 U.S.C. § 1327(b). The vesting of property, except as otherwise provided for in the plan, is ″free and clear of any claim or interest of any creditor provided for by the plan.″ 11 U.S.C. § 1327(c). Some courts interpret this last subsection of § 1327, combined with the power to alter the rights of secured creditors found in § 1322(b)(2), as giving a Chapter 13 debtor the power to modify or extinguish liens on estate property via a confirmed plan. In re Ramey, 301 B.R. 534, 544-45 (Bankr. E.D. Ark. 2003); In re Stewart, 2010 Bankr. LEXIS 3790, 2010 WL 4259940, at *6-8 (Bankr. E.D. La. 2010).

HN6 A debtor's ability to modify a secured creditor's lien in his plan raises the third concept at work in the Chapter 13 case—protection of secured creditor lien rights. There is a longstanding and oft-cited principle, dating back to the last century, that liens pass through bankruptcy unaffected. *See* Long v. Bullard, 117 U.S. 617, 620-21, 6 S. Ct. 917, 29 L. Ed. 1004 (1886). Although the principle pre-dates passage of the Code, it has been recently reaffirmed by the [*11] Supreme Court. *See* Dewsnup v. Timm, 502 U.S. 410, 417, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992) (recognizing the continued relevancy of the ″pre-Code rule that liens pass through bankruptcy unaffected″); *see also* In re Haberman, 516 F.3d 1207, 1209 (10th Cir. 2008) (citing principle). The principle is interpreted to mean that a secured creditor is not required to file a proof of claim or otherwise participate in the bankruptcy in order to protect its lien. *See* Dewsnup, 502 U.S. at 417-18. Rather, a secured creditor may ignore the proof of claim process altogether and look solely to its lien for satisfaction of the debt. In re Tarnow, 749 F.2d 464, 465 (7th Cir. 1984). The Code now specifically provides that a secured creditor's failure to file a proof of claim does not invalidate or extinguish a lien. 11 U.S.C. § 506(d)(2).

On the other hand, ***HN7*** the Code provides a debtor with several methods to modify or invalidate a lien. For example, certain types of secured claims can be ″crammed down″ to the value of the collateral pursuant to § 506(a). Debtors in this case propose to do this to their auto loan and second home mortgage. In addition, if a secured claim is disallowed by the court pursuant to § 502, the lien securing [*12] the disallowed claim will be void. 11 U.S.C. § 506(d); Dewsnup, 502 U.S. at 416. A debtor may initiate an adversary proceeding ″to determine the validity, priority or extent of a lien.″ Fed. R. Bankr. P. 7001(2). Section 522(f) allows avoidance of liens on personal property impairing an exemption. As discussed below, some courts conclude that a

[4] for a discussion of the problems facing many Chapter 13 debtors with home mortgages, see Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008).

debtor cannot affect a lien without invoking one of these specific methods. Other courts believe plan confirmation is an additional method, specifically permitted by § 1327(c), of modifying a lien.

It is not difficult to imagine that the interaction of the three concepts—claims allowance, plan confirmation, and protection of lien rights—often creates problems. For example, if a Chapter 13 plan purports to do something that is at odds with a filed proof of claim or a secured creditor's lien rights, which concept wins out? Must a creditor file both a proof of claim and a plan objection to protect its rights? Does a confirmed plan always control since it has *res judicata* effect? Or does an allowed claim take precedence, even if it was filed after plan confirmation? Do the lien rights of a secured creditor always ride through bankruptcy unaffected, [*13] even in the face of a contrary plan provision? Does the Code give a debtor the power to alter secured creditor's rights and to vest property free and clear of claims and interests through the plan process? If a debtor is prevented from altering a home mortgage holder's lien rights, how does the debtor ensure that he or she has cured the arrearage? Unfortunately, there are no simple answers to these questions.

C. The ″Modification Rule″

One potential solution to the lack of symmetry between the claims allowance process and the plan confirmation process is found in local forms used in this district. The Local Rules require debtors to use a Chapter 13 plan form containing the following provision:

> The debtor must file and serve upon all parties in interest a modified plan which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation . . . . The modification will be filed no later than one year after the petition date. Failure of the debtor to file the modification may be grounds for dismissal.

Local Bankr. Form 3015-1.1, ¶ VIII (the ″Modification Rule″). The Modification Rule presents a practical solution to a potentially [*14] thorny issue. The Rule allows both the plan confirmation process and claims allowance process to function. At the same time, it allows for later resolution of any inconsistency between a confirmed plan and subsequently filed proofs of claim. It only works, however, to the extent that a secured claimant files a proof of claim, which it is not required to do.

Despite these practical benefits, Debtors' proposed plan marks the Modification Rule as ″N/A,″ and Debtors argue this local rule is inconsistent with the Code and, therefore, unenforceable. ***HN8*** The power to set local rules is provided for in Rule 9029.[5] Under that Rule, a local bankruptcy rule must be consistent with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Local bankruptcy rules ″may prescribe practice or procedure but may not enlarge, abridge or modify any substantive right.″ In re Rivermeadows Assocs., Ltd., 205 B.R. 264, 269 (10th Cir. BAP 1997). A local rule which is inconsistent with the Code or attempts to limit a practice allowed by the Federal Rules of Bankruptcy Procedure is invalid. In re Wilkinson, 923 F.2d 154, 155 (10th Cir. 1991); In re Rivermeadows, 205 B.R. at 269.

Debtors contend that the Modification Rule is inconsistent with ***HN9*** § 1329, which governs plan modifications. In relevant part, that section provides that a plan may be modified ″upon the request of the debtor, the trustee, or the holder of an allowed unsecured claim.″ 11 U.S.C. § 1329(a). Nothing in the text of § 1329 specifically grants a bankruptcy court the power to order a post-confirmation plan modification *sua sponte*. Nevertheless, the Modification Rule essentially *orders* a debtor to file a plan modification, upon pain of dismissal, even if no modification is requested by the debtor, trustee or an unsecured creditor. Although the case law construing § 1329(a) is sparse, the cases that do exist appear to support Debtors' argument. As noted by one court, ***HN10*** § 1329(a) ″expressly limits the universe of persons who may propose or request modification of a confirmed Chapter 13 plan″ and ″[t]he bankruptcy court is statutorily excluded from that universe of persons.″ In re Muessel, 292 B.R. 712, 716 (1st Cir. BAP 2003); *see also* In re Haddox, 2003 Bankr. LEXIS 1469, 2003 WL 22681412, at *3 (10th Cir. BAP Nov. 12, 2003) (″By statute, at least, [*16] it does not appear that a bankruptcy court may sua sponte modify a confirmed plan.″). By way of contrast, other provisions of the Code specifically provide for *sua sponte* action by a court where Congress intended bankruptcy courts to have that power. *See, e.g.*, 11 U.S.C. § 707(b)(1) (providing that the court may dismiss a Chapter 7 case ″on its own motion″). Thus, the Court agrees with Debtors that, to the extent the Modification Rule amounts to a bankruptcy court order to modify a confirmed Chapter 13 plan, it is inconsistent with the Code and invalid.

D. Case Law Approaches

[5] All references to ″Rule″ shall [*15] refer to the Federal Rules of Bankruptcy Procedure, unless otherwise noted.

Taking the Modification Rule out of play returns us to the question of how to balance the competing concerns outlined above. Courts are split on the proper balance. The case law can be broadly categorized into three approaches, each discussed below.

1. Emphasis on the Claims Allowance Process and Secured Creditor Rights

The first category of cases, sometimes called the majority position, actually encompasses several different approaches to the issues presented.[6] A common thread among them all, however, is that Chapter 13 plan confirmation is not, by itself, sufficient to alter a secured creditor's lien rights. *E.g.,* [*17] *Universal Am. Mortg. Co. v. Bateman (In re Bateman), 331 F.3d 821, 827-33 (11th Cir. 2003)*; *Cen-Pen Corp. v. Hanson, 58 F.3d 89, 92-93 (4th Cir. 1995)*; *Simmons v. Savell (In re Simmons), 765 F.2d 547, 555-56 (5th Cir. 1985)*. Rather, these cases emphasize the principle that liens pass through bankruptcy unaffected, thus permitting a secured creditor to elect not to participate in the bankruptcy and instead to rely on its lien rights. *E.g., In re Bateman, 331 F.3d at 827*; *Cen-Pen Corp., 58 F.3d at 92*. These cases hold that, in order to alter lien rights, a debtor must invoke some process other than plan confirmation, such as the claims allowance process or a separate adversary proceeding. *E.g., Cen-Pen Corp ., 58 F.3d at 92* ("For a debtor to extinguish or modify a lien during the bankruptcy process, some affirmative step must be taken toward that end."). Only by invoking a separate process, these courts reason, will a creditor be afforded adequate notice and opportunity to respond. *E.g. Bateman, 331 F.3d at 831-32* (citing *In re Hobdy, 130 B.R. 318, 322 (9th Cir. BAP 1991))* (concluding the plan confirmation process should not be used to reduce a valid claim without affording a creditor [*18] the requisite notice and opportunity to be heard.); *In re Simmons, 765 F.2d at 552* (noting that purpose of a claim objection is to place the parties on notice that litigation is required to resolve an actual dispute); *In re Vincente, 257 B.R. 168, 179-80 (Bankr. E.D. Pa. 2001)* (listing cases) ("[A] creditor's lien rights may not be affected unless it has notice and opportunity to defend against the debtor's attempt to do so.").

Courts adopting this line of reasoning generally acknowledge the *res judicata* effect given a confirmed plan by *§ 1327*, but offer various reasons why *§ 1327* does not allow a plan to alter lien rights. For example, in *Universal Am. Mortg. Co. v. Bateman (In re Bateman), 331 F.3d 821 (11th Cir. 2003)*, the Eleventh Circuit cites fairness concerns that it would give the debtor a "windfall" if he were allowed to unencumber assets "through the simple expedient of passing his property through the estate." *Id. at 831* (quoting *In re Simmons, 765 F.2d at 555-56*). [*19] In addition, the *Bateman* court reasoned that it is the claims allowance process—not the plan confirmation process—which governs the amount of a secured creditor's claim. Thus, while *§ 1327* binds the parties to the distribution amount under the plan, the *Bateman* court concluded that the amount of the claim is determined by *§ 502(a)*, even if the amount listed in the debtor's plan differs. *Id. at 832*. The *Bateman* court reasoned that the claims allowance process is the more specific procedure for determining claim amounts and therefore controls over the more general policy considerations in *§ 1327(a)*. *Id. at 832* (citing *In re Hobdy, 130 B.R. 318, 322 (9th Cir. BAP 1991))*. Stated another way, courts adopting this line of reasoning hold that *§ 1327(a)* makes the plan binding as to the amount to be distributed under the plan, but hold that it is not binding as to the amount of the claim. *See Fleet Real Estate Funding Corp. v. Fewell (In re Fewell), 164 B.R. 153, 155-56 (Bankr. D. Colo. 1993)* (citing *In re Hobdy, 130 B.R. at 322*). If a portion of a creditor's allowed claim, as determined by *§ 502*, remains unpaid after a debtor has made all plan payments, the lien survives and is enforceable [*20] against the debtor. *See id. at 156-57*; *In re Bateman, 331 F.3d at 832*.

Cases in this category also downplay the import *§ 1327(c)*, which provides that, except as otherwise provided in a plan, confirmation vests property of the estate with debtor "free and clear of any claim or interest of any creditor provided for by the plan." Responding to a debtor's argument that this language gave him the power to strip a lien, the Seventh Circuit interpreted the terms "claim or interest" narrowly to *not* include a lien. *In re Simmons, 765 F.2d at 555*. The *Simmons* court cited as authority an earlier bankruptcy court opinion which reasoned that both "claim" and "lien" are separately defined by the Code, but the term "interest" is not. *Id.* (citing *In re Honaker, 4 B.R. 415, 416-17 (Bankr. E.D. Mich. 1980))*; *see* also *11 U.S.C. §§ 101(5)*, *101(37)*. Had Congress intended to allow lien stripping in *§ 1327(c)*, it would have used the defined term "lien" rather than the undefined "interest." *Id.* Other courts have focused on the term "provided for" in *§ 1327(c)*. These courts conclude that a plan only "provides for" a lien held by a secured creditor when it provides for payment to the creditor in an amount equal [*21] to its security. *Cen-Pen Corp., 58 F.3d at 94*.

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[6] *See* Eric Richards, *Due Process Limitations of the Modification of Liens Through Bankruptcy Reorganization*, 71 Am. Bankr. L.J. 43, 79-90 (1997) (discussing case law and describing this line of cases as the "majority view").

Thus, absent full payment owed to the secured creditor, a lien is not ″provided for″ and survives Chapter 13 confirmation. *Id.*; *Southtrust Bank of Alabama v. Thomas (In re Thomas), 883 F.2d 991, 998 (11th Cir. 1989)* (plan that made zero payments to secured creditor did not ″provide for″ lien).

Some of the cases in this category involve home mortgage liens. In those instances, *§ 1322(b)(2)* is offered as another basis for not permitting a plan to alter a home mortgage lien or an associated arrearage claim. *See Bateman, 331 F.3d at 831, n.9*. *In Bateman*, the secured creditor held a lien against the debtor's home and filed a timely proof of claim for an arrearage on that mortgage. The debtor then proposed a plan that would pay less than half of the mortgage arrearage listed in the proof of claim. The creditor did not object to the plan and it was confirmed. The *Bateman* court held that the creditor's lien, as well as the associated arrearage claim, survived the debtor's contrary plan provision. *Id. at 831* (″[I]f a lien on a mortgage survives the *§ 1327* *res judicata* effect of a confirmed plan, then so must any corresponding arrearage claim . . [*22] . .″). The Eleventh Circuit acknowledged that *§ 1322(b)(5)* permits a debtor to cure a home mortgage arrearage in a plan, but held that the provision ″does not compromise the amount of the aggregate secured claim or the rights of the secured creditor to recover the arrearage.″ *Id. at 827, n.5* (citing *Nobelman v. American Sav. Bank, 508 U.S. 324, 331-32, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993)*. Thus, despite ″three years of diligent execution of the Plan,″ the debtor's home was still encumbered by a lien for the full arrearage amount at the conclusion of the case. *Id. at 833*.

2. Emphasis on the Res Judicata Effect of a Confirmed Plan

A second line of cases puts emphasis on the *res judicata* effect of a confirmed plan under *§ 1327* and allows a Chapter 13 debtor to modify a secured creditors' rights through a plan. Similar to the Debtors' arguments in this case, these courts generally hold that a secured creditor's failure to object to a plan can result in modification of a claim and a lien. Courts adopting this line of reasoning acknowledge the principle that liens pass through bankruptcy as valid, but hold that the principle cannot provide absolute protection to a lien in a reorganization case.

Indeed, as noted by one court, [*23] the Supreme Court's latest decision discussing the principle, *Dewsnup v. Timm*, was a Chapter 7 liquidation case in which the reorganization powers of a debtor were not at issue. *In re Ramey, 301 B.R. 534, 544 (Bankr. E.D. Ark. 2003)* (citing *Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992)*; *see also In re Stewart, 2010 Bankr. LEXIS 3790, 2010 WL 4259940, at *6 (Bankr. E.D. La. 2010)*. Even the *Dewsnup* opinion itself appears to acknowledge that reorganization cases are of a different character. *See Dewsnup, 502 U.S. at 418-19* (stating that ″[a]part from reorganization proceedings″ the pre-Code bankruptcy statute did not permit involuntary reduction of a lien for any reason other than payment on the debt). Thus, cases in this category conclude that the principle cannot be taken ″to the extreme″ because it stands only for ″the proposition, now codified in *11 U.S.C. § 506(d)*, that *unless action is taken* to avoid a lien, it passes through a bankruptcy proceeding.″ *Matter of Pence, 905 F.2d 1107, 1109 (7th Cir. 1990)* (emphasis added).

Confirmation of a plan is one such action that can avoid a lien. *Id. at 1110*; *In re Ramey, 301 B.R. at 544*. The Code gives specific statutory authority for that action in *§§ 1322* and *1327(c)*. *In re Ramey, 301 B.R. at 544* [*24] (″A Chapter 13 plan has specific statutory authority to cure a default on a secured loan, modify the due date and amount of payments, and even eliminate a secured claim.″). As such, a secured creditor who elects not to participate in a bankruptcy case or file a plan objection, does so at its own risk, because a plan can and may modify the creditor's lien. *E.g., In re Stewart, 2010 Bankr. LEXIS 3790, 2010 WL 4259940, at *6-8 (Bankr. E.D. La. 2010)*.

Some cases in this category draw authority from Chapter 11 reorganization cases. As with Chapter 13, the Code gives Chapter 11 debtors the right to propose a plan that modifies the rights of secured creditors. *See 11 U.S.C. § 1123(b)(5)*. Chapter 11 also contains *§ 1141(c)*, a provision that is very similar to *§ 1327(c)*, which provides with immaterial exceptions that ″except as provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.″ Courts have interpreted *§ 1141(c)* to permit a Chapter 11 debtor to extinguish any lien that is not specifically preserved in the confirmed Chapter [*25] 11 plan. *See In re Penrod, 50 F.3d 459, 462-63 (7th Cir.1995)*; *In re Be-Mac Transp. Co., Inc., 83 F.3d 1020, 1025-26 (8th Cir. 1996)*.

In *Penrod*, the Seventh Circuit acknowledged the ″old saw″ that liens pass through bankruptcy unaffected. *Id. at 461*. It reasoned, however, that ″when lienholders participate in a bankruptcy proceeding, and especially in a reorganization, they know that their liens are likely to be affected, and indeed altered.″ *Id. at 462*. The court held that liens are ″interests″ covered by *§ 1141(c)* and that ″unless the plan of

reorganization, or the order confirming the plan says that a lien is preserved, it is extinguished by the confirmation . . . provided, we emphasize, that the holder of the lien participated in the reorganization." Id. at 463. "Our suggested interpretation reconciles the language of section 1141(c) with the principle, which we have pointed out cannot be maintained without careful qualification, that liens pass through bankruptcy unaffected. They do-unless they are brought into the bankruptcy proceeding and dealt with there." Id.

In this second category, § 506(d)(2), and the principle it embodies, is not seen as being in conflict with § 1327(c) [*26] because those sections are viewed as dealing with completely different aspects of the bankruptcy process. Section 506(d)(2) prevents "voiding" of a creditor's lien based *solely* on the failure to file proof of the underlying claim. Section 1327(c), on the other hand, "may operate to affect the lien of a creditor that has failed to file a proof of claim, but only when the additional statutory requirements of § 1327(c) are present: when confirmation has occurred, the creditor's claim is 'provided for' by the plan and the creditor's lien is not preserved by the plan or order of confirmation." 7 Norton Bankr. L. & Prac. 3d § 151:25 (2009). The "free and clear" effect of § 1327(c) is not dependent on whether a secured creditor has filed a proof of claim.[7] *See* In re Dendy, 396 B.R. 171, 177 n.7 (Bankr. D.S.C. 2008) (confirmed plan stripped down wholly unsecured second mortgage even though mortgage holder did not file proof of claim).

Cases in this category acknowledge the claims allowance process, but characterize it as an "alternate" process to determine a secured claim, and stress that secured creditors cannot rely on this alternative and ignore the confirmation process, without risking modification of their rights. In re Ramey, 301 B.R. at 542-45 (citing Keith M. Lundin, *Chapter 13 Bankruptcy* § 233.1 (3d ed. 2000 & Supp.2002)); In re Wolf, 162 B.R. 98, 107-08 (Bankr. D.N.J. 1993); [*28] In re Fili, 257 B.R. 370, 374 (1st Cir. BAP 2001). Thus, "except in cases where the notice to the creditor of the plan treatment of the lien is so insufficient that it violates due process of law," a plan will have *res judicata* effect. In re Ramey, 301 B.R. at 545. Indeed, some courts hold that confirmation of a plan that addresses allowance of a particular claim and that provides proper notice, will *bar* a creditor's later-filed claim under the principles of *res judicata*. In re Fili, 257 B.R. at 374. The creditor cannot rely solely on a proof of claim, but must also file an objection to the plan to disagree with the characterization or treatment of its claim. Id. at 374.

Courts emphasizing the *res judicata* effect of a plan also find it binding on the amount necessary to cure a home mortgage arrearage pursuant to § 1322(b)(5). Notwithstanding the general exception set forth in § 1322(b)(2), which prevents the modification of a lender's rights secured by a debtor's primary residence, § 1322(b)(5) explicitly "authorizes debtors to cure any defaults on a long-term debt, such as a mortgage, and to maintain payments on the debt during the life of the plan." *See* Rake v. Wade, 508 U.S. 464, 469, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993). [*29] The effect of the provision is to "essentially split each of [the creditor]'s secured claims into two separate claims-the underlying debt and the arrearages." Id. at 473. If the debtor is successful in curing the default, the debt is reinstated to its pre-default position, thereby "return [ing] the debtor and creditor to their respective positions before the default." In re Litton, 330 F.3d 636, 644 (4th Cir. 2003). Where a plan provides for a particular arrearage amount and that plan is confirmed and performed, courts have held that the arrearage amount listed in the plan is binding on the home mortgage creditor, even if the arrearage amount listed in the plan is incorrect. *See* Padilla v. GMAC Mortgage Corp. (In re Padilla), 389 B.R. 409, 422 (Bankr. E.D. Pa. 2008); In re Pitts, 354 B.R. 58, 65-66 (Bankr. E.D. Pa. 2006); In re Miller, 2007 Bankr. LEXIS 31, 2007 WL 81052, at *6 (Bankr. W.D. Pa. Jan. 9, 2007).

3. Emphasis on Due Process

The final category of cases has been called the "middle of the road" approach. In re Basham, 167 B.R. 903, 907 (Bankr. W.D. Mo. 1997). Courts adopting this view hold that a lien may be modified through the confirmation process, but only if the creditor received adequate notice [*30] that

[7] *See also* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 234.1 (4th ed. 2004). Mr. Lundin explains that the former Bankruptcy Act did not empower Chapter 13 debtors to affect the rights of secured claim holders that declined to participate in plans. [*27] With the passage of the Bankruptcy Reform Act of 1978, Congress sought to change this shortcoming and allowed secured claims to be provided for and bound by a Chapter 13 plan. "The option of a secured claim holder to not participate in the Chapter XIII plan was purposefully and completely eliminated by the Bankruptcy Reform Act of 1978." *Id.* If a secured creditor can avoid the *res judicata* effect of § 1327 by simply not filing a proof of claim, "then Chapter 13 reverts to practice under the former Act, and secured claim holders once again have a veto of their treatment under plans." *Id.* Mr. Lundin concludes, "[t]he Code provisions for the treatment of secured claims in Chapter 13 cases were precisely designed to prevent this outcome." *Id.*

its lien would be adversely affected by the proposed plan. *See* Piedmont Trust Bank v. Linkous (In re Linkous), 990 F.2d 160, 162 (4th Cir. 1993). Whether notice is adequate depends on the particular circumstances of the case. For example, in *Linkous*, the debtor's plan proposed to treat a creditor as partially secured pursuant to § 506(a). Id. at 161. The plan summary sent to the creditor listed the number and amount of payments debtor proposed to pay the creditor, but did not otherwise specifically mention that the secured creditor's claim was to be treated as partially secured. *Id*. The plan was confirmed without objection and no appeal was filed. Later, the secured creditor sought to revoke the confirmation on due process grounds. The Fourth Circuit agreed, concluding that a confirmation order is not entitled to *res judicata* effect under § 1327(a), ″if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution.″ Id. at 162. The Court determined that Rule 3012 required a debtor to give specific notice that a § 506 valuation hearing would be conducted. Id. at 163. Because the notice sent to the secured creditor did not make [*31] reference to an intent to value the secured claim pursuant to § 506(a), it was not ″reasonably calculated″ to apprise interested parties and thus failed the fundamental requirements of due process. *Id*.

This approach has some appeal but, arguably, the *Linkous* case and other cases following it have been limited by the Supreme Court's decision in United Student Aid Funds, Inc. v. Espinosa,130 S.Ct. 1367, 176 L. Ed. 2d 158 (2010). In *Espinosa*, the Chapter 13 debtor proposed a plan which provided that he would repay only the principal of his student loans. Id. at 1374. The debtor did not initiate an adversary proceeding to determine the dischargeability of his student loans. The debtor sent the plan to all creditors and no creditor objected. The plan was confirmed and no appeal was taken. After the debtor completed the plan and received a discharge of his student loan interest, the student loan creditor challenged the confirmed plan under Fed. R. Civ. P. 60(b)(4), on the basis that the confirmation order was void because the creditor did not receive due process. Specifically, the creditor argued that the Code requires a bankruptcy court to make a finding of undue hardship in an adversary proceeding before [*32] discharging student loan debt. Id. at 1374-75. The creditor asserted that, because there was no summons and complaint in connection with an adversary proceeding, its due process rights were violated.

The Supreme Court agreed that the creditor had been deprived of its right to an adversary proceeding to determine dischargeability and could have timely objected to the debtor's plan on that basis and appealed an adverse ruling on its objection. Id. at 1378. Nevertheless, the Supreme Court held that the lack of an adversary proceeding and its related summons and notice, ″did not amount to a violation of [the creditor's] constitutional right to due process.″ *Id*. In reaching this conclusion, the Supreme Court found that the due process right to notice does not require actual notice, but merely notice ″reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.″ *Id*. (citing Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). Because the creditor received actual notice of the filing and contents of the debtor's plan, the creditor's due process rights were ″more [*33] than satisfied.″ *Id*. Debtor's failure to file a summons and complaint was not grounds to void the confirmation order. *Id*. The creditor had ″forfeited its arguments regarding the validity of service or the adequacy of the Bankruptcy Court's procedures by failing to raise a timely objection in that court.″ Id. at 1380.

After Espinosa, it seems clear that service of a plan can satisfy due process, even if the plan proposes to do something that would normally require an adversary or motion process. Certainly the failure to follow procedural requirements set forth in the Code (such as filing of an adversary proceeding or contested matter) would be grounds to object to confirmation of a plan. However, failure to meet the additional procedural requirements will not be grounds to avoid the *res judicata* effect of a confirmation order, if the creditor received proper notice and service of the plan.

E. Analysis of Debtors' Non-Standard Language Under the Case Law

Against this backdrop, the Court must evaluate the Non-Standard Language in the Debtors' plan. In many cases, where creditors have not yet filed their proofs of claim prior to confirmation, the impact of this language is unknown. That is [*34] the case here in terms of the Debtors' first mortgage, held by Bank of America. The Debtors are proposing to allow Bank of America to retain its lien, to make regular payments under the existing terms of the note, and Debtors assert that they owe no arrearages on the debt. Bank of America has neither objected to the plan, nor filed a proof of claim. Should this passivity on the Bank's part be construed as their agreement that there are no arrearages and the plan be given *res judicata* effect on this factual assertion?

The issue is drawn into sharper focus in the case of the Debtors' auto loan, held by Americredit. Americredit has already filed a proof of claim, asserting that it holds a claim secured against the Debtors' car, which it values at $12,825,

and the balance of its claim is an unsecured deficiency claim in the amount of $1,791. The Debtors' plan values the car at $5,000 and proposes to cram down Americredit's secured claim to $5,000, leaving a much larger deficiency claim. Under § 502(a), Americredit's proof of claim is deemed allowed because the Debtors have not objected to it. Absent Americredit's consent, § 1325(a)(5) would require the Debtors to pay Americredit $12,825 [*35] in the plan on account of its secured claim or they must surrender the vehicle. Since Americredit did not object to the plan, has it given its consent to the plan's $5,000 cram down treatment? Should the Court ignore the inconsistency because Americredit did not participate in the confirmation process?

To answer these questions, this Court begins with a recognition that ***HN11*** the confirmation process and the claims adjudication process serve as alternative methods for resolving disputed claims. *See* In re Ayre, 360 B.R. 880, 886 (C.D. Ill. 2007). If procedural requirements are satisfied, both processes will afford a creditor with due process that its rights are being affected. In regard to claims, several rules ensure that the creditor is given due process. An objection to a proof of claim initiates a contested matter, and the objection and notice of the hearing must be served on the creditor, debtor and trustee. *See* Fed. R. Bankr. P. 3007, Local Bankr. R. 3007-1. Likewise, either party may separately initiate a contested matter to seek valuation of a secured claim. Fed. R. Bankr. P. 3012. In the case of valuing a lien on real property, Local Rule 3012-1 requires a debtor to file a separate [*36] motion asking for a valuation and determination of secured status under § 506 and to reference the request in any plan.

HN12 The plan confirmation process itself also requires service of process on any secured creditor whose rights will be affected by the plan. *See* Fed. R. Bankr. P. 9014; Local Bankr. R. 3015-1(b)(3). This first assumes that the plan contains a clear description of how the debtor proposes to allow and treat a particular creditor's claim.[8] It also requires compliance with the notice and service requirements of Rules 2002(b) and 7004. If followed, the creditor will be deemed apprised that its rights will be affected by confirmation and will have been afforded an adequate opportunity to object. *See* United Student Aid Funds, Inc. v. Espinosa,130 S.Ct. 1367, 1378, 176 L. Ed. 2d 158 (2010).

One point of clarification is in order before proceeding further in this analysis. There is a common misperception in this district that ″notice″ and ″service″ are synonymous. Under local rules, ***HN13*** when a debtor files his plan with his bankruptcy petition, the court will mail notice of the plan to all creditors listed on the debtor's mailing matrix. Since most mailing matrices list the creditors at post office boxes with no named representatives of the creditors, the court mailing may only satisfy the ″notice″ requirements of Rule 2002(b). Generally, it will not satisfy the additional ″service″ requirements of Rule 7004. While Rule 7004 allows for service to be effected by a first class mailing anywhere within the United States, it sets forth specific requirements *as to whom the mailing must be addressed*. For example, service on a corporation [*38] requires mailing to ″an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . .″ Fed. R. Bankr. P. 7004(b)(3). Rule 7004(b)(4)-(7) contains special rules for service on a governmental agency. Unless the debtor's matrix includes addresses that meet these requirements, the court's mailing will not satisfy the service requirements. In addition, if the affected party is an ″insured depository institution,″ with certain exceptions, the service must be by *certified* mail addressed to a named officer of the institution. Fed. R. Bankr. P. 7004(h). The court's mailing will never suffice when certified mail is required.

This is not to suggest that every creditor must be ″served″ with the plan. ***HN14*** All creditors must receive ″notice.″ But ″service″ is only required as to those creditors whose rights will be specifically impacted by the plan, such as a secured creditor whose lien rights and/or arrearage amount is intended to be affected, or a tax claim that a debtor seeks to determine its amount and treatment. It could also involve the rights of a lessor or a party to an executory contract. In most cases, it will involve secured [*39] and priority creditors that are specifically mentioned in the plan. Because the court cannot utilize its limited resources to police a debtor's compliance with the service requirements in the absence of an objection, the standard form of confirmation order in this district includes a caveat: ″This order binds those creditors and parties in interest that have been served in accordance with applicable rules.″ This language is intended to remind debtors' counsel that the plan will only

[8] The Court is aware that many plans in this district contain a more generic version of the Non-Standard Language that purports to void any liens on personal property, other than a car, if the creditor's lien is not specifically referenced in the plan. In other words, without even naming the creditor, the plan's provision attempts to wipe out the lien, absent an objection by the creditor. Presumably debtors' counsel [*37] are trying to avoid the expense of a lien search to find out if the debtor's computer or washing machine is subject to a security interest. This Court has previously ruled that this generic version does not afford a creditor sufficient due process that its lien rights are affected. *In re Jackson*, 2009 Bankr. LEXIS 4346, 2009 WL 5943245, at *3 (Bankr. D. Colo. Aug. 31, 2009).

be binding to the extent that they have satisfied both notice and service requirements.

HN15 To the extent that a debtor has complied with these rules, this Court will give *res judicata* effect to any final order specifically addressing the creditor's claim, whether that is an order on a claim objection or a confirmation order. The confirmation order, if entered first, will be controlling as to those claims specifically addressed in the plan. In essence, the Court adopts the second line of cases giving emphasis to the *res judicata* effect of a properly served plan. If a proposed plan unambiguously informs a creditor that its claim will be affected, disallowed or valued in a certain way, the creditor may not ignore [*40] the confirmation process just because the claims bar date has not expired. *In re Thaxton, 335 B.R. 372, 374 (Bankr. N.D. Ohio 2005)*. The confirmed plan is akin to a new contract between the debtor and its creditors, which defines the creditors' rights. *See In re Talbot, 124 F.3d 1201, 1209 (10th Cir.1997)*. The Court agrees with the cases discussed above that acknowledge the principle that liens ride through bankruptcy unaffected, but also recognizes the principle's limited application in a reorganization case. *See In re Penrod, 50 F.3d 459, 462-63 (7th Cir.1995)*. The Debtors' Non-Standard language is an expression of this obligation placed on a creditor to object to plan confirmation if it disagrees with how a debtor proposes to treat its claim. This language merely restates the *res judicata* effect that a confirmed plan may have on the rights of a creditor, including modification of a lien.

III. Conclusion

For the reasons stated above, the Court concludes the Non-Standard Language in the Debtors' proposed plan is permissible and not inconsistent with the Code. A separate standard confirmation order will enter, together with a separate judgment to this effect.

DATED this 25th day of [*41] March, 2011.

BY THE COURT:

/s/ Elizabeth E. Brown

Elizabeth E. Brown

United States Bankruptcy Judge

Positive
As of: December 8, 2014 11:46 AM EST

Woolsey v. Citibank, N.A. (In re Woolsey)

United States Court of Appeals for the Tenth Circuit

September 4, 2012, Filed

No. 11-4014

Reporter
696 F.3d 1266; 2012 U.S. App. LEXIS 18597; 68 Collier Bankr. Cas. 2d (MB) 292; 2012 WL 3797696

In re: KENNETH WOOLSEY; STEPHANIE WOOLSEY, Debtors.KENNETH WOOLSEY; STEPHANIE WOOLSEY, Appellants, v. CITIBANK, N.A., Appellee, KEVIN R. ANDERSON, Chapter 13 Trustee, Trustee - Appellee, NATIONAL ASSOCIATION OF CONSUMER ***BANKRUPTCY*** ATTORNEYS, Amicus Curiae.

Prior History: [**1] Appeal from the United States District Court for the District of Utah. (***D***.C. No. 2:10-CV-01097-BSJ).
*In re Woolsey, 438 B.R. 432, 2010 Bankr. LEXIS 3662 (Bankr. **D**. Utah, 2010)*

Core Terms

district court, secured claim, cases, ***bankruptcy*** court, stripping, appeals, collateral, repayment, void, liquidation, ***bankruptcy*** proceeding, interlocutory appeal, reorganization, permits, state law, invitation, hear, ***bankruptcy*** code, final decision, final judgment, circuits, confirm, removal, rights, liens, premature notice of appeal, statutory provisions, circumstances, interlocutory, ambiguity

Case Summary

Procedural Posture

Appellee creditor objected to appellant debtors' Chapter 13 plan. The ***bankruptcy*** court rejected the plan, and the United States District Court for the District of Utah affirmed. The debtors appealed.

Overview

The debtors proposed a plan under which the creditor's second mortgage against their home would have been voided because it was unsupported by any current value. The court of appeals held that it had jurisdiction over the debtors' appeal because the ***bankruptcy*** court had confirmed an amended plan after the district court's decision, which caused the premature notice of appeal to become effective. The ***bankruptcy*** and district courts properly found that *11 U.S.C.S. § 506(**d**)*, as interpreted by the U.S. Supreme Court in Dewsnup, precluded removal of the lien. The debtors argued that the second mortgage was not a "secured claim" and was therefore void under *§ 506(**d**)* because it was not supported by value in the collateral. However, under Dewsnup, the value in the collateral had no bearing on *§ 506(**d**)*; any lien secured under state law was protected against removal. The court of appeals declined to give the statutory term "secured claim" in *§ 506(**d**)* a different meaning in Chapter 13 cases than the term had in Chapter 7 cases. Although several courts had found that *11 U.S.C.S. § 1322(b)(2)* could be used to remove a wholly unsecured lien, the debtors had repudiated that line of argument.

Outcome

The district court's judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > US Supreme Court Review > General Overview

Governments > Courts > Judicial Precedent

HN1 Whether or not the United States Supreme Court is infallible, it is final. And it belongs to that Court, not a circuit court of appeals, to decide whether to revisit its precedent.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

HN2 The confirmation of an amended plan brings Chapter 13 ***bankruptcy*** proceedings to a close, surely constituting a final order subject to appeal. *28 U.S.C.S. § 158(**d**)*(1). Indeed, in the world of ***bankruptcy*** proceedings — a world where cases continue on in many ways for many years and

lack the usual final judgment of a criminal or traditional civil matter — confirmation of an amended plan is as close to the final order as any the ***bankruptcy*** judge enters.

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Civil Procedure > Appeals > Notice of Appeal

HN3 At least absent any indication of potential prejudice, a premature notice of appeal involving a ***bankruptcy*** matter, even one with an interstitial stop in the district court, ripens and becomes effective once a final order approving a plan of reorganization is entered.

Civil Procedure > Appeals > Notice of Appeal

HN4 *Fed. R. App. P. 4(a)(2)* instructs that a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

Civil Procedure > Appeals > Notice of Appeal

HN5 Under *Fed. R. App. P. 4(a)(2)*, a premature notice of appeal retains its validity only when the order appealed from is likely to remain unchanged in both its form and its content.

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > Federal Court Decisions

Governments > Courts > Judicial Precedent

HN6 While a panel of a federal circuit court of appeals may sometimes recognize that a prior panel decision has been clearly overruled by an intervening United States Supreme Court decision, the United States Court of Appeals for the Tenth Circuit is aware of no existing Tenth Circuit authority that might allow a panel to overrule another panel simply because the earlier panel did not mention a still earlier and (possibly) relevant Supreme Court decision.

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Civil Procedure > Appeals > Notice of Appeal

HN7 Hinton's test for validity of a premature notice of appeal is clearly satisfied where an appealed order from a district court (or ***Bankruptcy*** Appellate Panel) resolves the only outstanding issue in what has, by the time it reaches the court of appeals, become an otherwise completed ***bankruptcy*** proceeding.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

HN8 *11 U.S.C.S. § 506(**d**)* is a provision of the ***Bankruptcy*** Code allowing any debtor in ***bankruptcy***, regardless under which specific Chapter the debtor proceeds, to remove (or "strip off") certain liens. *Section 506(**d**)* explains that, to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void.

Bankruptcy Law > Claims > Allowance of Claims

HN9 *11 U.S.C.S. § 502* provides that a claim filed by a creditor is "allowed" if nobody objects — and even if there is an objection, a claim is still allowed unless stated otherwise in *§ 502*. *11 U.S.C.S. § 502(a)-(b)*.

Bankruptcy Law > Claims > Allowance of Claims

HN10 *11 U.S.C.S. § 502(b)(1)* "disallows" claims that are unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

Bankruptcy Law > Claims > Allowance of Claims

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN11 *11 U.S.C.S. § 506(a)* applies only to claims that are already "allowed," making abundantly clear it does not "disallow" anything.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN12 See *11 U.S.C.S. § 506(a)(1)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN13 The thrust of *11 U.S.C.S. § 506(a)* is to classify allowed claims (or portions of allowed claims) as either secured or unsecured, which in turn affects how the ***Bankruptcy*** Code treats them. The statute explains that for purposes of federal ***bankruptcy*** law a "secured claim" requires something more than a security interest recognized by state law. A claim, even if secured by a valid state law lien on property, qualifies as "secured" for purposes *§ 506(a)* and federal ***bankruptcy*** law only to the extent it is supported by value in the collateral. To the extent that the lien is supported by some but not enough value to cover the whole debt, *§ 506(a)* splits the claim in two, creating a secured claim and an unsecured claim. So even if a lien

qualifies as a valid security interest under state law, it gives rise to a "secured claim" for purposes of federal ***bankruptcy*** law only if and to the extent it is supported by value in the underlying property.

Bankruptcy Law > Claims > Allowance of Claims

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN14 The ***Bankruptcy*** Code allows debtors to void liens that are not "allowed" and "secured" claims. *11 U.S.C.S. § 506(**d**)*. The code defines "allowed" claims. *11 U.S.C.S. § 502*. It also defines "secured" claims. *§ 506(a)*.

Bankruptcy Law > Claims > Allowance of Claims

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN15 The term "allowed secured claim" means a claim "allowed" under *11 U.S.C.S. § 502* and "secured" by a lien enforceable under state law. So value in the collateral has no bearing on the lien-voiding language of *11 U.S.C.S. § 506(**d**)*: any lien secured under state law must be respected and protected from removal.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > General Overview

HN16 *11 U.S.C.S. § 506(**d**)* applies equally to bankruptcies under Chapter 13.

Governments > Legislation > Interpretation

HN17 An elementary rule of statutory interpretation is the rule against ascribing various meanings to a single iteration of a statutory term in different applications. Though giving a term different meanings in different but related statutes is one thing and disfavored enough, giving a single use of a term different meanings is another thing altogether, a ploy not just frowned upon but methodologically incoherent and categorically prohibited: To give these same words a different meaning for each category of cases to which they apply would be to invent a statute rather than interpret one. The United States Supreme Court has rejected the dangerous principle that judges can give the same statutory text different meanings in different cases. The notion has been forcefully rejected that courts could give the same word, in the same statutory provision, different meanings in different factual contexts.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Interpretation

HN18 When a statutory provision is given a limiting construction to avoid a serious constitutional question arising from one of its potential applications, that interpretation governs all applications of the provision — even those that do not raise the same constitutional concerns. If the statutory purpose and the constitutional concerns motivating the prior limiting construction are not present in a case, this still cannot justify giving the same provision a different meaning in different factual circumstances. Rather, the lowest common denominator, as it were, must govern.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

HN19 There is no principled way to conclude that, although *11 U.S.C.S. § 506(**d**)* does not authorize lien stripping in Chapter 7 cases, it has a different meaning in Chapter 11, 12, and 13 matters.

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Mariah E. Murphy (Anthony C. Kaye and Steven ***D***. Burt with her on the briefs), Ballard Spahr LLP, Salt Lake City, Utah, for Appellee Citibank.

Kevin R. Anderson, Salt Lake City, Utah, for Trustee-Appellee.

Tara Twomey, San Jose, California, for Amicus Curiae National Association of Consumer ***Bankruptcy*** Attorneys.

Judges: Before GORSUCH, HOLMES, and MATHESON, Circuit Judges.

Opinion by: GORSUCH

Opinion

[*1267] **GORSUCH**, Circuit Judge.

Like so many these days, Stephanie and Kenneth Woolsey owe more money on their home than it's worth. In fact, the

value of their home doesn't come close to covering the balance due on their first mortgage, much less the amount they owe on a second. And it's that second mortgage, held by Citibank, at the center of our case. After the Woolseys sought shelter in ***bankruptcy***, they prepared a Chapter 13 repayment plan. In their plan, they took the position that the ***bankruptcy*** code voids Citibank's lien because it is unsupported by any current value in the home. Naturally, Citibank didn't take well to the Woolseys' intentions. The bank objected to [**2] the Woolseys' plan and eventually persuaded the ***bankruptcy*** court to reject it. Later the district court, too, sided with Citibank and now the question has found its way to us.

Before us, though, the Woolseys don't just shrink from, they repudiate the only possible winning argument they may have had. They choose to pursue instead and exclusively a line of attack long foreclosed [*1268] by Supreme Court precedent. To be sure, the Woolseys argue vigorously and with some support that the Supreme Court has it wrong. But, as Justice Jackson reminds us, ***HN1*** whether or not the Supreme Court is infallible, it *is* final. *See* Brown v. Allen, 344 U.S. 443, 540, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (Jackson, J., concurring in the result). And it belongs to that Court, not this one, to decide whether to revisit its precedent. For now, and like the other judges to have passed on this case so far, we are obliged to apply the Court's current case law and that leads us, inexorably, to affirm.

* * *

But before we can get to all that, there's a jurisdictional snarl we have to untangle first. After Citibank successfully objected to the Woolseys' initial repayment plan, the ***bankruptcy*** court issued an order rejecting it. That order, of course, was hardly [**3] an appealable final decision spelling the end to things in ***bankruptcy*** court: it promised only more litigation until an amended repayment plan could win the ***bankruptcy*** court's approval. *See* Simons v. FDIC (In re Simons), 908 F.2d 643, 645 (10th Cir. 1990). All the same, the Woolseys appealed it to the district court. And this they could do because 28 U.S.C. § 158(a)(3) permits interlocutory appeals in these particular circumstances. For its part, however, the district court soon issued a summary order affirming the ***bankruptcy*** court's rejection of the Woolseys' initial plan, and it is that decision the Woolseys now seek to appeal to our court.

And that raises this question: Do we have the power to hear an interlocutory appeal of an interlocutory appeal? By what authority might we entertain an appeal from the district court of an interlocutory order regarding a matter pending in ***bankruptcy*** court? To be sure, the Woolseys could have sought permission to proceed to this court under the general interlocutory appeal statute, 28 U.S.C. § 1292(b). *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). But they didn't. Instead and at their behest, the district court purported to certify its [**4] interlocutory appeal for a further interlocutory appeal to this court under 28 U.S.C. § 158(***d***)(2)(A). Can a district court *do* that?

When a case is properly certified by the ***bankruptcy*** court, district court or ***bankruptcy*** appellate panel, Congress through § 158(***d***)(2)(A) has clearly given this court the power to hear "appeals described in the first sentence of [§ 158(a)]." The difficulty is that the "appeals described" in the first sentence of § 158(a) are not appeals from the district court, but appeals directly from the ***bankruptcy*** court. So it's evident enough that § 158(***d***)(2)(A) gives us the authority to hear appeals straight from the ***bankruptcy*** court, leapfrogging over the district court or ***bankruptcy*** appellate panel in order to speed up the resolution of dispositive legal questions. *See* Weber v. U.S. Tr., 484 F.3d 154, 157-58 (2d Cir. 2007). What's less certain is whether the statute *also* permits us to hear interlocutory appeals from the *district court's* disposition of an interlocutory appeal of a ***bankruptcy*** court order, in this respect covering much the same ground as § 1292(b).

Fortunately, it turns out we don't have to decide that question in this case. We don't because, while [**5] this appeal was wending its way to us, the ***bankruptcy*** court confirmed an amended repayment plan the Woolseys submitted after their initial plan voiding Citibank's lien was rejected. ***HN2*** The confirmation of an amended plan brought the ***bankruptcy*** proceedings to a close, surely constituting a final order subject to appeal. *See* 28 U.S.C. § 158(***d***)(1). [*1269] Indeed, in the world of ***bankruptcy*** proceedings — a world where cases continue on in many ways for many years and lack the usual final judgment of a criminal or traditional civil matter — confirmation of an amended plan "is as close to *the* final order as any the ***bankruptcy*** judge enters." *See* Interwest Bus. Equip., Inc. v. U.S. Tr. (In re Interwest Bus. Equip., Inc.), 23 F.3d 311, 315 (10th Cir. 1994) (internal quotation marks omitted).

Neither does the fact the Woolseys filed their notice of appeal in this court prematurely — after the district court decided its appeal but before the ***bankruptcy*** court confirmed the Woolseys' amended plan — deny them the right to appeal. In the multi-layered appellate world of ***bankruptcy*** practice this problem recurs not infrequently. And this circuit has responded by holding that, ***HN3*** at least absent

any indication of [**6] potential prejudice, a premature notice of appeal involving a ***bankruptcy*** matter, even one (like this one) with an interstitial stop in the district court, ripens and becomes effective once "a final order approving [a] plan[] of reorganization" is entered. *Interwest, 23 F.3d at 315*; *see also Adelman v. Fourth Nat'l Bank & Tr. Co. (In re Durability, Inc.), 893 F.2d 264, 265-66 (10th Cir. 1990)*. This court's precedent, moreover, finds analogies of various sorts in most other circuits. *See, e.g., Community Bank, N.A. v. Riffle, 617 F.3d 171, 173-74 (2d Cir. 2010)* (*per curiam*); *Rains v. Flinn (In re Rains), 428 F.3d 893, 900-01 (9th Cir. 2005)*; *Watson v. Boyajian (In re Watson), 403 F.3d 1, 5 (1st Cir. 2005)*; *Official Comm. of Unsecured Creditors v. Farmland Indus., Inc. (In re Farmland Indus., Inc.), 397 F.3d 647, 649-50 (8th Cir. 2005)*; *In re Rimsat, Ltd., 212 F.3d 1039, 1044 (7th Cir. 2000)*; *In re Emerson Radio Corp., 52 F.3d 50, 53 (3d Cir. 1995)*; 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3926.2 at 290 (2d ed. 1996). After all, the ***bankruptcy*** court's refusal to confirm the Woolseys' initial plan has now become a final and irrevocable [**7] decision, no longer subject to reconsideration there: the ***bankruptcy*** proceeding is closed. The district court has likewise finished its work and can't revise any decision we render. Neither have the parties identified any prejudice anyone would suffer by taking up the appeal now. Cumulatively, it's clear everything that could be done below has been done.

But even this analysis, we must acknowledge, isn't without its wrinkles. The notion that proceedings in a district court cumulatively might give rise to a final judgment was touched upon in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co., 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991)*. There, the Court interpreted ***HN4*** *Fed. R. App. P. 4(a)(2)*'s instruction that a "notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." *498 U.S. at 272-73*. While holding that the Rule allowed the appeal at issue, the Court proceeded, in a statement that may or may not have been essential to its holding, to say the Rule does not permit a premature notice of appeal from a "clearly interlocutory decision — such as a discovery ruling or a sanction order [**8] under *Rule 11*" because a "belief that such a decision is a final judgment would *not* be reasonable." *Id. at 276* (emphasis in original); *see Gonzales v. Texaco Inc., 344 F. App'x 304, 307 (9th Cir. 2009)* (unpublished) (suggesting all this language is dicta). Instead, the Court said, the Rule permits a premature notice of appeal only from decisions that themselves "*would be* appealable if immediately followed by the entry of judgment" because "[i]n these [*1270] instances, a litigant's confusion" about the finality of the case is "understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise." *FirsTier Mortg. Co., 498 U.S. at 276* (emphasis in original).

Whether and to what degree this discussion, even if controlling, pertains to ***bankruptcy*** practice is an open question. In the first place, it is a matter of some debate whether *Rule 4(a)(2)* — and so *FirsTier's* gloss on it — supplies the sole means for a court of appeals to secure jurisdiction over a prematurely filed appeal. The Rule, some argue, is but a rule of practice, not a limit on our statutory jurisdiction, and it might be supplemented by *Fed. R. App. P. 2* when necessary [**9] to allow courts to hear prematurely filed appeals that may not satisfy its particular terms but involve sufficiently final decisions that we are statutorily entitled to hear them. *Compare Khan v. Attorney Gen., No. 11-1789, 691 F.3d 488, 2012 U.S. App. LEXIS 16946, 2012 WL 3290155, at *3 n.2 (3d Cir. Aug. 14, 2012)* (citing *Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 587 (3d Cir 1999)* so arguing), *with Outlaw v. Airtech Air Conditioning & Heating, 412 F.3d 156, 160 n.2, 366 U.S. App. **D**.C. 374 (**D**.C. Cir. 2005)* (disagreeing). One might debate, as well, whether and to what degree the Rule needs to be supplemented, by means of *Rule 2* or otherwise, to fit the peculiarities of ***bankruptcy*** practice. The Rule seems to assume the court "announc[ing] a decision or order" is the same one that later enters "the judgment or order" embodying that previous announcement. Yet here of course we have an appeal from a decision announced by a district court concerning a final judgment (as it were) later entered by the ***bankruptcy*** court, no unusual situation in ***bankruptcy*** practice but surely not typical in the criminal or traditional civil practice to which the Rule seems to speak. And one might wonder whether compliance with *Rule 4(a)(2)* can be forfeited or waived if it [**10] does not describe the outer limits of our statutory jurisdiction. What it might say about any of this is surely a point for debate, but it is a curiosity all the same that *Interwest* and most related cases in other circuits make no mention of the Rule (one way or the other) when discussing appeals involving premature notices of appeal in the ***bankruptcy*** context. And, perhaps like litigants in those cases, the litigants in ours have not suggested the Rule or *FirsTier* imposes any impediment to entertaining this appeal.

Beyond even all this, however, *FirsTier's* relevance in ***bankruptcy*** practice is an open question for still a different reason: it isn't clear whether a circuit entertaining an appeal from a district court even needs to resort to the cumulative finality doctrine — or for that matter *§ 1292* or *§ 158(**d**)*(2)(A), two other possibilities we've already discussed. When it comes to ***bankruptcy*** matters, Congress

in § 158(d)(1) gives circuit courts jurisdiction to hear "final decisions" as well as final judgments, orders and decrees "entered under subsection[] (a)." Turning to § 158(a), Congress there gives district courts authority to entertain appeals from final judgments, orders and [**11] decrees, *and* certain interlocutory orders and decrees from the **bankruptcy** court. Meanwhile, though, no mention is made of "final decisions." Given this arrangement, one might wonder whether this court possesses jurisdiction under § 158(d)(1) to review a "final decision" of the district court "entered under subsection[] (a)," with respect to a **bankruptcy** court's interlocutory order — all without the necessity of any final **bankruptcy** court order. On this theory, the phrase "decision . . . entered under subsection[] (a)" as it appears in § 158(d)(1) permits us to review a district court's decision on a purely interlocutory [*1271] issue. As applied to this case, the district court's "final decision" rejecting the Woolseys' initial plan is enough to afford us jurisdiction: the finality of the **bankruptcy** court's proceedings is immaterial. *See* Wright, Miller, & Cooper, *supra*, § 3926.2 at 279-80 (discussing merits and demerits of this interpretation).

The layering of appeal on appeal in the **bankruptcy** context, where our usual ideas of finality are already put to the test, surely invites many and interesting questions. But while we cannot ignore them, neither must we decide them today. We don't have [**12] to do so because, even assuming a final **bankruptcy** proceeding is required to trigger our own jurisdiction under § 158(d)(1), and even assuming that Rule 4(a)(2) is the only means by which we may entertain cases involving a prematurely filed notice of appeal, this case satisfies the test this court has set forth for satisfying the Rule.

Though *FirsTier's* cryptic and arguably tangential discussion about the limits of Rule 4(a)(2) is open to many different understandings, in Hinton v. City of Elwood, 997 F.2d 774 (10th Cir. 1993), this court explained its understanding that, ***HN5*** under the Rule, "a premature notice of appeal retains its validity only when the order appealed from is likely to remain unchanged in both its form and its content." Id. at 778. Admittedly, *Hinton* did not discuss *FirsTier* but it does post-date *FirsTier* and so controls our analysis of the Rule. ***HN6*** While a panel of this court may sometimes recognize that a prior panel decision has been clearly overruled by an intervening Supreme Court decision, *see, e.g.,* Currier v. Doran, 242 F.3d 905, 912 (10th Cir. 2001), we are aware of no existing Tenth Circuit authority that might allow this panel to overrule another panel simply [**13] because the earlier panel didn't mention a still earlier and (possibly) relevant Supreme Court decision.

HN7 Hinton's test, moreover, is clearly satisfied where, as here, the appealed order from the district court (or **Bankruptcy** Appellate Panel) resolves the only outstanding issue in what has, by the time it reaches us, become an otherwise completed **bankruptcy** proceeding. In these circumstances, the challenged order not only amounts to the order of a superior authority the **bankruptcy** court could not undo later, it resolves the only appealed issue to arise out of the now concluded **bankruptcy** proceedings and so could not be changed in any event. In this situation, no one can claim serious surprise that the appealed order is amenable to appellate review. Indeed, to hold otherwise might require the appealing party to undertake the useless gesture of appealing again to the district court the very same order it just issued, all so it could get the matter back to this court, surely a paper pushing process no one would reasonably expect the law to require. Because of the layering effect of review in **bankruptcy**, our situation is very different from an attempt to appeal a district court's discovery [**14] or Rule 11 sanctions order discussed in FirsTier that no party could reasonably think ended the case. No similar injustice or circumvention of traditional concepts of finality are in play.

Neither, in any event, could we hold otherwise. As we've already explained, Interwest, like so many similar decisions in other circuits, expressly authorizes **bankruptcy** appeal in the circumstances we face. And we are of course bound by that precedent, as well. To be sure, and as we've already indicated, *Interwest* (like *Hinton*) does not discuss *FirsTier*. But (again like *Hinton*) *Interwest* post-dates *FirsTier* and we see no fair way by which we might avoid its teachings.

[*1272] Though we are able, ultimately and after the application of some elbow grease, to untie the jurisdictional knot and reach the merits of this case, we have paused to describe along the way a number of unresolved and beguiling questions so future litigants and district courts are not left unwarned or unwary — about the questions surrounding § 158(d)(2)(A)'s reach, the curious discrepancies of §§ 158(a) and (d), the anomalies of Rule 4(a)(2), and the still not entirely explored frontiers of *FirsTier*.

* * *

Now to the merits. May Chapter 13 [**15] debtors like the Woolseys void a state law lien secured by no remaining value in the collateral? By all appearances, the path to answering that question would seem to begin and end with the language of ***HN8*** 11 U.S.C. § 506(d), a provision of the **bankruptcy** code allowing any debtor in **bankruptcy**, regardless under which specific Chapter the debtor proceeds, to remove (or "strip off") certain liens. Section 506(d)

explains that, ″[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void.″ Or, put differently, if Citibank's claim *isn't* an ″allowed secured claim,″ the statute appears to allow the Woolseys to void the lien just as they originally proposed.

We are convinced Citibank's claim is an ″allowed″ one. ***HN9*** Section 502 provides that a claim filed by a creditor is ″allowed″ if nobody objects — and even if there is an objection, a claim is *still* allowed unless stated otherwise in § 502. 11 U.S.C. § 502(a)-(b). The parties avidly dispute whether the Woolseys ever properly objected to Citibank's claim, but nothing turns on their fight. It doesn't because, even assuming the Woolseys did object, no provision in § 502 ″disallows″ the bank's [**16] claim. Seeking to suggest otherwise, the Woolseys point to ***HN10*** § 502(b)(1). That provision ″disallows″ claims that are ″unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.″ But it's beyond question that Citibank's claim is a valid mortgage enforceable under Utah law — and that leaves § 502(b)(1) without any bite here. Alternatively, the Woolseys say Citibank's claim is disallowed by § 506(a), if not by § 502. Flipping forward a few pages to § 506(a), however, reveals that it has precisely nothing to say about whether a claim is allowed or disallowed. By its terms ***HN11*** § 506(a) applies only to claims that are already ″allowed,″ making abundantly clear it doesn't ″disallow″ anything.

Even accepting that Citibank's claim is ″allowed,″ though, there remains the question whether it is ″secured.″ And on that question § 506(a)(1) turns out to have quite a lot to say:

> ***HN12*** An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . [**17] . . 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.

HN13 The thrust of § 506(a) is to classify allowed claims (or portions of allowed claims) as either secured or unsecured, which in turn affects how the ***bankruptcy*** code treats them. The statute explains that for purposes of federal ***bankruptcy*** law a ″secured claim″ requires something more than a security interest recognized by state law. A claim, even if secured by a valid state law lien on property, qualifies as ″secured″ for purposes § 506(a) and federal ***bankruptcy*** law only to the extent it is supported by *value* in the collateral. United States v. Ron Pair Enters., Inc., [*1273] 489 U.S. 235, 239, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). To the extent that the lien is supported by some but not enough value to cover the whole debt, § 506(a) splits the claim in two, creating a secured claim and an unsecured claim. Id. at 239 n.3. So even if a lien qualifies as a valid security interest under state law, it gives rise to a ″secured claim″ for purposes of federal ***bankruptcy*** law only if and to the extent it is supported by value in the underlying property.

All this would seem to bring us within a simple [**18] syllogism from the end of this case. ***HN14*** The code allows debtors to void liens that aren't ″allowed″ and ″secured″ claims. *See* 11 U.S.C. § 506(***d***). The code defines ″allowed″ claims. *See id.* § 502. It also defines ″secured″ claims. *See id.* § 506(a). And so one might be forgiven for thinking any lien either ″disallowed″ under § 502 or ″unsecured″ under § 506(a) would be void under § 506(***d***). Because Citibank's junior lien isn't backed by any value in the home, Citibank holds only an allowed *unsecured* claim and so its lien would appear to be voidable, just as the Woolseys argue.

But the law in this corner of ***bankruptcy*** practice doesn't follow such a straight path. It doesn't because of *Dewsnup*. *See* Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992). There, the Supreme Court considered § 506(***d***) in the context of a Chapter 7 ***bankruptcy*** proceeding and concluded that ***HN15*** the term ″allowed secured claim″ means a claim ″allowed″ under § 502 and ″secured″ by a lien enforceable under state law. So it is, the Court held, value in the collateral has no bearing on the lien-voiding language of § 506(***d***): *any* lien secured under state law must be respected and protected from removal. Id. at 417. And it is precisely because [**19] of *Dewsnup's* holding that the ***bankruptcy*** court and district court refused the Woolseys' effort to remove Citibank's lien using § 506(***d***).

Now, one might well ask: How can it be that to qualify as ″secured claim″ in § 506(a) some value is needed but a mere three subsections later in § 506(***d***), value is irrelevant to whether a claim is ″secured″? It's surely a topsy-turvy result to give these two related provisions in the same statutory section entirely different (even opposing) meanings. After all, it defies the Supreme Court's own ″normal rule of statutory construction that identical words used in different parts of the same act are [presumed] to have the same meaning.″ Sullivan v. Stroop, 496 U.S. 478, 484, 110 S. Ct. 2499, 110 L. Ed. 2d 438 (1990) (internal quotation marks omitted).

Even so, the Supreme Court found § 506(***d***)'s use of the term ″secured″ sufficiently ″ambiguous″ that it felt at liberty

to overlook these problems. And the Court took the distinctly unusual step of finding the liberating ambiguity based on no more than the fact the litigants before it happened to disagree over the statute's meaning — an ailment surely most afflicting every statutory interpretation question in our adversarial legal system. Dewsnup, 502 U.S. at 416; [**20] *see also* id. at 422-23 (Scalia, J., dissenting) (criticizing the idea that a statutory ambiguity might be "achieved by being the subject of disagreement between self-interested litigants"). Still, in light of the ambiguity so generated, the Court felt free to strike out to interpret § 506(**d**) on its own, unchained by § 506(a)'s plain language.

Turning to historical practice for guidance, the Court said that state law liens in Chapter 7 cases, at least before the enactment of the current **bankruptcy** code, "pass[ed] through the **bankruptcy** case unaffected," retaining their force whether backed by value or not. Id. at 418. [*1274] Without some indication in the legislative history that Congress intended to alter this practice, the Court decided to interpret § 506(**d**) the same way in order to avoid "effect[ing] a major change in pre-[c]ode practice." Id. at 418. The Court also worried that any other result would bestow upon the debtor the "windfall" of any increase in value during the pendency of the **bankruptcy**, value more appropriately belonging to the lienholder. Id. at 417.

Even on their own terms these rationales are open to question. Whatever pre-code practice looked like, it would seem to have [**21] (at best) limited interpretive significance today, given that Chapter 7 indubitably permits liens to be removed in many situations. *See* Harmon v. United States, 101 F.3d 574, 581 (8th Cir. 1996) (collecting examples); In re Penrod, 50 F.3d 459, 461-62 (7th Cir. 1995). And it's far from clear how much we have to worry about the debtor winning a windfall: in most Chapter 7 cases it will be the remaining unsecured creditors rather than the debtor who will reap any appreciation in the property's value. *See* Dewsnup, 502 U.S. at 422 n.1 (Scalia, J., dissenting); *see also* David Gray Carlson, *Bifurcation of Undersecured Claims in* **Bankruptcy**, 70 Am. Bankr. L.J. 1, 10-11 (1996). Even more fundamentally still, when it comes to interpreting statutes the Court itself has repeatedly instructed that pre-enactment practice is relevant only "to the interpretation of an ambiguous text" and holds no sway when the statutory language is clear. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2073, 182 L. Ed. 2d 967 (2012). And the language of § 506(a) and (**d**) does seem pretty plain.

All this has led Justice Thomas to observe that *Dewsnup* has created more than a little "methodological confusion," confusion "enshroud[ing] [**22] both the Courts of Appeals and, even more tellingly, **Bankruptcy** Courts, which must interpret the Code on a daily basis." Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street P'ship, 526 U.S. 434, 463, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999) (Thomas, J., concurring in the judgment). In fact, both *Dewsnup's* decision to depart from the plain language of § 506(a) and the rationales it supplied for doing so have engendered many critics.[1]

But this much still is clear. Right or wrong, the Dewsnuppian departure from the statute's plain language is the law. It may have warped the **bankruptcy** code's seemingly straight path into a crooked one. It may not be infallible. But until and unless the Court chooses to revisit it, it *is* final.

That doesn't stop the Woolseys from trying to argue otherwise. In their view, Dewsnup controls the meaning of the term "secured" under § 506(**d**) only in Chapter 7 cases. The very same term in § 506(**d**), they contend, should be given an entirely different meaning when it comes to handling [*1275] Chapter 13 cases — requiring proof of value to avoid lien removal, just as the plain language of § 506(a) suggests. And we must admit their argument isn't entirely without appeal.

Take *Dewsnup's* reasoning first. When interpreting § 506(**d**), *Dewsnup* relied heavily on perceptions about Chapter 7 practice. But, of course, ***HN16*** § 506(**d**) applies equally to bankruptcies like the Woolseys' proceeding under Chapter 13. And as the Woolseys point out, very different considerations are at work in Chapter [**24] 7 liquidation bankruptcies than in reorganization bankruptcies under Chapter 13. In a Chapter 7 **bankruptcy**, the debtor liquidates his non-exempt assets to provide for immediate repayment

[1] For a sampling of these criticisms, and beyond those found in the powerful dissent in *Dewsnup* itself, *see, e.g.*, Bank of Am. Nat'l Trust, 526 U.S. at 462-63 (Thomas, J., concurring in the judgment); Cunningham v. Homecomings Fin. Network (In re Cunningham), 246 B.R. 241, 245-46 (Bankr. **D**. Md. 2000); Dever v. IRS (In re Dever), 164 B.R. 132, 138 (Bankr. C.**D**. Cal. 1994); Lawrence Ponoroff & F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and* **Bankruptcy** Policy, 95 Mich. L. Rev. 2234 (1997); Carlson, *supra*, at 12-20; Barry E. Adler, *Creditor Rights After* Johnson *and* Dewsnup, 10 Bankr. Dev. J. 1, 10-12 (1993); Mary Josephine Newborn, *Undersecured Creditors in* **Bankruptcy**: Dewsnup, Nobelman, *and the Decline* [**23] *of Priority*, 25 Ariz. St. L.J. 547 (1993); Margaret Howard, *Dewsnupping the* **Bankruptcy** Code, 1 J. Bankr. L. & Prac. 513 (1992).

of as much of his debt as possible, and in exchange receives immediate relief from dischargeable debt. *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007). The satisfaction of secured creditors comes primarily from a foreclosure sale of the collateral, and for this reason under pre-code practice there wasn't usually much reason to allow the debtor to void a lien on property he will be forced to surrender in any event. By contrast, in a Chapter 13 case the debtor's obligations are not met primarily through liquidation. Instead of selling his assets to meet his debts, the debtor has to commit a portion of his *future* income for a period up to five years as part of the ***bankruptcy*** repayment plan. In exchange, ″[t]he benefit to the debtor of developing a plan of repayment under Chapter 13, rather than opting for liquidation under Chapter 7, is that it permits the debtor to protect his assets.″ H.R. Rep. No. 95-595, at 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079.

All this suggests that [**25] lien stripping has a very different role to play in Chapter 13 than in Chapter 7. While voiding a lien may afford few benefits in a Chapter 7 proceeding, it may be more integral to achieving Chapter 13's goals. After all, if the law always precluded lien stripping in the Chapter 13 context, a debtor hoping to keep his property would have to provide for full repayment of a lien no matter how large, even if his debt is secured by worthless collateral. Faced with the prospect of paying much more than the property is worth under a Chapter 13 plan, many more debtors would likely throw up their hands and simply opt for liquidation. And this result would run contrary to Congress's preference for individual debtors to use Chapter 13 instead of Chapter 7. *See id*. at 118. It would undercut Congress's aim to allow individual debtors ″to retain the pride attendant″ on satisfying a repayment plan rather than face the ″stigma″ of liquidation. *Id*. It would thwart Congress's stated purpose to change ″the treatment of secured creditors″ in Chapter 13 to focus on ″the true value of the goods″ secured as collateral rather than simply the lien's ″value as leverage″ against the debtor. *Id*. at 124. And [**26] it would not even obviously help creditors as a whole: because Chapter 13 debtors commit future income to debt repayment, unsecured creditors' losses are often ″significantly less than [when] debtors opt for″ liquidation. *Id*. at 118; *see also* In re McDonald, 205 F.3d 606, 614 (3d Cir. 2000). For all these reasons, and as *Dewsnup* itself recognized, pre-code practice in reorganization cases like those under Chapter 13 (unlike pre-code Chapter 7 liquidation practice) often *permitted* liens to be stripped down to the value of the collateral. 502 U.S. at 418-19.[2]

[*1276] Not only does *Dewsnup's* reasoning rest on peculiarities of the Chapter 7 context bearing little relevance to Chapter 13 practice, the case expressly instructs us to read its holding narrowly. It tells us that its holding is limited to ″the case before us″ and that ″other facts . . . await their legal resolution on another day.″ Id. at 417. It adds candidly that the Court found it impossible to ″interpret[] the statute in a single opinion that would apply to all possible fact situations.″ Id. at 416. And taking up this invitation to give the decision a crabbed reading, every federal court of appeals to consider the question has already refused to extend *Dewsnup's* definition of the term ″secured claim″ to other statutory provisions using that term in Chapter 13, where the focus is on reorganization rather than liquidation.[3] This same pattern — of circuits distancing themselves from *Dewsnup* — recurs in Chapter 11 and Chapter 12 reorganization cases.[4] Most notably, the Supreme Court itself has declined to extend *Dewsnup's* understanding of the term ″secured claims″ when it appears in Chapter 13. *See* Nobelman v. Am. Sav. Bank, 508 U.S. 324, 328, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993) [**28] (″secured claim″ in § 1322(b)(2) is defined with reference to § 506(a) and the value of the collateral); Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 960, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997) (same in § 1325(a)(5)(B)). So it is that *Dewsnup* has lost every away game it has played: its definition of ″secured claim″ has been rejected time after time elsewhere in the code and seems to hold sway only in § 506(***d***).

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[2] *See also* Haberman v. St. John Nat'l Bank (In re Haberman), 516 F.3d 1207, 1213 (10th Cir. 2008); Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d 1165, 1170 (9th Cir. 2004) (″The rationales advanced in the *Dewsnup* opinion for prohibiting lien stripping in Chapter 7 bankruptcies . . . have little relevance in the context of rehabilitative ***bankruptcy*** proceedings under Chapter 11, 12, and 13, where lien stripping is expressly and broadly permitted″) (quotation omitted); Wade v. Bradford, 39 F.3d 1126, 1128 (10th Cir. 1994); Harmon, 101 F.3d at 581-82 & n.4; Margaret Howard, *Secured Claims in* ***Bankruptcy***: An Essay on Missing the [**27] *Point*, 23 Cap. U. L. Rev. 313, 314-16 (1994).

[3] *See, e.g.*, Haberman, 516 F.3d at 1213; Enewally, 368 F.3d at 1169-70; Bartee v. Tara Colony Homeowners Assoc. (In re Bartee), 212 F.3d 277, 291 n.21 (5th Cir. 2000).

[4] Chapter 11: Wade v. Bradford, 39 F.3d 1126, 1128-30 (10th Cir. 1994); *In re Heritage Highgate, Inc.*, 679 F.3d 132, 144 (3d Cir. 2012). Chapter 12: Okla. ex rel. Comm'rs of the Land Office v. Crook (In re Crook), 966 F.2d 539, 539 n.1 (10th Cir. 1992); Harmon, 101 F.3d at 582.

Building on all this, the Woolseys invite us to hand *Dewsnup* a loss even on its home court, within *§ 506(**d**)* itself. *Dewsnup* suggests that the term ″secured claim″ may mean something different in *§ 506(**d**)* than it does in the rest of the ***bankruptcy*** code, and many circuits and the Supreme Court itself have now (repeatedly) held as much. All that, of course, is curious enough [**29] in light of the ″normal rule″ that identical words bear identical meaning throughout a statutory structure. *Sullivan, 496 U.S. at 484*. But, the Woolseys say, we should go now a step further and read the term ″secured claim″ to mean two different things *even within § 506(**d**)* itself. When a Chapter 7 case comes along, they say, the term should mean what *Dewsnup* says it means: any claim secured under state property law is protected from removal, even if backed by no value. But when a court is faced with a Chapter 13 case, they argue, the term should be read to require proof of value before a lien is protected from removal in accord with *§ 506(a)*. They stress that *Dewsnup's* rationales are limited to Chapter 7 cases and that *Dewsnup* itself seems to suggest the term ″secured claims″ may be interpreted to mean different things in [*1277] different ″fact situations.″ *502 U.S. at 416*.

Though we must admit the Woolseys' invitation to undo *Dewsnup* in this way has its attractions, it's an especially odd invitation to issue, let alone for this court to accept. After all, it violates yet ***HN17*** another and even more elementary rule of statutory interpretation: the rule against ″[a]scribing various meanings to a *single* [**30] iteration″ of a statutory term in different applications. *Ratzlaf v. United States, 510 U.S. 135, 143, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)* (emphasis added) (internal quotation marks omitted). Though giving a term different meanings in different but related statutes is one thing and disfavored enough, in recent years the Supreme Court has suggested that giving a *single* use of a term different meanings is another thing altogether, a ploy not just frowned upon but methodologically incoherent and categorically prohibited: ″To give these same words a different meaning for each category [of cases to which they apply] would be to invent a statute rather than interpret one.″ *Clark v. Martinez, 543 U.S. 371, 378, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005)*; *see also id. at 386* (rejecting ″the dangerous principle that judges can give the same statutory text different meanings in different cases″); *United States v. Santos, 553 U.S. 507, 522-23, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008)* (opinion of Scalia, J.) (*Clark* ″forcefully rejected″ the notion that courts could ″giv[e] the same word, in the same statutory provision, different meanings in different factual contexts″ (emphasis omitted)).

Applying this rule, the Supreme Court has refused to give different meanings to a single statutory term even [**31] when the case for doing so is far stronger than the case the Woolseys are able to muster here. In *Clark*, for example, the Supreme Court held that ***HN18*** when a statutory provision is given a limiting construction to avoid a serious constitutional question arising from one of its potential applications, that interpretation governs *all* applications of the provision — even those that do not raise the same constitutional concerns. *Clark, 543 U.S. at 377-78*. While noting that ″the statutory purpose and the constitutional concerns″ motivating the prior limiting construction were not present in the case before it, the Court held this still ″cannot justify giving the *same* . . . provision a different meaning″ in different factual circumstances. *Id. at 380* (emphasis in original). Rather, ″the lowest common denominator, as it were, must govern.″ *Id*. Similarly, the Court has held, when a statute possesses both criminal and civil applications a narrowing interpretation in a criminal case driven by the rule of lenity must apply equally to civil litigants to whom lenity would not ordinarily extend. *Id. at 380* (citing *United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-518, 112 S. Ct. 2102, 119 L. Ed. 2d 308 & n. 10 (1992)* (plurality [**32] opinion) and *id. at 519* (Scalia, J., concurring in judgment)). If the rules of lenity and constitutional avoidance — powerful and long-standing interpretive traditions — fail to justify giving multiple meanings to a statutory term, it's difficult to see how anything the Woolseys offer us in this case might.

Not only is the rule against multiple interpretations of the same statute well entrenched, it is of special importance. Without it, even a statutory term used but a single time in a single statute risks never settling on a fixed meaning. And this surely would leave citizens at sea, only and always guessing at what the law might be held to mean in the unique ″fact situation″ of the next case — a result in no little tension [*1278] with the rule of law itself. *See id. at 382* (to accept that the same statutory provision could have multiple meanings ″would render every statute a chameleon, its meaning subject to change . . . in each individual case″).

Given all this, it's perhaps no surprise that of all the circuit courts approving of lien stripping in reorganization cases, not a single one has taken up the Woolseys' invitation to do so using *§ 506(**d**)*. Instead, they have relied exclusively on [**33] other statutory provisions particular to those chapters. *See, e.g., Wade, 39 F.3d at 1129* (permitting lien stripping in Chapter 11 cases under *11 U.S.C. § 1129(b)(2)*); *Harmon, 101 F.3d at 583* (permitting lien stripping in Chapter 12 cases under *11 U.S.C. § 1225(a)(5)*); *In re Lane, 280 F.3d 663, 665 (6th Cir. 2002)* (permitting lien stripping in Chapter 13 cases under *11 U.S.C. § 1322(b)(2)*); *see also* 4 *Collier on **Bankruptcy***, ¶ 506.06[1] (16th ed. 2011) (***HN19***

″[T]here is no principled way to conclude that, although *section 506(**d**)* does not authorize lien stripping in chapter 7 cases, it has a different meaning in chapter 11, 12, and 13 matters.″).

In light of recent and unambiguous Supreme Court precedent repudiating the interpretive move the Woolseys invite us to take, and because the Woolseys never even pause to confront this precedent, we decline to follow where they wish to lead. We do not doubt a strong argument can be made that the language and logic of *§ 506* permit the Woolseys to void not only Citibank's lien but any lien to the extent it is unsupported by value in the collateral. But we fail to see any principled way we might, as lower court judges, get there from here. *Dewsnup* may [**34] be a gnarled bramble blocking what should be an open path. But it is one only the Supreme Court and Congress have the power to clear away.

* * *

Having said that much, we candidly acknowledge we thought at first there might possibly be a way around *Dewsnup*, if not a way to plow through it so directly as the Woolseys urge. As we've already alluded to, many courts seeking to avoid *Dewsnup's* pinch have invoked provisions specific to the reorganization chapters to permit the removal or stripping down of liens unsupported by value. And when it comes to Chapter 13, many courts have already identified one apparently promising candidate in *§ 1322(b)(2)*.

Section 1322 sets forth the provisions a Chapter 13 reorganization plan may contain (as well as some that it must). Relevant for our purposes is *§ 1322(b)(2)*, which provides that the plan may

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

In broad strokes, this provision permits a debtor's plan to modify the rights of secured or unsecured [**35] creditors — all as part of Chapter 13's general effort to find a realistically achievable repayment plan. Of course, the power to modify creditors' claims is qualified — qualified both by other parts of *§ 1322* not at issue here, and by *§ 1322(b)(2)*'s own internal limitation on the modification of secured claims in real property. But those exceptions aside, the first and third clauses of *§ 1322(b)(2)* arm the debtor with considerable power to modify the rights of secured and unsecured creditors alike.

At first we wondered whether this modification power might include the ability to [*1279] strip off a lien unsupported by value in its collateral. To be sure, *§ 1322(b)(2)* itself prohibits modification of the rights of the ″holder of a secured claim″ supported by a lien on the debtor's home. But the Supreme Court's decision in *Nobelman v. American Savings Bank, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993)*, can be read to suggest that for a claim to be ″secured″ and therefore trigger the anti-modification clause in *§ 1322(b)(2)*, it must be supported by at least some value in the collateral — just as *§ 506(a)* (but not *Dewsnup*) says. *Nobelman, 508 U.S. at 328-31*. Indeed, no fewer than six circuits have already read *Nobelman* [**36] this way and held a debtor may invoke *§ 1322(b)(2)* to remove a wholly unsecured lien, even if that lien is secured against the debtor's principal residence. *See Lane v. W. Interstate Bancorp (In re Lane), 280 F.3d at 665*; *Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1221 (9th Cir. 2002)*; *Pond v. Farm Specialist Realty (In re Pond), 252 F.3d 122, 127 (2d Cir. 2001)*; *McDonald, 205 F.3d at 615*; *Bartee, 212 F.3d at 280*; *Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357, 1360 (11th Cir. 2000)*; *see also* 8 *Collier on **Bankruptcy***, supra, ¶ 1322.06[1][a][i].

The hitch is, the Woolseys didn't choose to pursue this line of argument before this court in their initial briefs. What's more, they have now expressly repudiated it in a supplemental submission. This even though the ***bankruptcy*** court offered a favorable discussion of lien stripping under *§ 1322(b)(2)*, uniform circuit precedent endorses it, and an amicus brief in this case from the National Association of Consumer ***Bankruptcy*** Attorneys ably argued the point. For their part, however, the Woolseys only glancingly referred to *§ 1322(b)(2)* in their opening briefs. Wanting to know more about that provision in light of all [**37] the authority discussing it as a possible avenue for relief for debtors like the Woolseys, we decided to ask the parties for supplemental briefing on the question whether *§ 1322(b)(2)* permits a Chapter 13 debtor to remove a wholly unsecured lien even if *§ 506(**d**)* does not. In response, the Woolseys made plain that they wanted no part of the argument. They emphatically announced ″[t]here is no Code provision other than *11 U.S.C. §506(**d**)* that declares void a wholly unsecured lien.″ Appellants' Supp. Br. at 4.

And that leaves us in an awkward place. There's a potentially promising argument for the Woolseys, one suggested by their own amicus, but it is one they want no part of.

Whatever our power to tackle the § 1322(b)(2) question in these circumstances, nothing *requires* us to do so, to foist on litigants arms they so avidly refuse to take up in the adversarial arena. So in deference to their wishes, we opt today against forcing a § 1322(b)(2) argument onto the unwilling Woolseys and leave that statute and meaning for another day when a ***bankruptcy*** petitioner actually wants to pursue the question. In this case, we limit ourselves to the question the Woolseys do want us to address: did the [**38] ***bankruptcy*** and district courts err in holding that § 506(***d***) precluded them from removing Citibank's lien? The answer to that narrow question, we have seen, has to be no so long as *Dewsnup* remains the law. For that reason (and that reason alone) we affirm.[5]

[5] Because this is a sufficient basis to affirm the ***bankruptcy*** court's refusal to confirm the plan proposing to remove Citibank's lien, we have no need to consider the ***bankruptcy*** court's separate holding that the Woolseys' plan was *also* deficient for failing to include the so-called ″lien retention″ language in ***§ 1325(a)(5)(B)(i)(II)***.

In re Garn

United States Bankruptcy Court for the District of Utah, Central Division

October 21, 2013, Decided

Bankruptcy Case No. 13-21907, Chapter 13

Reporter
2013 Bankr. LEXIS 4381; 2013 WL 5723746

In re: JACOB LYNN GARN and STACIE RAE GARN, Debtors.

Core Terms

Mortgage's, valuation, confirmation, appraisal, purposes, cases

Case Summary

Overview

HOLDINGS: [1]-The petition date was the appropriate date for valuing the interest of a junior mortgage lienholder for purposes of *11 U.S.C.S. § 506(a)(1)*, *11 U.S.C.S. § 1322(b)(2)*, and *Fed. R. Bankr. P. 3012*. As such, and given the junior lienholder's concession that it was underwater as of the petition date in this case, its junior lien was determined to be wholly unsecured.

Outcome

The junior lien was determined to be wholly unsecured. Proof of claim #8 was to be classified and treated as a general unsecured claim. And subject to the junior lienholder's lien retention rights during this chapter 13 case, the junior lien was to be extinguished and removed from the Midvale real property upon entry of an order granting debtors a discharge under *11 U.S.C.S. § 1328*.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

HN1 When valuing a secured creditor's interest in real property, *11 U.S.C.S. § 506(a)(1)* of the Bankruptcy Code provides that 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. So although the total amount of a creditor's claim is fixed as of the petition date under *11 U.S.C.S. § 502(b)*, *§ 506(a)(1)* contemplates the idea of different valuations of a secured creditor's collateral at different times and for different purposes. As discussed in In re Hales, jurisdictions generally choose from four valuation dates (depending on the purpose of the valuation): (1) the date of confirmation; (2) the date of the petition; (3) the date of the valuation hearing; or (4) the effective date of the plan. And most cases, covering all reorganization chapters and types of collateral, have unsurprisingly decided that the confirmation date is generally the appropriate valuation date when dealing with cramdown valuation for confirmation purposes.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN2 What occurs under *11 U.S.C.S. § 506(a)(1)* and *11 U.S.C.S. § 1322(b)(2)* is a threshold determination of whether the creditor is a holder of a secured claim at all. Thus, while it may be appropriate to determine the value of collateral--and, therefore, the extent to which a creditor's claim is secured--as of confirmation or the date of the valuation hearing, it is appropriate to determine if the creditor holds a secured claim at all as of the date the petition was filed. And once the court determines the nature of a claim, that claim must be paid the appropriate present value under either *11 U.S.C.S. § 1325(a)(4)* if unsecured or *§ 1325(a)(5)(B)(ii)* if secured.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

HN3 As a result of *11 U.S.C.S. § 1324(b)*'s addition by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, chapter 13 plans are often confirmed in the District of Utah without a final determination of feasibility due to the timing of the confirmation hearing vis-à-vis the claims bar date. The Chapter 13 Trustee and the U.S. Bankruptcy Court for the District of Utah do require debtors seeking to value junior mortgage liens under *11 U.S.C.S. § 506(a)(1)* and *Fed. R. Bankr. P. 3012* to at least begin the motion process prior to confirmation. But confirmation of the plan is not dependent on resolution of the matter even though, as in cases where plan payments must later increase to account for claims coming in unexpectedly high, subsequent modification of the confirmed plan may be necessary.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN4 The petition date is the appropriate date for valuing the interest of a junior mortgage lienholder for purposes of *11 U.S.C.S. § 506(a)(1)*, *11 U.S.C.S. § 1322(b)(2)*, and *Fed. R. Bankr. P. 3012*.

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For Stacie Rae Garn, Joint Debtor: Michael R. Lofgran, Huntsman, Lofgran & Associates, PLLC, Salt Lake City, UT.

Trustee: Kevin R. Anderson tr, Salt Lake City, UT.

Judges: JOEL T. MARKER, U.S. Bankruptcy Judge.

Opinion by: JOEL T. MARKER

Opinion

MEMORANDUM DECISION

Jacob and Stacie Garn obtained an appraisal of their home and soon after filed this chapter 13 bankruptcy case. Four months into the case and before confirmation of their chapter 13 plan, the Debtors filed a motion to determine that the second mortgage lien of 21st Mortgage Corporation was wholly unsecured and therefore subject to modification—including plan treatment as a general unsecured claim and stripping of the lien upon issuance of the Debtors' discharge. In its initial response to the motion, 21st Mortgage disagreed with the Debtors' valuation of the home and the amount owed on the first mortgage. But by the time of the evidentiary hearing, what appeared to be shaping up as a classic factual ″battle of the appraisers″ had morphed into a legal dispute about the proper date on which to determine the home's value.

For the reasons set forth herein [*2] based on the Court's review of the papers, evidence, arguments, and applicable case law, the Court determines that the petition date is the appropriate valuation date under these circumstances.[1]

I. FACTS

The relevant facts in this matter are simple and straightforward, and many of them are contained in the Stipulated Facts admitted into evidence as Exhibit 3. Of particular note, the parties agree that U.S. Bank holds a valid first mortgage on the Debtors' home in Midvale, Utah in the amount of $191,981.68 as of the February 28, 2013 petition date. The Debtors do not dispute the validity or amount of 21st Mortgage's $43,637.98 second mortgage claim as contained in proof of claim #8 filed on March 27. And although each side's appraiser testified at the September 30 evidentiary [*3] hearing, 21st Mortgage ultimately conceded that the valuation date alone will determine the outcome of the Debtors' motion to determine the secured status of its lien (Motion). This is because 21st Mortgage's own appraiser, at the request of Debtors' counsel, performed an appraisal within the week before the evidentiary hearing that also determined the property to be underwater as to 21st Mortgage as of the petition date. The Debtors' appraisal with an effective date of February 22 asserted a value of $166,000 (Exhibit 5); 21st Mortgage's appraisal with an effective date of August 8 asserted a value of $225,000 (Exhibit A); and the appraisal performed by 21st Mortgage's appraiser at the request of Debtors' counsel with an effective date of February 21 asserted a value of $187,000 (Exhibit B). Both of the February appraisals are obviously less than the $191,981.68 first mortgage owed to U.S. Bank.

II. DISCUSSION

[1] This Memorandum Decision constitutes the Court's findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a)(1), made applicable to this contested matter by Federal Rules of Bankruptcy Procedure 7052 and 9014(c). Any of the findings of fact herein are also deemed to be conclusions of law and conclusions of law herein are also deemed to be findings of fact and shall be equally binding as both.

HN1 When valuing a secured creditor's interest in real property, *§ 506(a)(1) of the Bankruptcy Code* provides that "[s]uch 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 [*4] on such disposition or use or on a plan affecting such creditor's interest."[2] So although the total amount of a creditor's claim is fixed as of the petition date under *§ 502(b)*, *§ 506(a)(1)* contemplates the idea of different valuations of a secured creditor's collateral at different times and for different purposes.[3] As discussed in *In re Hales*, which was cited by 21st Mortgage to support its position that the confirmation date or a date near it should control, "jurisdictions generally choose from four valuation dates [depending on the purpose of the valuation]: (1) the date of confirmation; (2) the date of the petition; (3) the date of the valuation hearing; or (4) the effective date of the plan."[4] And most cases, covering all reorganization chapters and types of collateral, have unsurprisingly decided that the confirmation date is generally the appropriate valuation date when dealing with cramdown valuation for confirmation purposes.[5]

But this Motion is qualitatively different. As substantial case law has recognized, a motion of this type is really raising the prerequisite issue of whether the anti-modification provisions of *§ 1322(b)(2)* are applicable.[6] Unlike *In re Hales*, this is not a two-year-old chapter 11 case involving the cramdown of commercial real estate for purposes of plan confirmation. Rather, in line with the Supreme Court's focus on the "rights of holders of secured claims" in *Nobelman v. American Savings Bank*,[7] what's ***HN2*** occurring here under *§ 506(a)(1)* and *§ 1322(b)(2)* is a "threshold determination [of] whether the creditor is a holder of a secured claim at all . . . . Thus, while it may be appropriate to determine the value of collateral—and, therefore, the *extent* to which a creditor's claim is secured—as of confirmation or the date of the valuation hearing, it is appropriate to determine if the creditor holds a secured claim at all as of the date the petition was filed."[8] And once the Court determines the nature of 21st Mortgage's claim, that [*6] claim must be paid the appropriate present value under either *§ 1325(a)(4)* if unsecured or *§ 1325(a)(5)(B)(ii)* if secured.

In practical terms, as Debtors' counsel noted in his opening statement, people take the possibility of stripping a junior mortgage lien in chapter 13 into account when deciding under what chapter of the Bankruptcy Code they should file. "Moreover, it would be illogical to determine whether the property is the debtor's principal residence for purposes of *§ 1322(b)(2)* on the petition date, but to determine [*7] the value of the property (which may often be related to the use of the property) at a different date."[9] Valuation affecting junior lienholders would be a moving target if senior secured creditors' claims became oversecured postpetition and were therefore augmented under *§ 506(b)*. And ***HN3*** as a result of *§ 1324(b)*'s addition by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, chapter 13 plans are often confirmed in the District of Utah without a final determination of feasibility due to the timing of the confirmation hearing vis-à-vis the claims bar date. The Chapter 13 Trustee and this Court do require debtors seeking to value junior mortgage liens under *§ 506(a)(1)* and *Rule 3012* to at least begin the motion process prior to confirmation. But confirmation of the plan is not dependent on resolution of the matter even though, as in cases where plan payments must later increase to account for claims coming in unexpectedly high, subsequent modification of the confirmed plan may be necessary. Thus, in further distinction to *In re Hales*, it cannot easily be said that this

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[2] Since this matter involves real property rather than personal property, ***§ 506(a)(2)*** does not apply.

[3] *In re Kennedy*, 177 B.R. 967, 972 (Bankr. S.D. Ala. 1995).

[4] *In re Hales*, 493 B.R. 861, 864 (Bankr. D. Utah 2013); *see also In re Wood*, 190 B.R. 788, 790-91 (Bankr. M.D. Pa. 1996) [*5] (collecting cases reaching various decisions regarding the appropriate valuation date).

[5] *See, e.g., In re TD Bank, N.A. v. Landry*, 479 B.R. 1, 8 (D. Mass. 2012).

[6] *In re Farthing*, No. 04-52243, 2005 Bankr. LEXIS 97, 2005 WL 3481508 at *2 (Bankr. E.D. Ky. Jan. 5, 2005) (collecting cases); *In re Marsh*, 929 F.Supp.2d 852 (N.D. Ill. 2013); *TD Bank, N.A. v. Landry*, 479 B.R. 1 (D. Mass. 2012); *In re Hernandez*, 493 B.R. 46, 53 (Bankr. N.D. Ill. 2013); *In re Edwards*, 245 B.R. 917 (Bankr. S.D. Ga. 2000); *In re Cerminaro*, 220 B.R. 518, 525 (Bankr. N.D.N.Y. 1998); *In re Dinsmore*, 141 B.R. 499, 505-06 (Bankr. W.D. Mich. 1992). *See also In re Woolsey*, 696 F.3d 1266, 1278-79 (10th Cir. 2012) (discussing § 1322(b)(2) as a "promising candidate" to support lien stripping in chapter 13 cases since ***§ 506(d)*** cannot).

[7] 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993).

[8] *Farthing*, 2005 Bankr. LEXIS 97, 2005 WL 3481508 at *2.

[9] *Landry*, 479 B.R. at 8 n.7.

Motion involves the valuation of 21st Mortgage's real property interest for "confirmation purposes."[10]

III. CONCLUSION

For the reasons set forth above, the Court concludes that ***HN4*** the petition date is the appropriate date for valuing the interest of a junior mortgage lienholder for purposes of § 506(a)(1), § 1322(b)(2), and Rule 3012. As such, and given 21st Mortgage's concession that it was underwater as of the petition date in this case, the junior lien of 21st Mortgage is hereby determined to be wholly unsecured. Proof of claim #8 will be classified and treated as a general unsecured claim. And subject to 21st Mortgage's lien retention rights during this chapter 13 case, the junior lien will be extinguished and removed from the Midvale real property upon entry of an order granting the Debtors a discharge under § 1328. The Debtors are directed to prepare an appropriate order in accordance with this Memorandum Decision.

The below described is SIGNED.

Dated: October 21, 2013

/s/ [*9] Joel T. Marker

JOEL T. MARKER

U.S. Bankruptcy Judge

[10] The [*8] Court notes that the Debtors waited an unnecessarily long time to file the Motion in this case. Similarly situated debtors should know whether they have a valid basis for a lien valuation motion as of the petition date or soon after, and a prompter filing in this case may have obviated the need for a contested hearing.

Griffey v. U.S. Bank (In re Griffey)

United States Bankruptcy Appellate Panel for the Tenth Circuit

December 12, 2005, Filed

BAP No. CO-05-066

Reporter
335 B.R. 166; 2005 Bankr. LEXIS 2400; 55 Collier Bankr. Cas. 2d (MB) 349

IN RE LARRY GRIFFEY and NORA JEAN GRIFFEY, Debtor. LARRY GRIFFEY and NORA JEAN GRIFFEY, Plaintiffs - Appellants, v. U.S. BANK, Defendant - Appellee.

Prior History: [**1] Appeal from the United States Bankruptcy Court for the District of Colorado. Bankr. No. 03-34845-ABC. Adv. No. 04-01406-ABC. Chapter 13.

Core Terms

unsecured claim, holder, secured claim, antimodification, bankruptcy court, stripping, modifying, mortgage, valuation, rights, courts

Case Summary

Procedural Posture
Plaintiffs, debtors, appealed an order of the United States Bankruptcy Court for the District of Colorado that denied their motion for reconsideration and entry of default. The debtors had brought a complaint against defendant creditor to ″strip off″ the creditor's second mortgage on their primary residence. Although the creditor did not respond, the bankruptcy court dismissed the complaint based on its interpretation of *11 U.S.C.S. § 1322(b)(2)*.

Overview

The issue was whether *11 U.S.C.S. § 1322(b)(2)* permitted the Chapter 13 debtors to remove the creditor's lien attached to the debtors' homestead where the creditor's claim was wholly unsecured as defined by *11 U.S.C.S. § 506(a)*. The bankruptcy appellate panel agreed with the majority of courts that the antimodification clause of *11 U.S.C.S. § 1322(b)(2)* did not apply to the holder of a wholly unsecured claim. Succinctly stated, the creditor was thus the holder of an ″unsecured claim,″ pure and simple - and if the words of *§ 1322(b)* meant what they plainly said, the rights of the creditor, as a holder of an unsecured claim, could be modified by the debtors' Chapter 13 plan.

Outcome

The bankruptcy appellate panel reversed the decision of the bankruptcy court and remanded the matter.

LexisNexis® Headnotes

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN1 A bankruptcy appellate panel reviews a bankruptcy court's conclusions of law under the de novo standard.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN2 *11 U.S.C.S. § 1322(b)(2)* allows Chapter 13 debtors to use a Chapter 13 plan to modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims. *11 U.S.C.S. § 1322 (b)(2)*. This provision is often referred to as the antimodification clause, and put more directly, it bars a debtor from modifying the rights of a creditor who has a claim secured only by the debtor's principal residence.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN3 See *11 U.S.C.S. § 506(a)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN4 In Nobelman, the United States Supreme Court held that the antimodification clause of *11 U.S.C.S. § 1322(b)(2)* prevents debtors from removing, commonly called ″stripping down,″ an unsecured portion of an undersecured creditor's claim on the debtors' homestead.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN5 The decision in Nobelman stands for the proposition that the antimodification clause of *11 U.S.C.S. § 1322(b)(2)* bars Chapter 13 debtors from stripping down a creditor's claim when any portion of that claim is secured by the debtors' home. To do so would alter the creditor's rights, something that is explicitly prohibited by the antimodification clause of *§ 1322(b)(2)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN6 The United States Court of Appeals for the Eighth Circuit has stated that while the antimodification clause uses the term ″claim″ rather than ″secured claim″ and therefore applies to both the secured and unsecured part of a mortgage, the antimodification clause still states that the claim must be secured only by a security interest in the debtor's principal residence. *11 U.S.C.S. § 1322(b)(2)*. If a mortgage holder's claim is wholly unsecured, a creditor is not in any respect a holder of a claim secured by the debtor's residence. The creditor simply has an unsecured claim and the antimodification clause does not apply. On the other hand, if any part of the creditor's claim is secured, then the entire claim, both secured and unsecured parts, cannot be modified.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN7 The United States Court of Appeals for the Fifth Circuit has expressed the view that if it is correct to look to *11 U.S.C.S. § 506(a)* for a judicial valuation of the collateral to determine the status of the bank's secured claim, then it stands to reason that valuation will control the determination of the mortgagee's security interest - i.e., whether it is a secured or unsecured claim. Once it is accepted that courts must apply *§ 506(a)*, then it follows, even under Nobelman, that a wholly unsecured mortgage holder does not have a secured claim. In the case of a wholly undersecured junior mortgage, the valuation function of *§ 506(a)* obviates the need to even consult *11 U.S.C.S. §1322(b)(2)*. Without an allowed secured claim, a creditor cannot invoke *11 U.S.C.S. § 1322(b)(2)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN8 The United States Bankruptcy Appellate Panel for the Tenth Circuit agrees with the majority of courts that the antimodification clause of *11 U.S.C.S. § 1322(b)(2)* does not apply to the holder of a wholly unsecured claim. Succinctly stated, the creditor is thus the holder of an ″unsecured claim,″ pure and simple - and if the words of *§ 1322(b)* mean what they plainly say, the rights of a creditor holding such a claim may be modified by a debtor's Chapter 13 plan.

Governments > Legislation > Interpretation

HN9 Federal courts are to apply the plain meaning of the statute absent the rare instance of where the result would be absurd. The courts' job, obviously, is to see that congressional enactments are applied in accordance with the presumed intent of Congress, as manifested in the language Congress has chosen to use. The United States Supreme Court says that when a provision has a plain meaning judges are to apply it and not otherwise explicate the Bankruptcy Code.

Counsel: Submitted on the briefs: [*]

Stephen E. Berken and Jennifer O. Pielsticker, the Law Offices of Stephen Berken, Denver, Colorado, for Appellants.

Judges: Before BOHANON, CORNISH, and MICHAEL, Bankruptcy Judges.

Opinion by: BOHANON

Opinion

[*167] BOHANON, Bankruptcy Judge.

The Appellants appeal the ″Order Denying Motion for Reconsideration and for Entry of Default Judgment.″ As explained below, the Court reverses and remands this matter to the bankruptcy court.

[*] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Background

The facts are undisputed. The Appellants are the debtors in the underlying Chapter 13 bankruptcy case, and they brought a complaint against U.S. Bank (″the Bank″), seeking to ″strip off″ the Bank's second mortgage [**2] on their primary residence. The Bank did not appear or answer the complaint. Consequently, the Appellants complied with the bankruptcy court's direction and filed a motion for default judgment. The Bank again did not respond. The bankruptcy court, however, denied the motion for default judgment and dismissed the complaint based on its interpretation of the Supreme Court's decision in *Nobelman v. American Savings Bank, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993)*.

The Appellants appealed to the United States District Court for the District of Colorado, but that appeal was dismissed for inadequate evidence in the record. The Appellants later sought to reopen the bankruptcy case in order to supplement the record with an affidavit setting forth the value of the home and the proof of claim showing that the amount due on the first mortgage was $ 90,290.97. Based on these uncontested figures, it is evident that the Bank holds a wholly unsecured claim. The bankruptcy court reopened the case and allowed the Appellants to supplement the record.

The Appellants then asked the bankruptcy court to reconsider its order denying the motion for default judgment. The bankruptcy court refused [**3] to reconsider its prior ruling and denied the Appellants' motion to reconsider. This appeal followed.

Standard of Review

Because the facts are uncontested and we are left only with questions of law, ***HN1*** we review the bankruptcy court's conclusions under the de novo standard. *In re Bartee, 212 F.3d 277, 284 (5th Cir. 2000)*; *In re Lam, 211 B.R. 36, 38 (9th Cir. BAP 1997)*.

Discussion

The issue is whether *11 U.S.C. § 1322(b)(2)* permits Chapter 13 debtors to remove a creditor's lien attached to the debtors' homestead where the creditor's claim is wholly unsecured as defined by *11 U.S.C. § 506(a)*.

We start our analysis with the language of the applicable sections of the Bankruptcy Code. ***HN2*** *Section 1322(b)(2) of the Bankruptcy Code* allows Chapter 13 debtors to use a Chapter 13 plan to ″modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.″ *11 U.S.C. § 1322(b)(2)* [**4] . This provision is often referred to as the antimodification clause, and ″put more directly, [it] bars a debtor from modifying the rights of a creditor who has a claim secured only by the [*168] debtor's principal residence.″ *McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606, 609 (3rd Cir. 2000)*.

Section 506(a) defines whether claims are treated as secured or unsecured. That section states that:

> ***HN3*** 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.

11 U.S.C. § 506(a) [**5] .

HN4 In *Nobelman*, the Supreme Court held that the antimodification [*169] clause of *§ 1322(b)(2)* prevents debtors from removing, commonly called ″stripping down,″ an unsecured portion of an undersecured creditor's claim on the debtors' homestead. [1] The debtors had argued that the language of *§ 1322(b)(2)* permitted them to ″strip down″ the unsecured portion of the bank's lien. In other words, the debtors urged an interpretation of the antimodification clause that would apply that clause only to portions of claims that were deemed secured as defined by *§ 506(a)*. The Supreme Court said that this interpretation made sense as a matter of grammar, but explained why it did not agree:

> Petitioners propose to reduce the outstanding mortgage principal to the fair market value of the

[1] Interestingly, there is subtle distinction drawn between ″stripping off″ and ″stripping down″ a lien. If the entire lien is removed, then it is considered ″stripping off.″ If the lien is only partially secured, then it is considered ″stripping down.″ *See In re Lam*, 211 B.R. at 37 n.2.

> collateral, and, at the same time, they insist that they can do so without modifying the bank's rights ″as to interest rates, payment amounts, and [other] contract terms.″ Brief for Petitioners 7. That appears to be impossible. The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot [**6] modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component. Thus, to preserve the interest rate and the amount of each monthly payment specified in the note after having reduced the principal to $ 23,500, the plan would also have to reduce the term of the note dramatically. That would be a significant modification of a contractual right.
>
> . . . .
>
> In other words, to give effect to § 506(a)'s valuation and bifurcation of secured claims through a Chapter 13 plan in the manner petitioners propose would require a modification of the rights of the holder of the security interest. Section 1322(b)(2) prohibits such a modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence.

Nobelman, 508 U.S. at 331-332.

[**7] ***HN5*** The decision in Nobelman then stands for the proposition that the antimodification clause of § 1322(b)(2) bars Chapter 13 debtors from stripping down a creditor's claim when any portion of that claim is secured by the debtors' home. To do so would alter the creditor's rights, something that is explicitly prohibited by the antimodification clause of § 1322(b)(2).

The bankruptcy court held that *Nobelman* controlled in this instance. However, the vast majority of the authority on this issue contradicts the bankruptcy court's position. *See* In re Zimmer, 313 F.3d 1220 (9th Cir. 2002); In re Lane, 280 F.3d 663 (6th Cir. 2002); Pond v. Farm Specialist Realty (In re Pond), 252 F.3d 122 (2nd Cir. 2001); Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357 (11th Cir. 2000); Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.3d 277; McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606; In re Mann, 249 B.R. 831 (1st Cir. BAP 2000); In re Lam, 211 B.R. 36; Pierce v. Beneficial Mortg. Co. (In re Pierce),282 B.R. 26 (Bankr. D. Utah 2002); In re Samala, 295 B.R. 380 (Bankr. D.N.M. 2003); [**8] In re German, 258 B.R. 468 (Bankr. E.D. Okla. 2001); In re Lee, 161 B.R. 271 (Bankr. W.D. Okla. 1993); Waters v. The Money Store (In re Waters), 276 B.R. 879 (Bankr. N.D. Ill. 2002); *In re King, 290 B.R. 641* (Bankr. C.D. Ill. 2003).

We agree with those courts that *Nobelman* does not extend to the circumstances in this case. Our conclusion is supported by the plain language of § 1322(b)(2). ***HN6*** The Court of Appeals for the Eleventh Circuit made this point when it stated that:

> While the antimodification clause uses the term ″claim″ rather than ″secured claim″ and therefore applies to both the secured and unsecured part of a mortgage, the antimodification clause still states that the claim must be ″secured only by a *security interest in* . . . the debtor's principal residence.″ 11 U.S.C. § 1322(b)(2) (emphasis added). If a mortgage holder's claim is wholly unsecured, then after the valuation that Justice Thomas said that debtors could seek under § 506(a), the bank is not in any respect a holder of a claim secured by the debtor's residence. The bank simply has an unsecured claim and [**9] the antimodification clause does not apply. On the other hand, if any part of the bank's claim is secured, then, under Justice Thomas's interpretation of the term ″claim,″ the entire claim, both secured and unsecured parts, cannot be modified. We think this reading reconciles the various parts of the Court's opinion.

In re McDonald, 205 F.3d at 612.

HN7 The Court of Appeals for the Fifth Circuit expressed a similar view:

> Given the express instruction to visit § 506(a) first, it is no wonder the majority of courts hold to the same reasoning put forward by Debtor. If it is correct to ″look[] to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim,″ then it stands to reason that valuation will control the determination of the mortgagee's security interest - i.e., whether it is a secured or unsecured claim. ″Once we accept that courts must apply § 506(a), then it follows, even under *Nobelman*, that a wholly unsecured mortgage holder does not have a secured claim.″ In the case of a wholly undersecured junior mortgage, the valuation function of § 506(a) obviates the need to even consult § 1322(b)(2). [**10] After all, Justice Thomas's determination that the creditor bank held a secured claim rested upon the fact that the lien

> was supported by at least some collateral value in the home. Unlike the bank in *Nobelman*, which held both a secured claim and an unsecured claim,[the creditor] holds only an unsecured claim. Without an allowed secured claim, a creditor cannot invoke *§ 1322(b)(2)*.

In re Bartee, 212 F.3d at 290 (citations omitted).

[*170] Based on this reasoning, ***HN8*** we agree with the majority of courts that the antimodification clause of *§ 1322(b)(2)* does not apply to the holder of a wholly unsecured claim. Succinctly stated, the Bank ″is thus the holder of an 'unsecured claim,' pure and simple - and if the words of *§ 1322(b)* mean what they plainly say, the rights of a creditor holding such a claim 'may' be modified by the debtors' Chapter 13 plan.″ *In re Lane, 280 F.3d at 668*.

This result may seem arbitrary, but it is, we believe, the one required by the plain meaning of the statute. *See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)* (stating that ***HN9*** federal courts are to apply the [**11] plain meaning of the statute absent the rare instance of where the result would be absurd). See also, *In re Lane, 280 F.3d at 669* (″Our job, obviously, is to see that congressional enactments are applied in accordance with the presumed intent of Congress, as manifested in the language Congress has chosen to use.″); *In re Horwitz, 167 B.R. 237, 239 (Bankr. W.D. Okla. 1994)* (″The [Supreme] Court says that when a provision has a plain meaning judges are to apply it and not otherwise explicate the [Bankruptcy] Code.″).

Unlike *Nobelman*, the Bank is the holder of a wholly unsecured claim. Consequently, application of the analysis set forth above leads only to the conclusion that the bankruptcy court erred.

Conclusion

Accordingly, the order appealed from is hereby REVERSED, and this matter is REMANDED to the bankruptcy court for further proceedings in accordance with this Opinion.

In re Hales

United States Bankruptcy Court for the District of Utah

June 18, 2013, Decided

Bankruptcy No. 11-20884, Chapter 11

Reporter
493 B.R. 861; 2013 Bankr. LEXIS 2501; 2013 WL 3153851

In re: DAVID T. HALES and WENDY H. HALES, Debtors.

Core Terms

Properties, confirmation, valuation, valuation date, secured claim, purposes, effective date, parties, valued, appropriate valuation, real property, use of property, evidentiary, collateral, appraisal, provides

Case Summary

Overview

ISSUE: Whether the date used to determine the value of real property Chapter 11 debtors owned should be the petition date or the plan confirmation date in a case where the debtors proposed to retain four apartment buildings they owned and cram down secured claims a bank filed on behalf of a trust. HOLDINGS: [1]-Courts generally used one of four dates for determining the value of a debtor's property, depending on the purpose of the valuation: (1) the date of confirmation; (2) the date of the petition; (3) the date of the valuation hearing; or (4) the effective date of the debtor's plan; [2]-Although the debtors proposed to value four apartment buildings they owned as of the petition date, the buildings had appreciated in value since the petition date, and using the value of the buildings on the petition date would have significantly affected the amount of secured claims the debtors had to pay a trust that held a security interest in all four buildings; [3]-Use of a date that was at or near the date the debtors' plan was confirmed was consistent with *11 U.S.C.S. §§ 506(a)* and *1129(b)* because the debtors proposed to retain all four properties and use them as investment properties.

Outcome

The court found that the appropriate date for valuation of the debtors' apartment buildings was a date at or near the date of confirmation, to coincide with the purpose of the valuation and the debtors' proposed use of the property.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Real Property Law > Bankruptcy > Secured Claims

HN1 See *11 U.S.C.S. § 506(a)(1)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Real Property Law > Bankruptcy > Secured Claims

HN2 *11 U.S.C.S. § 506(a)* requires a court to look to the purpose of the valuation of a debtor's property and of the proposed disposition or use of such property when determining value.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Best Interest Test

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Impaired Class Consent

HN3 *11 U.S.C.S. § 1129(a)(7)(A)* provides that each class of impaired claims must either accept a Chapter 11 bankruptcy plan or receive as much as the claimant would receive if the debtor were liquidated.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Best Interest Test

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Impaired Class Consent

HN4 See *11 U.S.C.S. § 1129(a)(7)(A)*.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

Real Property Law > Bankruptcy > Secured Claims

HN5 The phrase "effective date of the plan" is incorporated into *11 U.S.C.S. § 1129(b)(2)(A)(i)(II)*.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

Real Property Law > Bankruptcy > Secured Claims

HN6 See *11 U.S.C.S. § 1129(b)(2)(A)(i)(II)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Real Property Law > Bankruptcy > Secured Claims

HN7 Depending on the purpose of the valuation of a debtor's property, jurisdictions generally choose from four valuation dates: (1) the date of confirmation; (2) the date of the petition; (3) the date of the valuation hearing; or (4) the effective date of the plan. The United States Bankruptcy Court for the District of Utah is persuaded by the line of cases holding that the confirmation date, or a date near it, is the appropriate date for determining value of collateral for the purposes of confirmation.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Real Property Law > Bankruptcy > Secured Claims

HN8 *11 U.S.C.S. § 506(a)(1)* provides that value shall be determined in light of the purpose of the valuation and the proposed disposition or use of property.

Counsel: [**1] For David T. Hales, Debtor: John Bagley, Bagley Law, PC, South Jordan, UT; Philip J. Danielson, DLG Legal, Draper, UT.

For Wendy H Hales, Joint Debtor: John Bagley, Bagley Law, PC, South Jordan, UT; Philip J. Danielson, DLG Legal, Draper, UT.

United States Trustee, U.S. Trustee: Peter J. Kuhn tr, US Trustees Office, Salt Lake City, UT.

Judges: WILLIAM T. ***THURMAN***, U.S. Bankruptcy Judge.

Opinion by: WILLIAM T. ***THURMAN***

Opinion

[*861] **MEMORANDUM DECISION ON DATE OF VALUATION OF VERNAL PROPERTIES**

The issue presented to the Court is whether the date used in determining the value of real property should be the petition date or the plan confirmation date when the debtor proposes to retain the real property and "cram down" secured claims on the property for purposes of a chapter 11 plan of reorganization. The Court conducted a hearing on February 22, 2013 on the issue of valuation of the real property. ***Mark*** S. ***Middlemas*** appeared on behalf of HSBC Bank USA National Association as Trustee for PHH Alternative Mortgage Trust Series 2007-3 (the "Creditor"), and John Bagley appeared on behalf of David and Wendy Hales (the "Debtors"). At the conclusion of oral argument on the valuation date issue, the Court made findings of fact and conclusions [**2] of law on the record and ruled that in this case, the confirmation date, or a date near confirmation of the plan of reorganization, was the appropriate date to use for valuation of the Debtors' real property. The Court issued an Order on Combined [*862] Valuation Hearing and Confirmation Hearing on March 15, 2013 and reserved the right to issue written findings memorializing its decision.

I. JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to *28 U.S.C. § 1334*. This matter is a core proceeding under *28 U.S.C. § 157(b)(2)(B)*. Venue is properly laid in this Court under *28 U.S.C. § 1408*.

II. FACTS AND BACKGROUND

The Debtors filed a voluntary chapter 11 petition for relief on January 25, 2011. On Schedule A, the Debtors listed four apartment buildings, all located in Vernal, Utah (the "Vernal Properties"). Each apartment building contains four apartment units. Schedule A, as originally filed, listed the current value of Debtors' interest in the properties as $0.00. On March 4, 2011, the Debtors filed an Amended Schedule A and listed the current value of the Debtors' interest in the properties as $80,000 for each of the four apartment buildings. In February 2011 and March [**3] 2011, the Creditor filed proofs of claim in the amounts of: $218,421.84, $219,026.93, $220,538.71, and $218,799.05 for each of the Vernal Properties.

On July 26, 2011, the Debtors filed a Chapter 11 Plan of Reorganization (the "Plan") and Disclosure Statement. The Plan proposed to "cram down" the Creditor's secured claims on the Vernal Properties to the scheduled value of each Vernal Property as stated in the Plan, or $80,000. The Debtors filed an Amended Plan and Disclosure Statement on August 24, 2012 proposing the same treatment of Creditor's claims on each of the Vernal Properties. On October 1, 2012, the Creditor filed four objections to the Amended Plan and Disclosure Statement, one for each of its claims on the Vernal Properties. In each Objection, the

Creditor questioned the Debtors' scheduled value of $80,000 for each Vernal Property and stated:

> In light of the Creditor's secured claim . . . the Debtors' proffered value seems low and outdated. Therefore, Creditor requests that the Debtors provide a current valuation of the real property or include a provision for the treatment of Class 5 Creditors that indicates that Creditor shall retain its lien until its secured claim is [**4] paid in full.

The Debtors filed Amended Plans on October 15, 2012 and October 19, 2012, which proposed the same $80,000 valuation and treatment for each of the Vernal Properties and noted the dispute over valuation of the Vernal Properties. The valuation dispute included a disagreement regarding whether the valuation of the Vernal Properties should be considered as of the petition date or as of the confirmation date. This disagreement was particularly important because the values of the Vernal Properties had risen since the date of the petition. Further, under the Debtors' plan, if the properties were valued lower, the secured claims would be lower and hence, their payments would be less and the unsecured portions could possibly be treated dissimilarly.[1]

At the hearing on approval [**5] of the Debtors' Disclosure Statement, the Court set an evidentiary hearing to determine the appropriate value of the Vernal Properties. On December 11, 2012, the Court conducted [*863] that evidentiary hearing and heard expert testimony from the Creditor's appraiser and received appraisal reports for each of the four Vernal Properties.

The Creditor's appraisals of the Vernal Properties, dated December 3, 2012, provided separate valuations for each of the properties, ranging from $180,000 to $220,000. The Debtors intended to present two appraisals that demonstrated the value of one of the four properties. The first appraisal valued that single property as of the petition date, January 25, 2011, at $94,000. The second appraisal valued it as of November 14, 2012 at $210,000. At the conclusion of the Creditor's evidentiary presentation and argument, the Court continued the hearing for the Debtors' presentation and ordered the parties to submit additional briefing on the valuation date issue.

The continued evidentiary hearing was conducted on February 22, 2013. The Court began the hearing with oral argument on the valuation date dispute and subsequently made findings of fact and conclusions of law [**6] on the record as to that issue. This memorandum decision constitutes the written memorialization of the Court's findings and conclusions with respect to the valuation date issue.

III. ANALYSIS

Although the parties originally disagreed regarding the exact value of the Vernal Properties, both parties agreed that the Vernal Properties' value had increased in the two years since the petition was filed. Thus, the date that the Court determines is the appropriate date for valuation of the Vernal Properties significantly affects the amount of the secured claim that the Debtors must pay to the Creditor to retain the collateral under the Plan. The Debtors argued that the value of the Vernal Properties should be determined as of the date of petition and that any increase in value should inure to the benefit of the Debtors. The Creditor argued that a date at or nearer to confirmation, or the effective date of the Plan, is the appropriate date to value the Vernal Properties pursuant to the language of *11 U.S.C. § 506(a)* and the confirmation requirements of *11 U.S.C. § 1129*.[2]

A close reading of various statutes gives some direction to the Court on this inquiry. The key provision of the Bankruptcy Code is *§ 506(a)*, which reads:

> ***HN1*** 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.*

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[1] The Court notes Dill Oil Co. v. Stephens (In re Stephens), issued by the 10th Circuit Court of Appeals on January 15, 2013. That case dealt with the absolute priority rule in chapter 11. It may have had some impact on the strategy of the parties here, but was not argued. Further, the parties subsequently stipulated as to several matters, making further inquiry on the impact of the Stephens decision unnecessary.

[2] All subsequent chapter and section references herein are contained in Title 11 of the United States Code unless otherwise [**7] specified.

§ 506(a)(1) (emphasis added). As cited above, ***HN2*** § 506(a) requires the Court to look to the "purpose of the valuation and of the proposed disposition or use of such property" when determining value.

The requirements for confirmation of a chapter 11 plan pursuant to § 1129 provide further [**8] direction to the Court on the issue of the valuation date in this case. ***HN3*** Section 1129(a)(7)(A), [*864] which applies to this case, provides that each class of impaired claims must either accept the plan or receive as much as the claimant would receive if the debtor were liquidated:

> ***HN4*** (A) [E]ach holder of a claim or interest of such class—(i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, *as of the effective date of the plan*, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date[.] (emphasis added).

HN5 The phrase "effective date of the plan" is also incorporated into §1129(b)(2)(A)(i)(II):

> ***HN6*** (A) With respect to a class of secured claims, the plan provides . . . (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, *as of the effective date of the plan*, of at least the value of such holder's interest in the estate's interest in such property. (emphasis added).

The above-cited Code provisions support the contention that [**9] the value of the Vernal Properties should be determined at or near the time of confirmation. Here, the Debtors' Plan provides that the effective date of the Plan is the confirmation date.

The parties did not cite—and the Court did not find—controlling precedent from our circuit[3] on the valuation date issue. The parties did cite, however, to a plethora of case law on the issue, and the Court's own research also spawned a wide variety of divergent decisions.[4] ***HN7*** Depending on the purpose of the valuation, jurisdictions generally choose from four valuation dates: (1) the date of confirmation; (2) the date of the petition; (3) the date of the valuation hearing; or (4) the effective date of the plan. The Court is persuaded by the line of cases holding that the confirmation date, or a date near it, is the appropriate date for determining value of collateral for the purposes of confirmation. See *In re Dheming, No. 11-56798, 2013 Bankr. LEXIS 1166, 2013 WL 1195652 (Bankr. N.D. Cal. Mar. 22, 2013)*, *In re Seip, 116 B.R. 709 (Bankr. D. Neb. 1990)*, and *In re Kain, 86 B.R. 506 (Bankr. W.D. Mich. 1988)*.

The Debtors cite to In re Reddington/Sunarrow Ltd. Partnership as support for their contention that the petition date is the appropriate valuation date in this case. *In re Reddington/Sunarrow Ltd. P'ship, 119 B.R. 809 (Bankr. D.N.M. 1990)*. However, the Court in that case was valuing property for the purposes of determining adequate protection and itself acknowledged that the confirmation date is the appropriate valuation date for purposes of plan confirmation:

> The Court is aware of the decisions in *In re Seip, 116 B.R. 709 (Bankr. D. Neb.1990)*, and *In the Matter of Kain, 86 B.R. 506 (Bankr.W.D. Mich.1988)*. In both of those cases, the courts decided that the value of the collateral for purposes of confirmation of a plan should be determined as of the date of confirmation. Those courts were correct in their analysis that a value determination for plan confirmation purposes is not the same as a value determination for automatic stay purposes or for determining the allowed amount of a secured claim.

[*865] *at 812-13*. Thus, [**11] the In re Reddington/Sunarrow Ltd. Partnership court recognized that the purpose of the valuation has an effect on the date used for valuation. It is distinguishable from the instant case because the Debtors here are seeking to value the Vernal Properties for confirmation purposes.

The Debtors also rely heavily on *In re Wood, 190 B.R. 788 (Bankr. M.D. Pa. 1996)*, in support of using the petition date as the valuation date. There, the court determined that the petition date was the appropriate valuation date when determining value to strip off a junior lien. The debtor's zoning upgrade on her property while the chapter 11 case was pending increased the value of the real property by approximately $20,000. *In re Wood, 190 B.R. at 794-95*. The court relied upon a totality of the circumstances test and

[3] The 10th Circuit Court of Appeals.

[4] For an expansive list of the decisions that discuss the date of valuation, at least for [**10] cases dated prior to 1996, see the In re Wood decision from the Middle District of Pennsylvania. Wood v. LA Bank (In re Wood), 190 B.R. 788, 790-91 (Bankr. M.D. Pa. 1996).

provided a list of factors[5] that are useful in determining the appropriate valuation date for the purposes of valuing a secured claim under *§ 506(a)*. Id.

As with In re Reddington/Sunarrow Ltd. Partnership, this Court concludes that *In re Wood* is distinguishable. The court in In re Wood found that "it was solely due to the Debtor's efforts that the valuation of the property increased by Twenty Thousand Dollars ($20,000) during [**13] the bankruptcy" and that "rewarding the Debtor's postpetition efforts by allowing it to retain the Twenty Thousand Dollars ($20,000) of 'new value' would certainly support the Debtor's 'fresh start.'" *In re Wood, 190 B.R. at 794*. The Debtors in this case, however, do not contend that the increase in value of the Vernal Properties is due to anything other than a general increase in real estate values. The Debtors also do not contend that they made any specific improvements to the Vernal Properties that increased their market value.

In an unpublished case from the District of Kansas, the court addressed a case with similar facts to the case at hand where the debtor also sought to retain its principal asset. *In re El Charro Inc., No. 05-60294, 2007 Bankr. LEXIS 2550, 2007 WL 2174911 (Bankr. D. Kan. July 26, 2007)*. There, the court conducted an evidentiary hearing on the valuation of the El Charro Restaurant in Dodge City, Kansas. *2007 Bankr. LEXIS 2550, [WL] at *1*. Confirmation of the chapter 11 plan turned upon the value of the restaurant, as the debtor was seeking to retain the restaurant and the main secured creditor on the property objected to confirmation on that basis. Id. Although In re El Charro did not explicitly address the [**14] date of valuation issue, that court provided an analysis of the statutory provisions leading to its conclusion that the value should be determined as of the effective date of the plan, which is helpful in the Court's analysis here:

> [*866] *Section 506(a)* provides that the Bank's allowed secured claim is secured only to the extent of that value. What that value is will drive what the debtor is required to pay the Bank in order to retain the restaurant under *§ 1129(b)(2)(A)*. *Section 506(a)* states: "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." Debtor proposes to retain and use the property in the implementation of its plan. *Section 1129(b)(2)(A)(i)(II)* requires that debtor pay to the Bank a value that, as of the effective date of the plan, equals at least the value of the Bank's collateral.

*2007 Bankr. LEXIS 2550, [WL] at *4*. Similarly, the Debtors in the present case propose to retain the Vernal Properties for investment purposes, and the value of the Vernal Properties will dictate what the Debtors must pay on the Creditor's [**15] secured claims.

To be consistent with the statutory provisions of *§ 506* and *§ 1129*, the Court determines that the confirmation date, or a date near it, is the appropriate valuation date in this case. ***HN8*** *Section 506(a)(1)* provides that "value shall be determined in light of the purpose of the valuation and the proposed disposition or use of such property." The Debtors propose to retain the Vernal Properties as investments, and the purpose of the valuation is for confirmation purposes. Accordingly, *§1129*'s various provisions citing to value as of the "effective date of the plan" are consistent with this result.

IV. CONCLUSION

In this case, the Debtors propose to retain the Vernal Properties and use them in the future as investment properties that will generate rents. Thus, the appropriate date for valuation in this case is a date at or near the date of confirmation to coincide with the purpose of the valuation and the Debtors' proposed use of the property.

The below described is SIGNED.

Dated: June 18, 2013

/s/ William T. ***Thurman***

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[5] In re Wood, 190 B.R. 788, 794-95 (Bankr. M.D. Pa.1996) (holding that factors used in determining the appropriate valuation date include: "(1) the impact of the debtor's efforts on the postpetition change in value; (2) the expectancies of the [**12] parties at the time they may have made the loan agreement (if any); (3) the desirability of uniformity; (4) the convenience of administration; (5) the equitable concept that those who bear the risk should benefit from the rise in value; (6) a resulting windfall to any one party should be discouraged; (7) the bankruptcy policy set forth in section 552(b) which extends prepetition liens to postpetition proceeds in certain situations; (8) the bankruptcy policy set forth in ***11 U.S.C. § 362(d)***, which encourages the tendering of adequate protection payments to a creditor holding depreciating collateral; (9) the off-stated policy of bankruptcy to secure the debtor a 'fresh start;' (10) the result of utilizing a specific date of valuation on the bankruptcy itself including that impact upon senior and junior lien creditors; and (11) whether the party benefitting from a delay in valuation has been responsible for that delay").

WILLIAM T. *THURMAN*

U.S. Bankruptcy Judge

In re Lopez

United States Bankruptcy Court for the District of Colorado

July 1, 2014, Decided

Bankruptcy Case No. 13-22220 HRT, Chapter 13

Reporter
512 B.R. 663; 2014 Bankr. LEXIS 2840; 2014 WL 2960033

In re: CHRISTINE LEE LOPEZ, Debtor.

Core Terms

liens, secured claim, assessments, mortgage, security interest, declaration, statutory lien, unsecured claim, modified, antimodification, holders, valuation, provides, principal residence, parties, common interest, condominium, stripping, foreclosure proceeding, encumbrances, recorded, unpaid assessment, first mortgage, trust deed, bifurcated, Ownership, partially, charges, lender, senior

Case Summary

Overview

HOLDINGS: [1]-Where a condominium association (COA) had a lien on the debtor's condo for unpaid assessments, pursuant to the Colorado Common Interest Ownership Act, *Colo. Rev. Stat. § 38-33.3-316*, the lender's first deed of trust was senior to the COA lien, except for those assessments that would have become due during the six months preceding the institution of the lender's foreclosure proceedings; [2]-The antimodification clause of *11 U.S.C.S. § 1322(b)(2)* did not apply because the COA lien was a statutory lien; [3]-Only the super priority portion of the COA lien was supported by value to which its lien could attach. The remainder of the COA lien was void under *11 U.S.C.S. § 506(d)* upon completion of the plan.

Outcome

Objection to plan denied.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN1 See *11 U.S.C.S. § 506(a)(1)*.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN2 See *11 U.S.C.S. § 1322(b)(2)*.

Real Property Law > ... > Liens > Nonmortgage Liens > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN3 See *Colo. Rev. Stat. § 38-33.3-316*.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > ... > Liens > Nonmortgage Liens > General Overview

HN4 The plain language of the anti-modification clause of *11 U.S.C.S. § 1322(b)* uses the term ″security interest.″ The term ″security interest″ is defined in *11 U.S.C.S. § 101(51)* as a lien ″created by agreement.″ Based on this, some courts have found that any lien to which the debtor did not consent—meaning statutory and judgment liens—can be modified even if attached to the debtor's principal residence. A ″security interest″ is defined as a lien created by an agreement. This should be compared to a ″statutory lien,″ defined as a lien arising solely by force of a statute or specified circumstances or conditions, but does not include security interest whether or not such interest is provided for by or is dependent on a statute. A condominium association lien is generally recognized as a statutory lien.

Real Property Law > ... > Liens > Nonmortgage Liens > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN5 The Colorado Common Interest Ownership Act, *Colo. Rev. Stat. § 38-33.3-316*, defines ″security interest″ as an interest in real estate or personal property created by

contract or conveyance which secures payment or performance of an obligation, including a lien created by a mortgage, deed of trust and any other consensual lien intended as security for an obligation. *Colo. Rev. Stat. § 38-33.3-103(28)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

HN6 See *11 U.S.C.S. § 506(d)*.

Governments > Legislation > Interpretation

HN7 When a statute's language is plain, the sole function of the courts is to enforce it according to its terms.

Counsel: [**1] For Christine Lee Lopez, Debtor: Stephen E. Berken, Denver, CO.

Trustee: Douglas B. Kiel, Chapter 13 Trustee, Denver, CO.

Judges: Howard R. Tallman, Chief United States Bankruptcy Judge.

Opinion by: Howard R. Tallman

Opinion

[*664] **ORDER DENYING OBJECTION TO CHAPTER 13 PLAN**

THIS MATTER comes before the Court on the Debtor's Amended Chapter 13 Plan (docket #21) and the Amended Objection (docket #29) thereto filed by Centre Point Station Condominium Association ("COA"). An evidentiary hearing was held on December 12, 2013, at the conclusion of which the Court took the matter under advisement. The Court is now ready to rule.[1]

I. Background

The parties have stipulated to the relevant facts. Debtor filed for Chapter 13 on July 17, 2013. Her principal residence, located at 4600 East Asbury Circle #403, Denver, CO, 80222, was listed on Schedule A with a value of $96,212, subject to [**2] a secured claim of $130,425.09. On Schedule D (creditors holding secured claims), Debtor listed America's Servicing Company as having a first mortgage on the residence in the amount of $103,563, as well as a second mortgage on the residence in the amount of $24,015.09 and the COA as having an outstanding lien in the total amount of $2,847. U.S. Bank, as assignee for America's [*665] Servicing Company, filed POC 10-1 for $109,673.32.[2] The COA filed POC 7-1 for $6,652.69. Debtor listed her COA dues on Schedule J (current expenditures) at $230 per month.

On July 18, 2013, Debtor filed a Motion to Determine Value of Property under *11 U.S.C. § 506* in connection with the first and second mortgages (docket #8) and a Motion for Valuation and to Bifurcate Claim under *§ 506(a)(1)* in connection with the COA lien (docket #11). The Debtor proposed a valuation of the residence at $96,212 (less than the amount of the first mortgage), and a bifurcation of the COA lien into a super priority lien and a non-super priority lien. The Debtor requested "an order finding that the COA non-super priority [lien] [**3] . . . is wholly unsecured and that upon the completion of the debtor's chapter 13 plan, [the COA] must tender a release of its non-super priority lien, directly to the debtor, within 30 days of the order of discharge."

The COA filed an objection to confirmation of the Debtor's initial Chapter 13 plan, but did not file any response to the Debtor's *§ 506* motions. Debtor amended her plan on September 10, 2013, which drew another objection from the COA. In that objection, the COA stated that "subsequent to the initial Chapter 13 plan, opposing counsel sought valuation of the Debtor's primary residence and [Debtor] has amended the Chapter 13 plan." The COA withdrew its objection to the initial plan, "based on the Debtor's Amended Plan and the valuation," but objected to "stripping off" its lien. The Court then set the matter for briefing and a hearing.

II. Discussion

In its brief and at the hearing, the COA first noted that under *Nobelman v. American Sav. Bank, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993)*, the Bankruptcy Code prohibits a debtor from modifying the rights of a creditor who has a claim secured only by the debtor's principal residence. The COA then argued that "if any part" of a claim is secured, the [**4] entire claim, both the secured and

[1] The plan was confirmed on January 14, 2014, subject to this Court's determination of the amount of the lien due to the COA. Payments under the plan would be $114 more per month if the entire amount of the COA lien is included in the plan, which, according to Debtor's counsel, would likely result in the Debtor's inability to make payments under the plan.

[2] U.S. Bank is not attempting to collect under the second mortgage due to the lack of equity in the residence.

unsecured parts, cannot be modified, citing *In re Griffey, 335 B.R. 166 (10th Cir. BAP 2005)*. The COA contended that it had a statutory lien for assessments pursuant to the Colorado Common Interest Ownership Act, *C.R.S. § 38-33.3-316* (the "Act"), in the amount of $6,652.69, that was partially secured and could not be modified.

In response, the Debtor asserted that under the Act, the COA had a super priority lien over U.S. Bank's otherwise senior deed of trust in the event of a foreclosure, but that the lien was limited to the delinquent assessments accruing within six months of the initiation of foreclosure proceedings, which in this case amounted to $1,380. That is the amount the Debtor proposed to pay to the COA in her amended Chapter 13 Plan. At the hearing, the Debtor argued that *Nobelman*'s anti-modification prohibition does not apply to the COA lien, where the Act has specifically limited the COA lien to six months of assessments.

A. Relevant statutory law

Resolving this issue requires the Court to consider the interplay of the Act with *sections 506(a)(1)* and *1322(b)(2) of the Bankruptcy Code*. *11 U.S.C. § 506(a)(1)* provides:

> *§ 506*. Determination [**5] of secured status
>
> [*666] ***HN1*** (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 1322(b)(2) provides:

> *§ 1322*. Contents of plan
>
> ***HN2*** (b) Subject to subsections (a) and (c)[3] of this section, the plan may—
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

The Act provides, in relevant part, [**6] as follows:

> Title 38. Property--Real and Personal
>
> Real Property
>
> Interests in Land
>
> Article 33.3. Colorado Common Interest Ownership Act
>
> Management of the Common Interest Community
>
> ***HN3*** *§ 38-33.3-316*. Lien for assessments. (1) The association, if such association is incorporated or organized as a limited liability company, has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, attorney fees, fines, and interest charged pursuant to *section 38-33.3-302(1)(j)*, *(1)(k)*, and *(1)(l)*, *section 38-33.3-313(6)*, and *section 38-33.3-315(2)*[4] are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. If an assessment is payable in installments, each installment is a lien from the time it becomes due, including the due date set by any valid association's acceleration of installment obligations.
>
> (2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (I) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to;
>
> (II) A security interest on the unit which has priority over all other security interests on the unit and which was recorded before the date on which the assessment sought to be

[3] These sections are not at issue in this case.

[4] These sections describe the types of fees that can be charged. There is no dispute over the types of fees charged under the COA lien in [**7] this case.

enforced became delinquent, or, in a cooperative, a security interest encumbering only the unit owner's interest which has priority over all other security interests on the unit and which was perfected before the date on which the assessment sought to be enforced became delinquent; and

> (III) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

[*667] (b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of:

> (I) An amount equal to the common expense assessments based on a periodic budget adopted by the association under *section 38-33.3-315(1)* [**8] which would have become due, in the absence of any acceleration, during the six months immediately preceding institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien.
>
> (II) Deleted by Laws 1993, H.B.93-1070, § 21, eff. April 30, 1993.

(c) This subsection (2) does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association. A lien under this section is not subject to the provisions of part 2 of article 41 of this title or to the provisions of *15-11-202, C.R.S.*.

> (d) The association shall have the statutory lien described in subsection (1) of this section for any assessment levied or fine imposed after June 30, 1992. Such lien shall have the priority described in this subsection (2) if the other lien or encumbrance is created after June 30, 1992.
>
> (3) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.
>
> (4) Recording of the declaration constitutes [**9] record notice and perfection of the lien. No further recordation of any claim of lien for assessments is required.

B. Relevant Colorado case law

In *BA Mortgage, LLC v. Quail Creek Condo. Ass'n, 192 P.3d 447 (Colo. Ct. App. 2008)*, the Colorado Court of Appeals addressed the priority of encumbrances under the Act. In that case, the condominium association recorded its declaration in 1979. The owners purchased a condo unit and encumbered it with a first deed of trust in 1997. The association filed two assessment liens in May 2001, and the lender instituted a foreclosure in June 2001. The unit was sold to HUD, and in April 2002 the association recorded a restatement of its liens stating that the liens were still an encumbrance on the property. The lender then sued the association for slander of title.

The court held that under the plain language of the Act, the lender's deed of trust was senior to the association's assessment lien, except for those assessments accruing within six months prior to the commencement of the lender's foreclosure proceedings. The court also held that the association's lien included interest, charges, late charges, fines and attorney fees so long as the total does [**10] not exceed the limit, citing *First Atl. Mortgage, LLC v. Sunstone N. Homeowners Ass'n, 121 P.3d 254, 255 (Colo. Ct. App. 2005)*. The court noted that the purpose of the Act was to ″provide stability to the finances of common interest communities by granting them a super-lien for unpaid assessments, and to provide uniformity and predictability to lenders in order to promote the availability of financing.″ *BA Mortgage at 450*.

In this case, the COA submitted its Declarations as Exhibit B for the hearing. The Declarations were recorded on April 30, 2004. U.S. Bank recorded its first deed of trust on February 28, 2006, and instituted a foreclosure on April 27, 2012. Applying *BA Mortgage* to this case, the Court determines that U.S. Bank's first [*668] deed of trust is senior to the COA lien, except for those assessments that would have become due during the six months preceding the institution of U.S. Bank's foreclosure proceedings.[5] [**11] Thus, U.S. Bank has a lien against the residence for $109,673.32, subject to a carve-out for the assessments accruing within the six months prior to U.S. Bank's

[5] ***Section 506*** would be available to Debtor and operate on the COA's secured claim, whether or not U.S. Bank had instituted foreclosure proceedings prior to the filing of Debtor's case. The strip-off provisions of ***§ 506*** mimic the effect of a state court foreclosure proceeding.

foreclosure proceeding on April 27, 2012. The parties agree that this carve-out amount is no more than $1,380.[6]

C. Application of the Bankruptcy Code

Where the parties disagree is the effect of § 506(a)(1) and § 1322(b)(2) on the COA lien. The COA argues that its lien is partially secured; in other words, the mandatory six months of assessments given super priority (in the amount of $1,380) creates a secured interest in the residence under the language of 506(a)(1), which provides, in part: "An [**12] allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in 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." It follows, the COA reasons, that because its lien is partially secured, the total amount of its lien (in the amount of $6,652.69) cannot be modified under § 1322(b)(2), which provides, in part: "the plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."

To support this argument, the COA cites to Nobelman, 508 U.S. at 324, and Griffey, 335 B.R. at 166, stating that "[t]he *Griffey* Court recognized Justice Thomas's holding that *Nobelman* could strip an unsecured claim, because the Bank's claim was wholly unsecured, and the antimodification clause did not apply. The *Griffey* Court also understood if any part of the [**13] Bank's claim is secured, then, under Justice Thomas's interpretation of the term 'claim,' the entire claim, both the secured and the unsecured parts, cannot be modified." The COA thus concludes that because its lien is partially secured, the entire amount of its lien cannot be modified in the Debtor's Chapter 13 plan.

The Debtor, on the other hand, contends that the COA lien may be bifurcated into two liens: (1) the super priority lien for $1,380, which is first in time as to all consensual liens; and (2) the "covenant which runs with the land," for the remaining amount ($5,272.69), which is inferior to all other consensual liens, and which is "wholly unsecured." The Debtor then cites *Griffey* for the proposition that the anti-modification clause discussed in *Nobelman* does not "protect a junior lien holder whose claim is wholly unsecured by any equity in a debtor's primary residence." Thus, Debtor reasons, the non-super priority COA lien ($5,272.69) will share in Class IV unsecured creditor distributions [*669] if a timely proof of claim is filed and allowed.

Because the COA did not contest the Debtor's § 506 motion, it is undisputed that the value of the residence is $96,212; thus, there is [**14] no equity in the residence given the amount of the first mortgage held by U.S. Bank. The parties disagree, however, as to whether the COA lien is "wholly unsecured" or "partially secured," as those terms are defined in the Bankruptcy Code and relevant case law. Because both parties cite the *Griffey* case to support their opposing arguments, the Court will start with that case.

In *Griffey*, the Tenth Circuit Bankruptcy Appellate Panel ("BAP") identified the issue as "[w]hether 11 U.S.C. § 1322(b)(2) permits Chapter 13 debtors to remove a creditor's lien attached to the debtors' homestead where the creditor's claim is wholly unsecured as defined by 11 U.S.C. § 506(a)." Griffey, 335 B.R. at 167. The BAP then analyzed the language of § 1322(b)(2), noting that " [t]his provision is often referred to as the antimodification clause, and '[p]ut more directly, [it] bars a debtor from modifying the rights of a creditor who has a claim secured only by the debtor's principal residence.'" Id. at 167-68 (Citations omitted). The BAP then stated that "the decision in *Nobelman* . . . stands for the proposition that the antimodification clause of § 1322(b)(2) bars Chapter 13 debtors from stripping down [**15] a creditor's claim when any portion of that claim is secured by the debtors' home." Id. at 168-69. However, the BAP held that *Nobelman* did not apply in the case before it, reasoning as follows:

> While the antimodification clause uses the term "claim" rather than "secured claim" and therefore applies to both the secured and unsecured part of a mortgage, the antimodification clause still states that the claim must be "secured only by a *security interest in* . . . the debtor's principal residence." 11 U.S.C. § 1322(b)(2) (emphasis added). If a mortgage holder's claim is wholly unsecured, then after the valuation that Justice Thomas said that debtors could seek under § 506(a), the bank is not in any respect a holder of a claim secured by the debtor's residence. The bank simply has an

[6] At the end of the hearing, counsel for the COA stated that he believed the amount was actually $1,342. POC 7-1 shows that the monthly maintenance fee was $226, rather than the $230 that Debtor listed on her schedules. Multiplying the $226 by six months equals $1,356.

> unsecured claim and the antimodification clause does not apply.[7]

Id. at 169.

Additionally, the BAP cited with approval the Fifth Circuit case of *In re Bartee, 212 F.3d 277 (5th Cir. 2000)*, where that court explained:

> Given the express instruction [in *Nobelman*] to visit *§ 506(a)* first, it is no wonder the majority of courts hold to the same reasoning put forward by Debtor. If it is correct to "look[ ] to *§ 506(a)* for a judicial valuation of the collateral to determine the status of the bank's secured claim," then it stands to reason that valuation will control the determination of the mortgagee's security interest—i.e., whether it is a secured or unsecured claim. "Once we accept that courts must apply *§ 506(a)*, then it follows, even under *Nobelman*, that a wholly unsecured mortgage holder does not have a secured claim." In the case of a wholly undersecured junior mortgage, the valuation function of *§ 506(a)* obviates the need to even consult [*670] *§1322(b)(2)*. After all, Justice Thomas's determination that the creditor bank held a secured claim rested upon the fact that the lien was supported by at least some collateral value in the home. Unlike the bank in *Nobelman*, which held both a secured claim and [**17] an unsecured claim,[the creditor] holds only an unsecured claim. Without an allowed secured claim, a creditor cannot invoke *§ 1322(b)(2)*.

Griffey at 169 (*citing In re Bartee, 212 F.3d at 290*)(internal citations omitted).

In *Griffey* the BAP ultimately held that the antimodification clause of *§ 1322(b)(2)* does not apply to the holder of a wholly unsecured claim, as such is defined by 506(a).

At the hearing in the instant case, both parties recognized that the *Nobelman* and *Griffey* decisions specifically dealt with stripping off second mortgages, and did not address the issue of stripping off a lien such as the COA lien. The COA's argument that part of its lien is secured by the terms of the Act itself is a novel one, but is misplaced. The COA did not cite any case law interpreting the Act, or the Act's counterparts in other jurisdictions. The Debtor cited to two Colorado state court cases dealing with the Act, but neither addressed the issue presented in this bankruptcy case. The Court's analysis is thus based on its own research, since this issue appears to be one of first impression in this Court.

At the outset, the Court notes that ***HN4*** the plain language of the anti-modification clause of *§ 1322(b)* [**18] uses the term "security interest." The term "security interest" is defined in *Bankruptcy Code § 101(51)* as a lien "created by agreement." Based on this, some courts have found that any lien to which the debtor did not consent—meaning statutory and judgment liens—can be modified even if attached to the debtor's principal residence. *See In re McDonough, 166 B.R. 9,13 (Bankr. D. Mass. 1994)* (judgment lien); *Rankin v. DeSarno, 89 F.3d 1123, 1127 (3rd Cir. 1996)* (tax lien); and *In re Seel, 22 B.R. 692 (Bankr. D. Kan. 1982)* (mechanic's lien). In *Seel*, the Kansas bankruptcy court stated that "a 'security interest' is defined as a lien created by an agreement . . ..This should be compared to a 'statutory lien,' defined as a lien arising solely by force of a statute or specified circumstances or conditions, . . . but does not include security interest . . . whether or not such interest . . . is provided for by or is dependent on a statute . . .." *Id. at 695*. A condominium association lien is generally recognized as a statutory lien, *see, e.g.*, *Young v. 1200 Buena Vista Condos.., 477 B.R. 594 (W.D. Penn. 2012)*.

The Act itself refers to the lien at issue here as a statutory lien. Further, ***HN5*** the Act [**19] defines "security interest" as an "interest in real estate or personal property created by contract or conveyance which secures payment or performance of an obligation, including a lien created by a mortgage, deed of trust . . . and any other consensual lien . . . intended as security for an obligation." *BA Mortgage at 450* (citing *Colo. Rev. Stat. § 38-33.3-103(28)*). Thus, it appears that the COA lien is not a security interest, either as defined in the Bankruptcy Code or in the Act. The Court also examined the language of the COA Declaration, admitted as Exhibit B. The Declaration's Recitals state: "Declarant desires to create a condominium common interest community pursuant to the Colorado Common Interest Ownership Act . . . (the "Act.") (Recitals, Section B, page 6). The COA Declaration further provides: "Additionally, Declarant hereby submits the Property to the provisions of the Act." (Article 1, Section 1.1)

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[7] The BAP did recognize that "if any part of the bank's claim is secured, then, under Justice Thomas's interpretation of the term "claim," the entire claim, both secured and unsecured parts, cannot be modified." However, the BAP noted that in *Nobelman*, Justice Thomas's determination that the bank held a secured claim was based on the lien's [**16] having support by some collateral value in the home. *Griffey* at 169.

[*671] Because the COA lien is not a security interest as defined in the Code, the Act, or the language of the COA Declaration,[8] the Court holds that the antimodification clause of 1322(b)(2) does not apply. Thus, the COA lien is a statutory lien that may be modified in a Chapter [**20] 13 plan. Pursuant to § 506(a)(1), the COA lien may be bifurcated into secured and unsecured portions based on the valuation of the residence. The result is that a portion of the lien, supported only by the unsecured claim, is void, while a portion of the lien, supported by a secured claim, remains in place. *See* 11 U.S.C. § 506(d) (***HN6*** To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . .). Therefore, in this case, only the super priority portion of the COA lien is supported by value to which its lien may attach. The remainder of the COA lien is void under § 506(d) upon completion of the plan.

At the hearing, both parties addressed whether the COA lien "runs with the land," under applicable state law. The term "runs with the land" is a term of art that is generally used in real property law in connection with discussions of covenants and servitudes. To the extent that the parties use the term [**21] here to denote the fact that, in normal operation, the unsatisfied statutory lien for unpaid assessments is enforceable against the property in the hands of a transferee, in that sense, the COA's lien can be said to "run with the land." But the fact that an unsatisfied lien in favor of a property owners association may continue to be enforced against the property after a transfer does not distinguish the COA's statutory lien from any other type of lien. For example, an unsatisfied mortgage is enforceable against the encumbered property in the hands of a transferee. RESTATEMENT (THIRD) OF PROPERTY § 5.2(a). Claims based on mortgages are routinely analyzed under § 506(a) and such liens are routinely avoided under § 506(d). There is nothing in § 506 that provides a basis to exclude the COA's statutory lien from the operation of the Bankruptcy Code. The fact that the COA's unsatisfied statutory lien continues to be enforceable against a subsequent transferee, just like other liens, does not insulate it from being subjected to bifurcation under § 506(a) and avoidance under § 506(d).

Finally, the fact that a portion of the COA's prepetition lien may be avoided under § 506(d) does not affect [**22] the fact that its covenants — as distinct from its statutory liens — do "run with the land." As a consequence, the Debtor's obligation to pay postpetition assessments continues and postpetition liens that arise with respect to unpaid assessments are unaffected by this Order. In the case of In re Plummer, 484 B.R. 882 (Bankr. M.D. Fla. 2013) the court stated:

> [T]he court concludes that a condominium association lien encumbering the debtor's principal residence can be stripped off in a chapter 13 case where the amount of the first mortgage exceeds the value of the condominium. Of course, the power to strip off liens is limited to liens existing on the date of the petition. It does nothing to insulate a debtor who is a unit owner for liability for assessments that come due after the date of the petition that would otherwise be owed under Florida Statute 718.116(1)(a).

Id. at 890.[9] *See also* In re Foster, 435 B.R. 650 (9th Cir. BAP 2010) (holding that, [*672] where debtor remained in the home, the requirement to pay homeowners' association dues was a covenant running with the land, and so debtor's personal liability for post-petition dues was an incidence of property ownership unaffected by the [**23] filing of the bankruptcy petition). Such cases are consistent with the Section (1) of the Act, providing that "each installment is a lien from the time it becomes due...".

III. Conclusion

The Court's conclusion is supported by the plain language of the Act. ***HN7*** When a statute's language is plain, the sole function of the courts is to enforce it according to its terms. In re Woods, 743 F.3d 689, 694 (10th Cir. 2014). The Act provides that the COA's lien for unpaid assessments is prior to all other liens except a first mortgage and taxes, that each unpaid assessment becomes a lien on the property from the time it is due, and that the COA holds a senior lien not to exceed six months of assessments in the event of an action to enforce or extinguish its lien. [**24] Finally, being a statutory lien, the Court has concluded that the COA's secured, non-senior claim is subject to the operation of 11 U.S.C. § 506.

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[8] Even if some language in the Declaration attempted to make the COA lien a "security interest," generally when such language conflicts with the applicable statutory language, the statutory language controls. *See* BA Mortgage at 450.

[9] Florida's condominium statutory scheme is similar, but not identical, to Colorado's. *See generally* Andrea J. Boyack, Community Collateral Damage: A Question of Priorities, 43 Loy. U. Chi. L.J. 53, 100 (Fall 2011) (addressing the Uniform Common Interest Ownership Act, or "UCIOA," and noting that while Colorado is a "UCIOA state," Florida has given community association liens some limited priority without adopting the UCIOA in its entirety).

For all the foregoing reasons, it is

ORDERED that the COA's Amended Objection to Amended Chapter 13 Plan (docket #29) is DENIED. It is further

ORDERED that, under *11 U.S.C. § 506(a)*, the COA holds an allowed secured claim in the amount of $1,356[10] secured by a lien on the Debtor's residence at 4600 East Asbury Circle #403, Denver, CO 80222. In addition, the COA has an allowed unsecured claim of $5,296.69 (the claim total of $6,652.69 less the $1,356.00 secured portion). Under *11 U.S.C. § 506(d)* the unsecured portion of the COA's lien shall be void upon completion of payments under the Debtor's Plan. Upon successful completion of the Debtor's Plan, the Debtor may request an order that the lien is extinguished. If the bankruptcy case is dismissed or converted to a case under chapter 7, this Order shall be deemed vacated and the lien shall be reinstated and shall continue in full force and effect as specifically provided by *11 U.S.C. §§ 348(f)(1)(B)* and *(C)* and *349(b)(1)(C)*.

Dated this 1st day of July, 2014.

BY THE COURT:

/s/ Howard R. Tallman

Howard R. Tallman, Chief Judge

United States Bankruptcy Court

[10] As previously noted, POC 7-1 shows that the monthly maintenance fee was **[**25]** $226. Multiplying the $226 by six months equals $1,356.

Pierce v. Benefit Mortg. Co. (In re Pierce)

United States Bankruptcy Court for the District of Utah, Central Division

February 25, 2002, Decided

Bankruptcy Number 01-30416, Chapter 13, Adversary Proceeding Number 01-2367

Reporter
2002 Bankr. LEXIS 1473; 282 B.R. 26

In re: Bruce W. Pierce and Tammy L. Pierce, Debtors; Bruce W. Pierce and Tammy L. Pierce, Plaintiffs, vs. Beneficial Mortgage Co. of Utah, Defendant.

Disposition: [*1] Claim deemed entirely unsecured.

Core Terms

secured claim, holders, mortgage, stripped, real property, collateral, rights, principal residence, antimodification, courts, void, adversary proceeding, security interest, unsecured claim, first mortgage, residential, valuation, modify

Case Summary

Procedural Posture

Plaintiffs, married debtors, filed a Chapter 13 petition under the U.S. Bankruptcy Code and claimed a homestead exemption related to their residence. The debtors commenced an adversary action against defendant creditor regarding an alleged unsecured lien on the residence. The debtors later moved for an entry of default judgment against the creditor.

Overview

The debtors' complaint asserted that the creditor's trust deed was completely unsecured and should be voided or ″stripped″ pursuant to *11 U.S.C.S. § 506(a)*, *(d)* where the creditor held a second mortgage on the debtors' residence. The debtors also argued that the creditor's claim should be treated as an unsecured claim under the debtors' Chapter 13 plan. The court found that the creditor's lien, if secured at all, was secured only by a security interest in the debtors' principal residence. The court concurred with the majority view and held that under *11 U.S.C.S. § 506(a)* a completely unsecured mortgage holder did not have a secured claim. The unsecured mortgage holder was not protected by *11 U.S.C.S. § **1322(b)(2)*** and its lien could be stripped.

Outcome

The court deemed the creditor's claim as entirely unsecured and the creditor's lien was void.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Claims > Types of Claims > Unsecured Nonpriority Claims

Bankruptcy Law > Procedural Matters > Adversary Proceedings > General Overview

Bankruptcy Law > Procedural Matters > Contested Matters

HN2 A bankruptcy court is aware of several cases whereby liens and security interests have been determined via means other than an adversary proceeding, whether by motion, objection, or plan confirmation. However, in each of these cases, the matter was actually litigated, with creditors and/or the trustee being present to appropriately argue the merits of the lien. The better and more appropriate practice is to file a complaint and instigate an adversary proceeding as the rules provide.

Bankruptcy Law > Administrative Powers > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Procedural Matters > Adversary Proceedings > General Overview

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

Bankruptcy Law > Procedural Matters > Contested Matters

HN1 *Fed. R. Bankr. P. 7001(2)* states that a proceeding to determine the validity, priority, or extent of a lien or other interest in property is an adversary proceeding, which is supported by the majority of courts which have looked at the issue.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN6 See *11 U.S.C.S. § **1322(b)(2)***.

Bankruptcy Law > Claims > Types of Claims > Definitions

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Claims > Types of Claims > Unsecured Nonpriority Claims

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

Civil Procedure > Trials > Separate Trials

HN7 The United States Court of Appeals for the Tenth Circuit has determined that *11 U.S.C.S. § 506(a)* directs that a claim be bifurcated into a secured and an unsecured component and that a lien can be stripped from the unsecured component in a Chapter 11 case. Because a Chapter 11 creditor may elect to have his claim treated as fully secured by giving up its right to vote on the Chapter 11 reorganization plan, lien stripping must be permitted when the creditor chooses not to give up that right.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Real Property Law > Bankruptcy > Secured Claims

HN3 In the context of bankruptcy, the language of *11 U.S.C.S. § **1322(b)(2)*** allows a debtor's reorganization plan to modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN4 See *11 U.S.C.S. § 506(a)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Reorganizations > Lien Stripping

HN5 The language of *11 U.S.C.S. § 506(a)* indicates that when there is no equity in the property, then the claim is an unsecured claim and the lien is voidable under *11 U.S.C.S. § 506(d)* and can be ″stripped″ from the property.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Reorganizations > Lien Stripping

HN8 See *11 U.S.C.S. § 506(d)*.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Contracts Law > ... > Default > Foreclosure & Repossession > Agreements, Variances & Waivers

HN9 The United States Supreme Court has analyzed the interplay between *11 U.S.C.S. § 1322(b)*, *506(a)* and has determined that it is proper for the debtors to look to *§ 506(a)* for a judicial valuation of the collateral to determine the status of the secured claim. The Court has declined to allow a bifurcation in a matter where it would modify the rights of the secured creditor in contravention of *11 U.S.C.S. § **1322(b)(2)***. The Court, however, has not addressed the impact of *11 U.S.C.S. § 506(a)* upon *11 U.S.C.S. § **1322(b)(2)*** when there is absolutely no value remaining in the collateral securing the claim. This has led to a split in authority among the lower courts on the question of whether a lien on a wholly undersecured claim can be stripped.

Bankruptcy Law > Claims > Types of Claims > Definitions

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Claims > Types of Claims > Unsecured Nonpriority Claims

HN10 In the context of bankruptcy, a ″wholly undersecured″ claim is one for which the supporting collateral holds no remaining value after satisfaction of senior encumbrances.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Claims > Types of Claims > Unsecured Nonpriority Claims

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > Reorganizations > Lien Stripping

Real Property Law > Financing > General Overview

Real Property Law > Financing > Secondary Financing > General Overview

HN11 A number of circuit appeals courts, as well as bankruptcy appellate panels, have considered the issue of whether or not a lien can be stripped when it is completely unsecured under *11 U.S.C.S. § 506(a)* and represent the majority view. Most recently, the United States Court of Appeals for the Second Circuit has determined whether, under ***11 U.S.C.S. § 1322(b)(2)***, Chapter 13 debtors can void a lien on their residential property if there is insufficient equity in the residence to cover any portion of that lien.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Claims > Types of Claims > Unsecured Nonpriority Claims

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

Real Property Law > Financing > Secondary Financing > Lien Priorities

Real Property Law > ... > Liens > Nonmortgage Liens > Lien Priorities

HN12 The United States Court of Appeals for the Second Circuit has concluded that the antimodification exception of *11 U.S.C.S. § 1322(b)(2)* protects a creditor's rights in a mortgage lien only where the debtor's residence retains enough value -- after accounting for other encumbrances that have priority over the lien -- so that the lien is at least partially secured under *11 U.S.C.S. § 506(a)*.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN13 A bankruptcy court has held that a completely unsecured mortgage on a principal residence is protected under *11 U.S.C.S. § 1322(b)(2)* from modification.

Counsel: Lee Rudd, Salt Lake City, Utah, for Bruce W. Pierce and Tammy L. Pierce, Plaintiffs.

Judges: William T. Thurman, United States Bankruptcy Judge.

Opinion by: William T. Thurman

Opinion

MEMORANDUM DECISION

This matter came before the Court on Bruce W. Pierce and Tammy L. Pierce's (the ″Debtors″) Verified Motion for Entry of Default Judgment in the adversary proceeding filed November 28, 2001. At a duly noticed and scheduled hearing held February 13, 2001, where the Debtors were not present but represented by counsel, the Court took the matter under advisement in order to issue a written opinion. No other parties appeared, and no parties, including the subject creditor, Beneficial Mortgage Co. of Utah (″Beneficial″), have responded to the Debtors' complaint or motion. Because the defendant did not answer the complaint within the specified time, the Debtors prepared a proposed Default Judgment to be entered by the Court and served a copy of the Default Judgment and corresponding Default Certificate on Beneficial. However, the Court is aware that this is a matter of first impression in this District and believes it proper to issue a written opinion.

[*2] **FACTS**

The facts of this matter are straightforward. [1] [*3] The Debtors filed for bankruptcy protection under Chapter 13 on July 19, 2001. On the same date as the filing of the petition, the Debtors filed statements and schedules detailing debts and assets, including their residence valued at $ 66,000.00. In addition, the Debtors claimed a homestead exemption of $ 40,000.00 relating to that residence. No objections were filed to the listed exemption, and the Debtors' plan was confirmed on February 19, 2002. [2] Listed on the Debtors' schedule of creditors holding secured claims, is a first mortgage holder on the Debtors' residence, Household Finance Services, whose claim, according to the proof of claim it filed, is $ 77,699.98. Beneficial, a second lien holder, also filed a proof of claim asserting a secured claim in the amount of $ 24,406.12 and a prepetition arrearage amount of $ 923.40. This debt is also listed on the Debtors' schedule of creditors holding secured claims.

After Beneficial filed its proof of claim, and before confirmation of their Chapter 13 plan, the Debtors filed a complaint, arguing that Beneficial's trust deed is completely unsecured and should be voided or ″stripped″ pursuant to *11 U.S.C. § 506(a)* and *(d)* and that the claim filed by Beneficial should be treated as an unsecured claim under the Debtors' Chapter 13 plan. The Debtors argue that because the value of the collateral is only $ 66,000.00 and the first mortgage holder's claim exceeds that value, any remaining claim holder must be entirely unsecured and, therefore, the lien on the property held by Beneficial may be voided. The Debtors cite authority to support their position, however, there is no direct authority from this District nor from the Tenth Circuit Court of Appeals (″Tenth Circuit″). The Court, therefore, is in the position of ruling [*4] on a matter of first impression in the United States Bankruptcy Court for the District of Utah.

DISCUSSION

1. Jurisdiction

The Court has jurisdiction over the parties and subject matter of this adversary proceeding under *28 U.S.C. § 1334*. This is a core proceeding under *28 U.S.C. § 157(b)(2)(B)* and *(b)(2)(K)*, and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under *28 U.S.C. § 1409*.

2. Procedural History

The Debtors have properly brought this issue before the court in the posture of an adversary proceeding. While a few courts have entertained this issue via motion in a contested matter or through an objection to claim, [3] [*5] the Court follows the plain language of ***HN1*** *Federal Rule of Bankruptcy Procedure 7001(2)* which states: ″[A] proceeding to determine the validity, priority, or extent of a lien or other interest in property″ is an adversary proceeding, which is supported by the majority of courts which have looked at the issue. [4]

3. Analysis

The issue before the Court is whether a Chapter 13 debtor may ″strip off″ a wholly unsecured lien on real property despite the language of *11 U.S.C. § **1322(b)(2)*** [5] [*7] prohibiting the modification of the rights of holders of

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[1] The facts of the case are drawn from the complaint, which facts are deemed admitted, and from the verified petition and statements and schedules the Debtors filed in their bankruptcy case.

[2] For the purposes of this order, the Court finds the value of the residential real property to be $ 66,000.00 as listed on the Debtors' schedules and supported by an appraisal attached as Exhibit D to the Debtors' complaint.

[3] The ***HN2*** Court is aware of several cases whereby liens and security interests have been determined via means other than an adversary proceeding, whether by motion, objection, or plan confirmation. See e.g., Halverson v. Cameron (In re Mathiason), 16 F.3d 234, 237-38 (8th Cir. 1994); Trust Corp. of Mont. v. Patterson (In re Copper King Inn, Inc.), 918 F.2d 1404, 1407 (9th Cir. 1990); In re Hoskins, 262 B.R. 693, 697 (Bankr. E.D. Mich. 2001); Jones v. Progressive-Home Fed. Sav. and Loan Ass'n (In re Jones), 122 B.R. 246, 250 (W.D. Pa. 1990); In re Zobenica, 109 B.R. 814, 816 (Bankr. W.D. Tenn. 1990); In re Nat'l Oil Co., 112 B.R. 1019, 1020 (Bankr. D. Colo. 1990). However, in each of these cases, the matter was actually litigated, with creditors and/ or the trustee being present to appropriately argue the merits of the lien. The Court believes the better, and more appropriate practice is to file a complaint and instigate an adversary proceeding as the rules provide.

[4] See e.g., CEN-PEN Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995); Sun Finance Co., Inc. v. Howard (In re Howard), 972 F.2d 639 (5th Cir. 1992); Foremost Fin'l Serv. Corp. v. White (In re White), 908 F.2d 691 (11th Cir. 1990); Wright v. Commercial Credit Corp., 178 B.R. 703 (E.D. Va. 1995); Simmons v. Savell (In re Simmons), 765 F.2d 547 (5th Cir. 1985); In re Vincente, 257 B.R. 168 (Bankr. E.D. Pa. 2001).

[5] Unless noted otherwise, all further references to the United States Code are to Title 11.

security interests in real property that serve as the debtor's principal residence. [6] The Tenth Circuit has not ruled on this issue in the context of a Chapter 13 case, [7] however, several other Circuits, as well as numerous bankruptcy courts, have ruled on this exact issue, and the Court is guided by these opinions. The difficulty [*6] in accomplishing what the Debtors ask is ***HN3*** the language of ***§ 1322(b)(2)*** that allows a debtor's reorganization plan to "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence* …." (emphasis added). This is the situation the Debtors face -- Beneficial's claim, if secured at all, is secured only by a security interest in real property that is the Debtors' principal residence. However, under *§ 506(a)*:

> ***HN4*** An allowed claim of a creditor secured by a lien on property in which the estate has an interest … is a secured claim to the extent of the value of such creditor's interest in 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.

HN5 This language indicates that when there is no equity in the property, as in the Debtors' residence, then the claim is an unsecured claim and the lien is voidable under *§ 506(d)* [8] and can be "stripped" from the residence.

[*8] ***HN9*** The United States Supreme Court analyzed the interplay between *§ 1322(b)* and *§ 506(a)* in *Nobelman v. American Savings Bank, 508 U.S. 324, 124 L. Ed. 2d 228, 113 S. Ct. 2106 (1993)*, and determined that in a similar case, it was proper for the debtors to look to *§ 506(a)* "for a judicial valuation of the collateral to determine the status of the … secured claim." *Id. at 328*. In Nobelman, the debtors attempted to bifurcate the secured creditor's claim into a secured portion for an amount equal to the remaining value of the collateral and an unsecured portion equal to the remaining amount of the claim. The debtors then attempted to strip the lien from this unsecured portion. The Court declined to allow this bifurcation because it would modify the rights of the secured creditor in contravention of ***§ 1322(b)(2)***. See *id. at 332*. The Court, however, did not address the impact of *§ 506(a)* upon ***§ 1322(b)(2)*** when there is absolutely no value remaining in the collateral securing the claim. This, predictably, has led to a split in authority among the lower courts on the question of whether a lien on a wholly undersecured claim can be [*9] stripped. [9]

Since Nobelman, ***HN11*** a number of Circuit Appeals Courts [10] [*12] as well as Bankruptcy Appellate Panels [11] have considered the issue of whether or not a lien can be stripped when it is completely unsecured under *§ 506(a)* and represent the majority view. Most recently, the Second Circuit in *In re Pond, 252 F.3d 122, 123*, determined "whether, under *11 U.S.C. § 1322(b)(2)*, Chapter 13 debtors

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[6] ***HN6*** Section ***1322(b)(2)*** states that "the plan may … (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; …."

[7] The Tenth Circuit has resolved this issue in the context of a Chapter 11 case. In Wade v. Bradford, 39 F.3d 1126 (10th Cir. 1994), ***HN7*** the court determined that "***§ 506(a)*** directs that the claim be bifurcated into a secured and an unsecured component," id. at 1129, and that the lien can be stripped from the unsecured component in a Chapter 11 case. The court theorized that because a Chapter 11 creditor "may elect to have his claim treated as fully secured," id., by giving up its right to vote on the Chapter 11 reorganization plan, lien stripping must be permitted when the creditor chooses not to give up that right.

[8] ***Section 506(d)*** in relevant part states: ***HN8*** "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void …."

[9] ***HN10*** "A 'wholly undersecured' claim is one for which the supporting collateral holds no remaining value after satisfaction of senior encumbrances." Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.3d 277, 280 n.3 (5th Cir. 2000). For purposes of this opinion, the term "unsecured" is equivalent to "wholly undersecured."

[10] See e.g., Pond v. Farm Specialist Reality (In re Pond), 252 F.3d 122, 126 (2nd Cir. 2001) ("We conclude … that the antimodification exception of Section ***1322(b)(2)*** protects a creditor's rights in a mortgage lien only where the debtor's residence retains enough value … so that the lien is at least partially secured under ***Section 506(a)***."); American General Fin., Inc. v. Dickerson (In re Dickerson), 222 F.3d 924, 926 (11th Cir. 2000) (holding that "§ ***1322(b)(2)*** of the Bankruptcy Code protects only those homestead mortgages that are secured by some existing equity in the debtor's principal residence according to ***§ 506(a)*** …."); Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357, 1360 (11th Cir. 2000) ("Any claim that is wholly unsecured … would not be protected from modification under section ***1322(b)(2)***."); In re Bartee, 212 F.3d at 295 ("The legislative history and general policy considerations reinforce our holding that the Bankruptcy Code does not permit a wholly undersecured lienholder to rely upon the antimodification protections afforded mortgagees whose secured interest in the homestead is supported by at least some value."); McDonald v. Master Fin. Inc. (In re McDonald), 205

can void a lien on their residential property if there is insufficient equity in the residence to cover any portion of that lien." The facts in Pond are similar to those before this Court. The Chapter 13 debtor's residential property [*10] was valued at $ 69,000.00 and had four liens on the property: $ 1,505.18 in real property taxes; a first mortgage for $ 48,995.63; a second mortgage for $ 20,000.00; and the defendant's mortgage of $ 10,630.58. All of the liens, excluding the defendant's lien, totaled $ 70,500.81, an amount in excess of the value of the property and thereby leaving no value to secure defendant's lien. See *id. at 123-24*. The court adopted what is considered the majority view in that "the antimodification exception is triggered only where there is sufficient value in the underlying collateral to cover some portion of a creditor's claim." *Id. at 125*. It determined that because there was no value to secure the defendant's lien, the defendant could not be the holder of a secured claim under *§ 506(a)* as interpreted in Nobelman. ***HN12*** The court then concluded that the "antimodification exception of *Section* ***1322(b)(2)*** protects a creditor's rights in a mortgage lien only where the debtor's residence retains enough value -- after accounting for other encumbrances that have priority over the lien -- so that the lien is at least partially secured under *Section 506(a)*." *Id. at 126*. [*11]

Although this District has not considered the issue, at least two other bankruptcy courts within the Tenth Circuit have followed the majority position. *In re Lee, 161 B.R. 271 (Bankr. W.D. Okla. 1993)*, and more recently, *In re German, 258 B.R. 468 (Bankr. E.D. Okla. 2001)*, both arrived at the same conclusion as the above-cited opinion. German particularly relied on the Supreme Court's reference to *§ 506(a)* in determining whether [*13] a claim is secured. "If the minority's view [that the antimodification clause applies even if the claim is wholly unsecured] is accepted, there would be no need for *§ 506(a)*." *German, 258 B.R. at 470*.

At least one court within the Tenth Circuit has taken the minority position, however. [12] In *In re Bauler, 215 B.R. 628 (Bankr. D.N.M. 1997)*, the debtor attempted to strip the second mortgage, relying on the fact that the value of the first mortgage equaled the value of the property, thereby leaving no remaining collateral for the second mortgage holder. The court denied the debtor's motion, agreeing that the second mortgage was completely unsecured. The court reasoned that the plain language of ***§ 1322(b)(2)***, and a correct reading of Nobelman, prohibited a debtor from stripping a claim secured by an interest in real property because Congress would have used the words "secured claim" instead of "claim" if only secured claims could not be modified. [13] See *id. at 632-33*. ***HN13*** The court in Bauler held that "a completely unsecured mortgage on a principal residence is nevertheless protected under ***§ 1322(b)(2)*** from modification." [*14] *Id. at 632*.

[*15] This Court concurs with the majority view set forth in the above-cited Circuit Court opinions as well as German and Lee, and holds that under *§ 506(a)*, a completely unsecured mortgage holder does not have a secured claim, and is therefore not protected by ***§ 1322(b)(2)*** and its lien can be stripped. It is the Court's opinion that a thorough reading of Nobelman, with the statement that a party should first look to *§ 506(a)* for a "judicial valuation of the collateral to determine the status of the … secured claim," *Nobelman, 508 U.S. at 328*, precludes any other result. If the claim is unsecured, it cannot be "a claim secured only by a security interest in real property that is the debtor's principal residence," ***§ 1322(b)(2)***, and "to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void …." *§ 506(d)*.

CONCLUSION

F.3d 606, 615 (3rd Cir. 2000), cert. denied, ***531 U.S. 822, 148 L. Ed. 2d 31, 121 S. Ct. 66 (2000)*** ("We hold that a wholly unsecured mortgage is not subject to the antimodification clause in § ***1322(b)(2)***.").

[11] See e.g., Domestic Bank v. Mann (In re Mann), 249 B.R. 831, 840 (B.A.P. 1st Cir. 2000) ("Pursuant to ***§ 506(a)*** and § ***1322(b)(2)***, and notwithstanding the antimodification provision in the latter, Chapter 13 plans may void residential real property liens that are wholly unsecured."); Lam v. Investors Thrift (In re Lam), 211 B.R. 36, 41 (B.A.P. 9th Cir. 1997) ("The Nobelman decision holding that section ***1322(b)(2)*** bars a chapter 13 plan from modifying the rights of holders of claims, secured only by the debtor's principal residence, does not apply to holders of totally unsecured claims.").

[12] Some courts outside the Tenth Circuit join in the minority view which is that the real focus should be on the existence of the lien, not the value of the collateral, for the purposes of § ***1322(b)(2)***. For a comprehensive breakdown of the courts and commentators that make up the differing positions, see In re Bartee, 212 F.3d at 289 nn. 15-18 and In re Hoskins, 262 B.R. 693 (Bankr. E.D. Mich. 2001).

[13] The court in Bauler also cited policy considerations in support of its result. It suggested that "too much emphasis would be placed upon the valuation of the debtor's residence if this Court were to require a ***§ 506(a)*** valuation to determine whether the mortgage is protected by § ***1322(b)(2)***." Bauler, 215 B.R. at 633. This is in accord with the Eleventh Circuit's statement that "were we to decide this issue on a clean slate, we would not hold so …. denying that same protection to junior mortgages who lack that penny of equity, places too much weight upon the valuation process." In re Dickerson, 222 F.3d at 926.

The Court determines that because the stated value of the Debtors' residential property does not exceed the first mortgage holder's secured claim of $ 77,699.68, there is no remaining equity in the property to secure the Beneficial claim and, therefore, the claim is deemed to [*16] be entirely unsecured under § 506(a). Because the claim is completely unsecured, Beneficial's lien is void pursuant to § 506(d), and its rights are not protected by the antimodification statute under § 1322(b)(2). Debtors' counsel is directed to prepare a judgment consistent with this opinion.

DATED this 25th day of February, 2002.

William T. Thurman

United States Bankruptcy Judge

Zeman v. Waterman (In re Waterman)

United States District Court for the District of Colorado

March 13, 2012, Decided; March 13, 2012, Filed

Civil Action No. 11-cv-00929-CMA

Reporter
469 B.R. 334; 2012 U.S. Dist. LEXIS 33854; 2012 WL 872623

In re: CHRISTOPHER ***WATERMAN***, Debtor,SALLY J. ***ZEMAN***, Standing Chapter 13 Trustee, Appellant, v. CHRISTOPHER ***WATERMAN***, Appellee.

Prior History: *In re Waterman*, 447 B.R. 324, 2011 Bankr. LEXIS 1137 (Bankr. D. Colo., 2011)

Core Terms

strip, bankruptcy court, junior lien, confirmation, principal residence, ineligible, holders, cases, secured claim, courts, personal liability

Case Summary

Overview

The court affirmed the bankruptcy court's order confirming the debtor's amended Chapter 13 plan because (1) a Chapter 20 debtor could strip off a wholly unsecured lien against his primary residence when the debtor was ineligible for discharge under *11 U.S.C.S. § 1328(f)(1)* by virtue of a prior Chapter 7 bankruptcy discharge; (2) Chapter 20 lien stripping did not violate *11 U.S.C.S. § 1325(a)* because the bank's junior lien was wholly unsecured under *11 U.S.C.S. § 506*; and (3) Chapter 20 lien stripping was not a de facto discharge.

Outcome

Bankruptcy court's order affirmed.

LexisNexis® Headnotes

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Reorganizations > Lien Stripping

HN1 *11 U.S.C.S. § 1328(f)(1)* provides that there is no Chapter 13 discharge if the debtor obtained a Chapter 7 discharge within the past four years.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

HN3 When a debtor files a Chapter 13 petition within four year of receiving a Chapter 7 discharge, he is commonly referred to as a Chapter 20 debtor.

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN2 Where the issue presented on appeal from the bankruptcy court is a legal conclusion, it is subject to de novo review.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > Reorganizations > Lien Stripping

HN4 Chapter 13 is a reorganization chapter, in which lien stripping is expressly and broadly permitted, subject only to very minor qualifications. A Chapter 13 debtor's ability to strip off a lien is qualified by *11 U.S.C.S. § 1322(b)(2)*, which provides that a debtor's plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims. *§ 1322(b)(2)*. This is commonly referred to as the anti-modification provision. By its plain language, the anti-modification provision does not protect holders of unsecured claims. *Section 1322(b)(2)* says, without qualification and in the plainest of English , that a Chapter 13 plan may modify the rights of holders of unsecured claims.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Bankruptcy Law > Claims > Types of Claims > Unsecured Nonpriority Claims

Bankruptcy Law > ... > Types of Claims > Unsecured Priority Claims > General Overview

HN5 *11 U.S.C.S. § 506(a)* governs classification of a particular claim as secured or unsecured, providing that an allowed claim of a creditor secured by a lien on property in which the estate has an interest is a secured claim to the extent of the value of such creditor's interest in the estate's interest and is an unsecured claim to the extent that the value of such creditor's interest in the estate's interest is less than the amount of such allowed claim.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

HN6 Enacted as part of the Bankruptcy Abuse Prevention and Consumer Prevention Act of 2005, *11 U.S.C.S. § 1328(f)(1)* prohibits courts from granting a discharge of all debts provided for in a Chapter 13 plan if the debtor has received a discharge in a case filed under Chapter 7 during the four-year period preceding the date of the order for relief under this chapter.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Reorganizations > Lien Stripping

HN7 A Chapter 20 debtor may strip off a wholly unsecured lien from his principal residence, despite being ineligible for discharge by operation of *11 U.S.C.S. § 1328(f)(1)*. Nothing in the Bankruptcy Code expressly requires a Chapter 20 debtor to be eligible for discharge in order to strip off a creditor's wholly unsecured lien.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Reorganizations > Lien Stripping

HN8 *11 U.S.C.S. § 1325(a)(5)* provides that with respect to each allowed secured claim provided for by the plan the holder of a secured claim retains the lien until the earlier of the payment of the underlying debt determined under nonbankruptcy law or discharge under *11 U.S.C.S. § 1328*. By its own terms, *§ 1325(a)* only protects the holders of allowed secured claims. A creditor entitled to assert provisions of *§ 1325(a)* must be the holder of an allowed secured claim. Where a junior lien is wholly unsecured, *§ 1325(a)* does not preclude the debtor from stripping off the lien.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Reorganizations > Lien Stripping

HN9 The language of *11 U.S.C.S. § 1328(f)(1)* is clear: it prohibits only a discharge of all debts provided for in the plan. The argument that Chapter 20 lien stripping is tantamount to a discharge gives short shrift to the plain language of this *§ 1328(f)(1)*.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Reorganizations > Lien Stripping

HN11 There is no provision in the Bankruptcy Code expressly providing that a Chapter 20 debtor may not modify or strip off wholly unsecured liens. The Bankruptcy Code does not preclude a Chapter 20 debtor from enjoying all the rights of a Chapter 13 debtor, with the exception of the right to a discharge.

Governments > Legislation > Interpretation

HN12 The starting point for statutory interpretation is the language of the statute. When the statutory language is clear, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Reorganizations > Lien Stripping

HN10 A bankruptcy discharge extinguishes only one mode of enforcing a claim, namely, an action against the debtor in personam, while leaving intact another, namely, an action against the debtor in rem. Thus, a discharge releases a debtor from in personam liability, whereas a strip off affects a creditor's ability to proceed against the debtor in rem.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Reorganizations > Lien Stripping

HN13 The enactment of *11 U.S.C.S. § 1328(f)(1)* clearly evinces Congress's intent to limit the relief available to Chapter 20 debtors. However, Congress did not completely foreclose the availability of Chapter 13 to debtors who had previously received relief in Chapter 7.

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

Bankruptcy Law > Reorganizations > Lien Stripping

HN14 Allowing a Chapter 20 debtor to propose to strip off a wholly unsecured lien from his primary residence does not mean that the rights of his creditors will not be adequately safeguarded. Bankruptcy courts still have an independent

duty to determine whether a debtor's plan meets all the requirements for confirmation.

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

HN15 The Bankruptcy Code obligates bankruptcy courts to direct a debtor to conform his plan to the requirements of the Code.

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

Bankruptcy Law > Reorganizations > Lien Stripping

HN16 One requirement of paramount importance in a Chapter 20 situation is that the debtor's plan has been proposed in good faith and not by any means forbidden by law. *11 U.S.C.S. § 1325(a)(3)*. This is not an empty requirement. The filing of a Chapter 13 bankruptcy on the heels of having received a Chapter 7 discharge should raise a red flag as to whether the Chapter 20 plan is proposed primarily as an end-run around Chapter 7, or a second bite at the bankruptcy apple. Thus, bankruptcy courts should carefully scrutinize a Chapter 20 debtor's plan to ensure that it was proposed in good faith. However, the fact that some Chapter 20 debtors may not propose their plans in good faith is not reason to bar every Chapter 20 debtor from utilizing the lien stripping tools made available to him by Congress.

Counsel: [**1] For Sally ***Zeman***, The Standing Chapter 13 Trustee, Appellant: Britney Diane Beall-Eder, LEAD ATTORNEY, Deanna L. Westfall, Castle Stawiarski, LLC, Denver, CO.

For Christopher ***Waterman***, Appellee: Amy Dawn Desai, Bankruptcy Law Professionals of Colorado, Denver, CO; Jesse Chad Aschenberg, Aschenberg Law Group, P.C., Denver, CO.

Judges: CHRISTINE M. ARGUELLO, United States District Judge.

Opinion by: CHRISTINE M. ARGUELLO

Opinion

[*336] **ORDER AFFIRMING BANKRUPTCY COURT'S ORDER**

This matter is before the Court on the Chapter 13 Trustee's ("Trustee") appeal of the bankruptcy court's March 23, 2011 Order that confirmed Debtor Christopher ***Waterman***'s ("Debtor") second Amended Chapter 13 Plan. (Doc. # 54.)[1] The Court has jurisdiction over this appeal from the final order of the bankruptcy court. *See 28 U.S.C. § 158(a)(1), (c)(1)*.

The sole issue in this appeal is one that has generated a nationwide split among bankruptcy courts: whether a Chapter 13 debtor may "strip off"[2] a wholly unsecured lien against his primary residence when the debtor is ineligible for discharge by virtue of a prior Chapter 7 bankruptcy discharge. *See* ***HN1*** *11 U.S.C. § 1328(f)(1)* (no Chapter 13 discharge if the debtor obtained a Chapter 7 discharge within the past four years). Based on the facts of this case, the bankruptcy court said "yes." The Court agrees.

I. BACKGROUND[3]

Debtor filed for relief under Chapter [**3] 7 of the Bankruptcy Code on January 13, 2009. The case was designated as Case No. 09-10457-SBB ("Chapter 7 Case"). Debtor listed his residence as 9982 Hawthorne Street, Highlands Ranch, Colorado 80126 ("Residence"). Debtor stated in his Schedule D filed in the Chapter 7 Case that First National Bank held a second deed of trust on the Residence. On April 23, 2009, Debtor was granted a discharge in the Chapter 7 Case.

[*337] Despite his Chapter 7 discharge, Debtor, a mortgage broker, continued to endure economic hardship and fell

[1] "(Doc. # 54)" is an example of the convention used by this Court to identify the docket number assigned to a specific paper by the court's Case Management and Electronic Case Filing system. In this Order, unless otherwise noted, the convention is used to identify the docket number in the Debtor's Chapter 13 case filed with the Bankruptcy Court, *i.e.*, Case Number 10-35794. The bankruptcy court's order has been [**2] published in the Bankruptcy Reporter at *In re* ***Waterman***, 447 B.R. 324 (Bankr. D. Colo. 2011).

[2] "The term 'strip off' is colloquially used when, there being no collateral for a mortgage, the entire lien is proposed to be avoided. The term 'strip down' is used when, there being insufficient collateral value for a mortgage, the lien is proposed to be reduced to the value of the collateral." *In re Fair*, 450 B.R. 853, 855 (E.D. Wis. 2011) (quoting *In re Mann*, 249 B.R. 831, 832 n.1 (1st Cir. B.A.P. 2000)).

[3] There are no factual disputes in this appeal. These facts are taken from the parties' appellate briefs and from the bankruptcy court's Order.

behind on his mortgage payments and other financial obligations. Consequently, on October 11, 2010, Debtor filed a Chapter 13 petition. (Doc. # 1.) The case was designated as Case No. 10-35794 (″Chapter 13 Case″).

On November 9, 2010, Debtor filed a Motion to Determine Secured Status Pursuant to *11 U.S.C. § 506*,[4] seeking a determination that the second deed of trust on his Residence was wholly unsecured, and an order requiring First National Bank to remove the junior lien within 30 days of completion of Debtor's Chapter 13 Plan and an order closing the case. (Doc. # 22.) First National Bank did not object to Debtor's Motion.

On December 28, 2010, Debtor filed his first Amended Chapter 13 Plan, proposing to cure the arrearage on his first lien in order to keep the Residence, and to strip off First National Bank's junior lien because of a significant reduction in the value of the Residence. (Doc. # 34.) On January 5, 2011, the Trustee objected to Debtor's plan insofar as it proposed stripping off First National Bank's junior lien. (Doc. # 42.) That same day, Debtor filed a brief supporting the argument that he could strip off First National Bank's junior lien, despite being ineligible for a Chapter 13 discharge under *11 U.S.C. § 1328(f)(1)*. (Doc. # 43.) On January 31, 2011, Debtor filed a second Amended Chapter 13 Plan (Doc. # 48, the ″Plan″), containing the same terms by which Debtor proposed to strip off First National Bank's junior lien.

On March 23, 2011, the bankruptcy court issued a Memorandum Opinion and Order, finding that First National Bank's ″lien may be 'stripped' consistent with *11 U.S.C. § 506*″ provided that the Plan ″is otherwise confirmable and the Debtor completes his plan.″ (Doc. # 54 at 7.) After determining that Debtor's Plan complied with [**5] all other applicable provisions of Chapter 13 and the Bankruptcy Code, including finding that Debtor had filed both his Chapter 13 Petition and the Plan in good faith, the bankruptcy court confirmed the Plan. (*Id.*) The Trustee appealed.

II. STATEMENT OF ISSUE AND STANDARD OF REVIEW

The issue presented in this bankruptcy appeal is whether the bankruptcy court erred in finding that a Chapter 13 debtor, who less than four years before had filed a Chapter 7 bankruptcy and obtained a discharge of personal liability on his debts, *i.e.*, a Chapter 20 debtor,[5] can strip off a wholly unsecured second lien on his home. ***HN2*** Because the issue presented is a legal conclusion, it is subject to *de novo* review. *In re Baldwin*, 593 F.3d 1155, 1159 (10th Cir. 2010).

III. ANALYSIS

A. LIEN STRIPPING IN A TYPICAL CHAPTER 13 CASE

HN4 Chapter 13 is a reorganization chapter, in which ″lien stripping is expressly and broadly permitted, subject only to very minor qualifications.″ *Enewally v. Washington Mut. Bank (In re Enewally), 368 F.3d 1165, 1170 (9th Cir. 2004)* [**6] (quoting *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.3d 277, 291 n.21 (5th Cir. 2000)*). A [*338] Chapter 13 debtor's ability to strip off a lien is qualified by *§ 1322(b)(2)*, which provides that a debtor's plan may ″modify the rights of holders of secured claims, **other than a claim secured only by a security interest in real property that is the debtor's principal residence**, or of holders of unsecured claims.″ *§ 1322(b)(2)* (emphasis added). The bolded text is commonly referred to as the ″anti-modification provision.″ *See In re Jennings, 454 B.R. 252, 255 (Bankr. N.D. Ga. 2011)*. By its plain language, the anti-modification provision does not protect holders of unsecured claims. *See Lane v. W. Interstate Bancorp (In re Lane), 280 F.3d 663, 668 (6th Cir. 2002)* (″*Section 1322(b)(2)* says, without qualification and in the plainest of English, that a Chapter 13 plan 'may' modify the rights of 'holders of unsecured claims.'″); *In re Fisette, 455 B.R. 177, 182 (8th Cir. B.A.P. 2011)* (listing cases).

In this case, the parties agree that the anti-modification provision does not apply because the junior lien held by First National Bank against Debtor's Residence is wholly unsecured.[6] [**7] Thus, if Debtor had not previously discharged his personal liability in his Chapter 7 case, it is undisputed that he could strip off First National Bank's wholly unsecured junior lien in his Chapter 13 case.

B. LIEN STRIPPING WHERE DEBTOR IS INELIGIBLE FOR CHAPTER 13 DISCHARGE UNDER *11 U.S.C. § 1328(f)(1)*

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[4] All further section references herein are [**4] to the Bankruptcy Code, ***11 U.S.C. §§ 101-1532***.

[5] ***HN3*** When a debtor files a Chapter 13 petition within four year of receiving a Chapter 7 discharge, he is commonly referred to as a ″Chapter 20 debtor.″ *In re Fisette*, 455 B.R. 177, 184 (8th Cir. B.A.P. 2011).

[6] ***HN5*** ***Section 506(a)*** governs classification of a particular claim as secured or unsecured, providing that:

HN6 Enacted as part of the Bankruptcy Abuse Prevention and Consumer Prevention Act of 2005 ("BAPCPA"), § 1328(f)(1) prohibits courts from granting a discharge of all debts provided for in a Chapter 13 plan "if the debtor has received a discharge . . . in a case filed under chapter 7 . . . during the 4-year period preceding the date of the order for relief under this chapter."

Although § 1328(f)(1) expressly makes a Chapter 20 debtor [**8] ineligible for discharge, courts disagree as to whether it also precludes a Chapter 20 debtor from stripping off wholly unsecured liens from his primary residence. *See* Jennings, 454 B.R. at 256 n.7 (listing cases splitting on the issue of whether to allow Chapter 20 debtors to strip off wholly unsecured liens). Some bankruptcy courts hold that a Chapter 20 debtor's ineligibility for discharge bars him from stripping off wholly unsecured liens. *See, e.g.,* In re Gerardin, 447 B.R. 342, 347-48 (Bankr. S.D. Fla. 2011); In re Fenn, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010); In re Blosser, No. 07-28223, 2009 Bankr. LEXIS 1049, 2009 WL 1064455, at *1 (Bankr. E.D. Wis. Apr. 15, 2009) (unpublished); In re Jarvis, 390 B.R. 600, 605-06 (Bankr. C.D. Ill. 2008). The Trustee urges the Court to adopt this view, which is also the position taken by one bankruptcy court in this district. *See* In re Mendoza, No. 09-22395, 2010 Bankr. LEXIS 664, 2010 WL 736834, at *4 (Bankr. D. Colo. Jan. 21, 2010) (unpublished).

Other courts have held that ***HN7*** a Chapter 20 debtor may strip off a wholly unsecured lien from his principal residence, despite being ineligible for discharge by operation of § 1328(f)(1). These courts emphasize that nothing in the Bankruptcy Code [**9] expressly requires a Chapter [*339] 20 debtor to be eligible for discharge in order to strip off a creditor's wholly unsecured lien. *See, e.g.,* In re Gloster, 459 B.R. 200, 205 (Bankr. D.N.J. 2011); In re Okosisi, 451 B.R. 90, 103 (Bankr. D. Nev. 2011); In re Tran, 431 B.R. 230, 237 (Bankr. N.D. Cal. 2010); In re Grignon, No. 10-34196, 2010 Bankr. LEXIS 4279, 2010 WL 5067440, at *4 (Bankr. D. Or. Dec. 7, 2010) (unpublished); In re Hill, 440 B.R. 176, 182 (Bankr. S.D. Cal. 2010). This Court found only two appellate court decisions that addressed this issue and both found that a Chapter 20 debtor may strip off a wholly unsecured lien from his principal residence. *See* In re Fair, 450 B.R. 853, 855 (E.D. Wis. 2011); In re Fisette, 455 B.R. 177, 185 (8th Cir. B.A.P. 2011). For the following reasons, the Court affirms the bankruptcy court's determination that a Chapter 20 debtor may strip off a wholly unsecured lien from his principal residence, despite being ineligible for a discharge.

1. Chapter 20 Lien Stripping Does Not Violate § 1325(a)

The Trustee argues that the Court should deny confirmation of Debtor's proposed plan on the basis that it violates the requirements of § 1325(a)(5). Many of the courts that have refused [**10] to allow lien stripping in Chapter 20 cases have also relied on § 1325(a)(5) for support. *See* Fenn, 428 B.R. at 500; In re Lilly, 378 B.R. 232, 236-37 (Bankr. C.D. Ill. 2007).

HN8 Section 1325(a)(5) provides that "with respect to each **allowed secured claim** provided for by the plan" the holder of a secured claim retains the lien until "the earlier of the payment of the underlying debt determined under nonbankruptcy law or discharge under [§] 1328." By its own terms, § 1325(a) only protects the holders of allowed secured claims. *See* In re Frazier, 448 B.R. 803, 811 (Bankr. E.D. Cal. 2011) ("A creditor entitled to assert provisions of 11 U.S.C. § 1325(a) must be the holder of an 'allowed secured claim.'"). In this case, it is undisputed that First National Bank's junior lien is **wholly unsecured**; therefore, § 1325(a) does not preclude Debtor from stripping off the lien. *See* Okosisi, 451 B.R. at 98 (listing cases that have found § 1325(a)(5) inapplicable in Chapter 20 cases).

2. Chapter 20 Lien Stripping is Not a De Facto Discharge

Some bankruptcy courts have expressed concern that allowing Chapter 20 lien stripping amounts to a de facto discharge, and concluded that Congress could not have intended [**11] to allow this practice. *See, e.g.,* Fenn 428 B.R. at 500; Mendoza, 2010 Bankr. LEXIS 664, 2010 WL 736834, at *4. However, ***HN9*** the language of § 1328(f)(1) is clear: it prohibits only "a **discharge** of all debts provided for in the plan."[7] (Emphasis added.) The argument that Chapter 20 lien stripping is tantamount to a discharge give

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

[7] ***HN11*** There is no provision in the Bankruptcy Code expressly providing that a Chapter 20 debtor may not modify or strip off wholly unsecured liens. *See* **Waterman**, 447 B.R. at 328; Tran, 431 B.R. at 235-37 (citing various Bankruptcy Code provisions and finding that

short shrift to the plain language of this § 1328(f)(1).[8] [*340] *See, e.g.*, Fair, 450 B.R. at 857 (″none of the cases which refuse to allow lien stripping in a no-discharge chapter 13 case acknowledge or confront the plain language of § 1328(f)(1)″). Moreover, the Court disagrees with the view that Chapter 20 lien stripping is a de facto discharge. Simply put, stripping off a lien is not the same thing as being discharged from personal liability for the debt underlying that lien. As the Supreme Court has explained, ***HN10*** a bankruptcy discharge ″extinguishes only one mode of enforcing a claim — namely, an action against the debtor *in personam* — while leaving intact another - namely, an action against the debtor *in rem*.″ Johnson v. Home State Bank, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). Thus, a discharge releases a debtor from *in personam* liability, whereas a strip off affects a creditor's ability to proceed against [**12] the debtor *in rem*. Fisette, 455 B.R. at 187 n.9.

When Congress amends the Bankruptcy Code, it does not write ″on a clean slate.″ Dewsnup, 502 U.S. at 419. The Court ″must presume that Congress understood the distinction between discharging *in personam* liability and modifying the terms of an *in rem* lien when it enacted § 1328(f)(1).″ Fair, 450 B.R. at 857. By stripping off a wholly unsecured junior lien [**13] from his principal residence, a debtor removes the lien from his property, *i.e.*, the *in rem* liability. However, the strip off itself does not effect a discharge of a debtor's personal liability for repayment of the underlying debt. Although Debtor is not obligated to repay the underlying debt on his principal residence in this case, that discharge of personal liability on the underlying debt occurred as a result of his Chapter 7 discharge, not as a result of the Chapter 13 strip off of the lien.

HN13 The enactment of § 1328(f)(1) clearly evinces Congress's intent to limit the relief available to Chapter 20 debtors. However, Congress did not completely foreclose the availability of Chapter 13 to debtors who had previously received relief in Chapter 7. *See* Branigan v. Bateman, 515 F.3d 272, 283-84 (4th Cir. 2008); Johnson, 501 U.S. at 87. In many Chapter 13 cases, ″it is the ability to reorganize one's financial life and pay off debts, not the ability to receive a discharge, that is the debtor's 'holy grail.'″ Bateman, 515 F.3d at 283. In short, if Congress had wanted to prohibit a Chapter 20 debtor from stripping off a wholly unsecured lien on his principal residence, it could have easily [**14] done so. As it did not, the Court will not read additional restrictions into the statute.

3. Good Faith Concerns

Finally, some bankruptcy courts have not allowed lien stripping in a Chapter 20 context on the basis that it constitutes an ″abuse of process.″ *See* Mendoza, 2010 Bankr. LEXIS 664, 2010 WL 736834, at *5. However, ***HN14*** allowing a Chapter 20 debtor to propose to strip off a wholly unsecured lien from his primary residence does not mean that the rights of his creditors will not be adequately safeguarded. Bankruptcy courts still have an independent duty to determine whether a debtor's plan meets all the requirements for confirmation. *See* United Student Aid Funds, Inc. v. Espinosa, U.S. , 130 S.Ct. 1367, 1381, 176 L. Ed. 2d 158 (2010) (finding that ***HN15*** the Bankruptcy Code obligates bankruptcy courts to direct a debtor to conform his plan to the requirements of the Code). ***HN16*** One requirement of paramount importance in a Chapter 20 situation is that the debtor's ″plan has been proposed in good fatih [*341] and not by any means forbidden by law.″ § 1325(a)(3). This is not an empty requirement.[9] The filing of a Chapter 13 bankruptcy on the heels of having received a Chapter 7 discharge should raise a red flag as to whether the Chapter 20 [**15] plan is ″proposed primarily as an end-run around Chapter 7, or a second bite at the bankruptcy apple.″ Mendoza, 2010 Bankr. LEXIS 664, 2010 WL 736834, at *5. Thus, bankruptcy courts should carefully scrutinize a Chapter 20 debtor's plan to ensure that it was proposed in good faith. However, the fact that some Chapter 20 debtors may not propose their plans in good faith is not reason to bar every Chapter 20 debtor from utilizing the lien stripping tools made available to him by Congress.

IV. CONCLUSION

the Bankruptcy Code does not preclude a Chapter 20 debtor from enjoying all the rights of a chapter 13 debtor, with the exception of the right to a discharge).

[8] ***HN12*** The starting point for statutory interpretation is the language of the statute. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). When the statutory language is clear, ″the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.″ Lamie v. United States Tr., 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004).

[9] Indeed, some courts, although finding that § 1328(f)(1) does not prohibit a Chapter 20 debtor from stripping off a wholly unsecured lien, have declined to confirm the debtor's plan after finding that the plan was proposed in bad faith. *See* Tran, 431 B.R. at 237 (denying plan confirmation after finding that debtor had filed Chapter 13 petition in bad faith).

Accordingly, it is ORDERED that the March 23, 2011 Order of the Bankruptcy Court (Doc. # 54) confirming Debtor's Amended Chapter 13 Plan is AFFIRMED.

DATED: March 13, 2012

BY THE COURT:

/s/ Christine M. Arguello

CHRISTINE M. ARGUELLO

United States District Judge

Case name/cite	Chapter	Status of Property	Holdings
Riverplace East Housing Corp. v. Rosenfeld 23 F.3d 833 (4th Cir. 1994) (Virginia)	7	Never occupied by Debtor	• In order to terminate liability for HOA assessments, must transfer title, if necessary by deed in lieu of foreclosure. • Obligation to pay assessments arose from continued post-petition ownership of the property and not from a pre-petition contractual obligation • Section 523(a)(16) was added after this decision
Foster v. Double R. Ranch Assoc. 435 B.R. 650 (9th Cir. BAP 2010) (Washington)	13	Continued to be lived in by Debtor	• "You stay – you pay" – if debtor continues to reside in property after completing plan, the obligation may be considered long-term debt under § 1322(b)(5) and excepted from discharge under § 1328(a) • Despite parties agreement that § 523(a)(16) is in applicable to the discharge under § 1328(a), Court "doubt[ed] the omission of § 1328(a) in § 523(a)(16) or vice versa evinces a legislative intent to discharge postpetition HOA dues under § 1328(a) when the debtor uses the cure and maintenance provision under chapter 13 to say in his or her property after the order of relief." • As a matter of law, personal liability for HOA dues continues postpetition so long as he maintains legal, equitable or possessory interest and is unaffected by discharge
In re Heflin 2010 WL 1417776 (Bankr. E.D. Va. 2010)	13	Surrendered in plan; Relief from Stay granted to Lender	• HOA objected to confirmation as plan does not provide for payment of ongoing dues – objection overruled and plan confirmed. • HOA cites no authority that secured creditors are entitled to post-petition payments on surrendered collateral • Section 523(a)(16) does not apply in chapter 13 except for hardship discharge requests; standard chapter 13 discharge is broader than discharge granted in 7, 11 or 12 and does *not* exclude post petition HOA dues (emphasis in original). • Even if § 523(a)(16) applied, creditor not entitled to preferred just because it is a non-dischargeable debt
In re Heck, 2011 WL 133015 (Bankr. N.D. Cal. 2011)	7	Statement of Intent to surrender real property	• HOA collection efforts post-discharge do not violate discharge injunction as Debtors continue to hold legal title to the real property – pursuant to § 523(a)(16), debt is not discharged under § 727 • Bankruptcy Code does not impose a duty on secured creditors to act upon Debtors' Statement of Intention • Bankruptcy Court does not have subject matter jurisdiction to enter injunctive or declaratory relief – do not arise under the Code and not related to outcome of case
In re Burgueno, 451 B.R. 1 (Bankr. Ariz.	11	Property vacated;	• Stay relief does not transfer legal title, thus HOA fees and legal fees associated with

2011)		plan surrenders investment property; Relief from Stay granted to Lender	them are non dischargeable under § 523(a)(16) • Legal title was not transferred as part of the relief from stay order or confirmation order – warned about Espinosa issues by drafting language in plan that HOA dues would be discharged; but suggested Debtor may be able quit claim the property pursuant to § 363(b)(1) or as provision in plan under § 1123(a)(5)(B)
In re Pigg, 453 B.R. 728 (Bankr. M.D. Tenn 2011)	7	Property vacated; Lender changed locks on unit; Relief from stay granted to Lender	• HOA obtained priority lien over Lender as pursuant to By-Laws, the Lender had taken possession by changing the locks, excluding even the Debtor and maintaining insurance on the property • With change to § 523(a)(16) in 2005, and with the subsequent real estate market collapse, if the Lender never forecloses, the homeowner's liability for HOA fees continues in perpetuity • Using § 105, the Court vacated the discharge, reappointed chapter 7 trustee, set aside the no-distribution report, set aside order granting relief from stay and required the chapter 7 trustee sell the real property • Court found equity demanded a remedy which balances the rights of the creditors with the Debtor's right to fresh start. The inaction of the Lender and HOA was consent for a § 363 sale as they had knowledge of third party investor interested in property provided by the Debtor and the failure to accept deed in lieu of foreclosure
In re Spencer, 457 B.R. 601 (E.D. Mich. 2011)	13	Property vacated; plan surrenders the real property; relief from stay granted to lender	• Debtor's obligation to pay HOA fees depends on remaining as owner of the property – undisputed Debtor intends to surrender – surrender under Bankruptcy Code merely establishes the debtor will not oppose transfer of title. It is undisputed Lender has not taken title – absent some further action (foreclosure, deed in lieu of foreclosure, short sale), surrender does not divest a debtor of ownership. • Debtor became liable for HOA dues each month out of continued ownership of the real property rather than pre-existing contractual requirement. • Divesting ownership cuts off all future liability – the Court presumes the Debtor can transfer real property to avoid ongoing liability, absent evidence of any attempt to transfer ownership by tendering deed in lieu of foreclosure, no reason to assume efforts would be fruitless
In re Barr, 457 B.R. 733 (Bankr. N.D. Ill.	7	Continued to be lived	• Case filed 2 days after flood hit the Debtors' condo – special assessment levied 2 months later for the flood repairs

2011)		in by Debtor	• Section 523(a)(16) applicable and special assessment not discharged as the it was levied after the case was filed (the flood being the cause which occurred pre-petition did not matter). • Debtors enjoyed the benefits of post-petition ownership • Ruling provides enforcement of Congressional concern that other homeowners not be burdened with unpaid assessments by debtors who continue to own, occupy or benefit from their unit • No violation of discharge injunction for HOA collection efforts
In re Colon, 465 B.R. 657 (Bankr. D. Utah 2011)	13	Vacated prior to case being filed; surrendered in plan; Lender had Relief from Stay	• HOA filed for relief from stay to pursue HOA postpetition assessments or declaratory judgment that HOA postpetition assessments are not subject to automatic stay and are nondischargeable • Section 523(a)(16) does not apply to discharge under § 1328(a) – Congress' intent should not be inferred from omissions but rather the plain reading of the statutes • Debtors are not enjoying the benefits of the HOA – to hold debtors liable for post petition HOA dues when no longer living in property and surrendered to lender is inequitable and in contrast to plan language of 1328(a)
In re Fristoe, 2012 WL 4483891 (Bankr. D. Utah 2012)	7	Vacated, utilities shut off; Intent to Surrender filed; Lender changed the locks on property but no relief from stay filed;	• Seeking equitable relief under § 105 to debtors who have abandoned real property but remain subject to nondischargeable postpetition HOA fees. Lender refused to accept previous request for deed in lieu of foreclosure • "Court does not believe it has the power to order the relief requested under § 105(a), and therefore declines to grant the motion" as it would be inconsistent with other more specific provisions of the bankruptcy code - §§ 362 and 363 • 2005 change to § 523(a)(16) took away the requirement that the debtor occupy or exercise control over the unit – now so long as debtors have legal, equitable or possessory interest in unit
In re Khan, 504 B.R. 409 (Bankr. D. Md. 2014)	13	Property vacated – plan surrenders to secured lenders	• HOA sought relief from stay to pursue postpetition dues - granted • If Debtor receives discharge under § 1328(a), his personal liability would be discharged; however, until discharge is entered, the Debtor remains obligated for payment of these fees • After § 1328(a) discharge of the personal liability – the lien would remain on the property as covenant running with the land as an *in rem* obligation
In re Turkal, 507 B.R. 342 (Bankr. D. Kan. 2014)	13	Property vacated – plan surrendered	• Debtor brought adversary proceeding to determine dischargeability of debt • HOA was not listed as creditor in bankruptcy schedules – HOA did not receive notice

		property	of bankruptcy nor any amendments • Rather than deciding on HOA dues accrued post or pre petition, the Court found the debt nondischargeable under § 523(a)(3)as the debt had not been listed in the bankruptcy
In re Davis, No. 13-29651 (Bankr. D. Co. filed June 19, 2014)	13	Property vacated – plan surrendered property	• HOA objected to confirmation asserting debt could not be discharged • Under Washington (property located) and Colorado (case filed location) law, HOA assessments are covenants running with the land • Agreeing with Foster court that "as a matter of law, debtor's personal liability for HOA dues continues postpetition as long as he maintains his legal, equitable or possessory interest in the property and is unaffected by his discharge." • Noted the obligation ends when Debtor ceases to have legal, equitable or possessory interest in the property
In Lopez, 512 B.R. 663 (Bankr. D. Co. 2014)	13	Continued to be lived in by Debtor	• HOA objected to plan that bifurcates lien into superpriority and unsecured portions • Using state law, determined the HOA was entitled to superpriority status above first mortgage for the 6 months preceding the initiation of foreclosure proceedings • The HOA lien is eligible to be modified under the plan as § 1322(b)(2) did not apply based on the statutory nature of the lien. The HOA lien is not insulated from bifurcation under § 506(a) and avoidance under § 506(d)
In re Coonfield, 517 B.R. 239 (Bankr. E.D. Wash. 2014)	13	Property vacated – plan proposes transfer of title to Lender	• Lender and HOA objected to confirmation with title transfer provision • In Washington, cannot complete transfer of real property unless the transferee accepts, which Lender is not willing to do. • But Debtors do not need to divest themselves of legal title to avoid personal liability for ongoing assessments • Discharge exceptions under § 523(a) do not apply to § 1328(a) unless specifically enumerated; thus personal liability would be discharged at completion
In re Watt, 2014 WL 5304703 (Bankr. D. Or. 2014)	13	Property vacated – plan provided for vesting of real	• Lender objected to vesting provision in plan – "this vesting shall include all of Debtors legal and equitable rights" to the Lender • Under § 1322(b)(9), the plan may "provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity."

		property in Lender; Relief from Stay granted to Lender	Nothing in this provision requires the Lender's consent as required in § 1325(a)(5)(A) and instead could be by surrender § 1325(a)(5)(C). • Debtors must satisfy the good faith requirement under § 1322(a)(3) – but no evidence the vesting was an attempt to relieve the Debtors from responsibility of a nuisance or environmental problems. • Objection to confirmation overruled – plan confirmed.

TAKEAWAYS FROM THE CASE ANALYSIS

- Appears almost no escaping liability in chapter 7 context for post-filing HOA liabilities
  - If consult with client that would otherwise be eligible for chapter 7 (below median or fails means test), may want to consider advising for chapter 13 to get the personal liability discharge (if in jurisdiction that allows)
  - Perhaps if creditor/HOA failed to comply with reasonable efforts to dispose of property (such as bringing investor or buyer to parties), could have bankruptcy court assistance such as Pigg or state law claim for contract issues (breach of good faith and fair dealing, failure to mitigate, etc.)
  - New case – new date of relief, possible to discharge in subsequent bankruptcy
- Some jurisdictions allow chapter 13 discharge of personal liability while the *in rem* obligation remains
  - "You stay – you pay" mentality survives, if unit is not vacated, likely personal liability would remain
  - Possible that HOA may seek relief from stay during case, since not discharged until completion
    - Possible defense that granting relief from stay would affect the debtor's ability to reorganize as it would create an additional expense not otherwise provided for in the budget
    - Possible defense that would be preferential treatment to unsecured creditor (if no equity in home)
- Surrender and vesting a possible option for chapter 11 (§ 1123(a)(5)(B))/chapter 13 (§ 1322(b)(9))
  - State law issues regarding completion of transfer?
  - Is acceptance under § 1325(b)(5) required?
    - YES: In re Rosa, 495 B.R. 522 (Bankr. D. Haw. 2013) and In re Rose, 512 B.R. 790 (Bankr. W.D.N.C. 2014)
    - NO: In re Watt, 2014 WL 5304703 (Bankr. D. Or. 2014)

HOMEOWNERS ASSOCIATIONS

I don't care to belong to any club that will have me as a member – Groucho Marx

River Place East Housing Corp. v. Rosenfeld, 23 F.3d 833 (4th Cir. 1994): in order to terminate liability for HOA assessments, Debtor must transfer title. Debtor has post-petition liability due to the continued ownership of the property, not pre-petition contractual obligation.

1994 **Bankruptcy Reform Act** – added 11 U.S.C. § 523(a)(16)

> 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 a 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 – (A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or (B) 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.

- Occupancy and control over the unit mattered
- Approximately 21 years later, section amended

2005 **Bankruptcy Abuse Prevention and Consumer Protection Act** – amended 11 U.S.C.

> 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 a 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

§523(a)(16)

- Occupancy/control no longer required – extends circumstances that debtors would remain liable for HOA dues
- United State housing market correction occurred in 2005 – ("bubble bursting")
- Then housing / subprime crisis hits in about 2007
    - Takeover of Fannie Mae/Freddie Mac September 2008
    - Numerous bankruptcies, receiverships and takeovers of financial institutions

- In 2011, LPS Applied Analytics determined average loan in foreclosure has been delinquent for 631 days – nearly 21 months

EFFECT OF 11 U.S.C. § 523(a)(16)

Chapter 7 v. chapter 13

- 727 – no discharge of post-petition HOA dues
  - Pre-petition HOA dues dischargeable
  - Post-petition HOA liabilities could be dischargeable in future bankruptcy
- 1328(b) "Hardship discharge" – no discharge of post-petition HOA dues
  - Pre-petition HOA dues dischargeable
- 1328(a) – standard discharge still a "super" discharge?
  - **"**We doubt the omission of § 1328(a) in § 526(a)(16) or vice versa evinces a legislative intent to discharge postpetition HOA dues under § 1328(a) when the debtor uses the cure and maintenance provisions under chapter 13 to stay in his or her property after the order for relief." Foster v. Double R Ranch Assoc., 435 B.R. 650 at 659 (B.A.P. 9th Cir. 2010)
    - **LIMITED TO USING CURE AND MAINTAIN UNDER § 1322(b)(5)?**
      - Later cases in 9th Circuit allow discharge when property vacated
  - Discharge exceptions do not apply to § 1328(a) unless specifically enumerated – in light of Congress' determination that debts from § 523 are dischargeable absent a specific exception, post petition HOA dues are dischargeable under § 1328(a). "If Congress intended to categorically except debts for ongoing association assessments from discharge, it would have said so." In re Coonfield, 517 B.R. 239, 243-244 (Bankr. E.D. Wash. 2014)
    - "By contrast, a chapter 13 discharge that is granted upon completion of plan payments is significantly broader than the discharge granted an individual debtor under chapter 7, 11 or 12 and does *not* exclude post petition home owner association dues." In re Heflin, 2010 WL 1417776 (Bankr. E.D. Va. 2010).

Additional material: Jeffrey S. Adams, *Rewriting 11 U.S.C. § 523(a)(16): The Problems of Delays Foreclosure and Judicial Activism*, 30 Emory Bankr. Dev. J. 347 (2014)