

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

4	ELIZABETH ANDERSON,	)	
5		)	No. 10 A 02467
	Plaintiff,	)	
6	vs.	)	
7	HARRIS, N.A.,	)	Park City, Illinois
8		)	June 24, 2011
	Defendant.	)	10:30 a.m.
9	-----	)	
10	ELIZABETH ANDERSON,	)	No. 10 B 45294
11		)	
	Debtor.	)	

TRANSCRIPT OF PROCEEDINGS BEFORE THE  
HONORABLE A. BENJAMIN GOLDGAR

APPEARANCES:

For Elizabeth Anderson: Ms. Tina Adams;

19	Court Reporter:	Nicole Abbate, CSR
20		U.S. Courthouse
21		219 South Dearborn
22		Room 661
23		Chicago, IL 60604.

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1                   THE CLERK: Elizabeth Anderson.  
2 Anderson versus Harris Bank, N.A.

3                   MS. ADAMS: Tina Adams for the  
4 plaintiff. Your Honor, I did talk to the defendant's  
5 counsel, and he said he had a conflict today and was  
6 unable to make it.

7                   THE COURT: All right. Very well. I  
8 had hoped to have a published opinion in this because  
9 I'm going to break with some other judges on their  
10 approach, but I was not able to do that. And it  
11 seemed to me that what was important was that I get a  
12 decision. So I do have a ruling, which I will read.

13                   This adversary proceeding is before  
14 the court on the motion of defendant Harris N.A. to  
15 dismiss the complaint of plaintiff Elizabeth  
16 Anderson. In her complaint, Anderson seeks to strip  
17 off Harris's second mortgage lien on Anderson's  
18 residence. Harris contends that its lien can't be  
19 stripped, even if its claim is wholly unsecured,  
20 because Anderson is ineligible for a discharge.

21                   Because Anderson proposes to strip the  
22 lien only on the completion of her plan payments, and  
23 because Harris hasn't taken issue with her use of an  
24 adversary proceeding as a vehicle for lien-stripping,  
25 the motion presents no opportunity to address other

1 sticky questions such as when precisely  
2 lien-stripping occurs and whether an adversary  
3 proceeding is the proper vehicle to accomplish it.  
4 The only question on the current motion is whether  
5 Anderson's ineligibility for a discharge means she  
6 can't strip Harris's lien.

7           Although, as Harris notes, the vast  
8 majority of decisions in this circuit favor Harris's  
9 position on this question, the minority view is the  
10 correct one. The motion to dismiss will therefore be  
11 denied.

12           On a motion to dismiss under  
13 Rule(12)(b)(6), all well-pleaded allegations in the  
14 complaint are taken as true, and all reasonable  
15 inferences are drawn in favor of the non-movant.  
16 *Rujawitz v. Martin* 561 F.3d 685, 688 (7th Cir. 2009).

17           The complaint alleges the following  
18 facts. Debtor Elizabeth Anderson owns real estate  
19 located at 1533 Old Barn Road in Libertyville,  
20 Illinois. Although Anderson doesn't allege so  
21 specifically, the property appears to be her  
22 residence. The property has a fair market value of  
23 \$424,000. ING Direct holds a first mortgage lien on  
24 the property securing a loan with a principal balance  
25 of \$468,000. Harris has a second mortgage on the

1 property securing a loan. The current balance of  
2 that loan is unknown, but the original loan amount  
3 was \$117,000.

4 In 2010, Anderson filed a Chapter 7  
5 bankruptcy case. She received her discharge on  
6 May 26, 2010. On October 9, 2010, five and a half  
7 months later, Anderson filed this Chapter 13  
8 bankruptcy case. Anderson acknowledges that because  
9 she received a Chapter 7 discharge within four years  
10 of her Chapter 13 filing, she is ineligible for a  
11 discharge here. See 11 U.S.C. Section 1328(f)(1).

12 In her adversary complaint, Anderson  
13 seeks to "strip off" Harris's second mortgage and to  
14 treat Harris's claim as wholly unsecured. Anderson's  
15 proposed plan calls for the same treatment of the  
16 Harris claim.

17 Harris now moves to dismiss Anderson's  
18 complaint for failure to state a claim on the ground  
19 that a debtor ineligible for a discharge under  
20 Section 1328(f) can't strip off a wholly unsecured  
21 lien.

22 Harris's motion to dismiss will be  
23 denied. It is well-established that a Chapter 13  
24 debtor can strip off a wholly unsecured junior lien  
25 on the debtor's residence. Nothing in the Bankruptcy

1 Code suggests that a debtor not eligible for a  
2 Chapter 13 discharge is barred from employing that  
3 restructuring tool.

4           The starting point of the analysis is  
5 Section 506(a)(1), which defines when a claim has  
6 secured status. Under that section, the term  
7 "secured claim" doesn't have the same meaning that it  
8 has under state law. Even when a creditor has a  
9 security interest under state law, Section 506(a)  
10 provides that the creditor's claim in the bankruptcy  
11 is secured only to the extent of the value of the  
12 collateral supporting the claim. If the value is  
13 less than the claim, the claim is undersecured. And  
14 if there is no value at all supporting the claim, the  
15 claim is unsecured - the security interest under  
16 state law notwithstanding.

17           In a Chapter 13 case, a lien that is  
18 wholly unsecured under Section 506(a) can be removed  
19 as an encumbrance on the collateral - "stripped off"  
20 is the bankruptcy colloquialism - and the creditor's  
21 claim treated as unsecured. The question is how that  
22 can be done.

23           Some courts say that Section 506(d)  
24 provides the lien-stripping vehicle. That section  
25 voids a lien that secures a claim against the debtor

1 "that is not an allowed secured claim." The problem  
2 is that in *Dewsnup versus Timm*, 502 U.S. 410 (1992),  
3 the Supreme Court held that Section 506(d) doesn't  
4 permit lien-stripping in a Chapter 7 case, and under  
5 Section 103(a) of the Code the provisions of Chapter  
6 5 (of which Section 506(d) is one) apply equally to  
7 cases under Chapter 13. So what's true for Chapter 7  
8 under *Dewsnup* must also be true for Chapter 13. (In  
9 addition, Section 506(d) only permits the voiding of  
10 a lien that isn't an "allowed" claim. Since Section  
11 502(a) says a claim is "allowed" if filed, Section  
12 506(d) can only void a claim that is disallowed or  
13 not filed.)

14                   Rather than Section 506(d), the  
15 provisions of Chapter 13 itself provide the means for  
16 stripping off a lien when the creditor is wholly  
17 secured. See *In re Jarvis*, 390 B.R. 600, 603,  
18 (Bankr. C.D. Ill. 2008). Section 1322(b)(2) allows a  
19 plan to "modify the rights...of holders of unsecured  
20 claims." That modification can include stripping of  
21 the lien. True, Section 1322(b)(2) protects the  
22 rights of a holder of "a claim secured only by a  
23 security interest in real property that is the  
24 debtor's principal residence." But that protection  
25 doesn't help a creditor such as a junior lienholder

1 whose claim is unsupported by any value in  
2 collateral, because under Section 506(a) that  
3 creditor isn't the holder of a secured claim.

4           So far, nothing I've said is  
5 particularly controversial. Six courts of appeals  
6 and two bankruptcy appellate panels have all reached  
7 the same conclusion. See *In re Okosisi*, No.  
8 BK-S-09-27113-BAM, 2011 WL 2292148, at 2 (Bankr. D.  
9 Nev. May 16, 2011) (citing cases). All other things  
10 being equal, then, and assuming (as we must) the  
11 truth of the complaint's allegations, Anderson could  
12 strip off Harris's lien. Harris concedes as much.

13           What makes the difference here, Harris  
14 contends, is that Anderson is ineligible for a  
15 discharge in her Chapter 13 case. In 2005, the  
16 Bankruptcy Code was amended today add Section  
17 1328(f), which provides in part that "the court shall  
18 not grant a discharge if all debts provided for in  
19 the plan or disallowed under Section 502, if the  
20 debtor has received a discharge (1) in a case filed  
21 under Chapter 7...during the four-year period  
22 preceding the date of the order for relief under this  
23 chapter."

24           Although courts are deeply split on  
25 the issue, the majority of courts agree with Harris,

1 holding that a debtor who won't receive a discharge  
2 under this section can't strip off a wholly unsecured  
3 junior lien. At least five decisions in this circuit  
4 have reached this conclusion. See *Lindskog versus M*  
5 *& I Bank FSB*, Nos. 10-27037-jes, 10-2278, 2011 WL  
6 1576561 (Bankr. E.D. Wis. April 13, 2011); *Erdmann*  
7 *versus Charter One Bank*, 446 B.R. 861 (Bankr. N.D.  
8 Ill. 2011); *In re Fenn*, 428 B.R. 494 (Bankr. N.D.  
9 Ill. 2010); *In re Blosser*, Nos. 07-28223-svk,  
10 08-2353, 2009 WL 106445 (Bankr. E.D. Wis. April 15,  
11 2009); *Jarvis*, 390 B.R. 600.

12 The better view, however, is the  
13 minority - well-represented by two recent decisions,  
14 *In re Fair*, No. 10-C-1128, 2011 WL 14866021 (E.D.  
15 Wis. April 19, 2011), and *Okosisi*, 2011 WL 2292148.  
16 As these decisions explain, the reasons underlying  
17 the majority view are not convincing.

18 First, Section 1328(f)(1) itself  
19 doesn't bar the debtor ineligible for a discharge  
20 from stripping off the unsecured junior lien.  
21 Nothing in Section 328(f), or any other part of  
22 Section 1328 for that matter, addresses a debtor's  
23 treatment of secured or unsecured claims in a plan or  
24 otherwise. Section 1328(f) is concerned solely with  
25 the availability of discharge. See *Fair* 2011 WL



1 14866021, at 3; Okosisi, 2011 WL 2292148, at 8; In re  
2 Tran 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010).

3           Second, nothing elsewhere in the Code  
4 conditions a debtor's right to confirm a Chapter 13  
5 plan on the debtor's eligibility for a discharge.  
6 Courts taking the majority approach often rely on  
7 Section 1325(a), which discusses requirements for  
8 Chapter 13 plans. Specifically, these courts cite  
9 Section 1325(a)(5)(B)(i)(I)(bb), which says that  
10 "with respect to each secured claim provided for by  
11 the plan," the plan must provide that "the holder of  
12 such claim retain the lien securing the claim until  
13 the earlier of the payment of the underlying debt  
14 determined under non-bankruptcy law; or discharge  
15 under Section 1328." Courts in the majority reason  
16 that if a debtor is stripping off a lien, he isn't  
17 letting the creditor retain its lien until the debt  
18 is paid in full or until discharge.

19           The problem with this analysis is it  
20 assumes the claim in question is secured. That  
21 assumption is critical, because Section 1325(a)(5)  
22 only applies to an "allowed secured claim provided  
23 for by the plan." It doesn't apply to unsecured  
24 claims. But if no value supports a junior lien,  
25 Section 506(a) makes the creditor's claim unsecured

1 rather than secured. And if the claim is unsecured,  
2 the limits in Section 1325(a)(5) on how that claim  
3 can be treated are irrelevant. Decisions like Fenn  
4 that depend on Section 1325(a)(5) for their outcome  
5 fail to acknowledge that Section 506(a) is always the  
6 starting point in sorting out which claims can be  
7 given which treatment in a plan. See Fair, 2011 WL  
8 14866021, at 3; Okosisi, 2011 WL 2292148, at 6.

9 Third, the policy views of courts in  
10 the majority supply no basis for barring a debtor  
11 ineligible for a discharge from stripping off a lien.  
12 These courts find distasteful the prospect of what  
13 they call a "de facto discharge." In Blosser, for  
14 example, the court said that "allowing a debtor to  
15 file Chapter 7, discharge all dischargeable debts,  
16 and then immediately file Chapter 13 to strip off a  
17 second mortgage lien would not be much different than  
18 simply avoiding the mortgage lien in the Chapter 7  
19 itself," something Dewsnup doesn't permit. Blosser,  
20 2009 WL 1064455, at 1. In Jarvis, the court noted  
21 that it could "find no evidence that, by adding new  
22 Section 1328(f), Congress intended to expand debtors'  
23 remedies" in this way. Jarvis, 390 B.R. at 606.

24 But Section 1328(f) neither expands  
25 nor contracts "debtors' remedies." It says nothing

1 about them at all - except, of course, the remedy of  
2 discharge. Nor is stripping off an unsecured junior  
3 mortgagee's lien a "de facto discharge." See Fair,  
4 2011 WL 14866021, at 3 (calling this characterization  
5 "inaccurate"). The language of the Code is clear.  
6 With no express prohibition, debtors who won't be  
7 discharged because of Section 1328(f) are just as  
8 able to strip liens under Section 1322(b)(2) as  
9 debtors who will be discharged. Had Congress wanted  
10 to limit the operation of Section 1322(b)(2), it  
11 could have. It didn't. See Okosisi, 2011 WL  
12 2292148, at 6. In the absence of some prohibition in  
13 the Code itself, it is not the place of courts "to  
14 rewrite the statute, turning it into something they  
15 consider more logical, sensible, or conducive to  
16 human progress or enlightenment." In re  
17 Farrar-Johnson, 353 B.R. 224, 229 (Bankr. N.D. Ill.  
18 2006).

19 For these reasons, the motion of  
20 Harris N.A. to dismiss the adversary complaint of  
21 debtor Elizabeth Anderson is denied. Harris has 28  
22 days to answer the complaint. A separate scheduling  
23 order will be entered.

24 And I believe I have orders to that  
25 effect. I do.

1                   We'll continue the matter for status  
2 to August 5 at 10:30. Ms. Adams, I have copies for  
3 you.

4                   MS. ADAMS: Thank you, Your Honor.

5                   THE COURT: Thank you.

6                   (Which were all the proceedings had in  
7 the above-entitled cause, June 28,  
8 2011, 10:30 a.m.)

9 I, NICOLE ABBATE, DO HEREBY CERTIFY  
10 THAT THE FOREGOING IS A TRUE AND ACCURATE  
11 TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-  
12 ENTITLED CAUSE.  
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