

The Continuing Evolution of Lien Stripping

Since May of 2012, lien stripping has been evolving in this circuit as result of the opinion issued by the Eleventh Circuit in McNeal v. GMAC mortgage, LLC. This article provides a brief update on recent events and opinions rendered in this circuit that have occurred as a result of the still pending McNeal case

McNeal v. GMAC Mortgage, LLC

On May 11, 2012, the United States Court of Appeals for the Eleventh Circuit issued an opinion in McNeal v. GMAC Mortgage, LLC et al., Case No. 11-11352. The Eleventh Circuit held that the Supreme Court's opinion in Dewsnup v. Timm, 112 S. Ct. 773 (1992), was to be narrowly construed and Dewsnup did not abrogate Folendore v. United States Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989), as a number of lower courts in the circuit have held. McNeal held that “[u]nder our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is ‘clearly on point.’” McNeal at *2. In Folendore, the Eleventh Circuit, interpreting 11 U.S.C. §§ 502 and 506, held that a Chapter 7 debtor could “strip off” a wholly unsecured junior lien. Id. Because Dewsnup dealt only with “stripping down” a partially secured mortgage it did not abrogate this circuit's earlier decision. Id. However, the McNeal, decision was not originally selected for publication, which under Eleventh Circuit Rule 36-2 means that the opinion was not binding, merely persuasive. (11th Cir. R. 36-2).

The May 11, 2012 opinion has created a flurry of events and opinions.. Appellee, GMAC Mortgage, filed a motion for rehearing *en banc*. The Eleventh Circuit granted the motion for rehearing, but has not yet heard argument of counsel.¹ The Appellant, Ms. McNeal, filed a motion requesting the Eleventh Circuit publish the opinion which was granted on August 2, 2013. Consequently, the McNeal opinion is now binding precedent in the Eleventh Circuit, and Chapter 7 debtors may “strip off” wholly unsecured junior liens under Folendore.

The issue of whether a Chapter 7 debtor may “strip off” a junior lien is not completely settled. The Appellee's motion for reconsideration *en banc* is still pending before the Eleventh Circuit, which could result in reversal of the current opinion that is now binding. All bankruptcy practitioners must remain vigilant as to state of law on this issue of “lien stripping” in Chapter 7.

In re Sain

An ancillary issue related to the lien stripping issue, is the effect of stripping off the junior lien held by a Homeowners' Association or Condominium Association (an “Association”). An issue raised before the Honorable Judge Laurel Isicoff, was the whether the stripping of a lien of an Association acquired pursuant to Florida Chapters 718 or 720, affected the Association's right to collect the unpaid balance for assessments, owed by the Debtor, from the successor owner of the property or first mortgagee. See, In re Sain, 2013 WL 5852496 (Bankr. S.D.Fla. 2013).

¹ The delay is in-part due to the Appellee, GMAC Mortgage filing bankruptcy and the stay being entered.

In a well-reasoned opinion, Judge Isicoff held that the Association's right to collect under Florida Chapter 718 or 720, from the successor owner or first mortgagee is not affected. A bankruptcy discharges a "debtor's *in personam*" liability on the debt. However, the liability of a successor owner or first mortgagee is an independent statutory liability and cannot be discharged through the bankruptcy of another. A bankruptcy "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity, for such debt." Id. at *3 (quoting 11 U.S.C. § 524(e)).

This opinion, while having minimal impact on debtor's counsel; is especially important for practitioners that represent Homeowners' or Condominium Associations. In order for the Associations to make the best business decisions possible and protect their rights, they must be aware of the ramifications that this opinion might have when defending these actions in bankruptcy court.

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