

## **REAL ESTATE ISSUES IN CHAPTER 13 CASES**

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### **Introduction to Chapter 13 Bankruptcy**

Chapter 13 versus other bankruptcy chapters: Chapter 13 is a debt adjustment bankruptcy versus a liquidation bankruptcy under chapter 7. In chapter 7, a debtor keeps future income in exchange for giving up non-exempt assets. In chapter 13, a debtor is allowed to keep non-exempt assets in exchange for giving up disposable income for a minimum applicable commitment period of 36-60 months as long as creditors receive at least as much as they would in a theoretical chapter 7 liquidation. Chapter 13 plans are sometimes referred to as wage-earner plans. Overall, chapter 13 filings constitute about ten to twenty percent of local consumer bankruptcy filings.

Qualifications – Pursuant to the “means test” under 11 U.S.C. § 707(b), a chapter 7 case may be dismissed or converted to a case under chapter 13 if the court finds that continuing under chapter 7 would be an abuse based upon the debtor’s budget. Only an “individual with regular income” can proceed in a chapter 13 case. 11 U.S.C. § 109(e). Pursuant to 11 U.S.C. § 109(e): the debt limits for chapter 13 debtors (per debtor in a joint case) are as follows: \$383,175 (non-contingent, liquidated, unsecured debts), and \$1,149,525 (secured debts).

Debtor Motivations for Chapter 13: Debtors file chapter 13 cases primarily for the following reasons: (1) to cure mortgage arrears and either prevent or delay foreclosure; (2) to strip a wholly unsecured junior mortgage against their principal residence; (3) to pay priority tax claims over time through a chapter 13 plan instead of through administrative garnishment; (4) to cram-down and reduce principal balances and/or interest rates on vehicle loans or non-homestead

real estate; (5) the debtor does not qualify for a chapter 7 discharge and would rather manage debts through a chapter 13 payment plan than through non-bankruptcy workout options.

### **Procedures in a Chapter 13 Case**

Timeline in a typical Chapter 13 Case: The debtor generally files a proposed plan contemporaneously with the filing of the petition commencing the case. Within a reasonable time after the petition is filed, debtors must appear for a meeting of creditors pursuant to 11 U.S.C. § 341(a). If everything is in order, a plan may be confirmed within thirty days. More often, it takes three to six months and one or more plan modifications to resolve issues raised by the trustee or individual creditors. In rare situations, a chapter 13 case could remain pending without a confirmed plan for over a year. Without a confirmed plan in a reasonable time, the court can dismiss the case or convert to chapter 7.

Chapter 13 Trustee: The chapter 13 trustee's office provides primary administration of a chapter 13 case and any confirmed plan. The trustee and its counsel examines the debtor, the debtor's schedules, and documents provided by the debtor. The trustee has standing to object to proposed chapter 13 plans on various grounds at his or her discretion. The trustee represents the interests of the class of general unsecured creditors, which may conflict with the interests of any individual creditor. The trustee does not represent the interests of individual creditors.

Creditors and their attorneys may provide information or documents to the trustee, but should not expect the trustee to represent their interests or provide legal advice. Where a mortgagee with an unsecured claim faces adverse treatment under the plan, it is advisable for mortgagee's counsel to review the chapter 13 case and also applicable financial information known separately to the lending institution to confirm that the financial disclosures and projections in the chapter 13 case appear accurate and reasonable. Lenders with a long-standing

relationship with the debtor may have knowledge unknown to the trustee regarding the debtor's financial affairs and should engage counsel to perform some limited due diligence in a chapter 13 case if the debtor proposes a plan that materially impairs a lender's position.

The trustee collects payments from the debtor and redistributes the plan funds pursuant to the terms of the confirmed plan. This may include pre-confirmation adequate protection payments on secured claims. In Minnesota, the debtor is generally the disbursing agent for mortgage, property tax, and Home Owner Association payments that come due after the date the petition was filed;<sup>1</sup> the trustee is generally the disbursing agent for pre-petition arrears. Creditors have on-line access to payment and disbursement history and may ask the trustee's office questions about the administration of the estate.

### **The Automatic Stay and Relief Therefrom**

Automatic Stay and Co-Debtor Stay: The filing of the bankruptcy petition under any chapter operates as a stay on affirmative actions of creditors to collect on claims, including actions to perfect a mortgage or lien or to foreclose on a mortgage or lien. *See* 11 U.S.C. § 362(a). In chapter 13 cases, the automatic stay extends to co-obligors who did not file a petition seeking bankruptcy relief. *See Id.* at § 1301(a).

The automatic stay becomes an issue usually in the state foreclosure process. In Minnesota, the stay will stall any pending foreclosure up until the time of the sheriff's sale. But once a sheriff's sale occurs, § 362 does not operate to toll or suspend the running of the statutory period of redemption under MINN. STAT. § 580.23. *Johnson v. First National Bank of Montevideo*, 719 F.2d 270 (8th Cir. 1983). However, the debtor has 60 days from the date of the filing of the petition to redeem the property even if the petition was filed the day before the

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<sup>1</sup> In some jurisdictions (including the Northern District of Illinois and the Eastern District of Texas, among others) the trustee is the disbursing agent for all mortgage payments.

end of the redemption period. 11 U.S.C. § 108(b). These rules apply equally in chapter 7 and chapter 13 cases.

Actions taken in violation of the stay are generally voidable and of no effect. *In re Vierkand*, 240 B.R. 317 (8th Cir. BAP 1999). Further, the Code provides for sanctions for those parties who willfully violate the stay including actual damages, costs, attorney fees, and potentially punitive damages “in appropriate circumstances.” 11 U.S.C. § 362(k).

Stay Termination: The stay continues into effect until the earliest of the following events: (a) the case is closed; (b) the case is dismissed; or (c) in a case of an individual until the discharge is granted or denied. *See* 11 U.S.C. § 362(c). Thus, the stay will remain operative during a confirmed chapter 13 plan until there is a default in the plan that results in dismissal of the case. Conversion of a chapter 13 case to a chapter 7 does not on its own terminate the stay, but will terminate the co-debtor stay. *See* 11 U.S.C. § 1301(a)(2).

In some instances of potentially abusive conduct, the automatic will automatically terminated unless the debtor takes affirmative action to extend the stay. For instance, the stay will presumptively terminate within 30 days after filing for debtors who have had chapter 7 cases dismissed one-year prior to filing a chapter 13. The stay will similarly terminate for any debtor who has had a chapter 7, 11, or 13 case dismissed in the prior year for failing to abide by certain disclosure and performance requirements, including: (1) filing or amending the petition and other required documents without substantial excuse, (2) providing adequate protection as ordered by the court, or (3) performing the terms of the plan. *See Id.* at § 362(c)(3). Where debtors have had two more cases dismissed within the previous year, the stay does not go into effect upon any subsequent bankruptcy filing. *See Id.* at § 362(c)(4). If one of these conditions apply, the debtor

must move to have the stay placed or extended through primarily demonstrating good faith as to the bankruptcy filing. *See Id.* at § 362(c)(3)(B), & § 362(c)(4)(B).

Relief from the Automatic Stay: A mortgagee can seek relief from the stay and continue its state law enforcement actions. Pursuant to 11 U.S.C. § 362(d)(1), a party is entitled to relief from the automatic stay for cause, including lack of adequate protection related to the mortgaged property. Some examples of cause are: (1) the debtor is in default under the contract, note, security agreement or mortgage note; (2) the debtor has failed to make pre-petition and post-petition payments under the mortgagee's debt or a senior debt, or failing to pay property taxes; (3) the debtor continues to retain possession of the collateral presumably for his use and benefit while failing to pay the creditor; and (4) the collateral continues to depreciate in value Debtor or is not properly insured or physically to protect from risk of damage or loss. The court may require the debtor to give adequate protection to the creditor that may include some limited payment to account for accruing interest or other depreciation or take steps to better secure or insure the property.

Pursuant to 11 U.S.C. § 362(d)(2), relief from the automatic stay is also appropriate if the debtor has no equity in the property and the property is not necessary for an effective reorganization. *See In re Anderson*, 913 F.2d 530, 532 (8th Cir. 1990). Since chapter 13 is a reorganization proceeding, such stay relief could become appropriate if and when the chapter 13 trustee takes action to convert the case. When disputed, the creditor bears the burden of proof to show that the debtor has no equity in the secured property; if the creditor succeeds, the burden then shifts to the debtor to establish that the property is necessary to an effective reorganization. *In re Anderson* at 532. Whereas an equity cushion may serve as adequate protection in chapter 11, an equity cushion is not grounds for denial of relief from the automatic stay in a chapter 13

case in which the debtor has missed post-petition payments. *In re Borm*, 508 B.R. 104 (8th Cir. BAP 2014).

In single-asset real estate cases (which rarely occur in chapter 13 but are possible), a creditor can seek stay termination within 30 days unless the debtor has filed a plan that “has a reasonable possibility of being confirmed within a reasonable time” or begins making monthly payments in the amount of contractual interest accruing on the mortgage claim. *See* 11 U.S.C. § 362(d)(3). Proceedings for relief under this provision require the debtor to respond in thirty days, and the court must ultimately hold an evidentiary hearing as to any contested issues within sixty days after the motion. *See* 11 U.S.C. § 362(e)(1). A creditor can record an order lifting the stay as to real property in a single-asset real estate case in the county where the property resides. 11 U.S.C. § 362(d)(4). Upon recording the order shall remain effective against the property for up to an additional two years unless the debtor in a subsequent bankruptcy can seek relief based on changed circumstances or other good cause. *Id.*

A creditor can seek relief from the co-debtor stay where: (1) the non-debtor as opposed to the debtor received the consideration from the mortgagee in exchange for the secured obligation; (2) the proposed chapter 13 plan will not pay the joint claim; or (3) the creditor will suffer irreparable harm if the co-debtor stay is not lifted. *See Id.* at § 1301(c). The creditor can obtain co-debtor stay relief as early as twenty days after commencement of the case. *Id.* at § 1301(d).

There are certain local procedures for stay relief motions worth observing. Bankruptcy Rule 4001(a)(3) imposes a fourteen day waiting period for any order granting relief from stay to take effect. But locally, the bankruptcy judges routinely waive this 14-day temporary stay so long as there is a request and some rationale offered in the motion and a waiver provision in the

proposed order. If seeking relief to foreclose on homestead property, the creditor must complete Local Form 4001-1, which itemizes the loan history. Found at [www.mnb.uscourts.gov](http://www.mnb.uscourts.gov).

Generally, the debtor will have some breathing room to confirm a chapter 13 plan before the bankruptcy court would grant stay relief. Except in the instance of the single asset real estate case, as long as the debtor appears diligent towards confirming a plan, and remains paying the lender, the court will likely deny any motion for relief

### **Mortgagee Proofs of Claim and Validity of Mortgages**

Proof of Claim Filing for Mortgage: To receive payments from a trustee in either chapter 7 or chapter 13, a creditor must file a proof of claim.<sup>2</sup> Specifically, a creditor must file Official Form 410. A creditor with a claim secured by an interest in the debtor's principal residence must also file Official Form 410A.

A properly-scheduled creditor will receive notice of the bankruptcy filing shortly after commencement of the case that will state a deadline for filing timely proofs of claim, which is generally 90 days from the first meeting of creditors. With respect to the circumstance where the debtor contests the lender's secured status based on the value of the collateral (as addressed in the "lien stripping" section below, the lender has thirty (30) days after a judicial determination of its claim status to file an unsecured claim. *See* FED. R. BANKR. P. 3002(c)(3). This means that a creditor may be able to file a claim for a deficiency within 30 days after foreclosure and may be able to file an unsecured claim within 30 days after the entry of a judgment avoiding a mortgage or judgment lien. If a creditor does not file a timely proof of claim, the debtor may file a claim on the creditor's behalf within 30 days after the claims bar date. FED. R. BANKR. P. 3004.

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<sup>2</sup> In chapter 11, on the other hand, "[a] proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules." 11 U.S.C. § 1111(a).

If a debtor fails to accurately schedule the identity of the creditor such that the creditor did not have notice or actual knowledge of the case within time to file a proof of claim, the chapter 13 plan will not discharge the debt owed to the creditor. *See* 11 U.S.C. § 523(a)(3) & § 1328(a)(2).

Also relevant to mortgage claims allowance, a debtor does not have standing to dispute the validity of a pre-petition foreclosure, perfection of the mortgage, or assignment of the mortgage. 11 U.S.C. § 323(b); *Rugiero v. Nationstar Mortgage, LLC*, 580 Fed. Appx. 376 (6th Cir. 2014) (holding that Chapter 13 debtor lacked standing to sue mortgage company, nominee, and others for claims challenging mortgage foreclosure after he filed for Chapter 13 relief and while bankruptcy proceeding was pending; rather, bankruptcy trustee was party with capacity to sue); *In re Baber*, 523 B.R. 156 (Bankr. E.D. Ark. 2015) (debtor lacked standing to dispute assignment of note and corresponding mortgage because the debtor was not a party to the assignment).

### **Discharge**

After the completion of all payments required by the plan, and unless the court approves a waiver of discharge executed by the debtor or the debtor is ineligible for a discharge pursuant to § 1328(f), the court shall issue an order granting the debtor a discharge of all debts with certain exceptions. 11 U.S.C. § 1328(a). If the confirmed plan provides that the debtor will cure and/or maintain post-petition mortgage payments, that mortgage-holder's claim is excepted from the discharge. 11 U.S.C. § 1328(a)(1).

Generally, even if the *in personam* obligation is discharged, the creditor's *in rem* rights survive the discharge. *Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Long v. Bullard*, 117 U.S. 617 (1886). Home owner association assessments that accrue post-petition are excepted

from a chapter 7 discharge or a chapter 13 hardship discharge. 11 U.S.C. §§ 523(a)(16) and 1328(b). Home owner association assessments that accrue post-petition may be discharged under the standard chapter 13 discharge of § 1328(a) to the extent that the assessment arises from a prepetition contractual obligation, but may be excepted from the discharge to the extent that the assessment is a covenant that runs with the land. *In re Davenport*, 534 B.R. (Bankr. E.D. Ark. 2015).<sup>3</sup>

If a debtor obtains a junior mortgage not otherwise protected under the anti-lienstripping provisions discussed below through a fraudulent financial statement, or via other fraudulent representation or false pretenses, the creditor may file an adversary proceeding in the bankruptcy to seek a determination that the debt is non-dischargeable. *See* 11 U.S.C. § 523(a)(2), and § 1328(a)(2).

### **Chapter 13 Plan Rules Related to Real Property**

Sections 1322 and 1325 provide the standards for treating claims secured by real property in a bankruptcy case. There are specific requirements as well as general requirements for all creditors the debtor must satisfy in a chapter 13 plan.

Best Efforts (Disposable Income) Test: As the first general requirement, a debtor must meet the “best efforts” test. Under this standing, the debtor must either pay all allowed claims in full or pay all her disposable income (after allowing for reasonably necessary expenses) for a minimum of 36 months for a debtor whose income is below-median for his household size and 60 months for a debtor whose income is above-median for her household size. 11 U.S.C. § 1325(b). The court may not approve a plan that provides for payments that extend for a period

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<sup>3</sup> Under Minnesota law, a lien in favor of a home owners association has priority over all other liens other than the first mortgage and liens for real estate taxes. Minn. Stat. 515B.3-116(b).

that is longer than 5 years. *See Id.* at § 1322(d). Generally speaking, the trustee is likely to object to a debtor curing or maintaining payments for claims secured by non-homestead real estate on the grounds that the payments are not reasonable or necessary for the support of the debtor or dependents of the debtor unless the property produces significant positive cash flow.

Best Interests of Creditors (Liquidation) Test: As the second general requirement, a debtor must meet the “best interests of the creditors” test. Under this standard, a chapter 13 plan must provide for a distribution to creditors of a present value that is no less than the amount that the creditors would receive in a chapter 7 liquidation. *See Id.* at § 1325(a)(4). The trustee and court will factor non-exempt equity in real estate into the calculation of the minimum distribution to general unsecured creditors. If there are avoidance claims that the trustee could pursue that the debtor is not otherwise electing to pursue under a chapter 13 plan, this would also weigh substantially in the liquidation test and require conversion to chapter 7 so that the trustee could pursue.

Treatment of Claims Secured Real Estate: Secured claims, including claims secured by real estate, must be provided for in the plan. The following types of liens most often appear in chapter 13 cases: (1) senior and junior mortgages; (2) property tax liens; (3) Home Owner Association liens; (4) judgment liens; (5) mechanic’s liens; and (6) other miscellaneous liens.

The plan, in conjunction with a motion by the debtor or trustee, may provide for avoidance of a judgment lien secured by real property. 11 U.S.C. § 522(f). The plan may also provide for cure and maintenance of long-term secured claims. 11 U.S.C. §§ 1322(b)(3) and (b)(5). The plan may provide for surrender of the collateral. 11 U.S.C. § (a)(5)(C). The plan may provide that the collateral vests in the holder of a secured claim. 11 U.S.C. § 1322(b)(9).

Curing Mortgage Arrears: Pursuant to 11 U.S.C. §§ 1322(b)(3) and (b)(5), the chapter 13 plan may cure prepetition mortgage arrears “within a reasonable time.” Locally, courts presume that a cure period of up to twelve months is reasonable. *In re Newton*, 161 B.R. 207, 213 (Bankr. D. Minn. 1993). Beyond twelve months, the debtor must show an additional cure period is reasonable based on a case-by-case analysis that may include, among other factors: (1) the debtor’s past payment history, including prior defaults; (2) the reasons why the default(s) occurred; (3) whether the property is owner-occupied or investment property, to the extent that may bear on the debtor’s motivation to effect the cure; (4) whether the cure proposal represents the debtor’s “best effort;” (5) the amount of “discretionary income” available to make the plan feasible; (6) the amounts and relative priority of competing liens; (7) the existence or non-existence of an “equity cushion.” *Id.* at 215 (providing a non-exhaustive list of fourteen factors).

Property tax arrears may be cured through a chapter 13 plan, but the cure must include statutory interest at the rate of 10%. MINN. STAT. § 279.03, subd. 1a.

Residential Mortgages and Senior Liens Protected: A key provision in chapter 13 provides a 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.” 11 U.S.C. § 1322(b)(2). While drafted specifically to protect voluntary residential mortgages, courts equally apply this protection to other non-consensual liens. This means that a debtor may not “strip down” or “cram down” a mortgage to reduce the principal balance down to current market value. *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). The protection under § 1322(b)(2) does not apply to non-homestead real property and does not apply if the claim is secured by other property in addition to the principal residence.

In *Nobelman*, the Supreme Court held that if § 1322(b)(2) applies given the character of the mortgage, the plan cannot modify the “rights” of the mortgage holder, meaning that the plan cannot alter the contractual relationship between the debtor and mortgage lender. Often, where § 1322(b)(2) applies, the debtor simply continues paying the mortgage outside the plan, the mortgage is deemed “not treated” by the chapter 13 plan, and the underlying debt is not discharged upon completion of the plan. *In re Park*, 532 B.R. 392, 396-98 (Bankr. M.D. Fla. 2015), and *authorities cited therein*. Or the plan may state that it is not modifying the lender’s rights with respect to such a claim. Even if § 1322(b)(2) applies, the plan can still cure any pre-petition arrearage for such a mortgage, but the Code specifically states that a mortgage cured under § 1322(b)(5) are not discharged. *Id.* § 1328(a)(1).

The residential mortgage protection does not apply to mortgages which will mature under their original payment schedule within the plan period. *See* 11 U.S.C. § 1322(c)(2). The Code provides that a chapter 13 plan can modify such plans under § 1325(a)(5) addressed below. *Id.*

Treatment of Secured Claims Provided for by the Plan: Mortgages not subject to the anti-modification protection or that will mature within the plan period, are subject to cram down treatment. In the event the debtor can modify the mortgage the court will confirm a plan that meets one of three options: (1) the creditor consents to the proposed plan treatment; (2) the creditor will retain the lien against the property and the plan will pay the creditor an amount equal to the present value of the creditor’s lien (this is the “cramdown” option); or (3) the debtor will “surrender” the collateral on the effective plan date. *See* 11 U.S.C. § 1325(a)(5).

Under a surrender provision, the debtor is not required to deliver the property; rather, the debtor just needs to make the property available to the creditor for collection under state law. *See, for example, In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015). Generally, a creditor

subject to a surrender provision should still file a motion for relief from the automatic stay, schedule a sheriff's sale, and wait out the redemption period.

Vesting: A recent source of controversy nationally is whether a bankruptcy plan can affirmatively vest title in real estate to the secured lender. This may often arise with distressed property that carries ongoing costs and liabilities potentially undesirable for the lender to assume.

Under the Code, a chapter 13 plan may also provide that property will vest in an entity other than the debtor. 11 U.S.C. § 1322(b)(9). Pursuant to this authority, locally one bankruptcy judge confirmed a plan with a vesting provision, under this the debtor could force a secured creditor to accept a quit-claim deed or deed-in-lieu of foreclosure. *See In re Stewart*, 536 B.R. 273 (Bankr. D. Minn. 2015); *see also In re Sagendorph*, 2015 WL 3867955 (Bankr. D. Mass. 2015) (plan may vest property to creditor depending on the circumstances in the case including whether there is environmental contamination or debtor-induced waste on the property);

### **Lien Stripping Unsecured Mortgages**

As noted above, § 1322(b)(2) protects the standard residential mortgage, but in a declining real estate market debtors may assert in a chapter 13 case that a junior lender's mortgage lacks equity in the property given the amount owed on the senior liens. If the debtor can demonstrate to the court that a junior lien is wholly unsupported by value, the court will determine the mortgagee's claim as unsecured in the bankruptcy case. The debtor may then treat the lender's claim within the unsecured class, and have the plan provide for release of the junior mortgage on plan completion. Practitioners refer to this practice as "lien stripping."

The Bankruptcy Appellate Panel for the Eighth Circuit and the Eighth Circuit Court of Appeals forced the Minnesota bankruptcy court to acknowledge the practice of lien stripping in

separate cases in 2011 and 2014. *Minnesota Housing Finance Agency v. Schmidt*, 765 F.3d 877 (8th Cir. 2014); *In re Fisette*, 455 B.R. 177 (8th Cir. B.A.P. 2011) (also determining that a chapter 20 debtor can lien strip meaning a discharged chapter 7 debtor can subsequently file a chapter 13 to restructure the homestead debt). Minnesota may have been the last district in the country to adopt this practice, as prior to *Schmidt* and *Fisette*, Minnesota judges interpreted § 1322(b)(2) to protect homestead mortgages regardless of the value of the residence.

Lien stripping involves a substantial policy judgment determined to date by the judicial branch. Lien stripping may permit a debtor to strip-off a substantial second or third mortgage, even though the value of the residence barely falls short of the preceding mortgage. On the other hand, if the creditor can show even a “penny of equity,”<sup>4</sup> the creditor can retain a substantial mortgage from modification. Since mortgages are often long-term debts subject to at least one cycle of economic recession in their course, debtors can use lien stripping not necessarily to save a residence but enjoy a future windfall. Debtor windfalls are a disfavored outcome of interpreting and administrating the bankruptcy laws.

In response to the initial *Fisette* BAP decision, the district of Minnesota enacted Local Rule 3012-1 which governs procedures for lien stripping. Under Local Rule 3012-1, a debtor seeking to challenge the value of a lien must file and serve a separate motion along with the proposed chapter 13 plan that must designate the target creditor’s claim as unsecured. The motion will typically be on at least 28 days’ notice because the motion to value must be heard the same day as the confirmation hearing. FED. R. BANKR. P. 2002(b). Debtor must serve the

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<sup>4</sup> There is also a dispute as to how a mortgage protected by § 1322(b)(2) is counted for § 109(e) eligibility whether secured or partially unsecured. *See e.g., In re Sandrin*, 536 B.R. 309 (Bankr. D. Colo. 2015) (holding deficiency on mortgage not counted as secured claim or as unsecured claim for eligibility limits despite mortgage qualifying for protection under § 1322(b)(2)).

motion to value on all holders of interests in the property, and must also tender evidence of value. Service of the motion on an “insured depository institution” (i.e., banks) usually requires service by certified mail on a bank officer. *See* FED. R. BANKR. P. 9014 and 7004(h)(2). The courts have required that the motion to value have attached to it a certified appraisal, though tax value or an additional brokers’ opinion may have some additional probative value.

In opposition to a properly-served motion to value, the creditor must typically offer a counter-appraisal showing value to support the lien. If the creditor initially produces a credible counter-valuation, the court will typically schedule a brief allowance of time for discovery and an evidentiary hearing. The court’s valuation determination will rely heavily on the testimony and written reports of the appraisers.

There are certain legal issues unresolved to date in this district because of our “late start” in lien stripping.

Valuation Standard. Courts apply market valuation to real property subject to a lien stripping motion based primarily on comparable market sales data. This is based on the Code’s requirement that valuation should be based on the “proposed disposition or use of such property” in the debtor’s plan. *Cf. Associates Commercial Corp. v. Rash*, 520 U.S. 953, 961-62 (1997). Since the debtor intends to retain the property, the value should be based on market or replacement value versus liquidation value.

The consequence of market value standard bars the debtor from deducting anticipated selling and other liquidation costs from the value of the property. *See In re Ricci-Breen*, 2015 WL 5156617 (Bankr. S.D.N.Y. 2015), *and authorities cited therein*. The market value standard should also limit the probative value of the debtor’s reliance on any short sales, lender owned sales, or cash sales in considering an appraised value. *See In re Strever*, 468 B.R. 776, 782

(Bankr. D. S.C. 2012) (stating “a seller of a foreclosed home is...likely to be motivated to sell for a lower price than a sale between two willing individuals in an arm’s length transaction”); *In re Williams*, 480 B.R. 813, 817 (Bankr. E.D. Tenn. 2012) (stating “use of distressed sales unduly lowers the value.”); *In re Serda*, 395 B.R. 450, 454 (Bankr. E.D. Cal. 2008). Under the market value standard, only non-distressed residential transactions should constitute comparable transactions.

Time of Valuation. While the petition date has become nearly uniform as the valuation date, *See e.g., In re Hegeduis*, 525 B.R. 74 (Bankr. N.D. Ind. 2015), this issue is technically undecided locally. Local Rule 3012-1(b)(2)(D) requires that the debtor tender value “as of the commencement of the Chapter 13 case,” but this rule does not foreclose a party from arguing for a later date. In addition, it is possible that post-petition date sales are at least probative in a valuation proceeding. One or two comparable sales could come to light shortly after the petition date that bump the value across that “penny of equity” line. It may be worthwhile to have a petition date appraisal and a confirmation date appraisal if there is a six month or more variance between the dates. *See In re Guitierrez*, 503 B.R. 458, 461 (Bankr. C.D. Cal. 2013) (stating that the court has discretion under § 506 to select a valuation date); *Cf. In re Cahill*, 503 B.R. 535, 540 (Bankr. D. N.H. 2013) (holding confirmation date appropriate date for determining value in chapter 11 residential lien stripping case); *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) (stating that “any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor”).

Burden of Proof. With respect to the burden of proof, a debtor seeking to strip a junior lien holds the evidentiary burden of proof to establish that the junior creditor is wholly-unsecured under § 506(a). *In re Slovak*, 489 B.R. 824, 826-27 (Bankr. D. Minn. 2013). Some courts have

stated that if the valuation amounts are very close (i.e., within 10%), debtor may win through establishing an initial burden and the creditor failing to provide evidence overcoming the initial showing. *In re Hassan*, 2015 WL 5895481 (Bankr. E.D.N.Y. 2015).

Evidentiary hearings can be a little fast and loose but it is important as the creditor to insist on competent evidence for all elements of an appraisal including some underlying facts and assumptions. The subjective condition of the property as adjudged by the appraiser often becomes a determinative factor in a case where there is a close valuation dispute. There may be inadequate data for supporting a below average condition. For any claim of defects (i.e. “there was once water in the basement”) the debtors will rarely provide an engineering report to verify a defect or a competent estimate on a repair. The appraisal or the debtor’s self-serving testimony is rarely probative as to a defect claim.

Release of Mortgage upon Completion of Plan Payments. Under the Local Rule, where the court previously determined a mortgage as entirely unsecured, the debtor can request a supplemental order at the end of the case that will release the lien. Local Rule 3012-1(f). The court consulted with the local county property offices who indicated they will record and acknowledge the release orders.

In our district there is an issue as to certain lien stripping plans confirmed prior to enactment of Local Rule 3012 that may have been confirmed without a valuation proceeding or determination, or perhaps without adequate service. At the time, the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code still both contemplated a form of valuation determination upon a motion and after notice and a hearing. *See* 11 U.S.C. § 506(a)(1); FED. R. BANKR. P. 3012. Many confirmed plans simply stated the value of the property, and provided for a lien strip without any formal valuation proceeding. Local courts confirmed some of these plans

where creditors never objected. There is a question of validity as to those prior plans, but likely the confirmation of the prior plan without objection would be viewed as creditor acceptance, so long as the creditor received proper service or otherwise had adequate due process. *See e.g., In re Crawford*, 532 B.R. 645 (Bankr. D. S.D. 2015).

Other Issues: Our court recently also held that lien stripping is not allowed where one of the obligors on the underlying debt is not in bankruptcy. *See In re Brown*, 536 B.R. 837 (Bankr. D. Minn. 2015).

There is a split of authority as to whether or not a former primary residence financed by a purchase money mortgage remains a primary residence on the date of the petition. *See e.g., In re Smart*, 214 B.R. 63, 68 (Bankr. D. Conn. 1997) (holding that former residence continues to qualify as primary residence). *See also, In re Kelly*, 486 B.R. 882, 884-85 (Bankr. E.D. Mich. 2013) (explaining three different approaches to determining whether a property not resided in on the petition date could yet constitute a “primary residence” under § 1322(b)(2)).

There is some uncertainty where the lender and the debtor want to compromise a valuation dispute on the best way to document that settlement.

**Fill in this information to identify the case:**

Debtor 1 \_\_\_\_\_

Debtor 2 \_\_\_\_\_  
(Spouse, if filing)

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_

Case number \_\_\_\_\_

Send original to:  
U.S. Bankruptcy Court  
301 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

**Official Form 410**  
**Proof of Claim**

12/15

**Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.**

**Filers must leave out or redact** information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

**Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.**

**Part 1:** Identify the Claim

1. **Who is the current creditor?** \_\_\_\_\_  
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor \_\_\_\_\_

2. **Has this claim been acquired from someone else?**  No  
 Yes. From whom? \_\_\_\_\_

3. <b>Where should notices and payments to the creditor be sent?</b>	<b>Where should notices to the creditor be sent?</b>	<b>Where should payments to the creditor be sent? (if different)</b>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Name _____ Number _____ Street _____ City _____ State _____ ZIP Code _____ Contact phone _____ Contact email _____
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): -----	

4. **Does this claim amend one already filed?**  No  
 Yes. Claim number on court claims registry (if known) \_\_\_\_\_ Filed on \_\_\_\_\_  
MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**  No  
 Yes. Who made the earlier filing? \_\_\_\_\_

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?  No  
 Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: \_\_\_\_ \_

7. How much is the claim? \$\_\_\_\_\_ Does this amount include interest or other charges?  
 No  
 Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.  
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).  
Limit disclosing information that is entitled to privacy, such as health care information.

9. Is all or part of the claim secured?  No  
 Yes. The claim is secured by a lien on property.

**Nature of property:**

Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.

Motor vehicle

Other. Describe: \_\_\_\_\_

**Basis for perfection:** \_\_\_\_\_

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

**Value of property:** \$ \_\_\_\_\_

**Amount of the claim that is secured:** \$ \_\_\_\_\_

**Amount of the claim that is unsecured:** \$ \_\_\_\_\_ (The sum of the secured and unsecured amounts should match the amount in line 7.)

**Amount necessary to cure any default as of the date of the petition:** \$ \_\_\_\_\_

**Annual Interest Rate** (when case was filed) \_\_\_\_\_ %

Fixed

Variable

10. Is this claim based on a lease?  No  
 Yes. Amount necessary to cure any default as of the date of the petition. \$ \_\_\_\_\_

11. Is this claim subject to a right of setoff?  No  
 Yes. Identify the property: \_\_\_\_\_

**12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

No

Yes. Check all that apply:

Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

Up to \$2,775\* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

Wages, salaries, or commissions (up to \$12,475\*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

Other. Specify subsection of 11 U.S.C. § 507(a)(    ) that applies.

**Amount entitled to priority**

\$ \_\_\_\_\_

\$ \_\_\_\_\_

\$ \_\_\_\_\_

\$ \_\_\_\_\_

\$ \_\_\_\_\_

\$ \_\_\_\_\_

\* Amounts are subject to adjustment on 4/01/16 and every 3 years after that for cases begun on or after the date of adjustment.

**Part 3: Sign Below**

**The person completing this proof of claim must sign and date it. FRBP 9011(b).**

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

**A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.**

Check the appropriate box:

I am the creditor.

I am the creditor's attorney or authorized agent.

I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date \_\_\_\_\_  
MM / DD / YYYY

\_\_\_\_\_  
Signature

**Print the name of the person who is completing and signing this claim:**

Name \_\_\_\_\_  
First name Middle name Last name

Title \_\_\_\_\_

Company \_\_\_\_\_  
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address \_\_\_\_\_  
Number Street

City State ZIP Code

Contact phone \_\_\_\_\_ Email \_\_\_\_\_

**Fill in this information to identify the case:**

Debtor 1 \_\_\_\_\_  
Debtor 2 \_\_\_\_\_  
(Spouse, if filing)  
United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_  
Case number \_\_\_\_\_

# Official Form 410S1

## Notice of Mortgage Payment Change

12/15

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: \_\_\_\_\_

Court claim no. (if known): \_\_\_\_\_

Last 4 digits of any number you use to identify the debtor's account: \_\_\_\_\_

**Date of payment change:**  
Must be at least 21 days after date of this notice \_\_\_\_\_

**New total payment:** \$ \_\_\_\_\_  
Principal, interest, and escrow, if any

### Part 1: Escrow Account Payment Adjustment

**1. Will there be a change in the debtor's escrow account payment?**

- No
- Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: \_\_\_\_\_

Current escrow payment: \$ \_\_\_\_\_      New escrow payment: \$ \_\_\_\_\_

### Part 2: Mortgage Payment Adjustment

**2. Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable-rate account?**

- No
- Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: \_\_\_\_\_

Current interest rate: \_\_\_\_\_%      New interest rate: \_\_\_\_\_%

Current principal and interest payment: \$ \_\_\_\_\_      New principal and interest payment: \$ \_\_\_\_\_

### Part 3: Other Payment Change

**3. Will there be a change in the debtor's mortgage payment for a reason not listed above?**

- No
- Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (Court approval may be required before the payment change can take effect.)

Reason for change: \_\_\_\_\_

Current mortgage payment: \$ \_\_\_\_\_      New mortgage payment: \$ \_\_\_\_\_

Debtor 1 \_\_\_\_\_  
First Name Middle Name Last Name

Case number (if known) \_\_\_\_\_

**Part 4: Sign Here**

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

*Check the appropriate box.*

- I am the creditor.
- I am the creditor's authorized agent.

**I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.**

**X** \_\_\_\_\_ Date \_\_\_\_\_  
Signature

Print: \_\_\_\_\_ Title \_\_\_\_\_  
First Name Middle Name Last Name

Company \_\_\_\_\_

Address \_\_\_\_\_  
Number Street  
\_\_\_\_\_  
City State ZIP Code

Contact phone \_\_\_\_\_ Email \_\_\_\_\_

**Fill in this information to identify the case:**

Debtor 1 \_\_\_\_\_

Debtor 2 \_\_\_\_\_  
(Spouse, if filing)

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_

Case number \_\_\_\_\_

**Official Form 410S2**

**Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/15**

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: \_\_\_\_\_

Court claim no. (if known): \_\_\_\_\_

Last 4 digits of any number you use to identify the debtor's account: \_\_\_\_\_

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- No
- Yes. Date of the last notice: \_\_\_\_\_

**Part 1: Itemize Postpetition Fees, Expenses, and Charges**

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Bankruptcy/Proof of claim fees	_____	(5) \$ _____
6. Appraisal/Broker's price opinion fees	_____	(6) \$ _____
7. Property inspection fees	_____	(7) \$ _____
8. Tax advances (non-escrow)	_____	(8) \$ _____
9. Insurance advances (non-escrow)	_____	(9) \$ _____
10. Property preservation expenses. Specify: _____	_____	(10) \$ _____
11. Other. Specify: _____	_____	(11) \$ _____
12. Other. Specify: _____	_____	(12) \$ _____
13. Other. Specify: _____	_____	(13) \$ _____
14. Other. Specify: _____	_____	(14) \$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Debtor 1 \_\_\_\_\_  
First Name Middle Name Last Name

Case number (if known) \_\_\_\_\_

**Part 2: Sign Here**

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

*Check the appropriate box.*

- I am the creditor.
- I am the creditor's authorized agent.

**I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.**

**X** \_\_\_\_\_ Date \_\_\_\_\_  
Signature

Print: \_\_\_\_\_ Title \_\_\_\_\_  
First Name Middle Name Last Name

Company \_\_\_\_\_

Address \_\_\_\_\_  
Number Street  
City State ZIP Code

Contact phone \_\_\_\_\_ Email \_\_\_\_\_

