CHAPTER 13 GUIDELINES REGARDING
MOTIONS TO VALUE (AKA "LAM" MOTIONS)
(February 5, 2013)
Judge Wayne Johnson

I. INTRODUCTION.

Applicable law provides that a chapter 13 debtor may avoid a junior lien on the debtor's residence under certain circumstances. *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220, 1227 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36, 41 (9th Cir. BAP 1997), *appeal dismissed*, 192 F.3d 1309 (9th Cir. 1999). The procedure for obtaining this relief has multiple steps in chapter 13 cases. First, if a debtor wishes to confirm a chapter 13 plan that treats a junior lienholder as unsecured, the debtor must file a motion pursuant to Rule 3012 of the Federal Rules of Bankruptcy Procedure to obtain a court order finding that the claim of the junior lienholder is not a secured claim. This motion must be filed and heard prior to confirmation of the chapter 13 plan.

Second, if the Court grants the motion and confirms the chapter 13 plan, the debtor must fully perform under the terms of the plan. If the debtor does so, then at the end of the case (after entry of discharge), the debtor may file an adversary proceeding to obtain an unconditional judgment avoiding the lien and stating that the lien is invalid and no longer enforceable. Rule 7001(2) of the Federal Rules of Bankruptcy Procedure requires an adversary proceeding to obtain an order stating that a lien is invalid and unenforceable. Given that only approximately 8% of chapter 13 cases are successful (i.e. result in a confirmed chapter 13 plan that is fully performed), the number of valuation motions filed pursuant to Rule 3012 vastly exceeds the number of instances in which a lien is actually avoided.

The problem of the large volume of valuation motions is compounded by a lack of uniformity among the motions. The titles of motions by debtors in chapter 13 cases to avoid junior liens secured by their principal residence (i.e. "lien strip motions," "motions to extinguish junior liens," "motions to value," "*Lam* motions," etc.) are as varied as their content. Throughout these guidelines, however, all such motions shall be described as "Valuation Motions."

Given the considerable volume of Valuation Motions, use of a standardized form is necessary to more quickly and efficiently process such motions. The issues arising in a Valuation Motion are typically quite discrete (i.e. the value of collateral and the amount of existing liens) and can be easily presented in a uniform fashion. Just as motions for relief from stay (another type of motion filed in very large numbers) have been standardized, Valuation Motions in chapter 13 cases should also be uniform.

This is especially true given that 92% of chapter 13 cases fail (i.e. fail to achieve confirmation or default occurs thereafter). When a chapter 13 case fails, the time and energy expended by the Court in considering the Valuation Motion becomes pointless. Unlike motions for relief from stay (which provide some benefit for the moving party

even in a failed bankruptcy case), Valuation Motions serve little purpose in a chapter 13 case that fails and, as stated above, the vast majority of them fail.

As a result, the Court has developed form F 4003-2.4.JR.LIEN.MOTION, entitled "Debtor's Notice of Motion and Motion to Avoid Junior Lien on Principal Residence [11 U.S.C. § 506(d)]." The form may be found on the Court's website, www.cacb.uscourts.gov, by clicking on "Forms" then "Local Bankruptcy Rules Forms," and scrolling down to F 4003-2.4.JR.LIEN.MOTION. While no form is perfect in character or form, this form is widely used and familiar to attorneys for chapter 13 debtors. Indeed, other judges have established guidelines requiring its use.

Accordingly, all Valuation Motions filed by debtors in chapter 13 cases pending before Judge Johnson must be made using form F 4003-2.4.JR.LIEN.MOTION including the proof of service. If a Valuation Motion is not filed using form F 4003-2.4.JR.LIEN.MOTION, including the proof of service, the motion will be denied.

In addition, all motions must be accompanied with a notice of the motion. Most local forms have been created with a notice included within the motion but, for unknown reasons, an older version of form F 4003-2.4.JR.LIEN.MOTION - Form 4003-2.4-Motion - does not include one. Do not use the older form. Instead, use the current version of the form F 4003-2.4.JR.LIEN.MOTION which includes a notice of the motion.

Use of form F 4003-2.4.JR.LIEN.MOTION for purposes of the pre-confirmation Rule 3012 motion to value collateral is mandatory notwithstanding the fact that, as discussed above, an adversary proceeding is ultimately required to avoid the lien. Some courts use form F 4003-2.4.JR.LIEN.MOTION in lieu of an adversary proceeding to permit avoidance of a junior lien on a conditional basis. As stated above, Judge Johnson does not follow that procedure based on the provisions of F.R.B.P. Rule 7001(2). However, because form F 4003-2.4.JR.LIEN.MOTION has been developed by the Court and the form is widely used already (particularly in the Riverside Division), it makes sense to use the form in the interests of promoting consistency and judicial economy.

Nevertheless, consistent with F.R.B.P. Rule 3007(b), to the extent that the title of the Valuation Motion or the content of the motion seek relief avoiding, extinguishing, attacking or otherwise modifying any lien, that language and relief will not be approved by the Court. The relief that will be granted will be limited solely to valuing the collateral of a junior lienholder and determining the treatment of its claims in the bankruptcy case. Nothing in the order granting the Valuation Motion shall be construed to avoid a lien or determine the extent, validity, or priority of a lien or security interest. The lien of the junior lienholder will remain of record and the junior lienholder shall retain all rights under the lien unless and until the Court enters a further order or judgment avoiding the lien. If the Court confirms a plan of reorganization and the debtor timely performs all obligations under the confirmed plan and the debtor obtains a discharge, the debtor may thereafter initiate an adversary proceeding pursuant to F.R.B.P. Rule 7001(2) to obtain a further order or judgment extinguishing or avoiding the junior lien.

II. EVIDENCE.

A large number of Valuation Motions are not granted due to a failure to provide proper evidence or to properly serve the motions. Debtors and their counsel should (a) fill out the form completely and accurately, including the proof of service, (b) file and serve their papers in a timely manner in accordance with all applicable Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules, (c) deliver a judge's copy (with tabs) to chambers and (d) follow the additional guidelines below.

As the form indicates, all Valuation Motions must be supported by evidence regarding the amount and priority of the liens at issue and the value of the property. All evidence must be admissible and persuasive.

Liens. Without evidence as to the validity and amount of the senior secured loan and the junior secured loan, the requested relief cannot be granted. The debtor's declaration, which contains the debtor's testimony regarding the liens and introduces the documents into evidence, along with a copy of the deed of trust, a loan statement, proof of claim or other statement from the current lender may establish the amount and validity of the lien. No documents will be considered as evidence unless they are accompanied by a declaration of the debtor. The debtor's testimony alone, with no documentation, will not be sufficient to establish validity and amount (similarly, the debtor's schedules are not sufficient). The Court also does not consider a credit report listing amounts owed to be admissible evidence of validity and amount; it is hearsay.

Attach a Copy of the Lien. The primary goal of filing a Valuation Motion is to avoid a recorded deed of trust. Therefore, debtors should attach to the Valuation Motion a copy of the recorded instrument that they wish to avoid. This serves two purposes.

First, unless and until a debtor locates a copy of the recorded deed of trust, the entire chapter 13 case may be pointless. Debtors need to know (at the beginning of the case) precisely which instrument they seek to invalidate. They cannot accomplish this goal without locating a copy of the recorded instrument.

Second, attaching a copy of the deed of trust to the Valuation Motion at the beginning of the case will assist the Court and the parties at the end of the case when the debtor seeks a final order invalidating the lien. When a lien has been identified at the beginning of the case and a copy submitted to the court, it is much easier at the end of the case to grant relief avoiding the lien.

Historical Information. Any declaration submitted by a debtor should include (among other information) the date of the original purchase of the residence, the original purchase price of the residence and the original amount of the secured debt against the residence. If the debtor obtained new financing secured by the residence either by entirely refinancing the original debt or obtaining new junior liens (i.e. obtaining a second or third mortgage), the declaration should also include the date of each new

financing and the total amount of the debt secured by the residence upon completion of the new financing.

Current Value. A current appraisal of the property provides evidence of its present value. However, an appraisal must be authenticated by the appraiser in a declaration. Neither the debtor nor counsel for the debtor can authenticate an appraisal. The declaration of the appraiser should also establish the credentials of the appraiser and contain an opinion of value.

The motion must be complete and must be supported by admissible and persuasive evidence. The failure to provide adequate evidence in support of the motion will result in denial of the motion.

III. SERVICE.

Use of the proof of service in form F 4003-2.4.JR.LIEN.MOTION is mandatory. The proof of service must be completely filled out to indicate which parties were served, how they were served, and when they were served. Be sure to allow sufficient notice of the hearing to comply with Rule 9013-1(d) of the Local Bankruptcy Rules (notice to be served not later than twenty-one days before the hearing date). If a hearing date is chosen that is less than twenty-one days after service, the motion will be denied.

Proper service of the motion (especially complying with Rule 7004 of the Federal Rules of Bankruptcy Procedure) is critical. A large portion of Valuation Motions are denied due to improper service.

A. Who to Serve.

The following parties must be served with Valuation Motions: the chapter 13 trustee, the senior lienholder, the affected junior lienholder, any servicing agent for the affected junior lienholder, and all other parties asserting a lien against the property.

In order to evaluate whether service is proper (and to provide evidence of the current amount of the secured debt), the debtor must submit the most recent billing statement received from the senior lienholder and the most recent billing statement received from the holder of the lien that is the subject of the Valuation Motion. Both of these documents must be attached as exhibits to the motion. However, if either the senior lienholder or the junior lienholder has filed a proof of claim in the existing bankruptcy case, the proof of claim may be submitted in lieu of the monthly billing statement. A recent proof of claim is often the best form of evidence regarding the identity of a lienholder, the amount of its debt and the proper address for service of the motion.

If billing statements or a proof of claim are not attached (or the billing statements are not recent), the motion will likely be denied.

B. Method of Service.

When serving a creditor with the motion, if any attorney has appeared for the creditor in the case, serve the creditor by serving its attorney of record. *See, e.g.*, F.R.B.P. Rule 7005; Rule 5(b)(1) of the Federal Rules of Civil Procedure; F.R.B.P. Rule 7004(h)(1).

If no attorney has appeared in the case for the creditor but the creditor has filed a proof of claim in the bankruptcy case, serve the creditor at the address indicated on the proof of claim to the attention of the person who signed the proof of claim. Based on certain caselaw, it would be wise for debtors to also serve a creditor who has filed a proof of claim in the manner provided by F.R.B.P. Rule 7004 (i.e. as if the proof of claim had not been filed) in addition to using the address listed on the proof of claim.

If the creditor has not filed a proof of claim and no attorney has appeared then service must be made in accordance with F.R.B.P. Rule 7004 (discussed below).

Compliance with F.R.B.P. Rule 7004(b)(3). Rule 7004(b)(3) applies to domestic and foreign corporations, partnerships and other unincorporated associations and provides that service may be made by first-class mail upon "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." The address for the corporation and its agent, if any, can usually be found on the California Secretary of State website or the corporation's website.

When serving the junior lienholder who is the target of the motion, the debtor should serve the agent for service of process for the junior lienholder as designated in the records of the California Secretary of State. If no agent for service of process has been designated in the records of the California Secretary of State, then service may be made upon "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process."

Compliance with F.R.B.P. Rule 7004(h). As discussed above, Rule 7004(b)(3) is generally applicable to most businesses, but the introductory language states that it applies "[e]xcept as provided in subsection (h)." Rule 7004(h) specifically applies to insured depository institutions (as defined in section 3 of the Federal Deposit Insurance Act). Many lienholders are FDIC-insured institutions and must be served in accordance with Rule 7004(h).

Debtors researching whether a lienholder is an FDIC-insured institution should consult the FDIC website (http://www.fdic.gov) which has a feature to search for institutions. The website will provide an address for the institution. Information regarding the identity of officers can often be found on the institution's website. Please note that many institutions are subsidiaries of FDIC-insured institutions (for example, Bank of America Home Loans is a subsidiary of Bank of America, N.A.). In these cases, the FDIC-insured parent must also be served in accordance with Rule 7004(h).

Rule 7004(h) requires that service be made by certified mail addressed to an officer of the institution. Regular first-class mail does not comply with Rule 7004(h); certified mail must be used.

If an FDIC-insured entity has also designated an agent for service of process with the California Secretary of State then, in addition to serving the FDIC-insured entity in the manner indicated above, debtors should also serve the agent for service of process (by certified mail).

As a general rule, if there is any doubt as to whether service needs to comply with Rule 7004(h), serve the motion by certified mail to (1) the agent for service of process listed on the California Secretary of State website, (2) any other address used for communication with the lienholder (i.e. from a billing statement) and (3) to an officer of the institution using the address listed on the FDIC website.

Ultimately, it is to the debtor's benefit to ensure that service is correct. Federal law (including, but not limited to, Rule 60(b)(4) of the Federal Rules of Civil Procedure and Rule 9024 of the Federal Rules of Bankruptcy Procedure) allows a party to challenge any court order as void if the order was obtained as a result of insufficient service of process of the Valuation Motion. If the Court grants a Valuation Motion that is not properly served, the party who is purportedly bound by the order may later seek to set aside the order as void.

C. Evidence of Method of Service.

Evidence should be attached to the motion that demonstrates that the address and name information on the proof of service is accurate. For example, whenever service is accomplished using information from the California Secretary of State, a copy of the document used (i.e. a website printout or other record) should be attached as an exhibit to the motion. Whenever service is accomplished using information from the FDIC, a copy of the document used (i.e. a website printout or other record) should be attached as an exhibit to the motion. Whenever service is accomplished using information obtained from the junior lienholder's website or some other source, a copy of the document used should be attached to the motion. In particular, when service must be made upon an officer, evidence should be provided that demonstrates that the person served is an officer of the served institution. Whenever service is accomplished by using a proof of claim, the proof of claim should be attached.

IV. IDENTITY OF JUNIOR LIENHOLDER.

Finally, if a Valuation Motion is properly served and contains sufficient evidence, it will be granted but only with respect to the creditor specifically identified in the motion. The order granting the motion shall be binding upon the specifically identified creditor (and any successors-in-interest to or assignees of the creditor) but not upon any other creditor, any affiliate of the creditor or any other party. Therefore, if necessary, the debtor should take appropriate steps (prior to filing the bankruptcy case) to research the identity of the junior lienholder, such as obtaining a title report or making a RESPA demand seeking information set forth in 12 U.S.C. § 2605(k)(1)(D), etc.

V. FORM OF ORDER.

When Valuations Motions are granted by the Court, local form F 4003-2.4.ORDER should not be used. Instead, a form of order has been posted with these guidelines and the Court will typically prepare and enter the order itself. If, for any reason, a Valuation Motion is granted but the Court does not promptly enter an order, counsel for the prevailing party should submit a proposed order seven days after the hearing using the form order posted with these guidelines.

VI. PROCEDURE AT THE END OF THE CASE.

At the end of a chapter 13 case, some debtors successfully complete the case. They make all payments required by the chapter 13 plan and obtain a discharge. In some of those cases, debtors have previously filed a Valuation Motion and obtained a conditional order finding that a junior lien against a real property is unsecured. At the end of the case, those debtors want an unconditional order finding that junior liens are invalid, void and unenforceable.

Some judges allow debtors to obtain such an unconditional order at the end of the case by motion or declaration while other judges require an adversary proceeding pursuant to F.R.B.P. Rule 7001(2). Judge Johnson takes the latter view and requires an adversary proceeding. Nevertheless, when debtors file adversary proceedings, the vast majority should be resolved by default. Res judicata should apply as long as the debtor properly served the original Valuation Motion at the beginning of the case.

These complaints by debtors should ask for an unconditional order. In other words, the relief that a debtor seeks at the end of a chapter 13 case is a judgment that states that a specific deed of trust is unconditionally invalid, void and unenforceable. The judgment will read something like this: “The deed of trust executed by John and Jane Smith in favor of Mortgage Lender dated January 1, 2000 securing a debt in the principal amount of $350,000 and recorded on January 10, 2000 as document number 2000-1234567 with the county recorder for Riverside County is invalid, void and

unenforceable." This is the type of order that will satisfy a title company and allow the debtor to sell or refinance real property post-bankruptcy.

The problem that arises is that chapter 13 debtors often use the Court's form F 4003-2.5J.R.LIEN.COMPLAINT. That complaint does not ask for the relief that debtors want at the end of the case and the language in the complaint does not put the lenders on notice of the scope of the relief that debtors want. Examine paragraphs 3, 4 and 5 of the prayer in the form complaint. Debtors do not want this type of conditional relief at the end of a case.

As a result, do not use form F 4003-2.5J.R.LIEN.COMPLAINT at the end of a case. Instead, draft a simple complaint that describes the history of the case. Mention the key facts such as the following:

- The debtors filed the chapter 13 case on (state the petition date),
- The debtors proposed a chapter 13 plan with certain terms (state the length of the proposed plan, the percentage to unsecured creditors, the monthly plan payment amount and any other important plan terms),
- The Court held a confirmation hearing on (state the date),
- The Court confirmed the plan on (state the date) with the following terms (state the length of the confirmed plan, the percentage to unsecured creditors, the monthly plan payment amount and any other important plan terms),
- The confirmation order is document number (state the number) on the court's docket,
- The plan contemplated avoidance of a junior lien (thoroughly describe the document and attach a copy of the instrument to be avoided as Exhibit 1 to the complaint),
- The debtors filed a Valuation Motion on (state the date) which has been docketed as document number (state the number),
- The motion was granted on (state the date),
- The order granting the motion was entered on (state the date) and a copy of the order is attached as Exhibit 2 to the complaint,
- The debtors have complied with all requirements under the plan,
- The debtors have made all required payments to the trustee,

- The debtors have made all direct payments which the plan provided would be made by the debtors directly to creditors,

- The debtors have satisfied all conditions set forth in the order granting the Valuation Motion (attached as Exhibit 2), and

- The debtors received a discharge on (state the date) and the debtors are now entitled to a judgment stating the lien is invalid, void and unenforceable.

Debtors should attach to the complaint a copy of the lien that they want to avoid as well as the order issued earlier in the case granting the Valuation Motion. The prayer of the complaint should assert relief stating that the attached lien is void, invalid and no longer enforceable. Keep it simple. That is what debtors want at the end of a case.

When drafting the complaint, debtors should name as defendants all relevant parties which would include the holder of the lien at the time of the Valuation Motion as well as any successors-in-interest (i.e. the party who currently holds the lien if it has changed since the time of the Valuation Motion). Also, check the claims docket to ascertain whether a proof of claim was ever filed by the lienholder. Name all possible parties as defendants and serve the complaint and summons on all of them in a timely fashion. Use current addresses for all defendants and, in addition, use the address information in the proof of service for the Valuation Motion. If the creditor ever filed a proof of claim in the case, serve the creditor at the address on the proof of claim too (as well as the other addresses).

Service of Valuation Motions, complaints and the summons is crucial. If the Court grants a judgment but the debtor fails to properly serve the Valuation Motion at the beginning of the case or the summons and complaint at the end of the case, the judgment will be void and the lien will remain valid. Debtors must insure that they comprehensively serve the Valuation Motion, the complaint and the summons.