

Stripping Mortgages and Car Loans

Erik LeRoy
January 28, 2014

Foundations:

11 USC 506(a) addresses extent to which allowed claim is secured; bifurcation into secured & unsecured.

11 USC 506(d) contains special provisions governing disallowance of liens.

11 USC 1129(b)(2)(a)(i)(II), 1225(a)(5) & 1325(a)(5)(B)(ii) cram down provisions.

11 USC 1322(b)(2) & 1123(b)(5) post *Dewsnup* amendment to protect residential lenders (can't modify claim secured by principal residence). Not in §1222(b)(2).

11 USC 1325 (hanging paragraph following 1325(b)(5)) dealing with auto loans.

Dewsnup v. Timm 502 U.S. 410 (1992) can't use 506(d) to strip a mortgage lien in chapter in chapter 7.

Enwally v. Wash Mutual Bank, 368 F.3d 1165, 1169 (9th Cir 2004) “after *Dewsnup* courts have refused to allow lien stripping in ch 7 cases.”

Nobelman v. American Savings Bank, 508 U.S. 324 (1993) can't strip a partially underwater residential mortgage in chapter 13, but if the lien has no value (wholly under or unsecured) it can be stripped.

Mortgages:

Can't strip to FMV in a chapter 7 (*Dewsnup*)

Can strip to FMV in ch 11, 12 or 13 in certain circumstances

If secured by other property *In re Hammond* 27 F.3d 52 (3rd Cir. 1994)

If the collateral is a rental, or a multifamily in which the debtor occupies a unit. *Lomas Mortgage v. Louis* 82 F.3d 1 (1st Cir. 1996) & *Scarborough v. Chase Manhattan* 461 F.3d 406 (3rd Cir 2006) (but read *Brunson* 201 BR 351 (Bankr WDNY 1996) using a case by case approach, which may not be consistent with *In re Benafel*, 461 BR 581 (9th CIR BAP 2011) which held time to determine when property is principal residence is petition date.)

Mobile home is personalty subject to cram down. *In re Thompson* 217 BR 375 (2d Cir BAP 1998)

Stripping formula for a wholly unsecured residential second is §§506(a) & 1322(b)(2). *In re Woolsey v. Citibank*, 696 F.3d 1266 (10th Cir 2012)

Stripping is available in no-discharge case (chapter 20) but the mortgage has to be wholly

unsecured *In re Davis* 716 F3d 331 (4th Cir. 2013) *In re Rogers* 489 BR 327 (D Conn 2013) *In re Wapshare* BR ,(Bankr SDNY 2013) (9th Circuit position unclear)

Chapter 13 hybrid plans: plans in which the secured portion of a bifurcated claim *secured by non-residential property* would be paid beyond the plan's term aren't confirmable. Such plans attempt to take advantage of the "modification" provisions of § 1322(b)(2) and the "cure and maintain" provisions of § 1322(b)(5) *In re Bullard*, BR (1st Cir BAP 2013) 1322(b)(5). See *Enwally v. Wash Mutual Bank*, 368 F3d 1165, 1169 (9th Cir 2004) holding in a ch 13 hybrid plans inconsistent with applicable statutes.

Chapter 12 hybrid plans: using §506(a) and §1222(b)(2), a debtor can "strip down" an undersecured creditor's lien to the value of the collateral. *Harmon v. United States*, 101 F.3d 574 (8th Cir. 996). *In re Estrada*, 387 B.R. 875, 880 (Bankr. M.D. Fla. 2008)(citing *Harmon's* holding that "section 506 operates with section 1225 in a chapter 12 case to allow 'strip down' of liens."). Chapter 12 also permit debtors to provide for repayment of secured claims beyond the term of the plan. §1222(c) & §1222(b)(9) *In re Hand*, unreported (Bankr.M.D.Fla. 2/4/2010). *In re Wilson*, 378 BR 862 (Bankr Mont 2007). 9th Cir. position unclear.

By motion or adversary action: If no proof of claim filed, probably by adversary action (See *Harmon*) but watch for any application of the decision to be rendered by the Supreme Court in *Executive Benefits*.

Interest rate on mortgage loan can be modified if last payment due before end of plan term. *In re Hubbell* BR (Bankr EDNC 8/23/13)

Car Loans:

Can't strip in chapter 7 (*Dewsnup & Nobelmann* apply)

Can strip or adjust in ch 13:

When car loan older than 910 days

When car acquired for business use *In re Garrison* 8 ABR 351 (Bankr Alaska 2006) but *see In re Marushart* 483 BR 627 (Bankr MD Pa 2012) (Not where car used for both business and personal use)

Can strip the portion of the loan attributable to trade-in deficiency. *AmeriCredit v. Penrod* 611 F.3d 1158 (9th Cir 2010) negative equity from car trade-in tacked onto new loan can be stripped from the loan (disagreeing with eight other circuit decisions).

Creditor gets present value (*Till* interest rate prime plus 1.5%) *Drive Fin Serv. v. Jordan* 521 F3d 343 (5th Cir 2008).