IS "CHAPTER 20" AVAILABLE POST-BAPCPA?

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November, 2011

Introduction

The real estate crisis has left 15 million American homeowners, 27%, owing more on their mortgages than their homes are worth.[1] Yet in April 2011, foreclosure filings declined 32% from 2010.[2] While this is seemingly good news, the reality is that the decline did not result from a positive turnaround. Mortgagees simply slowed the process because they could not move the foreclosed properties fast enough and they also needed to confirm their procedures were in place to ensure their foreclosures would not be invalidated.[3] A common story debtors have relayed to bankruptcy attorneys is that they have made every effort to work with their lenders to modify their mortgages. However, debtors are seldom successful in this endeavor.

In a Chapter 7, a debtor can discharge personal liability on most unsecured debt, but cannot cure mortgage arrearages. In a Chapter 13, a debtor can cure mortgage arrearages, but this may not be a viable option because the debtor may have insufficient disposable income after paying a first and second mortgage, a percentage of unsecured debt and a trustee's fee. If the debtor could avoid a second mortgage payment and unsecured debt, the debtor might keep his or her home. This conundrum has lead debtors' counsel to resort to creative solutions, one of which is a so-called "Chapter 20."

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[1] FoxNews.com, Laura Ingle, *Homeowners Hit Brick Wall, with Many Owing More than their Homes are Worth*, Feb. 9, 2011, *available at* http://www.foxnews.com/us/2011/02/09/homeowners-hit-brick-wall-owing-homes-worth.
[2] CNN Money.com, Les Christie, *Foreclosures down for 7th straight month*, May 12, 2011, *available at* http://money.cnn.com/2011/05/12/real_estate/foreclosures/fell/again/index.htm.

In a Chapter 20 the debtor files a Chapter 7 case and receives a discharge for liability on unsecured debt. Then the debtor files a Chapter 13 case in order to strip off a wholly unsecured lien, i.e., a junior mortgage. The Chapter 13 plan generally will not provide for any payment to unsecured creditors because they have just been discharged in the Chapter 7 case. At this juncture the debtor can afford to pay any arrearages on a first mortgage and pay a trustee's fee. This practice was more common prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in October 2005.

With the enactment of BAPCPA, a debtor's ability to utilize a Chapter 20 has been called into question because lien-stripping may be contingent on the debtor receiving a discharge in the Chapter 13. A debtor no longer has the ability to receive a discharge in a Chapter 13 that has been filed in close proximity to a Chapter 7 pursuant to 11 U.S.C. § 1328(f), which states:

> [T]he court shall not grant a discharge of all debts provided for in the [Chapter 13] plan or disallowed under section 502, if the debtor has received a discharge (1) in a case filed under Chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter….

BAPCPA also amended the Code section dealing with how a Chapter 13 plan must treat a secured creditor who objects to the plan. 11 U.S.C. § 1325 provides as follows:

> (a) [T]he court shall confirm a plan if –
> …
> (5) with respect to each allowed secured claim provided for by the plan –
> …
> (B)(i) the plan provides that –
> …
> (I) the holder of such claim retain the lien securing such claim until the earlier of –
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328; and

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[3] Les Christie, *Foreclosures down for 7th straight month*, May 12, 2011, *available at* http://money.cnn.com/2011/05/12/real_estate/foreclosures/fell/again/index.htm.

> (II) 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….

If permanent lien-stripping is in fact dependent upon discharge, the 4-year limitation [4] precludes a debtor's ability to utilize a Chapter 20. The courts are split on the effect of the interaction between § 1325 and § 1328(f). One view is that an unsecured mortgage cannot be permanently modified unless a discharge is granted.[5] The other view is that a debtor may strip off a wholly unsecured lien permanently if the debtor obtains confirmation of the plan, performs under the plan, and meets all other statutory requirements.[6]

I. The "No Discharge" Camp.

The view that a strip-off of a wholly unsecured lien on a debtor's principal residence does not require a discharge and becomes effective and permanent upon completion of the debtor's obligations under a confirmed plan was once the minority. However, this trend is gaining acceptance and may have closed the gap on the camp that insists a discharge is required.

A. Getting by the anti-modification provision of § 1322(b)(2).

A common starting point is Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993). Nobelman did not directly speak to whether a debtor can strip off a wholly unsecured lien, but stands for the proposition that the anti-modification provision of § 1322(b)(2) prohibits a

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[4] The 4-year clock begins ticking on the date of filing, not on the date of discharge. Gagne v. Fessenden (In re Gagne), 394 B.R. 219 (B.A.P. 1st Cir. 2008).

[5] In re Victorio, 2011 Bankr. LEXIS 2704, (Bankr. S.D. Cal. 2011); Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885 (B.A.P. 10th Cir. 2010); In re Gerardin, 447 B.R. 342 (Bankr. S.D. Fla. 2011); In re Fenn, 428 B.R. 494 (Bankr. N.D. Ill. 2010); In re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008); In re Mendoza, 2010 Bankr. LEXIS 664 (Bankr. D. Colo. Jan. 21, 2010); Blosser v. KLC Fin., Inc. (In re Blosser), 2009 Bankr. LEXIS 1049 (Bankr. E.D. Wis. Apr. 15, 2009).

[6] Fisette v. Keller (In re Fisette), No. 11-6012 (B.A.P. 8th Cir. Aug. 29, 2011); In re Jennings, 2011 Bankr. LEXIS 2693 (Bankr. N.D. Ga. July 11, 2011); Davis v. TD Bank (In re Davis), 447 B.R. 738 (Bankr. D. Md. 2011); In re Okosisi, 451 B.R. 90 (Bankr. D. Nev. 2011); In re Fair, 450 B.R. 853 (Bankr.E.D. Wis. 2011); In re Waterman, 447 B.R. 324 (Bankr. D. Colo. 2011); In re Tran, 431 B.R. 230 (Bankr. N.D. Cal. 2010); In re Frazier, 448 B.R. 803 (Bankr. E.D. Cal. 2011); In re Hill, 440 B.R. 176 (Bankr. S.D. Cal. 2010); In re Grignon, 2010 Bankr. LEXIS 4279 (Bankr. D. Or. Dec. 7, 2010); Hart v. San Diego Credit Union, 449 B.R. 783 (S.D. Cal. 2010).

Chapter 13 debtor from stripping a lien when any portion of it is secured by the debtor's home.[7] Section 1322(b)(2) provides that 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*, or holders of unsecured claims, or leave unaffected the rights of holders of any class of claims. (Emphasis added.)

In Nobelman the debtors sought to bifurcate the secured and unsecured portions of a lien on their residence. The Court held that such action would violate §1322(b)(2) because the debtors could not modify the unsecured portion without changing the creditor's rights with respect to the secured portion of the claim.[8] The anti-modification provision protects a creditor only when that creditor is at least partially secured.[9]

Consequently, debtors seeking to strip a mortgage must first determine whether a creditor has a secured or unsecured claim under § 506(a). A claim will be determined wholly unsecured if the creditor's claim has no value due to the fact that the home's worth is fully encumbered by the first mortgage, i.e., there is no equity in the collateral over and above the first mortgage. In such case, the anti-modification provision does not apply and the debtor may avoid the lien under §506(d).[10]

B. Addressing § 1328(f)(1)—the discharge question.

A Chapter 7 discharge relieves the debtor only from an action against the debtor *in personam*[11] but the action against the debtor *in rem* remains.[12] Therefore, a Chapter 7 discharge

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[7] Nobelman v. American Sav. Bank, 508 U.S. 324, 326 (1993).
[8] Id. at 331.
[9] Id. at 326.
[10] 11 U.S.C. § 506(d) states, "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."
[11] 11 U.S.C. § 542(a) states "[a] discharge in a case under this title – … (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor."

prevents the creditor from taking action against the debtor on the note, but the lien remains on the debtor's residence which allows the creditor to foreclose against the real estate if the debtor fails to pay the mortgage.

As indicated previously, a Chapter 13 debtor is ineligible for a discharge if he or she has filed a Chapter 7 in the previous 4 years pursuant to §1328(f)(1). A growing number of courts hold that a discharge is not required to permanently strip-off a wholly unsecured mortgage on the debtor's principal residence.[13] The rationale is that Congress did not place a limit on a debtor's eligibility to be a Chapter 13 debtor on the debtor's ability to receive a discharge.[14] Section 1325(a)(5), which mandates that the debt be paid or discharged as a condition to plan confirmation, is not applicable because the debt is wholly unsecured.[15] Thus, nothing in the Code prevents lien stripping in a Chapter 20.[16] Lien stripping is a "tool" that is available in the Chapter 13 "toolbox."[17]

C. Under what authority is a strip-off permanent absent a discharge?

Prior to BAPCPA, Chapter 13 cases ended in one of three ways: dismissal, conversion or discharge.[18] Note that if a case is dismissed, pursuant to § 349(b)(1)(C) any lien avoided under § 506 would be reinstated upon a dismissal. If a case is converted, section 348(f)(1)(C) states

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[12] Johnson v. Home State Bank, 501 U.S. 78, 84 (1991).
[13] Fisette v. Keller (In re Fisette), No. 11-6012 (B.A.P. 8th Cir. Aug. 29, 2011); In re Jennings, 2011 Bankr. LEXIS 2693 (Bankr. N.D. Ga. July 11, 2011); Davis v. TD Bank (In re Davis), 447 B.R. 738 (Bankr. D. Md. 2011); In re Okosisi, 451 B.R. 90 (Bankr. D. Nev. 2011); In re Fair, 450 B.R. 853 (Bankr.E.D. Wis. 2011); In re Waterman, 447 B.R. 324 (Bankr. D. Colo. 2011); In re Tran, 431 B.R. 230 (Bankr. N.D. Cal. 2010); In re Frazier, 448 B.R. 803 (Bankr. E.D. Cal. 2011); In re Hill, 440 B.R. 176 (Bankr. S.D. Cal. 2010); In re Grignon, 2010 Bankr. LEXIS 4279 (Bankr. D. Or. Dec. 7, 2010); Hart v. San Diego Credit Union, 449 B.R. 783 (S.D. Cal. 2010).
[14] In re Jennings, 2011 Bankr. LEXIS 2693 at *4 (Bankr. N.D. Ga. July 11, 2011) (citing 11 U.S.C. § 109 and In re Lewis, 339 B.R. 814 (Bankr. S.D. Ga. 2006)).
[15] Fisette v. Keller (In re Fisette), No. 11-6012 (B.A.P. 8th Cir. Aug. 29, 2011); Davis v. TD Bank (In re Davis), 447 B.R. 738, 746 (Bankr. D. Md. 2011); In re Okosisi, 451 B.R. 90, 98 (Bankr. D. Nev. 2011); In re Hill, 440 B.R. 176, 183 (Bankr. S.D. Cal. 2010).
[16] In re Jennings, 2011 Bankr. LEXIS 2693 at *4 (Bankr. N.D. Ga. July 11, 2011) (referencing §§ 506, 1322, 1325, 1327). Section 1322(b)(2)'s anti-modification provision would be an obstacle if the lien had any value according to this view.
[17] Id. (citing In re Hill, 440 B.R. 176 (Bankr. S.D. Cal. 2010) and In re Tran, 431 B.R. 230 (Bankr. N.D. Cal. 2010)).

that any creditor of a secured interest "shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion." Assuming the Chapter 20 debtor suffers neither dismissal nor conversion, the court in Okosisi has announced a fourth option to end a Chapter 13: completion of all plan payments without discharge.[19] This is sufficient, according to Okosisi, to afford permanency to the strip-off.[20]

In support of the "fourth option," Okosisi partially relies on the Code and Bankruptcy Rules as authority: Section 350(a) provides that a case shall be closed once it is fully administered and Bankruptcy Rule 5009 states the case is presumed fully administered once the trustee files a final report and certifies it has been fully administered.[21] Since the case closes without discharge, conversion or dismissal, the Code provisions that would otherwise reverse lien avoidance actions in a Chapter 13 plan are not implicated and do not frustrate the permanence of the lien avoidance.[22] The court further relied upon § 1327 which provides that a confirmed plan is binding on "the debtor and each creditor … whether or not such creditor … has objected to, has accepted, or has rejected the plan…and vests all of the property of the estate in the debtor… free and clear of any claim or interest of any creditor provided for by the plan."[23] Confirmation orders are binding; *res judicata* prevents a creditor from collaterally attacking the order.[24] Therefore, as long as the confirmation order remains in effect, the liens remain permanently stripped once the case is closed.[25]

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[18] In re Okosisi, 451 B.R. 90, 99 (Bankr. D. Nev. 2011).
[19] Id. at 99-100.
[20] Id.
[21] Id. at 99.
[22] Id. at 100.
[23] Id.
[24] Id.
[25] Id.

II. The "Discharge" Camp.

Courts generally agree that lien stripping is available after Nobelman.[26] They also generally do not dispute that a Chapter 13 debtor is eligible to file within four years of filing a Chapter 7.[27] The United States Supreme Court acknowledged in Johnson v. Home State Bank that "Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief."[28] One reason for this would be that the debtor may seek the shelter of the automatic stay protection to propose structured payments on debts, even if the debtor is ineligible for a discharge.[29] Notwithstanding this, many courts hold that lien stripping is contingent upon completion of the Chapter 13 plan and discharge.

A. Closing a Chapter 13 without a discharge bars permanency of a strip-off.

This camp recognizes that a debtor may modify a creditor's lien during the life of the plan, but the modification is not permanent.[30] As the court in In re Jarvis put it, "the lien avoiding effect is established at confirmation, [but] actual lien avoidance is contingent upon the debtor completing the plan and receiving a discharge."[31] Once the plan is complete and the case is closed, the lien persists under § 1325(a)(5) which states that a "holder of [an allowed secured

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[26] See In re Lane, 280 F.3d 663 (6th Cir. 2002); In re Pond, 252 F.3d 1222 (2nd Cir. 2001); In re McDonald, 205 F.3d 606 (3rd Cir. 2000); In re Bartee, 212 F.3d 277 (5th Cir. 2000); In re Tanner, 217 F.3d 1357 (11th Cir. 2000); In re King, 290 B.R. 641, 651 (Bankr. C.D. Ill. 2003). The less prevalent view is that Nobelman's focus was on a mortgage holder's underlying claims, whether or not wholly unsecured under § 506(a). The argument is that the court's application of §506(a) was merely dicta and should not be taken out of context, i.e., the proper focus is on state-law rights of mortgage holders. Thus, allowing lien stripping would "open a loophole Nobelman tried to close." In re Waters, 276 B.R. 879, 882 (Bankr. N.D. Ill. 2002) (citing Barnes v. American Gen. Fin. (In re Barnes), 207 B.R. 588 (Bankr. N.D. Ill. 1997)). In re Waters, 276 B.R. 879, 884 (Bankr. N.D. Ill. 2002) rejected this position; it counters that the court's discussion of § 506(a) is meaningful—not dicta; the lower court had ruled that § 506(a) is inapplicable and Nobelman's analysis held that § 506(a) could be reconciled with § 1322(b)(2). Dicta is defined as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding." In re Waters, 276 B.R. 879, 884 (Bankr. N.D. Ill. 2002) (citing Sarnoff v. American Home Prods. Corp., 789 F.2d 1075, 1084 (7th Cir. 1986)).

[27] In re Jarvis, 390 B.R. 600, 605 (Bankr. C.D. Ill. (2009) (citing In re Bateman, 515 F.3d 272 (4th Cir. 2008)); In re Lewis, 339 B.R. 814 (Bankr. S.D. Ga. 2006); In re McGehee, 342 B.R. 256 (Bankr. W.D. Ky. 2006); In re Sanders, 368 B.R. 634 (Bankr. E.D. Mich. 2007).

[28] Johnson v. Home State Bank, 501 U.S. 78, 87 (1991).

[29] In re Jarvis, 390 B.R. 600, 605 (Bankr. C.D. Ill. (2009).

[30] In re Lilly, 378 B.R. 232, 236 (Bankr. C.D. Ill. 2007).

claim] retains the lien securing the claim until … the payment of the underlying debt … or discharge." If the debtor was able to permanently avoid the lien after the Chapter 13 closes, this would amount to an improper *de facto* discharge.[32] Under this view, requiring a discharge to permanently strip-off a lien provides consistent treatment of lien holders in a Chapter 13, whether the case concludes by conversion, dismissal or without discharge.[33]

B. Even a creditor with a stripped-off lien is a secured claim holder.

In the recent case of In re Victorio, the court took great issue with the notion that a creditor's "bundle of state law rights in the property" disappear with the "waive of the virtual wand of 11 U.S.C. § 506(a)."[34] A Chapter 7 debtor receives a discharge of personal liability on debts that have not been reaffirmed.[35] A lien "rides through" the Chapter 7; the secured creditor retains the state law lien rights on the real estate.[36] The underlying debt itself has not been extinguished.[37] The "value" of the lien is not stripped by the Chapter 7 discharge but rather fluctuates with the value of the collateral.[38] Therefore, according to this camp the court's first step should not be to determine the "value" of the lien under § 506(a), but rather to determine if a valid mortgage secures a debtor's principal residence.[39] If so, pursuant to § 1322(b)(2) the creditor's rights may not be modified regardless of the equity in the residence.[40]

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[31] Jarvis, at 604.
[32] Lilly, at 236.
[33] Id. at 237 (Bankr. C.D. Ill. 2007). Recall that 11 U.S.C. § 349(b)(1)(C) states that any lien avoided under § 506 is reinstated upon a dismissal and 11 U.S.C. § 348(f)(1)(C) states that any creditor of a secured interest "shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion."
[34] In re Victorio, 2011 Bankr. LEXIS 2704 at *15 (Bankr. S.D. Cal. July 8, 2011).
[35] Id. (citing Dewsnup v. Timm, 502 U.S. 410, 417-18 (1992)).
[36] Id.
[37] Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885, 891 (B.A.P. 10th Cir. 2010).
[38] Id. at 892.
[39] Barnes v. American Gen. Fin. (In re Barnes), 207 B.R. 588, 592 (Bankr. N.D. Ill. 1997).
[40] Id.

C. Permitting lien stripping absent a discharge amounts to a *de facto* discharge and is contrary to the Code and principles of bankruptcy.

As Victorio points out, even pre-BAPCPA a discharge was the only way to make lien stripping permanent.[41] BAPCPA has not changed this. If Congress intended to permit lien stripping absent a discharge, it would have provided for this expressly.[42] According to this court, allowing permanent lien avoidance in this manner is contrary to basic bankruptcy principles and grants a debtor a "broad new remedy against allowed claims … without the new remedy being mentioned somewhere in the Code itself or in the annals of Congress."[43] According to Victorio, the "fourth option" is purely "invented" and is nothing more than an attempt to "create a new 'permanent' bar to collection…very properly called a *de facto discharge*."

III. The good faith requirement presents an additional obstacle.

Lien stripping through a so-called Chapter 20 has yet another obstacle to overcome—every Chapter 13 plan must be filed in good faith pursuant to 11 U.S.C. § 1325(a)(3). Chapter 20 cases are disfavored and must be closely scrutinized.[44] What does good faith mean? In the pre-BAPCPA case of In re Metz, 820 F.2d 1495, 1498-99 (9th Cir. 1987), the court held that a successive Chapter 13 filing on the very day the debtor received a Chapter 7 discharge was not bad faith *per se* under a totality of the circumstances test, even where the plan proposed no payment to unsecured creditors. The good faith requirement is examined on a case-by-case basis.[45] Some of the factors that courts consider under this test include:

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[41] In re Victorio, 2011 Bankr. LEXIS 2704 at *17 (Bankr. S.D. Cal. 2011).
[42] Id.
[43] Id. at *10.
[44] In re Cushman, 217 B.R. 470, 476 (Bankr. E.D. Va. 1998).
[45] In re Chanthaleukay, 2010 Bankr. LEXIS 50 (Bankr. M.D.N.C. Jan. 7, 2010) (citing Deans v. O'Donnell, 692 F.2d 968 (4th Cir. Va. 1982)).

1. The time period elapsed between the Chapter 7 and Chapter 13;[46]

2. Whether the debtor kept up mortgage payments;[47]

3. Whether the debtor's situation had changed;[48]

4. Whether the two filings accomplish a result that is not permitted in either chapter standing alone;[49]

5. Whether the filings treat creditors in a fundamentally fair and equitable manner;[50]

6. Whether the filings abuse of the purpose and spirit of the Bankruptcy Code;[51]

7. Whether the debtor has misrepresented facts;[52] and

8. Whether the debtor has attempted to manipulate the Bankruptcy Code.[53]

In the pre-BAPCPA case of Keach v. Boyajian (In re Keach), 243 B.R. 851 (B.A.P. 1st Cir. 2000) the Bankruptcy Appellate Panel for the First Circuit defined good faith as "honesty in purpose" in a case where the debtor filed a Chapter 13 on the heels of his Chapter 7 discharge because he was unsuccessful in discharging a claim made against him for fraud relating to a business transaction.[54] The Keach court held that the successive filings were permissible and not done in bad faith *per se*, especially where the debtor's circumstances change.[55] The Court reasoned that both the debtor's pre-filing conduct and the "spirit of the Code" are irrelevant—

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[46] Id. at *5 (Bankr. M.D.N.C. Jan. 7, 2010) (court found bad faith where Chapter 13 filed one week from date of Chapter 7 discharge and before Chapter 7 closed).
[47] In re Metz, 820 F.2d 1495, 1498 (9th Cir. 1987).
[48] Id. (debtor's income increased); In re Chanthaleukay, 2010 Bankr. LEXIS 50 at *6 (Bankr. M.D.N.C. Jan. 7, 2010) (court found bad faith where no material change found and Schedules I and J reflected the same income and expenses in the Chapter 13 as Chapter 7).
[49] Chanthaleukay, at *6 (Chapter 13 confirmation denied for bad faith because successive filings accomplished something neither filing could standing alone). In Chanthaleukay, the Chapter 13 debtors sought to cure an arrearage and keep their home. The court noted that this type of relief is not available to Chapter 7 debtors because there is no right to cure. In their Chapter 7, the debtors discharged all of their unsecured debt; therefore no dividend could be paid to unsecured creditors since none existed. The court explained that a zero percent plan would be contrary to section 1325(b) and not permissible under Chapter 13, because the debtors had a few hundred dollars of disposable income after payment of their monthly expenses and over and above the proposed plan payment of $1,700.00 per month. Id. at *7-8.
[50] Id. at *6.
[51] Id.
[52] In re Goeb, 675 F.2d 1386, 1390 (9th Cir. Cal. 1982).
[53] Id.
[54] Keach v. Boyajian (In re Keach), 243 B.R. 851, 868 (B.A.P. 1st Cir. 2000).

rather courts should look only to post-filing conduct.[56] While the court admitted that an analysis of the surrounding factors is prudent, it cautioned as follows:

> Even the simplistic word "honesty" can be elastic in its perception and application, subsuming as it does the elusive element of "intent" which can be judged only by examining surrounding circumstances such as the debtor's candor with creditors and the court. But we do say that courts must be very careful not to allow the freedom of such an examination to seduce them into a moralistic override of Congress' determinations. A review of the surrounding circumstances should and must be limited to an examination of only those circumstances which are relevant.[57]

Since Keach was decided, the First Circuit's Bankruptcy Appellate Panel has officially adopted the totality of the circumstances test[58] recognizing that many bankruptcy courts in the First Circuit had already expanded Keach's holding and included both pre-petition and post-petition conduct of debtors in the good faith analysis.[59] The good faith obligation is now imposed on the debtor at two stages of a Chapter 13 proceeding—filing the petition and filing the plan.[60]

IV. The proper procedural mechanism is an open question.

If lien stripping is available in Chapter 13, what is the proper procedural mechanism: through the plan or an adversary proceeding? Some courts take the position that the procedure to strip a lien is an adversary proceeding under Bankruptcy Rule 7001(2), as the determination goes

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[55] Id. at 851.
[56] Id. at 871.
[57] Id.
[58] Sullivan v. Solimini (In re Sullivan), 326 B.R. 204, 211 (B.A.P. 1st Cir. 2005).
[59] See In re Dicey, 312 B.R. 456 (Bankr. D.N.H. 2004); In re Fleury, 294 B.R. 1 (Bankr. D. Mass. 2003); In re Scotten, 281 B.R. 147, 149 (Bankr. D. Mass 2002); In re Virden, 279 B.R. 401 (Bankr. D. Mass. 2002).
[60] Sullivan, at 211.

to the "validity, priority, or extent of a lien."[61] Other courts have ruled that such stripping is permitted through the Chapter 13 plan.[62]

The terms used in Bankruptcy Rule 7001(2) have been interpreted to mean the following: "'validity' means the existence or legitimacy of the lien itself, 'priority' means the lien's relationship to other claims to or interests in the collateral, and 'extent' means the scope of the property encompassed by or subject to the lien."[63] The argument that lien stripping is permissible through a Chapter 13 plan is based on the notion that the heart of the matter is actually the determination of the property's secured status and value for the purpose of avoidance under § 506(a), not the validity of the lien, its relation to other liens or the scope of the property secured by the lien.[64] Such a determination is made at a hearing on the plan which affects the creditor's rights under § 506(a), as it is a contested matter under Bankruptcy Rule 3012 and outside of the scope of Bankruptcy Rule 7001(2). Thus, the argument follows that this may be accomplished in the plan confirmation process.[65] However, the plan must comport with the principles of fairness and due process by providing adequate notice.[66] "[D]ue process require[s], notice must be reasonably calculated to bring to the party's attention to the nature and substance of the pending determination, i.e., … adverse effect on the party's rights (the qualitative aspect), and … reasonable time in which to respond (the quantitative aspect)."[67]

On the other hand, courts that hold an adversary proceeding is required reason that stripping a lien goes beyond a mere valuation and determination analysis under § 506(a)—the

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[61] In re Ginther, 427 B.R. 450 (Bankr. N.D. Ill., 2010); In re Forrest, 424 B.R. 831 (Bankr. N.D. Ill. 2009); In re Waters, 276 B.R. 879 (Bankr. N.D. Ill. 2002).
[62] In re King, 290 B.R. 641 (Bankr. C.D. Ill. 2003).
[63] Id. at 648 (citing In re Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990)).
[64] Id.
[65] Id.
[66] Id. at 649.
[67] Id.

debtor seeks to obliterate the lien and treat the creditor as unsecured.[68] "[W]hen the existence of the lien itself is at issue, then the 'validity' and 'extent' of the lien are certainly at issue" which requires an adversary proceeding under Bankruptcy Rule 7001(2).[69] In addition to the Bankruptcy Rules it has been argued that due process requires an adversary proceedings to afford a "heightened degree" of notice by service of a summons and complaint on a registered agent or officer, as opposed to the more limited notice of the confirmation hearing and ability to object to the plan with 28 days' notice which is typically mailed to a creditor's billing address.[70]

Conclusion

Courts are divided on the issue of whether or not permanent lien stripping is permissible in a "Chapter 20" absent a discharge. Courts in the First Circuit have apparently not reported decisions that squarely address Chapter 20 lien stripping post-BAPCPA or the procedural mechanism to accomplish the task. One matter is certain, however. If a debtor attempts Chapter 20, the debtor must be certain that the facts and circumstances of the filing and plan meet the good faith requirement under the totality of the circumstances if the case has any chance of survival.

[68] In re Ginther, 427 B.R. 450, 456 (Bankr. N.D. Ill., 2010)
[69] In re Forrest, 424 B.R. 831, 833 (Bankr. N.D. Ill. 2009).
[70] Id. at 835; Fed. R. Bankr. P. 7003, 7004; Fed. R. Bankr. P. 2002(b).