

## **Consumer Bankruptcy - Second Mortgage and Chapter 13**

Because of the mounting foreclosures on residential properties, there has been a lot of talk lately among foreclosure defense attorneys about “lien stripping” of second mortgages in bankruptcy. Here are some basic facts about stripping of second mortgage liens on debtor’s primary residence:

- Motions or actions to strip second mortgage on residential property can be brought in Chapter 13 cases. Chapter 13 is reserved for wage earners and other individuals with regular monthly incomes.
- The value of the second mortgage has to be **wholly unsecured**. Thus, if there is even a \$1 of value left on the second mortgage, the second mortgage is considered secured.
- That means that the appraised value of the property subject to the lien has to be equal to or lesser than the amount owed on the first mortgage. “Appraised” means a full blown, **independent appraisal**; not an undervalued one that favors the homeowner, or one based on property value for property tax purposes. Only then, can a bankruptcy attorney consider filing a motion with the court, or an adversary proceeding, depending on the jurisdiction and facts of the case, to strip the second mortgage.
- The appraisal should be done before filing of the petition. This is because once the petition has been filed, all property becomes property of the bankruptcy estate. The debtor cannot pay the appraiser without the court’s permission.
- If the court grants the motion, or rules in debtor’s favor in the adversary proceeding, the second mortgage becomes an unsecured debt, and is treated on par with all the other unsecured debts under Chapter 13 Plan.
- Second mortgage lien is stripped only after the borrower has successfully completed the three- or the five year plan under Chapter 13. If the borrower fails to complete the payments under the plan, the second mortgage is reinstated.

In Florida, the support for the motion or a proceeding to strip the second mortgage on the debtor’s primary residence is the 11<sup>th</sup> Circuit Court of Appeals case *In Re Tanner*, 217 F.3d 1357 (11<sup>th</sup> Cir. 2000).