

One Minute Memo®



United States Supreme Court To Decide Critical Lien Stripping Issue

By *Scott M. Pearson and Anne V. Dunne*

On Monday, November 17, 2014, the United States Supreme Court agreed to decide a critical issue for mortgage lenders and secondary market investors, whether Section 506(d) of the Bankruptcy Code allows a Chapter 7 debtor to “strip off” a junior mortgage lien when the outstanding senior debt exceeds the current value of the senior lien. *Bank of America, N.A. v. Caulkett*, No. 13-1421, 2014 WL 2207208 (U.S. Nov. 17, 2014); *Bank of America, N.A. v. Toledo-Cardona*, No. 14-163, 2014 WL 3965212 (U.S. Nov. 17, 2014).

Relying on the Supreme Court’s decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which held that a partially secured lien could not be “stripped down,” the Fourth, Sixth and Seventh Circuits have reasoned that, just as a partially secured lien cannot be stripped down, a lien that is wholly underwater cannot be stripped off under 506(d). However, the Eleventh Circuit held in *McNeal v. GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012), that a lien can be stripped off under 506(d) when it is wholly underwater.

Since *McNeal* was decided in 2012, hundreds of debtors in the Eleventh Circuit have filed an onslaught of motions and complaints to strip off wholly underwater junior liens, creating significant problems for junior lienholders. The grant of certiorari therefore is a welcome development. As always, we will continue to monitor and report on key developments in this area.

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