Chapter 20: No Stripping without Judicial Permission

A debtor files a Chapter 7 case and gets a discharge. She then files a Chapter 13 case before the requisite four years have passed which would allow her to get a Chapter 13 discharge. Even though she is not eligible for a discharge in the Chapter 13 case, she can potentially still receive the benefit of the automatic stay and use other reorganization and restructuring benefits of Chapter 13 to manage debt that was not discharged in or incurred subsequent to the Chapter 7 case. For the uninitiated, this is referred to colloquially as a "Chapter 20" bankruptcy filing.

There has been significant debate about how far the benefits of a Chapter 20 go. Specifically, there has been debate about whether junior liens can be stripped from homestead real properties in the context of Chapter 20 cases.

When it comes to the stripping question, saying that the overall judiciary is divided is a huge understatement. Not only are the Circuits themselves divided, but there is significant division within a number of them including the 11th. Several compelling (and conflicting) decisions on the matter have come out of Florida bankruptcy courts recently. Before we explore those, it would be a good idea to look at the recent history of the issue.

There are essentially two schools of thought on the idea of whether a debtor can strip a mortgage in a Chapter 20. These can be labeled Team *Gerardin* and Team *Fisette* (kind of like Team Edward and Team Jacob).

In re Gerardin[1] is an opinion published on the issue from the Southern District of Florida in February of 2011. Judges Isicoff and Cristol joined Judge Mark, who wrote the opinion, addressing the issue of lien stripping in Chapter 20 circumstances. *Gerardin* is a consolidation of seven different cases. *In re Fisette*[2] is an opinion from the 8th Circuit Bankruptcy Appellate Panel regarding lien stripping in Chapter 20 circumstances in August of 2011.

Both opinions are well-reasoned and both recognize that the question of stripping a lien in a Chapter 20 depends on the interplay of three sections of the Bankruptcy Code: 506 (which presents the process for determining the secured status of a claim), 1322(b)(2) (which prohibits the modification of a secured lien on a homestead), and 1325(a)(5)(B)(i)(I) (which states that a plan can only be confirmed if it provides that holders of all allowed secured claims will retain their liens until payment under non-bankruptcy law or discharge). Both teams agree that no secured lien on a homestead can be stripped or crammed down even if the lien is grossly under-secured.

---

[1] 447 BR 342
[2] 455 BR 177

Gerardin holds that homestead liens that pass through a Chapter 7 discharge are – by definition – allowed, secured, liens. It also holds that Section 506(d) is not a self-executing "miracle lien remover,[3]" but requires another code section to be able to strip a lien: an enabling section. Were it not so, the *Gerardin* court finds, liens could be stripped in Chapter 7 cases. The court further finds that the appropriate enabling section is section 1325. However, as stated above, section 1325 states that allowed, secured claims must be dealt with in a plan either through return of the secured property, full payment, or discharge. Since discharge is not an option, the Court reasons, either the house must be surrendered or the full lien must be paid but stripping under 506 is not an option.

Fisette holds that homestead liens that pass through a Chapter 7 discharge are merely claims. The *Fisette* court finds that the appropriate application of bankruptcy law is to then take the claim and apply 506 to determine whether it is secured or unsecured before considering 1322 or 1325. The court finds that if the lien is found to be unsecured, 1325 and 1322 do not apply in the way they are in *Gerardin* and the lien can be stripped under 506.

Team *Gerardin* is partially supported by a 10th Circuit Bankruptcy Appellate Panel from May, 2010: *In re Picht*[4]. *Picht* deals with the slightly different question of whether an under-secured lien can be satisfied in a Chapter 20 case by payment of the secured portion and cramdown of the balance. *Picht* uses a very similar analysis of 506 as *Fisette* and comes to a similar conclusion. In addition, *In re Quieros-Amy*[5] came out of the Southern District of Florida in September 2011. It is almost a carbon copy of *Gerardin*. In December 2011, Judge Briskman from Orlando ruled on a Motion to Value and Avoid Lien in the case *In re Judd*[6]. Judge Briskman firmly falls behind Team *Gerardin* in his reasoning for denying the lien strip in *Judd*.

Team *Fisette* is supported by two very recently published decisions written by Judge Williamson in *In re Scantling*[7] and Judge Glenn in *In re Dang*[8] which were published in February and March of this year respectively. Of these decisions, *Scantling* probably lays out the argument for stripping in a Chapter 20 in the clearest way. It reviews relevant Supreme Court and 11th Circuit cases[9] one by one and explains each point of law relevant to Chapter 20 lien stripping before engaging in an overall analysis of the interplay between 506, 1322, and 1325 and rebutting the arguments laid out by Team *Gerardin*. The author (who is a consumer bankruptcy attorney and not entirely impartial) found *Scantling* to be the most complete analysis of the issue of any of the opinions he reviewed.

---

[3] At 348
[4] 428 BR 885
[5] 456 BR 140
[6] WL 6010025
[7] 2012 Bankr. Lexis 661
[8] 2012 Bankr. Lexis 1152
[9] *Johnson v. Home State Bank*, *Dewsnup v. Timm*, *Nobleman v. American Savings Bank*, and *In re Tanner*.

The *Gerardin*/*Fisette* split exists in jurisdictions all over the country including the Middle District of Florida. Within the Tampa Division, Judge Williamson is the only judge with a published opinion on the subject. Judge McEwen was prepared to make a ruling in March when the case was dismissed. She has expressed support for Team *Fisette*. Judge May has not published on the subject and says his mind is still open but that he is influenced by the *Picht* opinion and Team *Gerardin*. Both Judges May and McEwen have expressed a desire for the 11th Circuit to take up the issue as soon as practicable to get some clarity on what the law should be. For now, practitioners in the Middle District of Florida will have to advise their clients that whether a lien can be stripped in a Chapter 20 situation will depend on which team their judge is on.