No. 10-02278

IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re JEANNIE MARIE LINDSKOG,
Debtor.

JEANNIE MARIE LINDSKOG

v.

M&I MARSHALL & ILSLEY BANK

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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ARGUMENT

"Nothing in the Bankruptcy Code precludes a debtor who is not eligible for a discharge from filing a chapter 13 case, obtaining confirmation of a chapter 13 plan, and with the exception of the right to a discharge, from enjoying all the rights of a chapter 13 debtor, including the right to strip off liens." *In re Tran*, 431 B. R. 230 (Bankr. N.D. Cal. 2010). "The Court concludes as a matter of law that a discharge is not a necessary prerequisite to a lien strip." Judge Steven W. Rhodes, *In re Coryell*, No. 09-54760, Hearing Transcript at 8, Addendum A.

I. The right to modify secured claims in chapter 13 is universally accepted, and that right, combined with claim bifurcation, permits debtors to strip off wholly unsecured mortgages without a discharge.

Since the Bankruptcy Code was enacted in 1978, debtors' ability to modify creditors' rights in chapter 13 has been explicit and broad. The plain language of section 1322(b)(2) permits debtors to "modify the rights of holders of secured claims…or holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." In creating this section of the Code, Congress made a definitive and significant departure from the former chapter XIII of the Bankruptcy Act of 1898, which gave debtors no effective way for dealing with secured creditors.[1]

This ability to modify creditors' rights in chapter 13 is constrained by a limited exception for claims only secured by a security interest in real property that is the debtor's principal residence. 11 U.S.C. § 1322(b)(2). This special protection for residential mortgages applies only if the creditor has an "allowed secured claim" as determined by section 506(a). *See Nobelman v. American Sav. Bank*, 508 U.S. 324

[1] Under chapter XIII of the Bankruptcy Act of 1898, a repayment plan could not be approved unless every secured creditor that would receive payments in the plan consented to it. *See* Bankruptcy Act of 1898, §§ 651–52, 11 U.S.C. §§ 1051–52 (1976).

(1993). The rights protected by anti-modification provision of section 1322(b)(2) include the "right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against [debtor's] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure." *Nobelman*, 508 U.S. at 329. Conversely, absent special protection, section 1322(b)(2) permits a debtor to modify any of the listed rights. Thus, chapter 13 explicitly allows debtors to modify the rights of junior mortgage holders, including avoiding the lien attached to the collateral, if the anti-modification provision of section 1322(b)(2) does not apply. *See In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000); *In re Griffey*, 335 B.R. 166 (B.A.P. 10th Cir. 2005); *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000). The availability of a discharge is not a prerequisite to the application of section 506(a) and 1322(b)(2).

A. In this case, M&I does not have an "allowed secured claim," and it is therefore not protected by the anti-modification provision of section 1322(b)(2).

The starting point in this analysis is a determination of the status of M&I's claim as secured or unsecured under section 506(a). *See Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993). Section 506(a) is designed to deal with the situation, not uncommon in bankruptcy, where the lien amount exceeds the current value of the property. In relevant part, section 506(a) provides:

> (a) 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.

11 U.S.C. § 506(a). "[T]his section separates an undersecured creditor's claim into two parts—he has a secured claim to the extent of the value of his collateral; he has an unsecured claim for the balance of his claim." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 356 (1977)(506 effectively "abolishes the use of the terms 'secured creditor' and 'unsecured creditor' and substitutes in their places the terms 'secured claim' and 'unsecured claim.'").

The Supreme Court has repeatedly explained that in the reorganization chapters of bankruptcy section 506 "governs the definition and treatment of secured claims, i.e., claims by creditors against the estate that are secured by a lien on property" and that for bankruptcy purposes "a claim is secured only to the extent of the value of the property on which the lien is fixed." *United States v. Ron Pair Enter., Inc*., 489 U.S. 235, 241 (1989)(chapter 11). In *Nobelman v. American Sav. Bank*, the Supreme Court held that in chapter 13 whether a claim secured by residential property is entitled to protection from modification under section 1322(b)(2) is determined by looking to section 506(a). The Court stated that if the lien is supported by at least some value, the lien holder is the "holder of a secured claim" under the Bankruptcy Code, and its claim may be entitled to protection under 1322(b)(2). *Nobelman*, 508 U.S. at 329 ("The portion of the bank's claim that exceeds $23,500 is an 'unsecured claim componen[t]' under § 506(a)"). However, implicit in the *Nobelman* decision is the corollary principle that if the lien has no true economic worth based on the value of the underlying collateral, and is therefore totally unsecured, then the anti-modification provision does not come into play and the claim may be modified because the creditor is not the holder of an allowed secured claim.

While not yet addressed by the Seventh Circuit Court of Appeals, this corollary principle has been adopted by six other courts of appeals and two bankruptcy appellate panels. *See In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000); *In re Griffey*, 335 B.R. 166 (B.A.P. 10th Cir. 2005); *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000). The majority of lower courts in the Seventh Circuit have reached the same conclusion. *See In re King*, 290 B.R. 641, 646 (Bankr. C.D. Ill. 2003), and cases cited. As a matter of common sense, a lien that attaches to nothing provides no security to the lien holder.

In this case the parties appear to agree that the lien held by M&I is presently not supported by any value in the collateral. Applying section 506(a), M&I is not the holder of an "allowed secured claim" and is not entitled to protection of the anti-modification provision.

B. Debtor may modify M&I's claim by avoiding the lien even if no discharge is available to her.

The only limitation on the Debtor's ability to modify the rights of M&I in chapter 13 is the anti-modification provision of section 1322(b)(2). Nothing in the Code prevents Debtor, who is ineligible for a discharge, from enjoying all the rights of a chapter 13 debtor, including the right to strip off. *See Tran*, 431 B.R. at 235; *see also In re Grignon*, 2010 Bankr. LEXIS 4279 (Bankr. D. Or. Dec. 7, 2010)(overruling trustee's objection and confirming chapter 13 plan stripping off wholly unsecured junior lien in no discharge chapter 13). Rather, the right to strip off a wholly unsecured junior lien "is conditioned on the debtor's obtaining confirmation of, and performing under, a chapter 13 plan that meets all the statutory requirements." *Id.*; Judge Steven W. Rhodes, *In re* Coryell, No. 09-54760, Hearing Transcript at 10, Addendum A.

The availability of a discharge under section 1328(f) is not relevant to whether the debtor may modify creditors' claims in chapter 13. The bankruptcy discharge eliminates the debtor's personal liability for a discharged debt. 11 U.S.C. 524(a). It prevents creditors from beginning or continuing actions against the debtor to collect the amount owed to it by the debtor prior to bankruptcy. The discharge has no effect on liens one way or another. Because the discharge only affects personal liability and has no effect on liens, it can not be a precondition for modifying liens if a chapter 13 debtor has satisfied all statutory requirements for plan confirmation and successfully performs that plan.

II. The reasoning of *Dewsnup*—involving lien stripping in a chapter 7 case—is not applicable in chapter 13.

Courts have consistently held that *Dewsnup* is not applicable in the reorganization chapters—chapters 11, 12 and 13. *Nobelman*, which was decided after *Dewsnup*, and its progeny never consider *Dewsnup* as a barrier to stripping off wholly unsecured junior mortgages in chapter 13. *See In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000); *In re Griffey*, 335 B.R. 166 (B.A.P. 10th Cir. 2005); *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000). As noted by the Ninth Circuit in *In re Enewally*, 368 F.3d 1165, 1170 (9th Cir. 2004):

> The rationales advanced in the *Dewsnup* opinion for prohibiting line stripping in Chapter 7 bankruptcies, however, have little relevance in the context of rehabilitative bankruptcy proceedings under Chapter 11, 12, and 13, where lien stripping is expressly and broadly permitted, subject to very minor qualifications. The legislative history makes clear that lien stripping is permitted in the reorganization chapters.

Courts relying on *Dewsnup* in the chapter 13 context fail to consider the limited nature of the decision and the fundamental historical differences that preclude applying *Dewsnup* in chapter 13 cases. *See In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010)(suggesting 506(d) cannot apply in chapter 13 because it does not apply in chapter 7). In *Dewsnup*, the majority was reluctant to depart from established pre-Code practice without clearer direction and comment by Congress. 502 U.S. at 419. Prior to *Dewsnup*, for nearly a hundred years, lien stripping in chapter 7 was not permitted. *See In re Gibbons*, 164 B.R. 717, 718 (Bankr. D.N.H. 1993). By contrast, in enacting the Bankruptcy Code, Congress evinced a clear intent to change the way chapter 13 debtors could deal with secured creditors. The historic principles that applied in *Dewsnup* in chapter 7 do not apply in chapter 13.

Furthermore the holdings of *Dewsnup* and *Nobelman* are not inconsistent. In *Dewsnup*, a chapter 7 debtor sought to avoid the portion of a $120,000 loan that exceeded the $39,000 value of the property. Thus, the debtor sought to "strip down" a partially secured first lien, rather than "strip off" a wholly unsecured junior lien. The Supreme Court rejected debtor's argument and stated that "the words [in 506(d)] should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured." *Dewsnup*, 502 U.S. at 415. In the Supreme Court's view, the existence of some collateral sufficed to render the lien a secured claim. Thus, the Court concluded that section 506(d) did not permit a chapter 7 debtor to strip down a creditor's lien to the judicially determined value of the underlying collateral. The Supreme Court in *Dewsnup* did not decide whether a completely unsecured lien would be void under section 506(d). Rather the *Dewsnup* court specifically contemplated a narrow interpretation of its decision. *Id*. at 417 ("We therefore focus upon the case before us and allow other facts to await their legal resolution on another day.").

Dewsnup, Nobelman and the plain language of the Code can be harmonized by applying the two-step process set forth in *Nobelman*, the later of the two cases. First section 506(a) should be applied to determine the status of the creditor's claim as secured, unsecured, or having both secured and unsecured components. Section 506(d) permits avoidance of a lien that is not an allowed secured claim. If after the application of 506(a) the creditor holds a secured claim then the lien may not be avoided under section 506(d). However, if the lien has no economic value because the collateral is insufficient to support it, then the wholly unsecured lien is avoidable under section 506(d). *See In re Cook*, 2010 WL 4687953 (Bankr. E.D. Va. Nov. 10, 2010)(506(d) may be used in chapter 13 to avoid junior lien for unpaid homeowners association dues where no equity remains in the property to which the lien may attach); *In re King*, 290 B.R. 641 (Bankr. C.D. Ill. 2003)("Where the result of that claim determination process is that the creditor's claim is determined to be wholly unsecured, the creditor's lien is 'void.' 11 U.S.C. 506(d)."). This method gives meaning to all the statutory language and harmonizes the existing Supreme Court decisions.

III. *Jarvis*, and the cases that follow it, rest on a weak foundation because *Jarvis* misapplies both *King* and *Lilly* in reaching its conclusion that a chapter 13 discharge is necessary to strip a lien.

In re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008), was the first case to address the issue of lien stripping in a no discharge chapter 13. Subsequently, several courts have followed *Jarvis* in holding that a discharge is necessary to strip a lien in chapter 13. *See In re Trujillo*, 2010 WL 4669095 (Bankr. M.D. Fla. Nov. 10, 2010); *In re Colbourne*, 2010 WL 4485508 (Bankr. M.D. Fla. Nov. 8, 2010); *In re Mendoza*, 2010 WL 736834 (Bankr. D. Colo. Jan. 21, 2010); *In re Blosser*, 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2010). However, an analysis of the court decisions underlying *Jarvis* demonstrates that these cases rest on a shaky foundation.

With no direct precedent to work from, the *Jarvis* court relied on *In re King*, 290 B.R. 641, 646 (Bankr. C.D. Ill. 2003), and *In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007), to reach its conclusion. *King* is cited for the proposition that lien avoidance is contingent upon the debtor completing the plan ***and receiving a discharge.*** *Jarvis*, 390 B.R at 604. However, the *Jarvis* court acknowledges that pre-BAPCPA debtors who completed their plans as a matter of course received a general discharge. In other words, the discharge, except in the case of hardship, followed automatically from the completion of the chapter 13 plan. In interpreting *King*, *Jarvis* mistakenly creates two necessary conditions to lien avoidance (plan completion and discharge) when previously the second condition (the discharge) was purely derivative of the first (plan completion). Other pre-BAPCPA cases, not cited by *Jarvis*, simply leave off the derivative condition (discharge) and state that lien avoidance only requires completion of the debtor's chapter 13 plan. *See In re Feher*, 202 B.R. 996 (Bankr. S.D. Ill. 1996)(cram down premised on "debtors' successful completion of their chapter 13 plan payments"); *In re Gibbons*, 164 B.R. 207 (Bankr. D.N.H. 1993)(lien avoidance "contingent on full performance of the plan"). As noted above, the discharge determines only whether any personal liability on a debt is eliminated. 11 U.S.C. 524(a). It has no effect on liens one way or the other. Thus, *Jarvis* overreaches in concluding that "modification has traditionally only been achieved through a discharge."

Similarly, *Jarvis* relies on *In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007), for the proposition that, without a discharge, modifications to a creditor's rights imposed by the plan are not permanent and have no binding effect once the term of the plan ends. As with *King*, the *Jarvis* court acknowledges that *Lilly* is distinguishable because the decision rests on section 1325(a)(5) which relates to the treatment of allowed secured claims. *Jarvis*, 390 B.R. at 605. The *Jarvis* court correctly recognized that *Lilly* involved a creditor with an allowed secured claim, whereas junior liens unsupported by value in the collateral do not achieve the same status. *Id*. Nevertheless, the *Jarvis* court found persuasive *Lilly's* analysis of the modification of creditor's rights. *Lilly*'s analysis, in turn, relied on three cases—*Place, Holway, and Ransom*—to support the proposition that modifications to a creditor's rights without a discharge were not permanent. However, as explained below, the cases relied on by *Lilly* do not support that conclusion reached by *Lilly*, and thus *Lilly* provides a weak legal basis for *Jarvis* and its followers.

In re Place, 173 B.R. 911 (Bankr. E.D. Ark 1994), deals with lien stripping in a chapter 7 case, not a chapter 13 case as indicated in the *Lilly* citation to *Place*. *See Lilly*, 378 B.R. at 236. The *Place* court found the matter governed by *Dewsnup* and denied the debtor's motion to avoid the lien. *Place*, 173 B.R. at 912. *Place* does not stand for the longstanding principle related to the modification of creditor's rights in chapter 13 that *Lilly* claims and *Jarvis* relies upon. *In re Ransom,* 336 B.R. 790 (B.A.P. 9th Cir. 2005), addresses the ability of a debtor to discharge a student debt in a chapter 13 plan and had nothing to do with liens. [2] Lastly, in *In re Holway*, 237 B.R. 217 (Bankr. M.D. Fla. 1999), the debtors received a discharge after converting to chapter 7, but did not complete their plan payments. The *Holway* court states that only debtors who successfully complete their chapter 13 plans enjoy the unique ability to pay their tax liability without the penalties and interest normally associated with tax debt. *Id.* at 219. As in *King*, *Holway* treats the chapter 13 discharge and completion of chapter 13 plan payments as interchangeable concepts. It does not follow from *Holway* that modification of a creditor's rights is necessarily conditioned upon a chapter 13 discharge, as opposed to completion of chapter 13 plan payments. The majority of cases holding lien avoidance is contingent on eligibility for a discharge rely on *Jarvis*, which in turn relies on *King* and *Lilly*, which rely on *Place*, *Ransom*, and *Holway*. *See In re Trujillo*, 2010 WL 4669095 (Bankr. M.D. Fla. Nov. 10, 2010); *In re Colbourne*, 2010 WL 4485508 (Bankr. M.D. Fla. Nov. 8, 2010); *In re Mendoza*, 2010 WL 736834 (Bankr. D. Colo. Jan. 21, 2010); *In re Blosser*, 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2010); *see also In re Casey*, 428 B.R. 519 (Bankr. S.D. Cal. 2010)(relying on the reasoning in *Lilly, Place, Holway and Ransom*). At bottom, the weak foundation upon which this stack of cases is built cannot support a requirement that a chapter 13 discharge is necessary to avoid lien for which is not supported by value in the collateral.

[2] Subsequent to *Lilly*, the BAP decision in *Ransom* was vacated in light of the Ninth Circuit's opinion in *Espinosa v. United Student Aid Funds*, 553 F.3d 1193 (9th Cir. 2008), *aff'd*, 130 S.Ct 1367 (2010), which held that provisions of the confirmed plan have a preclusive effect and may modify a creditor's rights.

Pre-BAPCPA case law demonstrates that plan completion was the critical condition for lien avoidance and that discharge was often a sloppy shorthand for plan completion. Post-BAPCPA, plan completion (or a finding of hardship under 1328(b)) remains necessary, but not always sufficient for a discharge. 11 U.S.C. 1328(f). It is logical error, however, to assume lien avoidance now depends on a discharge rather than plan completion.

IV. Section 1325(a)(5) has no applicability in cases, such as this, where the creditor does not hold an "allowed secured claim" as determined under *Nobelman*.

Section 1325(a)(5) sets forth the criteria for the treatment of allowed secured claims provided for by the plan. A plan is entitled to confirmation if, with respect to each allowed secured claim provided for in the plan, 1) the creditor accepts the plan; 2) the debtor surrenders the collateral; or 3) the debtor treats the claim as provided for in section 1325(a)(5)(B). To confirm a plan over the objection of a holder of an allowed secured claim, the plan must provide that 1) the holder retains the lien until the underlying debt in paid or discharge under section 1328, 2) the debtor must pay present value on the allowed secured claim, and 3) distribution of property under to plan to holders of allowed secured claims must be in equal monthly payments and sufficient to provide adequate protection if the collateral is personal property. 11 U.S.C. 1325(a)(5)(B).

In this case, M&I is not a holder of an allowed secured claim, and therefore its claim need not be treated in accordance with section 1325(a)(5)(B). As discussed above, in the reorganization chapters, the Supreme Court has been clear that the application of section 506(a) determines whether a creditor has an allowed secured or unsecured claim, or both. *See Nobelman v. American Sav. Bank*, 508 U.S at 329; *United States v. Ron Pair Enter., Inc.*, 489 U.S. at 241. Courts holding otherwise have disregarded more than a decade of consistent jurisprudence in chapter 13 cases. *See In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000); *In re Griffey*, 335 B.R. 166 (B.A.P. 10th Cir. 2005); *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000).

For example, in *In re Woolsey*, 2010 WL 4249216 (Bankr. D. Utah Oct. 8, 2010), the court denied confirmation of a plan proposing to strip down a wholly unsecured junior mortgage because the plan did not provide for lien retention until the underlying debt was paid in full or a discharge was granted. *Id*. at •3, *see* 11 U.S.C. § 1325(a)(5)(B). In holding the junior mortgage holder had an "allowed secured claim," the *Woolsey* court never mentions *Nobelman* and its universal application in chapter 13. Instead, without clear explanation, the court relies heavily on *Dewsnup*—the chapter 7 case—even though that case, too, is distinguished because it involved a partially secured claim. *Id*. at *2.

Similarly, in *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010), the court erroneously denied plan confirmation because the debtor's plan did not provide for lien retention as required by section 1325(a)(5)(B) despite the fact that the junior mortgagee did not have an allowed secured claim. Unlike *Woolsey*, the *Fenn* court acknowledges the applicability of *Nobelman*. *Id*. at 503. Despite acknowledgment that Nobelman is controlling, the *Fenn* court, nevertheless, finds that confirmation requires compliance with 1325(a)(5)(B). The court does not explain why a provision concerning allowed secured claims is relevant to a claim that is not an allowed secured claim.

Contrary to these decisions, other courts have correctly found that in chapter 13 the holder of an unsecured junior mortgage does not have an allowed secured claim, and therefore neither the anti-modification provision of 1322(b)(2) or the lien retention provision of 1325(a)(5)(B) apply. *See In re Jarvis*, 390 B.R 600, 605 (Bankr. C.D. Ill. 2008)(finding 1325(a)(5) not applicable to unsecured junior mortgagee because mortgagee not holder of an allowed secured claim); *see also Nobelman v. American Sav. Bank*, 508 U.S. 324. 329 (1993); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010); *In re Grignon*, 2010 Bankr. LEXIS 4279 (Bankr. D. Or. Dec. 7, 2010).

V. Allowing debtor to strip off a lien that is secured in name only and that is not supported by any true economic value is not unfair to junior mortgagees.

Courts have repeatedly noted a distinction between the first and second mortgage markets. Starting in the mid-1990's the second mortgage market expanded rapidly as lenders pushed high loan-to-value (LTV) mortgages.[3] In issuing a warning to lenders about the risks involved with such loans in comparison to traditional mortgage loans, the Office of Thrift Supervision described the practice as follows:

> An increasing number of lenders are aggressively marketing home equity and debt consolidation loans, where the loans, combined with any senior mortgages, are near or exceed the value of the security property…Until recently, the high LTV home mortgage market was dominated by mortgage brokers and other less regulated lenders. Consumer groups and some members of Congress have expressed concern over the growth of these loans, and the mass marketing tactics used by some lenders.

Thrift Bulletin TB 72, Office of Thrift Supervision, Department of the Treasury, August 27, 1998, at 1. Lenders who make such high LTV loans, or no equity loans, take their illusory security in the debtor's home not for its economic value or the ability to foreclose, but for the threat of foreclosure.

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[3] In 1995, home equity lenders had made $1 billion in high LTV loans. By 1997, the amount of these loans had increased to $8 billion. High Loan-To-Value Lending, General Accounting Office, GAO/GGD 98-169, August 13, 1998; Paine's High LTC Specialist is Out," National Mortgage News, October 27, 1997, 1997 WL 12863567.

In the early 2000's, lenders aggressively pitched "piggyback" loans to borrowers unable to come up with a larger down payment, or any down payment at all. Piggyback loans feature two mortgages—an 80 percent first mortgage and a second mortgage for 10, 15 or 20 percent of the purchase price. The structure typically combined a traditional fixed-rate or adjustable-rate first mortgage with either a closed-end second lien or a home equity line of credit. The risks of piggyback loans were well known to the second mortgage industry by mid-2005. *See* Broderick Perkins, Piggyback Loan Growth Poses Mortgage System, Realty Times (July 13, 2005), available at http://realtytimes.com/rtpages/20050713_piggyback.htm. ("The potential for risk is that already over-extended home buyers will be left with an upside down mortgage should the bubble burst and price drop.") The additional risks borne by piggyback and other high LTV lenders caused them to charge higher interest rates on these second mortgages. Now that the housing bubble has burst and home values have dropped, creditors can hardly argue that they were not aware of the potential risk that debtors would be left with upside down junior mortgages—risk that they priced into their products

Lastly, debtors do not receive a "windfall" at the expense of high LTV lenders. M&I claims that Debtor's property may be higher in the future. Markets are uncertain, and it is not certain if, or when, the value of Debtor's property will increase. Secondly, M&I's right to foreclose will not currently result in any monetary gain. Bankruptcy is not intended to benefit either the creditor in securing a potential increase in property value, or the debtor. However, where the future is uncertain, the lien should be avoided. *In re Cook*, 2010 WL 4687953 (Bankr. E.D. Va. Nov. 10, 2010)(no statutory or case authority stands for the proposition that lien avoidance may be denied solely based on anticipated future increase in the value of the secured creditor's collateral).

Bankruptcy policy should not be used to protect piggyback and high LTV lenders who would not otherwise be protected outside of bankruptcy and who knowingly made riskier loans. Any other result will create a perverse incentive for lenders to make high LTV loans knowing that they will gain an unfair advantage in bankruptcy.

CONCLUSION

Longstanding principles of chapter 13 that allow debtors the broad right to modify creditors' claims and the absence of any statutory language requiring a discharge to avail themselves of those rights, dictate that wholly unsecured liens may be stripped off in chapter 13 cases regardless of whether the debtor is eligible for a discharge.

Respectfully submitted,

/s Abraham Michelson

Abraham Michelson, Esq.

ADDENDUM A

In re Coryell, No. 09-54760
Hearing Transcript

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: JOHN D. AND DALE A. CORYELL, Debtors.	Docket No. 09-54760
	Detroit, Michigan
	September 2, 2009
	2:10 p.m.

HEARING RE. CONFIRMATION HEARING
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

MS. CARROLL: John and Dale Coryell, 09-54760. This is the adjourned time for confirmation in this matter. And, your Honor, we were before you on August the 5th previously, and your Honor had -- at that time debtor's counsel had indicated that they were seeking to have the claim -- the second mortgage of Bank of America treated as -- really not to be treated in the Chapter 13 and that an adversary had been filed asking that the lien be stripped, that Bank of America had not filed a response, and that essentially they were asking that Bank of America not be a creditor for the purposes of this case. They provided at that time for the first time an unpublished decision from California that I believe that the Court was given a copy of at that time. Our office also received a copy of that unpublished opinion at that time, and your Honor offered my office an opportunity to file a brief and gave us a three-week deadline to do that.

We did file a brief in that matter. Debtor's counsel had not actually requested to file a brief at the time of the last hearing, and -- but did so apparently in response to my brief outside of the three-week period, which I did receive late last week also along with some amended -- some amendments by debtor's counsel which appears to change the request from the earlier hearing.

An amended plan was filed late last week in addition to amended Schedules BVJ, an amended means test, and I will tell you that while I did make the determination to read through the brief, I have not made a full review of the plans and schedules and amended means test to report to the Court today, so what I will say is that the amended plan still treats Bank of America as a claim. Bank of America is still listed as a claim on Schedule D, is still asking that the lien be stripped and is also -- because this was -- this was also the case in the first plan -- is still asking that Bank of America's claim be treated as a Class 8 general unsecured claim, which was also the language in their original plan but was different than what was argued on the record at the last time. I assume from the filing of this now amended plan that they are conceding that point and asserting that they do not -- they are not wishing to treat Bank of America as though no plan exists, and they do not need to be treated for the purposes of an unsecured claim in this matter, but I guess I would have the debtor clarify that for me because it wasn't clear to me.

The second part of this is part of the issue was feasibility, was the plan -- whether or not there'd been appropriate notice given to Bank of America that they were -- that their claim is not being treated at all. They were not even being offered Class 8 treatment pursuant to the plan. Now we have -- with this amended plan -- and they are still offering that -- that's not an issue any longer. Apparently they do plan to have that secured claim that's currently on file and has not been objected to treated as an unsecured claim.

They did not respond to the adversary that was filed in this matter, and after the time of the last hearing, based upon the fact that I didn't think there was sufficient notice in the plan, I actually tried to contact somebody from Bank of America based upon the claim that was filed. They didn't appear to be represented by counsel. It was someone in-house, and our office did contact whoever the person was on the proof of claim that had signed it just to advise them of what had happened at the hearing; that this was -- that we were going forward on this issue. And at the time, they indicated that they would refer it to legal; that someone would be filing an appearance. However, to date, I've not seen that that has occurred, and I don't believe that the creditor present here is representing the second claim of Bank of America. Is that correct, before I go any further, or not --

MS. DAVIS: That is correct. I'm the first lien.

MS. CARROLL: -- in my recitations? So on that basis, it would appear that while I think I have authority for -- I think I've set forth authority in the brief that we filed with the Court that a lien strip is not appropriate in a case where a discharge is not going to be granted by the debtor based upon previous discharges that the debtor has received. Bank of America appears to be really tacitly agreeing to this treatment by their failure to appear in these proceedings or respond, so I'm prefacing my remarks with that. I would have the debtor set forth -- or debtor's counsel really set forth that I am interpreting the plan that they filed correctly and what their argument is and what changes have been made to their argument at this point before we address any of the legal issues or if your Honor would have us address further legal issues at this time.

MS. TSE: Good afternoon, your Honor. Katherine Tse for Richard Nahabedian on behalf of the debtors.

MR. ROOKARD: And Brian Rookard from the Financial Law Group appearing on behalf of the debtors as well. Your Honor, I was brought in -- I came into the case afterwards, after I had -- Ms. Tse is a friend of mine, and she had called me and told me the issue, and I said, "Hey, I'm doing a brief on this, and I can help you out, I think," and so what I did was I actually prepared the brief in this, and the debtors have agreed to ask me to represent them during this proceeding.

THE COURT: And good briefs from both sides. Thank you.

MR. ROOKARD: Okay.

THE COURT: Thank you.

MR. ROOKARD: No problem, your Honor. Appreciate that. Your Honor, I want to address the legal issue because that's primarily --

THE COURT: No. I don't want you to address the legal issue. I want you to answer the question that Ms. Carroll raised.

MR. ROOKARD: Oh, all right. As far as what we're actually intending in the plan? Okay.

THE COURT: Right.

MR. ROOKARD: It's just like any other regular Chapter 13 lien strip, your Honor. As is well known, Johnson versus Home State Bank says even where a debt has been discharged --

THE COURT: Please just answer my question.

MR. ROOKARD: It's going to be treated as an unsecured claim, your Honor. There is --

THE COURT: So what's the amount of the claim?

MR. ROOKARD: About 84,000, I think it was.

THE COURT: And you're going to pay six percent of that?

MR. ROOKARD: Six percent, your Honor. That's correct.

THE COURT: Does that answer your question, Ms. Carroll?

MS. CARROLL: Yes, your Honor.

MS. DAVIS: Good afternoon, your Honor. Laura Davis on behalf of Mortgage Electronic Registration Systems. Your Honor, we are the first lien in this matter, and we're standing before you today -- in the event that there is an adjournment, I would request adequate protection payments going forward.

MR. ROOKARD: And we indicated that we were not opposed to that.

THE COURT: All right. The Court concludes as a matter of law that a discharge is not a necessary prerequisite to a lien strip. In so concluding, the Court relies primarily on the Sixth Circuit's decision in Lane, which outlined the structural mechanism for lien strip, and it appears to the Court that there's nothing about that mechanism that invokes or involves the discharge whatsoever.

Now, having said that, I want to ask you again to clarify for the record --

MR. ROOKARD: Um-hmm.

THE COURT: -- is it the debtor's intent that the lien strip will be effective upon plan completion or upon plan confirmation?

MR. ROOKARD: That's a good question, your Honor.

THE COURT: I just want an answer.

MR. ROOKARD: Well, technically, the --

THE COURT: Please, just an answer.

MR. ROOKARD: The plan --

THE COURT: What is the debtor's position?

MR. ROOKARD: The debtor's position is the plan states that lien strip is effective upon confirmation, and that's in line with Section 1327(c). That's the model plan. The model plan says that itself, that the property vests free and clear in the debtor at the time of confirmation.

You know, we're also willing to -- and I don't have a problem with this necessarily -- that the property vests free and clear at the time of plan completion as well. I would point out to the Court that actually the Central District of California actually required --

THE COURT: I was just asking you your position.

MR. ROOKARD: Oh, okay. That's my position.

THE COURT: The Court cannot and will not construe the Bankruptcy Code to permit the debtor to have a lien strip upon confirmation because it would be grossly inequitable to do so. If the debtor dismisses the case a week after confirmation, it would be intolerable to have a lien strip take effect, and that's true despite Section 1348 and 1349 --

MR. ROOKARD: Um-hmm.

THE COURT: -- because, frankly, those Code provisions are ambiguous about whether this lien avoidance is itself then avoided upon dismissal or conversion. So I want the order confirming plan -- to the extent the plan doesn't specifically provide for it, the order confirming plan to specifically state that the lien strip is effective upon plan completion.

MR. ROOKARD: Okay.

MS. CARROLL: That's fine, your Honor. And I would also say that the judgment that was entered in the adversary also states that it is upon the completion of the plan, that --

THE COURT: All right. So then there's --

MS. CARROLL: -- that would be effectuated, so that would all then be --

THE COURT: There's law of the case there as well. All right. Now, Ms. Carroll, do you want time -- is that what you're requesting -- to review the --

MS. CARROLL: I am, your Honor.

THE COURT: -- second amended plan?

MS. CARROLL: I am, your Honor, and also the means test and just to verify that -- otherwise I think that upon review of those additional documents that were filed, that this -- that this case is probably in a condition that we could resolve it prior to the next hearing, but I'm not ready to say that I'm -- or that we can agree to that today.

THE COURT: All right. Is September 23rd enough time?

MS. CARROLL: I believe so, your Honor, and if creditor's counsel would be -- would go ahead and submit a proposed order and we can review the amount, I'm not opposed to the request for adequate protection.

THE COURT: For adequate protection. Is that all right?

MR. ROOKARD: That sounds fine by me.

THE COURT: All right. Again, counsel, thank you for your excellent briefs.

MR. ROOKARD: Thank you very much.

MS. CARROLL: Thank you, your Honor.

(Proceedings concluded at 2:21 p.m.)

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WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett　　　　　March 4, 2010

Lois Garrett