

NOTE: This material is dated and is provided as general guidance for best practices. Please check for any updated statutes, rules, or online procedures that might apply. See also, Order Granting Motion to Strip Lien.

PRACTICE GUIDELINES MEMORANDUM

TO: Attorneys Practicing Before Me and
Other Interested Persons

FROM: C. Timothy Corcoran, III
United States Bankruptcy Judge

DATE: January 5, 1994 (Revised July 1, 1998)

RE: Guidelines for Determining the Secured
Status of Claims and Redeeming Collateral

I have attempted to summarize here the applicable procedural and substantive law relating to motions to determine the secured status of claims pursuant to Section 506(a) of the Bankruptcy Code and motions to redeem pursuant to Section 722. My purpose is to assist counsel in preparing these motions so the relief to which the parties are entitled may be granted.

I. In general.

First, counsel should remember that we wish to determine motions of this sort on the papers and without the necessity of a hearing. The court will enter an order directing a response when the motion is filed. If no response is made within the response period, or if the response filed sets forth no factual or legal ground to deny the relief or to require a hearing, the court will enter an order granting the relief. Because the motion papers must demonstrate clear entitlement to the relief, it is imperative that the motion allege all the necessary facts showing that entitlement. The facts must also be sworn; the motion should either be verified or accompanied by an appropriate affidavit.

II. Determining secured status of claims.

Section 506(a) of the Bankruptcy Code defines an "allowed secured claim." It also provides for the determination

of the portion of the allowed claim that is secured by the value of the estate's interest in property. The remainder of the claim, if any, is an allowed unsecured claim. The statute further provides that the value should be determined in light of the purpose of the valuation.

A. Preliminary requirements.

Before filing a motion for determination of the secured status of a claim, the movant should first confirm that an allowed claim exists that is secured by a lien on property. The court cannot determine the secured status of a claim for any purpose unless there is first such an allowed secured claim. 11 U.S.C. § 506(a). In this regard, secured creditors often file unsecured claims, making it unnecessary for the debtor to invoke the provisions of Section 506.

For a claim to be allowed in a case under Chapter 7, 12 or 13, a timely proof of claim must be filed by, or on behalf of, the creditor. F.R.B.P. 3002(a) and 3004.

In a case under Chapter 11, a claim listed in the schedule of liabilities constitutes prima facie evidence of the validity and amount of a creditor's claim, unless the claim is scheduled as disputed, contingent, or unliquidated. F.R.B.P. 3003(b)(1). Any claim that is not scheduled or is scheduled as disputed, contingent, or unliquidated will be allowed only if a proof of claim is filed by, or on behalf of, that creditor. F.R.B.P. 3003(c)(2) and 3004.

In all chapters, if a creditor fails to file a proof of claim, the debtor may file a proof of claim on the creditor's behalf within 30 days after the expiration of the time for filing claims prescribed by F.R.B.P. 3002(c) or 3003(c). F.R.B.P. 3004. If the debtor files the claim, the debtor should file the claim as wholly secured rather than as a "split" claim, partially secured and partially unsecured. The debtor should then use a motion to determine the secured status of the claim as the vehicle to establish what amount is secured and what amount is unsecured.

B. Form of motion to determine secured status of a claim.

Once there is an allowed claim that is secured by a lien on property, the movant should include the following in a motion to determine the secured status of that claim:

1. Title the motion "[Moving Party's] Motion to Determine Secured Status of Claim of [Name of Creditor] (Claim

No. __) ". Note that the motion is not properly called a motion to value collateral.

2. Identify the creditor by its full legal name. Refer to the claim by its claim number as it appears on the claims register, if there is one. Describe the claim and the amount of the claim as reflected in the proof of claim or in the schedules, as may be appropriate. Explain how the claim has been allowed.

3. State the purpose of the valuation.¹ For example, the valuation might be sought for purposes of determining the amount of adequate protection to be paid to the creditor; to determine the amount to be paid to redeem the property;² or to determine the required treatment of the claim in a plan.

4. Specifically describe the property to be valued. Depending on the type of property, the description might be by legal description; or the year, make and VIN of an automobile.

5. Include a specific description of the security interest in the property, including the recording information of the document, judgment, or the like that establishes the security interest.

6. Include the identity of any other entity holding a secured interest in the property, the dollar amount of those claims, and the relative priorities of the liens.

7. State the value of the property and the basis for that valuation. For example, the proffered proof of valuation might be an appraisal or an opinion of value by the owner of the property.

¹ As discussed in Section IV below, the Supreme Court has determined that Section 506(d) cannot be used to void a lien as to the unsecured portion of a claim as determined by Section 506(a). Accordingly, motions to determine the allowed secured claim for the purpose of voiding or "stripping" the lien as to the unsecured claim will be denied.

²If you wish to redeem, be sure to refer to Section III below for a more complete discussion.

8. Request that the court determine the value of the allowed secured claim to be a specified amount and the unsecured claim to be a specified amount for the purpose specified.

9. Serve the motion on all creditors holding a secured interest in the property in accordance with F.R.B.P. 9014 and 7004. Also serve any other party as may be necessary because of the purpose for which the valuation is sought. In a case under Chapter 7 or Chapter 13, also serve the trustee. In a case under Chapter 11, also serve the United States trustee.

10. Insure that the motion is verified or supported (as to the value of the collateral) by affidavit.

C. Response.

When a properly served motion is filed, the court routinely enters an order directing the affected claimants to respond within 20 days. If there is no response or if the creditor consents, the order directing a response requires the movant to submit a proposed form of order granting the relief requested. In those cases where the motion to determine secured status is filed in conjunction with a request for another form of relief that requires a hearing, the clerk will notice a hearing.

D. Form of proposed order.

The proposed order³ should contain the following:

1. Title the order "Order Determining Secured Status of Claim of [Name of Creditor]". Again, note that the title is not Order Valuing Collateral.

2. This case came on for consideration of the motion (Document No.) to determine the secured status of the claim held by [Name of Creditor] (Claim No.).

³I have also prepared a Practice Guidelines Memorandum for Preparing and Submitting Forms of Order generally. A copy is available from the clerk. Counsel will wish to consult that memorandum for general guidance in preparing proposed forms of order when the simple failure to respond example used here is not applicable.

3. The court entered an order directing a response.

4. Although the time given to respond has expired, the creditor filed no response.

5. The court therefore deems the motion to be uncontested.

6. Based upon the verified motion [or the affidavit filed in support of the motion], the court finds that the movant is entitled to the relief requested.

The ordering paragraphs should include the following:

"The motion for determination of secured status is granted. Accordingly,

"a. The collateral securing the debt owed to [Name of Creditor] more particularly described as [description of collateral as stated in the motion] is determined to have a value of \$_____.

"b. Claim No. ____ held by [Name of Creditor] is therefore allowed as a secured claim in the amount of \$_____ and as an unsecured claim in the amount of \$_____ for the purpose of _____."

The service list on the proposed order should include the names and addresses of all of the parties upon whom the motion was served.

III. Authorizing redemptions.

Section 722 of the Bankruptcy Code permits the court to authorize redemption of tangible personal property that has been claimed as exempt by the debtor or abandoned by the trustee. A debtor can seek this relief in connection with determining secured status in a single motion.

A. Preliminary requirements.

Before filing a motion to redeem, counsel should first confirm that the subject property has been listed in the schedules and either has been claimed as exempt by the debtor or abandoned by the trustee. If property has not been specifically listed in the schedules, a general statement that the trustee has abandoned the remaining assets of an estate does not operate as an abandonment of the unlisted property.

Section 722 provides that the debtor may redeem the property from the creditor's lien by paying the amount of the allowed secured claim. Before filing the motion to redeem, therefore, the movant should also confirm that there is an allowed claim. See Section II(A) above. Assuming that there is such a claim, the court can then determine the value of the secured claim in conjunction with the motion to redeem. 11 U.S.C. § 506(a).

Section 722 provides for the redemption of only tangible personal property that is intended primarily for personal, family, or household use. Counsel should therefore ensure that the property to be redeemed fits into one of these categories.

In addition, Section 722 provides that the lien on the exempt or abandoned property must secure a "dischargeable consumer debt." Section 101(8) defines consumer debt as a "debt incurred by an individual primarily for a personal, family, or household purpose." Dischargeability is controlled by Section 523. Counsel should therefore ensure that the debt involved fits these narrow parameters. For example, a debtor may not redeem property from an IRS lien; an individual debtor engaged in a sole proprietorship may not redeem business property or personal property securing a business debt.

B. Form of motion to redeem.

Once the preliminary requirements have been satisfied, the movant should include the following in a motion to redeem:

1. Title the motion "[Moving Party's] Motion to Redeem Property From Lien of [Name of Creditor]".

2. Identify the creditor by its full legal name. Refer to the claim by its claim number as it appears on the claims register, if there is one. Describe the claim and the amount of the claim as reflected in the proof of claim or in the schedules, as may be appropriate. Explain how the claim has been allowed.

3. Specifically identify the tangible personal property (e.g., the year and make of an automobile and the VIN number).

4. State that the property is used primarily for personal, family, or household use.

5. Identify each of the parties holding a lien on the property and the facts indicating that the debt for which the property is held as collateral is a dischargeable consumer debt.

6. State, as may be the case, that: (1) the property has been claimed by the debtor as exempt under Section 522 of the Bankruptcy Code, the time for objecting to the claim of exemption has expired, no one has filed an objection, and the property is therefore exempt; or (2) the property has been abandoned by the trustee under Section 554.

7. Include the identity of any other entity holding a secured interest in the property, the dollar amount of those claims, and the relative priorities of the liens.

8. State the value of the property to be redeemed and the basis for that valuation.

9. Request that the court determine the allowed secured claim to be a specified amount and the unsecured claim to be a specified amount held by each creditor holding a lien on the property to be redeemed.

10. Request authority to redeem the property by paying the holder of the lien the amount of the allowed secured claim of the holder.

11. Serve the motion on all creditors holding a claim that is secured by a lien on the subject property in accordance with F.R.B.P. 9014 and 7004. In a case under Chapter 7 or Chapter 13, also serve the trustee. In a case under Chapter 11, also serve the United States trustee.

12. Insure that the motion is verified or supported (as to the value of the collateral) by affidavit.

C. Response.

When a properly served motion is filed, the court routinely enters an order directing the affected creditors to respond within 20 days. If there is a response, the clerk will schedule a hearing on the matter. If there is no response or if the creditor consents, the movant should submit a proposed form of order granting the relief requested.

D. Form of proposed order.

If there is no response to the motion within the required time,⁴ the movant should submit a proposed form of order. The order should include the following information in the body of the order:

1. Title the order "Order Authorizing Redemption of Property From Lien of [Name of Creditor]".

2. The case came on for consideration of the motion to redeem property from the lien of [Name of Creditor] (Document No. ____).

3. The court entered an order directing a response.

4. Although the time given to respond has expired, the creditor filed no response.

5. The court therefore deems the motion to be uncontested.

6. Based upon the verified motion [or the affidavit filed in support of the motion], the court finds that the movant is entitled to the relief requested.

The ordering paragraphs should include the following:

"The motion to redeem is granted. Accordingly,

"a. The collateral securing the debt owed to [Name of Creditor] more particularly described as [description of collateral as stated in the motion] is determined to have a value of \$_____.

"b. The claim of [Name of Creditor] (Claim No. ____) is therefore allowed as a secured claim in the amount of \$_____ and as an unsecured claim in the amount of \$_____ for the purpose of redemption.

"c. The debtor is authorized to redeem the collateral from the lien securing the collateral by paying [Name of Creditor] the amount of \$_____ within 30 days of the date of service of notice of the entry of this order."

⁴See note 3, supra.

The service list on the proposed order should include the names and addresses of all of the parties upon whom the motion was served.

IV. Other Section 506 issues.

In addition to the problems this memorandum addresses, there has been some confusion as to other provisions of the Bankruptcy Code that might be available to deal with undersecured claims.

Although other circuits had held otherwise, the Eleventh Circuit permitted a debtor to obtain a valuation of the property securing the claim of a creditor under Section 506(a) and then avoid the lien to the extent that the claim was not secured by the value of the property pursuant to Section 506(d). In that manner, a debtor could "strip" the lien from the unsecured portion of the claim. Folendore v. U. S. Small Business Administration (In re Folendore), 862 F.2d 1537 (11th Cir. 1989).

The Supreme Court later held, however, that Section 506(d) cannot be used by a debtor to strip the lien from the unsecured portion of a creditor's allowed claim as determined by use of Section 506(a). The court held that Section 506(d) is applicable to void a lien only when the underlying claim has been disallowed. Dewsnup v. Timm, 112 S.Ct. 773 (1992).

Note that the Dewsnup decision does not affect the use of Section 506(a) to determine the amount of an allowed secured claim for other -- non-lien stripping -- purposes, such as for redemption. Id. Likewise, the decision does not affect a Chapter 13 or Chapter 11 debtor's use of Section 506(a) to determine the amount that must be paid to a secured creditor under a plan on account of the secured claim.

V. Other help.

Counsel should feel free to contact my law clerk, Cheryl Thompson, at (813) 301-5200 if counsel has questions about the subject of this memorandum in particular or about practice and procedure issues generally.