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who have been practicing a considerable amount of time, it might take some getting used to that Schedule A now combines personal and real property in one form, that Schedule B is now for secured creditors, and that Schedule C is now a combined form for priority and unsecured creditors, etc.... Expect that first petition review with the new forms to feel a bit foreign. The new forms are scheduled to go into effect December 2013. Also, keep on the lookout for a revised proposed national model plan to be published for comment in August 2013.

New Forms in Effect as of April 1, 2013

Every three years the Judicial Conference is tasked with making adjustments to certain dollar amounts stated in various provisions of the Bankruptcy Code pursuant to 11 U.S.C.§104(a). The changes are based on the Consumer Price Index. This year's dollar amounts are reflected on the new forms as of April 1, 2013. For a comprehensive list of dollar amount changes reflected on the forms and those changes not reflected on the forms (i.e. debt limits for chapter 13 under 109(e)), see the Federal Register/Vol 78, No. 35/ Thursday, February 21, 2013/Notices which is listed on the Court's website under Pending Changes in the Bankruptcy Forms.

IN RE MCNEAL: IS IT A GOLDEN TICKET FOR CHAPTER 7 DEBTORS TO STRIP-OFF WHOLLY UNSECURED LIENS UNDER §506(D) OR FOOLS' GOLD

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Since the United States Supreme Court's landmark decision in *Dewsnup v. Timm*[1] in 1992, which held that a Chapter 7 debtor could not "strip down" a partially secured lien under 11 U.S.C. §506(d)[2] of the Bankruptcy Code, bankruptcy courts across the country have nearly unanimously held that §506(d) is not available to Chapter 7 debtors to avoid liens, whether said liens are partially secured or wholly unsecured. That is until the Eleventh Circuit's recent decision in *McNeal v. GMAC Mortgage, LLC*[3], which has not been published and is currently pending *en banc* review[5] but has already made a huge impact in the Eleventh Circuit. For instance, on May

25, 2012, the Bankruptcy Court for the Middle District of Florida issued a revised "Negative Notice" list for permissive motions to be filed in Chapter 7 proceedings to include a "Motion to Determine Secured Status/Strip Lien on Real Property."[6] Not only are Chapter 7 debtors filing Motions to Strip Liens in active Chapter 7 cases, but some debtors are even re-opening closed Chapter 7 cases to strip off their junior liens.[7] *McNeal's* impact may transcend the Eleventh Circuit if it does not change its ruling after *en banc* review, in which case the split among the Circuit Courts will be solidified and conditions may perhaps become ripe for Supreme Court review.

a. ***McNeal* and Its Revival of *In re Folendore***

In *McNeal*, the Chapter 7 debtor appealed to the Eleventh Circuit from an order of the United States District Court for the Northern District of Georgia, affirming the bankruptcy court's denial of her motion seeking to "strip off" a second priority wholly unsecured lien on her home. While, the *McNeal Court* acknowledged that several courts have interpreted *Dewsnup* from precluding Chapter 7 debtors to "strip off" wholly unsecured junior liens,[8] it concluded that it is bound by a prior Eleventh Circuit decision, *Folendore v. United States Small Business Administration*[9] , which concluded that a wholly unsecured claim was voidable under §506(d).[10] Although *McNeal* is not a published decision it has revived *Folendore*, which was widely thought to have been abrogated by *Dewsnup*, even within the Eleventh Circuit.[11] *McNeal* held that it was bound by *Folendore* rather the *Dewsnup* because of a prior panel rule which provided that "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'"[12] . *McNeal* reasoned that because *Dewsnup* disallowed only a "strip down" of a partially secured mortgage lien and did not address a "strip off" of a wholly unsecured lien, it is not "clearly on point."[13]

McNeal has revived the debate regarding what it means to have an "allowed secured claim" for purposes of §506(d). One interpretation, which is currently the majority view, is set forth in *Dewsnup. Folendore* holds the minority view. Each view is discussed below.

b. Dewsnup's Interpretation of Section 506(d) and Rationale for Its Holding

In *Dewsnup*, the Chapter 7 debtor initiated an adversary proceeding to "strip down" the balance she owed on her farmland to its present fair market value.[14] The debtor argued that a "strip down" was authorized "by the interrelationship of the security-reducing provision of §506(a)[15] and the lien-avoiding provision of §506(d)."[16] The Bankruptcy Court, the District Court, and the Tenth Circuit all disagreed, reasoning that §506 did not apply because the Chapter 7 trustee abandoned the farmland, thereby rendering §506 inapplicable because the property was no longer "property in which the estate has an interest."[17] The Supreme Court affirmed but it adopted a more expansive reasoning than the lower courts. It determined that the meaning of "allowed secured claim" in §506(d) was not an "indivisible term of art" but instead referred a claim that is both "allowed" and "secured," with each modifier requiring an independent analysis, specifically, whether the claim was "allowed" under §502 and "secured" in the sense that a *lien* secures the underlying collateral.[18]

The Supreme Court refused to adopt the alternative view that an "allowed secured claim" in Section 506(d) should have the same meaning as it does in Section 506(a), in which case the value of the property, rather than the lien, would determine whether or not the claim was an "allowed secured claim." It reasoned that:

> [T]he practical effect of Dewsnup's argument is to freeze the creditor's secured interest at the judicially determined valuation in contravention of the pre-Code rule that liens on real property pass through bankruptcy unaffected. Congress must have enacted the Code with a full understanding of the latter rule, and, given the statutory ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims to the extent that they become "unsecured" for purposes of §506(a) without mentioning the new remedy somewhere in the Code or in the legislative history is implausible and contrary to basic bankruptcy principles.[19]

Simply put, the Supreme Court interpreted §506(d) in a way that was consistent with the pre-Code rule that liens ride through bankruptcy by using the existence of the *lien* as the basis for determining whether a claim is "secured" for purposes of §506(d).

c. *Folendore's* Interpretation of Section 506(d) and Rationale for Its Holding

In contrast to *Dewsnup*, *Folendore* did not take a

term-by-term approach to interpreting "allowed secured claim" for purposes of §506(d). Rather, *Folendore* held that §506(a) allowed the value of the underlying collateral to determine the secured nature of the claim, and therefore, a wholly unsecured claim can be voided by the plain language of §506(d) because the property's value does not give the creditor an "allowed secured claim."[20] In other words, the analysis of what is an allowed secured claim under Sections 506(a) and (d) are identical, which makes the *value* of the property, rather than the existence of a lien, the predominant measure of whether the claim is an "allowed secured claim." The *Folendore* court in so holding, believed that it was promoting the fresh start policy of bankruptcy rather than following what the creditor promoted as the plain language interpretation of § 506(d).[21]

D. IMPACT OF MCNEAL

McNeal has become a "golden ticket" for Chapter 7 debtors in the Eleventh Circuit to avoid wholly unsecured junior liens on their residences and which can be useful in loan modification negotiations with the first lien holder and in short sales. In cases of loan modifications, many pooling and servicing agreements (PSA), which govern the relationship between loan servicers and investors, make it hard to modify the first-lien mortgage unless the second-lien holder relinquishes their claim on it, since the first-lien holders are generally reluctant to agree to a modification that leaves a junior claim intact, since lien priority dictates claimants bear the loss first.[22] In short sales, the junior lien holder will generally withhold its consent unless it can recover some price in exchange for releasing its lien. Furthermore, any appreciation in the home will inure to the debtor's benefit rather than the junior lien creditor's benefit. As property prices recover from the depths of the 2008 financial crisis, Chapter 7 debtors stand to gain tremendously by voiding junior liens on their properties. *McNeal*, with its revival of *Folendore*, has given Chapter 7 debtors in the Eleventh Circuit the benefits of reorganization without filing bankruptcy in one of the reorganization Chapters and waiting several years for a discharge or plan completion to effectuate lien avoidance. This may spill over to other Circuits where a Circuit-level decision has not been published on this issue.

However, *McNeal* may perhaps be "fools' gold" in Circuits like the Fourth[23], Sixth[24] and Ninth Circuit, which have interpreted *Dewsnup* to apply to both partially unsecured and wholly unsecured liens. *In Laskin v. First*

National Bank of Keystone[25], the Ninth Circuit BAP addressed the issue of whether a Chapter 7 debtor could avoid a wholly unsecured junior lien under §506(d).[26] The Court held that "Section 506(d) does not explicitly confer an avoiding power on a Chapter 7 debtor."[27] *Laskin* went on to state that even if a Chapter 7 debtor had standing to avoid the lien, the holding in *Dewsnup* prohibited the avoidance of the lien under §506(d), regardless of whether the claim was partially secured or wholly unsecured.[28] The Court reasoned that:

> [W]hether the lien is wholly unsecured or merely undersecured, the reasons articulated by the Supreme Court for its holding in *Dewsnup*…– that liens pass through bankruptcy unaffected, that mortgagee and mortgagor bargained for a consensual lien which would stay with real property until foreclosure, and that any increase in value of the real property should accrue to the benefit of the creditor, not the debtor or other unsecured creditors – are equally pertinent.[29]

Similarly, in *Concannon v. Imperial Capital Bank*[30] the Ninth Circuit BAP held that the Supreme Court's decision in *Dewsnup* prohibited debtors from "stripping off" a judgment creditor's wholly unsecured nonconsensual lien, despite the debtors' attempts to distinguish cases from the other Ninth Circuit cases on the basis that the lien in question was a non-consensual lien.[31] Finally, the Ninth Circuit in *Enewally v. Washington Mutual Bank*, interpreted *Dewsnup* as prohibiting a Chapter 7 debtor to strip a lien but stated that *Dewsnup* had no application in the reorganization Chapters of 11, 12, and 13.[32]

Currently, there are splits among the circuits: the Fourth, Sixth, and the Ninth Circuit BAP do not allow Chapter 7 lien avoidance under §506(d). The Eleventh Circuit does, and there is also a scattered minority of opinions by judges outside of these Circuits.[33] With the growing number of cases coming down the pipe in the Eleventh Circuit, and the fact that there are six Circuits Courts without a Circuit-level decision on this issue, *McNeal* has huge potential for change.

E. Conclusion

After *McNeal*, lien stripping in a Chapter 7 case is alive and well in the Eleventh Circuit. Perhaps its effects will transcend the Eleventh Circuit if it affirms its decision after *en banc* review, since the benefits of lien avoidance in a Chapter 7 are compelling and there are six Circuits without a Circuit-level decision on point. Armed with an Eleventh Circuit opinion on their side, Chapter 7 debtors across the country may change the jurisdictional landscape following the *McNeal* decision. *McNeal* is definitely a case to keep your eye on.

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1 *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).
2 Section 506(d) provides: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void...."
3 *McNeal v. GMAC Mortgage, LLC (In re McNeal)*, 2012 WL 1649853 (11th Cir. 2012).
4 Eleventh Circuit Rule 36-2 provides that an unpublished decision does not serve as binding precedent.
5 The Appellees in *McNeal* have filed a petition for rehearing *en banc* on June 1, 2012. However, the Eleventh Circuit entered an Order on February 22, 2013 staying all of the proceedings in *McNeal* because the Appellees have filed a Chapter 11 bankruptcy case pending in the United States Bankruptcy Court, Southern District of New York (no. 12-12020 *et seq.*).
6 Negative Notice List Revised 5-25-2012, United States Bankruptcy Court Middle District of Florida, May 25, 2012, available at http://www.flmb.uscourts.gov/announcements .
7 *See eg.*, Case No. 12-69161 in the United States Bankruptcy Court, Northern District of Georgia; *see also* Case No. 12-09126 in the United States Bankruptcy Court, Middle District of Florida.
8 *McNeal*, 2012 WL 1649853 at **2.
9 *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir.1989).
10 *McNeal*, 2012 WL 1649853 at **2.
11 *In re Swafford*, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993); *In re Windham*, 136 B.R. 878, 882 n.6 (Bankr. M.D. Fla. 1992).
12 *McNeal*, 2012 WL 1649853 at **2 (citing *Atl. Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir.2007))
13 Id.
14 *Dewsnup v. Timm*, 502 U.S. at 412.
15 Section 506(a)(1) provides: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest...is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...."
16 *Dewsnup v. Timm*, 502 U.S. at 413.
17 Id. at 413-14.
18 Id. at 420-24.
19 Id. at 410-11.
20 *Folendore*, 863 F.2d at 1538-39.
21 *Folendore*, 862 F.2d at 1540.
22 *Sumit Agarwal et al, Second Liens and the Holdup Problem in First-lien Mortgage Renegotiation*, Federal Deposit Insurance Corporation, September 2012, available at http://www.fdic.gov/news/conferences/2012-09-2728/Second%20Liens%20and%20the%20Hold%20Up%20Problem.pdf .
23 *Ryan v. Homecomings Financial Network (In re Ryan)*, 253 F.3d 778, 782 (4th Cir. 2001).
24 *Talbert v. City Mortgage Services (In re Talbert)*, 344 F.3d 555 (6th Cir. 2003).
25 *Laskin v. First National Bank of Keystone (In re Laskin)*, 222 B.R. 872 (B.A.P. 9th Cir. 1998)
26 Id. at 874
27 Id. (internal cite omitted).
28 Id. at 876.
29 Id.
30 *Concannon v. Imperial Capital Bank (In re Concannon)*, 338 B.R. 90, 94 (9th Cir. B.A.P. Ariz 2006).
31 Id. at 93, fn. 5.
32 *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1169-70 (9th Cir. 2004).
33 In re Lavelle, 09-72389, 2009 WL 4043089 (Bankr. E.D.N.Y. Nov. 19, 2009); *Yi v. Citibank, N.A. (In re Yi)*, 219 B.R. 394 (E.D. Va. 1998); *Howard v. National Westminster Bank, U.S.A. (In re Howard)*, 184 B.R. 644 (Bankr. E.D.N.Y. 1995).