LIEN STRIPPING IN CHAPTER 7, CHAPTER 13 AND "CHAPTER 20"

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Section 506(a) of the Bankruptcy Code provides that a secured claim in bankruptcy may be limited to the value of the creditor's collateral.[1] This provision recognizes the economic reality outside the bankruptcy process of enforcement of the creditor's lien. If a creditor seizes collateral and sells it, the creditor can realize no more than the collateral's value. To the extent the claim exceeds the value of the collateral, the creditor has an unsecured claim.

Section 1322(b)(2) permits modification of secured claims in chapter 13. Through the application of sections 506(a), 1322(b)(2) and 1325(a)(5), the debtor may provide in a chapter 13 plan for payment of the present value of the creditor's allowed secured claim during the pendency of the plan.[2]The process of satisfying liens under this provision has come to be known as "strip down." Lien stripping in chapter 7 cases through the application of section 506(d) generally has been prohibited by the Supreme Court decision is *Dewsnup v. Timm*,[3] as discussed below.

An exception to the general modification rule applies to claims secured "only by a security interest in real property that is the debtor's principal residence."[4]Significantly, the protection against modification afforded to home mortgage lenders is not unlimited. In each

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[1]A lien may be voided to the extent it exceeds the value of the collateral to which it is attached. 11 U.S.C. § 506(d).

[2] To satisfy the "present value" requirement of § 1325(a)(5)(B)(ii), interest generally must be paid on the secured portion of the bifurcated claim. The Supreme Court in *Till v. SCS Credit Corp.*, 124 S. Ct. 1951 (2004), held that a formula method is to be used for calculating the interest required, with the prime rate of interest as the starting point, adjusted by a factor for risk.

[3] 502 U.S. 410 (1992).

[4] 11 U.S.C. § 1322(b)(2). *See Nobleman v. Am. Savings Bank*, 508 U.S. 324 (1993).

of the following situations, courts have recognized that a home secured loan may be modified:

- The security interest of the creditor is not secured by any portion of the debtor's principal residence (for example, a wholly unsecured junior mortgage such as a $40,000 second mortgage on a $100,000 home subject to a first mortgage of $105,000);
- The claim is not secured only by real property that is the debtor's principal residence because the collateral serves as both the debtor's residence and as income producing property (for example, a multi-family property);
- The collateral is not considered real property under state law (for example, a mobile home);
- The claim is not secured only by the debtor's principal residence because the creditor has taken additional security (for example, appliances or other personal property located in the residence);and
- The final payment on the mortgage debt will come due during the course of a chapter 13 plan (for example, short-term and balloon payment mortgages).

A. Strip Off of "Wholly Unsecured" Liens

1. Application in Chapter 13 Cases.

In determining whether a home secured claim is entitled to protection from modification under section 1322(b)(2), a court must first look to section 506(a) for a valuation of the claim's secured and unsecured components. This "interplay between" Code section 506(a) and section 1322(b)(2) was noted by the Supreme Court in *Nobelman v. American Sav. Bank.*[5] *Nobelman* makes clear that section 506(a) is essential to the preliminary determination of whether the anti-modification protection should be invoked at all.[6] If the claim is supported by at least some security, the lien holder is the

[5] 508 U.S. 324, 124 L.Ed.2d 228, 233 (1993). The Court in *Nobleman* was asked to decide the scope of § 1322(b)(2) in relation to a lien holder having at least some partial security. The Court did not decide the effect of § 1322(b)(2) on a totally unsecured lien holder.

[6] The Supreme Court in *Nobelman* clearly recognized the need to turn to § 506(a) first to determine whether the creditor has a secured claim:

"holder of a secured claim" and its claim may be entitled to protection under section 1322(b)(2). On the other hand, if the lien has no true economic value based on the underlying collateral and is therefore totally unsecured, then the exception does not come into play and the claim may be modified. This reading of the statute gives effect to both subsections, and has been adopted by the majority of courts.

The Second, Third, Fourth, Fifth, Ninth and Eleventh Circuits have explicitly ruled that strip off is permissible.[7] The First, Seventh, Eighth, and Tenth Circuit Courts have yet to definitively weigh in on the issue. Consequently, at least one bankruptcy court in each of those jurisdictions has rejected a debtor's efforts to strip off an unsecured claim in a chapter 13 case.[8] However, two Bankruptcy Appellate Panels[9] and most bankruptcy courts in these undecided circuits have adopted the clear majority view favoring strip off.

2. Application in Chapter 7 Cases.

Most courts have held that chapter 7 debtors may not strip off wholly unsecured liens, generally finding the Supreme Court decision is *Dewsnup v. Timm* to be controlling.[10] A few courts have ruled the other way.[11]

> Petitioners were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim. It was permissible for petitioners to seek a valuation in proposing their Chapter 13 plan, since § 506(a) states that '[s]uch value shall be determined ... in conjunction with any hearing ... on a plan affecting such creditor's interest.' But even if we accept petitioners' valuation, the bank is still the 'holder' of a 'secured claim,' because petitioners' home retains $23,500 of value as collateral. *Nobelman*, 113 S.Ct. at 2210.

[7] *First Mariner Bank v. Johnson*, 411 B.R. 221 (D. Md. 2009), *aff'd*, 2011 WL 52358 (4th Cir. Jan 06, 2011)(unpublished opin.); *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2003); *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). *See also In re Gonzales*, 2010 WL 1571172 (Bankr. S.D. Fla. Apr. 20, 2010) (lien securing condominium association fees was not subject to anti-modification provisions of § 1332(b)(2) and could be stripped off except for portion based on Florida statute that was part of first mortgagee's secured claim).

[8] *See In re* Fraize, 208 B.R. 311 (Bankr. D. N.H. 1997); *In re Barnes*, 207 B.R. 588 (Bankr. N.D. Ill. 1997); *In re Hughes*, 402 B.R. 325 (Bankr. D. Minn. 2009); *In re Carroll*, 2010 WL 3895537 (Bankr. D. Utah Oct. 1, 2010).

[9] *In re Fisette*, 455 B.R. 177 (B.A.P. 8th Cir. 2011); *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000).

[10] *E.g.*, *In re Talbert*, 344 F.3d 555 (6th Cir. 2003); *Ryan v. Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *In re Laskin*, 222 B.R. 872 (B.A.P. 9th Cir. 1998); *In re*

In a recent unpublished opinion, a three-judge panel of the Eleventh Circuit in *In re McNeal*[12] held that it was bound by an earlier, pre-*Dewnsup* decision[13] from another panel permitting strip off in a chapter 7 case. The *McNeal* court refused to treat the earlier *Folendore* decision as abrogated by *Dewsnup*. Relying upon the Circuit's prior panel precedent rule that a later panel may depart from an earlier panel's decision only when an intervening Supreme Court decision is clearly "clearly on point the court held that *Dewnsup* did not control as to the treatment of a wholly unsecured lien in a chapter 7 case. Although the *McNeal* court acknowledged that *Dewsnup* appeared to reject the plain language analysis used in *Folendore*, it nevertheless held that any difference between the reasoning in the decisions would not permit departure from the prior precedent and that the Supreme Court itself stated in *Dewsnup* that its decision should be limited to the exact issue raised by the facts of the case.

It is questionable whether *McNeal* will survive *en banc* review or be followed by other three-judge panels in the Eleventh Circuit. Lower courts in other Circuits in which the issue is undecided have refused to follow *McNeal* and have found *Dewsnup* to be controlling.[14]

3. Application in "Chapter 20" Cases

The most controversial issue dividing the courts at present is whether the debtor may strip off a mortgage in a no-discharge chapter 13 case. Due to Code amendments made in 2005, a debtor may not receive a discharge if the debtor received a discharge in an earlier chapter 7 case filed within the four-year period before the current chapter 13 case (a so-called "chapter 20" case), or if the debtor received a discharge in a chapter 13

Cater, 240 B.R. 420 (M.D. Ala. 1999); *In re Richins*, 469 B.R. 375 (Bankr. D. Utah 2012); *In re Grano*, 422 B.R. 401 (Bankr. W.D.N.Y. 2010); *In re Bessette*, 269 B.R. 644 (Bankr. E.D. Mich. 2001); *In re Keltz*, 261 B.R. 845 (Bankr. W.D. Pa. 2001); *In re Fitzmaurice*, 248 B.R. 356 (Bankr. W.D. Mo. 2000); *In re Cunningham*, 246 B.R. 241 (Bankr. D. Md. 2000); *In re Virello*, 236 B.R. 199 (Bankr. D.S.C. 1999); *In re Swiatek*, 231 B.R. 26 (Bankr. D. Del. 1999).

[11] *In re Lavelle*, 2009 WL 4043089 (Bankr. E.D. N.Y. Nov. 19, 2009); *In re Zempel*, 244 B.R. 625 (Bankr. W.D. Ky. 1999); *In re Howard*, 184 B.R. 644 (Bankr. E.D.N.Y. 1995).

[12] *In re McNeal*, 477 Fed.Appx. 562 (11th Cir. 2012)(*not for publication*).

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

[14] *See In re Palomar*, 2012 WL 4739407 (N.D. Ill. Oct 03, 2012); *Wachovia Mortg. v. Smoot,* 478 B.R. 555 (E.D. N.Y. 2012).

case filed during the two-year period before the current chapter 13 case.[15] Courts generally are in agreement that the inability to receive a discharge does not make a debtor ineligible for chapter 13 relief.[16] Moreover, the Supreme Court decision in *Johnson v. Home Bank*[17] makes clear that a mortgage creditor has a claim against the debtor's property in a chapter 13 case even though the debtor's personal obligation on the mortgage loan has been discharged in an earlier chapter 7 case.

The controversy lies to some extent in the method used to achieve a lien strip off in a chapter 13 case. In fact, the outcome in no-discharge cases may depend upon how the debtor argues the basis for the strip off. By arguing that the lien is voided under section 506(d), debtors invite the response that a chapter 20 is being used to circumvent the decision in *Dewsnup v. Timm*,[18] which prohibits application of section 506(d) in chapter 7 cases. Some courts have been persuaded by this view and have found chapter 20 filings made for strip off purposes to be improper.[19] They conclude that section 506(d) alone cannot be used to strip a lien,[20] or that the only way to make a strip off under section 506(d) "permanent" is to obtain a discharge.[21] These courts generally equate a chapter 20 filing with a case conversion, and rely upon Congressional intent expressed in section 348(f)(1)(C)(I).[22] Despite the creditor's lack of an allowed secured claim based on section 506(a), another reason often stated is that section 1325(a)(5)(B)(II) prohibits lien stripping in no-discharge cases.[23] Even if this provision

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[15] 11 U.S.C. § 1328(f).
[16] *E.g., In re Bateman*, 515 F.3d 272 (4th Cir. 2008).
[17] 501 U.S. 78 (1991).
[18] 502 U.S. 410 (1992),
[19] *In re Mendoza*, 2010 WL 736834 (Bankr. D.Colo. Jan 21, 2010); *In re Blosser*, 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2009); *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008).
[20] *In re Gerardin*, 447 B.R. 342 (Bankr. S.D. Fla. 2011).
[21] *In re Victorio*, 454 B.R. 759 (Bankr.S.D. Cal. 2011), *aff'd*, 470 B.R. 545 (S.D. Cal. 2012).
[22] *Id*.
[23] *In re Lindskog*, 2011 WL 1576561 (Bankr. E.D. Wis. Apr 13, 2011); *In re Woolsey*, 438 B.R. 432 (Bankr. D. Utah 2010); *In re Fenn*, 428 B.R. 494 (Bankr. N.D.Ill. 2010); *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008).

were applicable, one court has noted that its plain language makes lien strip off permanent based on plan completion, not on a discharge.[24]

Debtors have been more successful in no-discharge strip off cases by arguing that section 1322(b)(2) alone or in combination with section 1327(c) provides the authority for lien stripping. In these cases, courts have held that the discharge entered under section 1328(a) deals only with the debtor's personal liability and has nothing to do with lien avoidance. Rather, it is plan completion that voids the lien. They reason further that the language added by BAPCPA in section 1328(f) to preclude a discharge in certain cases makes no mention of lien avoidance, no other provision in the Code makes lien stripping dependent upon receipt of a discharge, and section 1325(a)(5)(B)(II) is simply not applicable.[25] As one court has stated, it is not a discharge but rather "completion of the plan and performance under the new contract created under the Bankruptcy Code which result in the debtors having the right to demand and receive the release of the lien."[26]

Even among courts that permit strip off in a chapter 20 case, controversy surrounds the treatment of the creditor's claim in the subsequent chapter 13 case. Some courts hold that the creditor should be permitted to have its avoided lien treated as an

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[24] *In re Tran*, 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010). Section 1325(a)(5)(B)(i)(II) provides that "if the case under this chapter is dismissed or converted *without completion of the plan*, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law."

[25] *In re Fisette*, 455 B.R. 177 (B.A.P. 8th Cir. 2011); *Zeman v. Waterman* (*In re Waterman*), 469 B.R. 334 (D. Colo. 2012); *In re Fair*, 450 B.R. 853 (E.D. Wis. 2011); *Hart v. San Diego Credit Union*, 449 B.R. 783 (S.D. Cal. 2010); *In re Scantling*, 465 B.R. 671 (Bankr. M.D. Fla. 2012); *In re Gloster*, 459 B.R. 200, 205 (Bankr. D.N.J. 2011); *In re Jennings*, 454 B.R. 252 (Bankr. N.D. Ga. 2011); *In re Okosisi*, 451 B.R. 90 (Bankr. D. Nev. 2011); *In re Davis*, 447 B.R. 738 (Bankr. D. Md. 2011); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010); *In re Grignon*, 2010 WL 5067440 (Bankr. D. Or. Dec 07, 2010); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010).

[26] *In re Frazier*, 448 B.R. 803, 810 (Bankr. E.D. CA 2011).

allowed unsecured claim.[27] Other courts reject this approach, reasoning that this would convert the creditor's nonrecourse claim into a recourse claim.[28]

Moreover, the availability of no-discharge lien stripping, in courts that permit it, is no guarantee that the debtor's plan will be confirmed. If an objection to confirmation is filed, the debtor will need to show that the plan has been filed in good faith.[29] In one of the leading cases supporting strip off in a chapter 20 case, the court nevertheless denied confirmation in both consolidated cases.[30] The court found that one debtor was proposing to pay nothing on more than $93,000 in unsecured debt and the other debtor, who had almost no debt besides the underwater mortgage and was "solvent in a balance sheet sense," appeared to be filing solely to strip off the mortgage. In general, a chapter 13 case filed immediately after the debtor has received a discharge in a chapter 7 case will be subject to scrutiny and will require a showing of compelling facts to overcome an objection on bad faith grounds.

In *In re Okosisi*,[31] the court relied upon the following factors in finding that the debtors' plan in a no-discharge lien stripping case was filed in good faith:

- Debtors are insolvent and in need of bankruptcy relief other than strip off;
- Debtors have an arrearage on the first mortgage that will be cured under the plan and was not generated solely to justify filing chapter 13 case;[32]
- Debtors have priority tax claims that will be paid under the plan;
- Debtors are proposing to make substantial plan payments over a five year period (even though dividend to unsecured creditors will be small), devoting all disposable income and future tax refunds to plan;[33]
- Debtors did not use serial filings to avoid payments to creditors.

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[27] *In re Jennings*, 454 B.R. 252 (Bankr. N.D. Ga. 2011); *In re Okosisi*, 451 B.R. 90, 96 (Bankr. D. Nev. 2011)("Once the lien is so avoided, the unsecured claim that is represented by this nonrecourse debt becomes an unsecured claim in the bankruptcy case."); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010).

[28] *In re Sweitzer*, 476 B.R. 468 (Bankr. D. Md. 2012)(noting that § 1111(b), which makes a deficiency claim held by a nonrecourse creditor allowable in a chapter 11 case, is not applicable in a chapter 13 case).

[29] 11 U.S.C. § 1325(a)(3)(plan should be "proposed in good faith and not by any means forbidden by law"); *see also* 11 U.S.C. § 1325(a)(7)(petition).

[30] *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010).

[31] 451 B.R. 90 (Bankr. D. Nev. 2011).

[32] *See also In re Frazier*, 448 B.R. 803 (Bankr. E.D. CA 2011)($20,000 arrearage); *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010)($18,000 arrearage).

[33] *See also In re Frazier*, 448 B.R. 803 (Bankr. E.D. CA 2011)(plan payments totaling $164,580).

4. Lien Stripping Procedure

The Federal Rules of Bankruptcy Procedure do not address the proper procedure for stripping off a wholly unsecured mortgage in a chapter 13 case based on the application of sections 1322(b)(2) and 506(a). The following methods have been adopted:

Adversary Proceeding. Several courts have held that debtors must initiate an adversary proceeding to effectuate a lien strip off.[34] According to these courts, debtors may not rely upon a chapter 13 plan provision to achieve this end. However, debtors in these cases generally had sought a determination of the validity of the lien rather than a valuation of the collateral.[35]For example, the Third Circuit recognized this distinction in a case in which the debtor alleged that the creditor's mortgage was invalid because it had been rescinded based on TILA violations, noting: "the concept of 'lien stripping' is related to the valuation of the collateral, not the validity of a lien."[36]

Plan Provision and/or Motion to Value. A debtor who strips off a wholly unsecured junior mortgage in a chapter 13 case is primarily seeking a determination of the amount of the creditor's allowed secured claim, if any, for purposes of plan treatment. Moreover, Fed.R. Bankr. P. 7001(7) requires an adversary proceeding "to obtain an injunction or other equitable relief, *except when a ... plan provides for the relief*." Thus, most courts seem to prefer that the matter be raised in a plan provision alone or a related motion.[37]In fact, some courts may not permit the debtor to proceed by adversary proceeding.[38] In addition to the plan provision, some courts may require that the debtor

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[34]*E.g.*, *In re Forrest*, 424 B.R. 831 (Bankr. N.D. Ill. 2009); *In re Enriquez*, 244 B.R. 156 (Bankr. S.D. Cal. 2000).
[35]*See In re Mansaray-Ruffin*, 530 F.3d 230 (3d Cir. 2008); *Cen-Penn Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995); *see also* Fed.R. Bankr. P. 7001(2).
[36] Mansaray-Ruffin, 530 F.3d at 236. *See also In re Kemp*, 391 B.R. 262 (Bankr. D. N.J. 2008)(noting this distinction in *Mansaray-Ruffin* and finding that an adversary proceeding is not required in order to the reclassify a claim as unsecured).
[37]*See, e.g.*, *In re Stassi*, 2009 WL 3785570 (Bankr. C.D. Ill. Nov 12, 2009); *In re Millspaugh*, 302 B.R. 90 (Bankr. D. Idaho 2003); *In re Sadala*, 294 B.R. 180 (Bankr. M.D. Fla. 2003); *In re Hoskins*, 262 B.R. 693 (Bankr. E.D. Mich. 2001).
[38]*E.g.*, *In re Pereira*, 394 B.R. 501 (Bankr. S.D. Cal. 2008).

file and serve a separate motion to value the creditor's secured claim pursuant to Fed.R. Bankr. P. 3012, with a notice of hearing set for the plan confirmation date.[39]

Because a plan provision, if used to strip a mortgage, affects a potential claim involving an interest in real property, the plan provision must be as explicit as possible. Otherwise, the debtor may face a due process challenge from the creditor whose lien was to be voided.[40]

Service of process will depend upon the procedure used. If an adversary proceeding is required, then service of the summons and complaint will be in accordance with Bankruptcy Rule 7004. Any related motions, such as a motion to modify the plan to provide for a strip off, should also be served in the same manner.[41]

Even if an adversary proceeding is not filed, several courts have held that the service provisions applicable to a summons and complaint in an adversary action must be followed in serving the affected creditors with a plan containing these lien voiding provisions and any related motions.[42] If the creditor holding the junior lien is an insured depository institution, service generally will not be effective unless an officer of the institution is served by certified mail.[43]

B. Liens on Multi-Unit Property

Several limitations on the anti-modification exception for mortgage claims derive from the exact language used in section 1322(b)(2). In describing claims entitled to

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[39] *E.g.*, *In re Bennett*, 312 B.R. 843 (Bankr. W.D. Ky. 2004).

[40] *See In re Brawders*, 325 B.R. 405 (B.A.P. 9th Cir. 2005)(plan provision inadequate to strip a tax lien); *In re Shook*, 278 B.R. 815 (B.A.P. 9th Cir. 2002)(plan provision did not specifically address holder's claim); *In re Rascon*, 321 B.R. 48 (N.D. Cal. 2005)(plan provision did not violate holder's due process rights); *In re Perry*, 337 B.R. 649 (Bankr. N.D. Ohio 2005)(boilerplate language in plan provision that did not refer to mortgage holder by name did not provide sufficient notice to holder that its lien would be stripped off).

[41] *See In re Miller*, 428 B.R. 791 (Bankr. S.D. Ohio 2010)(finding service to be improper because only adversary complaint, and not motion to modify plan, was served on insured depository institution under Rule 7004(h)).

[42] *See In re Stassi*, 2009 WL 3785570 (Bankr. C.D. Ill. Nov 12, 2009); *In re Pereira*, 394 B.R. 501 (Bankr. S.D. Cal. 2008) (debtor must comply with Bankruptcy Rule 7004(b)(3) and (h) in serving the plan with terms that strip off a wholly unsecured junior lien); *In re Jean*, 306 B.R. 708 (Bankr. S.D. Fla. 2004)(plan should be served under Bankruptcy Rule 7004(b)); *In re Millspaugh*, 302 B.R. 90 (Bankr. D. Idaho 2003).

[43] *See* Fed. R. Bankr. P. 7004(h).

protection from modification, the word "only" in section 1322(b)(2) modifies the entire phrase "by a security interest in real property that is the debtor's principal residence." In addition, the word "is" in the phrase makes clear that the "real property" can only be the "debtor's principal residence." This construction led many bankruptcy courts before BAPCPA to conclude that if the security is not only the principal residence, such as when the collateral is a multi-unit property, then modification is permitted.[44] This reading of the statutory language was also found to be consistent with Congress' use of the word "residence" rather than "dwelling."[45]

In *Lomas Mortg., Inc. v. Louis*,[46] the First Circuit acknowledged that this was an appropriate reading of section 1322(b)(2) but found that the plain language was not conclusive. By relying upon legislative history of a subsequent related amendment, however, the *Lomas* court concluded that a debtor may strip down a mortgage secured by a multi-family residence.[47]

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[44] *In re Adebanjo*, 165 B.R. 98 (Bankr. D. Conn. 1994) (§ 1322(b)(2) "protects claims secured only by a security interest in real property that is the debtor's principal residence, and not the real property in which the debtor resides."); *In re McGregor*, 172 B.R. 718 (Bankr. D. Mass. 1994); *In re McVay*, 150 B.R. 254 (Bankr. D. Or. 1993) (residential property used in part as bed and breakfast); *In re Ramirez*, 62 B.R. 668 (Bankr. S.D. Cal. 1986). *But see In re Guilbert*, 165 B.R. 88 (Bankr. D.R.I. 1994), *rev'd on other grounds*, 176 B.R. 302 (D.R.I. 1995).

[45] If Congress intended to include multi-family residential properties, it could have used previously defined terms other than "principal residence." *In re Adebanjo*, 165 B.R. 98, 104 (Bankr. D. Conn. 1994)(Congress has repeatedly used the term "dwelling" in other statutes and defined that term to include one to four family residences). For example, in the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq*., Congress provides rights for consumers to rescind certain mortgages on property used as a "principal dwelling." 15 U.S.C. § 1635(b)(2). In that context, Congress defines "dwelling" to encompass "a residential structure or mobile home which contains one to four family housing units, ..." 15 U.S.C. § 1602(v). Congress neither used the term "dwelling," nor created a similarly defined term encompassing one to four family residences, in identifying claims eligible for protection from modification in § 1322(b)(2).

[46] 82 F.3d 1 (1st Cir. 1996).

[47] The First Circuit noted that the decision in *In re Ramirez*, 62 B.R. 668 (Bankr. S.D. Cal. 1986), was cited favorably by Congress in the legislative history to the 1994 amendments in the section-by-section analysis, when discussing section 206 of the 1994 Act. *Lomas Mortg., Inc. v. Louis*, 82 F.3d 1, 6 (1st Cir. 1996). Section 206 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) conformed the treatment of mortgages in chapter 11 to that in chapter 13 by adding a home mortgage anti-modification provision in chapter 11 that is identical to § 1322(b)(2). *Ramirez* was

The Third Circuit in *In re Scarborough*[48] reached the same conclusion as the First Circuit, but relied solely on the plain meaning of the statute and without resort to the legislative history. Adopting the construction of the statute set forth in an earlier bankruptcy court opinion, *In re Adebanjo*,[49] the Third Circuit stated:

> By using the word "is" in the phrase "real property that is the debtor's principal residence," Congress equated the terms "real property" and "principal residence." Put differently, this use of "is" means that the real property that secures the mortgage must be only the debtor's principal residence in order for the anti-modification provision to apply. … A claim secured by real property that is, even in part, not the debtor's principal residence does not fall under the terms of § 1322(b)(2).[50]

No change was made to the language in section 1322(b)(2) by BAPCPA. Congress did enact, however, several provisions which relate to section 1322(b)(2) as part of the 2005 amendments, though these seem to have been intended to impose limitations on other forms of strip down discussed below. A definition was added for "debtor's principal residence," which is defined as "a residential structure, including incidental property, without regard to whether that structure is attached to real property."[51] A 2010 technical amendment added to the definition of "debtor's principal residence" language noting that the structure be "used as the principal residence by the debtor."[52] "Incidental property" is further defined to include "property commonly conveyed with a principal residence in the area where the real property is located...."[53]

The BAPCPA definitions do not alter the reading of section 1322(b)(2) by the Third Circuit in *In re Scarborough* and the majority of courts, nor do they appear intended to overrule these decisions.[54] Significantly, Congress added a definition for

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cited as an example of an existing substantive limitation on the anti-modification provision for "property other than real property used as the debtor's residence." *See* H.R. Rep. No. 835, at 46 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3354.

[48] 461 F.3d 406 (3d Cir. 2006).

[49] 165 B.R. 98, 104 (Bankr. D. Conn. 1994).

[50] 461 F.3d 406, 411 (3d Cir. 2006).

[51] 11 U.S.C. § 101(13A).

[52] 11 U.S.C. § 101(13A) (2010) (The term "debtor's principal residence"—(A) means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property;...).

[53] 11 U.S.C. § 101(27A).

[54] *See In re Picchi*, 448 B.R. 870 (B.A.P. 1st Cir. 2011).

"debtor's principal residence" without squarely addressing this issue. If Congress intended to protect liens on multi-unit residential structures from modification, it would have been a simple matter to add language to the new definition in section 101(13A), such as: "a residential structure which contains one to four family housing units, ...", as Congress has done in other statutes.[55]

The definition of "incidental property" in section 101(27A) also should not change the result in most cases. Other rental units normally are not "property commonly conveyed with a principal residence." In some areas where there is a high concentration of multi-family residential structures, mortgage lenders perhaps may argue that a security interest that covers other units in addition to the debtor's residence is "incidental property." But even if such a factual predicate is established, the "commonly conveyed" language in the definition appears to have been intended to apply to additional property interests conveyed "with" the principal residence, perhaps such as a boilerplate assignment of rents clause,[56] rather than conveyance of the multi-unit property itself.

Moreover, there is no mention in the legislative history for the 2005 amendments that the new definitions were intended to overrule *Lomas* or other opinions permitting strip down of multi-family residential structures. In fact, since Congress had previously cited with approval in the legislative history for the 1994 amendments the decision in *In re Ramirez*, a case which the *Lomas* court noted "squarely holds that the anti-modification provision of § 1322(b)(2) does not apply to multi-unit houses where the security interest extends to the rental units,"[57] it is not likely that such an impact would go unmentioned.

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[55] *E.g.*, 15 U.S.C. § 1602(v)(discussed in note 15, *supra*).

[56] The new definition in section 101(27A) specifically references "rents" and would thus appear to overrule cases which had held an assignment of rents clause in a mortgage alone to be sufficient additional security to preclude application of the anti-modification language of § 1322(b)(2). *E.g., In re Heckman*, 165 B.R. 16 (Bankr. E.D. Pa. 1994); *In re Jackson*, 136 B.R. 797, 803 (Bankr. N.D. Ill. 1992). It is important to note that the holding in *In re Scarborough* and many other opinions expressing the majority view on multi-unit residential structures is not based on the assignment of rents as additional security, and in fact this argument was specifically rejected by the *Scarborough* court. 461 F.3d 406, 410 (3d Cir. 2006).

[57] *Lomas*, 82 F.3d at 7.

Thus, post-BAPCPA opinions have continued to permit strip down of multi-unit properties.[58]

In applying this exception to the anti-modification provision, some courts will consider whether the property was intended by the parties to be used as a multi-unit property.[59] These courts have expressed concern that there could be gamesmanship by the debtor on the eve of bankruptcy so as to invoke the exception, such as by the renting out of a room in the home, or a garage, in a structure that had been previously used as a single-family residence. In such cases it may be relevant whether there was a 1–4 Family Rider attached to the mortgage or deed of trust, as is customarily done with security interests on multi-family property.[60]

C. Liens on Mobile or Manufactured Homes

To be entitled to the anti-modification protection in section 1322(b)(2), the secured creditor must establish that (1) its claim is secured only by real property, and (2) the real property is the debtor's principal residence. If the creditor's claim is not secured solely by a security interest in "real property" that is the debtor's residence, the secured loan may be modified. Before BAPCPA, it was clear that a loan secured by real estate upon which a mobile or manufactured home was situated, or a lien secured by the manufactured home itself, was not secured solely by real property that was the debtor's principal residence if the manufactured home was treated as personal rather than real property.[61]In determining whether the secured property is real or personal property for purposes of section 1322(b)(2),courts looked to applicable state law.[62]

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[58]*See, e.g. ,In re Picchi*, 448 B.R. 870 (B.A.P. 1st Cir. 2011); *In re Johnson-Hines*, 2012 WL 1820881 (Bankr. N.D. Ga. Apr 04, 2012); *In re Zaldivar*, 441 B.R. 389 (Bankr. S.D. Fla. 2011).

[59]*See In re Brunson*, 201 B.R. 351 (Bankr. W.D. N.Y. 1996)(adopting a totality of the circumstances approach).

[60]*See In re Zaldivar*, 441 B.R. 389 (Bankr. S.D. Fla. 2011)(rejecting creditor's argument that mortgage provided for property to be used solely as debtor's principal residence because this position was inconsistent with the attached 1-4 Family Rider).

[61]*E.g.*, *In re Thompson*, 217 B.R. 375 (B.A.P. 2d Cir. 1998) (loan may be modified as mobile home personal under New York law); *In re Tirey*, 350 B.R. 62 (Bankr. S.D. Tex. 2006); *In re Nowlin*, 321 B.R. 678 (Bankr. E.D. Pa. 2005); *In re* Colver, 13 B.R. 521 (Bankr. D. Nev. 1981); *In re Plaster*, 101 B.R. 696 (Bankr. E.D. Okla. 1989). *See also In re Johnson*, 269 B.R. 246 (Bankr. M.D. Ala. 2001) (creditor with mortgage on real estate

A new definition for "debtor's principal residence" added by BAPCPA may have been intended to provide broad protection for manufactured home lenders from strip down in all situations, by defining "debtor's principal residence" to mean a residential structure, "without regard to whether that structure is attached to real property."[63]The definition further provides that it includes "an individual condominium or cooperative unit, a mobile or manufactured home, or trailer."[64]However, no change was made to section 1322(b)(2) and the "real property" requirement remains in that provision. While a manufactured home may be the debtor's principal residence under the Code definition, it would still be personal property if state law so provides and therefore the debt would not be secured "only by a security interest in real property" that is the debtor's principal residence.

Had Congress intended to extend the anti-modification protection to all manufactured homes, regardless of whether the structure is considered real property or personal property under state law, it would have been a simple matter to have amended section 1322(b)(2) by adding three words: "…only by a security interest in real property ***or personal property*** that is the debtor's principal residence."[65] This is exactly the method used by Congress in making a similar distinction concerning the homestead exemption. Section 522(d) refers to the debtor's interest in "real property or personal property that the debtor or a dependent of the debtor uses as a residence…."

Since Congress did not amend section 1322(b)(2) in this manner, the most plausible explanation for the BAPCPA definition in section 101(13A) is that it was intended simply to clarify that a manufactured home loan should not be treated differently than any other loan secured by the debtor's principal residence if that

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where mobile home was situated but not on mobile home did not have lien on debtor's principal residence).

[62] See *In re Colver*, 13 B.R. 521 (Bankr. D. Nev. 1981); 5 Collier on Bankruptcy ¶ 1322.06 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005).

[63] 11 U.S.C. § 101(13A)(A).

[64] 11 U.S.C. § 101(13A)(B).

[65] A conflict would exist between the definition in § 101(13A) and § 1322(b)(2) if Congress had taken a different approach and defined "debtor's principal residence" to mean a residential structure, "without regard to whether that structure is attached to real property *or whether that structure is considered real property or personal property under applicable nonbankruptcy law*."

residence is real property. More narrowly stated, the language is intended to make clear that a loan secured by a manufactured home that is real property as determined under state law may not be modified, even if it is attached to property that is not security for the loan, property that is leased land, or property that is not owned by the debtor.[66]This is consistent with the inclusion in the definition of "condominium or cooperative unit," which could be located on real property that is not (or only partially) subject to the lender's security agreement, or on leased land, particularly in affordable housing developments, in which the unit owner is a lessee under a "ground lease."

Thus, the majority of courts in post-BAPCPA opinions have held that that a mortgage or deed of trust secured by a manufactured or mobile home that is personal property under state law is not subject to the anti-modification provision in section 1322(b)(2) and may be stripped down.[67]

D. Additional Security

A claim that is not secured **"**only**"** by the debtor's principal residence, such as when additional security is provided, may be modified. BAPCPA attempted to limit modification on these grounds by adding a definition of "debtor's principal residence" as a residential structure which includes "incidental property." [68]A separate definition of "incidental property" is also added by the 2005 Act, which refers to property rights going beyond ownership of the structure. The term "incidental property" is specifically defined to mean:(1) "property commonly conveyed with a principal residence in the area where the property is located;" (2)"all easements, rights, appurtenances, fixtures, rents, royalties,

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[66] Some states permit a manufactured home to be converted to real property if it is permanently affixed to land that the owner is renting, as long as the lease is of at least a specified length, typically twenty years. See, e.g., *Ariz. Rev. Stat*. Ann. § 33-1501; Cal. Health & Safety Code § 18551(a)(1)(A)(West); N.C. Gen. Stat. § 105-273(13).

[67]*See In re Reinhardt*, 563 F.3d 558 (6th Cir. 2009); *In re Ennis*, 558 F.3d 343 (4th Cir. 2009); *In re Coleman*, 392 B.R. 767 (B.A.P. 8th Cir. 2008); *In re Davis*, 386 B.R. 182 (B.A.P. 6th Cir. 2008); *Green Tree Servicing, L.L.C. v. Harrison*, 2009 WL 82565 (W.D. La. Jan. 12, 2009); *In re Shepherd*, 381 B.R. 675 (E.D. Tenn. 2008); *Moss v. Greentree-Ala., L.L.C.,* 378 B.R. 655 (S.D. Ala. 2007); *In re Jordan*, 403 B.R. 339 (Bankr. W.D. Pa. 2009); *In re Oliveira*, 378 B.R. 789 (Bankr. E.D. Tex. 2007). *But see In re Lunger*, 370 B.R. 649 (Bankr. M.D. Pa. 2007).

[68] 11 U.S.C. § 101(13A)(A).

mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds," and (3) "all replacements or additions."[69]

Courts had differed prior to the 2005 Act regarding whether some of the rights enumerated in the new definition of "incidental property" were additional collateral which removed a secured claim from the protection against modification in section 1322(b)(2). Claims secured by the debtor's principal residence and also household goods,[70]proceeds from credit insurance,[71] appliances,[72] rents,[73]bank accounts,[74]or escrow accounts established for payment of taxes and insurance[75]were held to be subject to modification.

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[69] 11 U.S.C. § 101(27B).

[70]*In re Hammond*, 27 F.3d 52 (3d Cir. 1994); *In re Bouvier*, 150 B.R. 24 (Bankr. D.R.I. 1993). The *Hammond* case was cited favorably as representing current law by the legislative history to the 1994 amendments to the Code. 140 Cong. Rec. H10, 764 (daily ed. Oct. 4, 1994).

[71]*In re Pedigo*, 283 B.R. 493 (Bankr. E.D. Tenn. 2002); *In re* Selman, 120 B.R. 576 (Bankr. D.N.M. 1990); *Transouth Fin. Corp. v. Hill*, 106 B.R. 145 (W.D. Tenn. 1989); *In re Stiles*, 74 B.R. 208 (Bankr. N.D. Ala. 1987). *But see In re Washington*, 967 F.2d 173 (5th Cir. 1992) (mere fact that debtor obtained credit life and disability insurance was not additional security, at least in case where insurance was voluntary and could be canceled by the debtors, and there was no language pledging the policy as security for the loan or assigning its proceeds to the creditor).

[72] *Sapos v. Provident Inst. of Sav*., 967 F.2d 918 (3d Cir. 1992) (anti-modification protection does not apply because security interest included personal property such as household appliances and wall-to-wall carpeting); *Wilson v. Commonwealth Mortgage Corp*., 895 F.2d 123, 128 (3d Cir. 1990) (appliances and furniture); *In re Escue*, 184 B.R. 287 (Bankr. M.D. Tenn. 1995) ("refrigerator, space heater, and similar items" additional security even though described as "fixtures" in mortgage documents); *In re Jablonski*, 70 B.R. 381 (Bankr. E.D. Pa. 1987) (security interest covered appliances and also rents, issues, and profits), *aff'd on other grounds*, 88 B.R. 652 (E.D. Pa. 1988); *In re Reeves*, 65 B.R. 898 (Bankr. N.D. Ill. 1986) (security interest also covered fixtures).

[73] *Lutz v. Miami Valley Bank*, 192 B.R. 107 (W.D. Pa. 1995) (security interest in rents); *Secor Bank v. Dunlap*, 129 B.R. 463 (E.D. La. 1991) (security interest also covered easements, rights, appurtenances, rents, royalties, mineral oil and gas rights and water rights and stock and all fixtures); *In re Heckman*, 165 B.R. 16 (Bankr. E.D. Pa. 1994) (security interest in rents placed mortgage outside scope of § 1322(b)(2)); *In re Jackson*, 136 B.R. 797 (Bankr. N.D. Ill. 1992) (modification permitted because rents are additional security). *But see In re Davis*, 989 F.2d 208 (6th Cir. 1993).

[74]*In re Libby*, 200 B.R. 562 (Bankr. D.N.J. 1996) (mortgage included additional security in debtor's account at the creditor bank); *In re Crystian*, 197 B.R. 803 (Bankr. W.D. Pa. 1996) (right to setoff against checking account constituted additional security).

[75]*In re Donadio*, 269 B.R. 336 (Bankr. M.D. Pa. 2001) (security interest also covered escrow account for taxes and insurance); *In re Stewart*, 263 B.R. 728 (Bankr. W.D. Pa.

Some courts, however, focused on whether the additional collateral provided something more to the creditor than might already exist as a component of its security interest in the real property, often by considering whether the security interest was contained in "boilerplate" language commonly found in mortgage documents.[76]These courts often followed a two-part test developed by the court in *In re French*,[77]which considered whether the additional items of collateral were (1) merely enhancements that can be made component parts of the real property, and (2) of little or no independent value. If the collateral met both of these elements, the mortgage could not be modified.

Rather than adopt a test similar to that set out in *In re French*, the BAPCPA amendments instead provide an exclusive list of items that shall be deemed "incidental property." Significantly, the definition does not use the non-exclusive term "include" or "includes" in listing the items in section 101(27B),[78]nor does it state that similar items are to be considered. The specificity in the new definition of "incidental property" clarifies that security interests in types of property not enumerated, such as appliances, furniture, bank accounts, motor vehicles, or property of entities other than the debtor, will permit the mortgage loan to be modified, as under pre-BAPCPA law.[79] An additional security interest in any type of property not commonly conveyed with a principal residence in the area where

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2001) (same, even though collateral not in hands of mortgage holder on petition date). *But see In re Ferandos*, 402 F.3d 147 (3d Cir. 2005)(funds in escrow account do not constitute additional collateral as a matter of New Jersey law); *In re Davis*, 989 F.2d 208 (6th Cir. 1993) (requirement that debtor obtain fire insurance, absent the existence of proceeds from such insurance due to a fire, was not additional security for purposes of § 1322(b)(2)).

[76]*In re Ferandos*, 402 F.3d 147 (3d Cir. 2005)(security interest in rents did not constitute interest in additional collateral because real property is defined to include "rents" under New Jersey law); *In re Davis*, 989 F.2d 208 (6th Cir. 1993) (holding that benefits which are merely incidental to an interest in real property do not remove mortgage from anti-modification protection); *In re French*, 174 B.R. 1 (Bankr. D. Mass. 1994).

[77]174 B.R. 1 (Bankr. D. Mass. 1994).

[78]*See* 11 U.S.C. § 102((3)("'include' or 'includes' are not limiting").

[79]*E.g., Sapos v. Provident Inst. of Savings*, 967 F.2d 918 (3d Cir. 1992) (wall-to-wall carpeting additional security); *In re Libby*, 200 B.R. 562 (Bankr. D.N.J. 1996) (mortgage included additional security in debtor's account at the creditor bank); *In re Bouvier*, 160 B.R. 24 (Bankr. D.R.I. 1993) (claim secured not only by mortgage but also by personal property of debtors' corporation).

the property is located, or not expressly described in the new definition, should permit modification.

The definition of incidental property added by BAPCPA should overrule decisions, for example, which had permitted modification based on additional security in rents and profits from the property,[80] insurance proceeds,[81] and mortgage escrow accounts.[82] However, if the additional security is personal under state law, such as mortgage escrow accounts in some states, Congress' failure to eliminate the "real property" requirement in section 1322(b)(2) should mean that decisions which turned on the real property versus personal distinction still control.[83]

E. Short-Term Mortgages

Section 1322(c)(2) provides that short-term and balloon payment mortgages having a final payment that comes due during the life of a chapter 13 plan are not entitled to the special protection from modification provided to other home secured loans by section 1322(b)(2). For these mortgage claims, the 1994 amendment to the Code which added this provision removes the anti-modification protection and allows chapter 13 debtors to provide for strip down.

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[80] *In re Heckman*, 165 B.R. 16 (Bankr. E.D. Pa. 1994) ("rents of the premises" are additional collateral); *In re DeCosta*, 204 B.R. 1 (Bankr. D. Mass. 1996).

[81] It is arguable whether a security interest that applies only to unearned insurance premiums, rather than proceeds from on an insurance claim, are covered by the new definition. *See In re Pedigo*, 283 B.R. 493 (Bankr. E.D. Tenn. 2002) (creditor's right to cancel credit life and disability policy and claim unearned premium was additional security).

[82] *In re Donadio*, 269 B.R. 336 (Bankr. M.D. Pa. 2001) (security interest also covered escrow account for taxes and insurance); *In re Stewart*, 263 B.R. 728 (Bankr. W.D. Pa. 2001).

[83] *E.g., In re Ferandos* 402 F.3d 147 (3d Cir. 2005); *In re Murray*, 2011 WL 5909638 (Bankr. E.D. N.C. May 31, 2011); *In re Bradsher*, 427 B.R. 386 (Bankr. M.D. N.C. 2010) (additional security interest in escrow account treated as personal property under state law); *In re Thomas*, 344 B.R. 386 (Bankr. W.D. Pa. 2006) (escrow account is personal property under Pennsylvania law and modification was therefore permitted). *But see In re Inglis*, 481 B.R. 480 (Bankr. S.D. Ind. 2012)(determination of whether item is additional security for purposes of anti-modification provision under § 1322(b)(2) is a matter of federal bankruptcy law).

The language of section 1322(c)(2) effectively creates an "exception to the exception" for modification of home secured claims. It provides that "notwithstanding" section 1322(b)(2), a chapter 13 plan may "provide for the payment of [a] claim as modified pursuant to § 1325(a)(5)."[84]Virtually every court that has interpreted section 1322(c)(2) has read the statute to permit modification, including a determination of a creditor's secured claim under section 506(a) and bifurcation of the claim in the case of an under secured creditor, on any home secured mortgage in "which the last payment on the original payment schedule . . . is due before the date on which the final payment under the plan is due."[85]However, the Fourth Circuit in *In re Witt*[86]held that strip down is not permitted under section 1322(c)(2) because the provision provides for modification of payments and not claims. The *Witt* court misreads section 1322(c)(2) because the statute plainly refers to "claims as modified."

F. Timing for Determining Valuation under Section 506(a)

Section 506(a) states that "value shall be determined in light of the purpose of the valuation and of the proposed use or disposition of such property ...." Because this

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[84] The prefatory language "notwithstanding subsection (b)(2)" in § 1322(c)(2) is critical to the amendment's interpretation. This phrase means that the special anti-modification restriction for home secured loans simply does not apply to claims covered by § 1322(c)(2). *See In re Bagne*, 219 B.R. 272, 277 (Bankr. E.D. Ca. 1998) ("Plainly, this language instructs the court to disregard § 1322(b)(2)"); *In re Mattson*, 210 B.R. 157 (Bankr. D. Minn. 1997); *In re Young*, 199 B.R. 643 (Bankr. E.D. Tenn. 1996); *In re Lobue*, 189 B.R. 216 (Bankr. S.D. Fla. 1995).

[85] *E.g.*, *In re Paschen*, 296 F.3d 1203 (11th Cir. 2002) (statutory exception to Code's anti-modification provision permits debtors to bifurcate and cram down undersecured, short-term home mortgages); *In re Eubanks*, 219 B.R. 468 (B.A.P. 6th Cir. 1998); *In re Reeves*, 221 B.R. 756 (Bankr. C.D. Ill. 1998); *In re Mattson*, 210 B.R. 157 (Bankr. D. Minn. 1997) (§ 1322(b)(2) protections did not apply to loans maturing before end of plan); *In re Young*, 199 B.R. 643 (Bankr. E.D. Tenn. 1996) (debtors could strip down mortgage if last payment was due before final scheduled plan payment); *In re Sarkese*, 189 B.R. 531 (Bankr. M.D. Fla. 1995) (debtors could pay off mortgage which had ballooned prior to bankruptcy using the cramdown provisions of § 1325(a)(5)); *In re Lobue*, 189 B.R. 216 (Bankr. S.D. Fla. 1995) (debtor could pay matured mortgage through plan); *see also In re Nepil*, 206 B.R. 72 (Bankr. D.N.J. 1997) (loan on which creditor had obtained foreclosure judgment could be treated as loan on which final payment due before end of plan).

[86] 113 F.3d 508 (4th Cir. 1997). *See also In re Rowe*, 239 B.R. 44 (Bankr. D.N.J. 1999) (prepetition acceleration alone does not bring a mortgage under this provision).

language does not explicitly set a valuation date, courts are divided on this issue.[87] Depending upon whether the real estate market is declining or improving, there may be an advantage for parties to argue for an earlier or later valuation date.

Some courts make this determination for lien stripping purposes based on the value of the property at the time of the bankruptcy filing.[88] These courts conclude that the petition date is appropriate because debtors typically have used the property as their principal residence throughout the bankruptcy case beginning with the petition date.

Other courts use the effective date of the chapter 13 plan as the valuation date, which is usually the date of the confirmation hearing (or 14 days after entry of the confirmation order), unless the plan states otherwise.[89] These courts find that because the valuation is being done in the context of determining the amount of the creditor's allowed secured claim for purposes of plan confirmation, the appropriate date of valuation should be the date of the confirmation hearing.

Finally, because section 506(a) does not refer to the "effective date of the plan," and based on the legislative history of section 506(a), some courts have adopted a "flexible approach to valuations, rather than a single, fixed method."[90]

G. Timing for Determining Whether Property is the Debtor's Principal Residence.

Courts have also disagreed on the applicable time period for determining whether the property is the debtor's principal residence. Some courts have held that the relevant period should be the time when the mortgage transaction was entered into.[91] By considering the use of the collateral at the time of the loan transaction, or the intent of the

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[87] There is less controversy with respect to personal property. Section 506(a)(2) provides that valuation of personal property acquired for personal, family, or household purposes is to be determined "at the time value is determined," which would typically be the date of confirmation hearing.

[88] *In re Vallejo*, 2010 WL 520698 (Bankr. N.D. Cal. Feb 09, 2010); *In re Dean*, 319 B.R. 474 (Bankr. E.D. Va. 2004). *See also In re Wade*, 354 B.R. 876 (Bankr. N.D. Iowa 2006).

[89] *In re Roach*, 2010 WL 234959 (Bankr. W.D. Mo. Jan 15, 2010); *In re Crain*, 243 B.R. 75 (Bankr. C.D. Cal. 1999).

[90] *In re Aubain*, 296 B.R. 624, 636 (Bankr. E.D. N.Y. 2003).

[91] *In re Scarborough*, 461 F.3d 406 (3d Cir. 2006); *In re Moore*, 441 B.R. 732 (Bankr. N.D. N.Y. 2010).

parties in entering into the transaction, courts that favor this approach believe it is more consistent with the policy objectives of the anti-modification provision.

According to the Ninth Circuit BAP, however, the better view and majority position is that the use of the property on the date of the transaction should control.[92]Courts adopting this position in part rely upon the statutory phrase "that is" in section 1322(b)(2), which is cast in the present tense. That argument may have been bolstered by a 2010 technical amendment to the Bankruptcy Code, which added to the definition of "debtor's principal residence" the requirement that the structure be "used as the principal residence by the debtor." This reference to the present use of the property by the debtor supports the petition date rather than the loan transaction date as the relevant time period.[93]

[92]*In re Benafel*, 461 B.R. 581, 589 (B.A.P. 9th Cir, 2011) ("we find that the majority of cases interpreting § 1322(b)(2) favor use of the petition date to determine principal residence"). *See also In re Christopherson*, 446 B.R. 831, 835 (Bankr. N.D. Ohio 2011); *In re Jordan*, 330 B.R. 857, 860 (Bankr. M.D. Ga. 2005); *In re* Leigh, 307 B.R. 324, 331 (Bankr. D. Mass. 2004); *In re Bosch*, 287 B.R. 222, 226 (Bankr. E.D. Mo. 2002); *In re Schultz*, 2001 WL 1757060 (Bankr. D. N.H. 2001); *In re Larios*, 259 B.R. 675 (Bankr. N.D. Ill. 2001); *In re Churchill*, 150 B.R. 288 (Bankr. D. Maine 1993); *In re Dinsmore*, 141 B.R. 499 (Bankr. W.D. Mich. 1992).

[93]*See* 8 *Collier On Bankruptcy*, § 1322.06[1][a] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2011).