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Feature

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When Is a House a "Home"?

Varied Dates Used to Determine a Debtor's "Principal Residence"

Section 1322(b)(2) prohibits the modification of "the rights of [a] holder ... of ... a claim secured only by a security interest in real property that is the debtor's principal residence."[1] In a chapter 13 case, this provision protects home mortgage claims from being "stripped down" under § 506(a) to the value of the underlying collateral.[2]

For decades, a debate over the date as of which to determine whether a piece of "real property" qualifies as "the debtor's principal residence" has persisted. Today, three approaches dominate the case law. Most federal courts utilize the petition date, but many others look to the period corresponding to the mortgage's formation, usually picking the closing or execution date. Meanwhile, some spurn any definite cutoff.[3] Considering the crucial role played by § 1322(b)(2) in the chapter 13 process, the decision to favor one of these lines of authority — and a lawyer's familiarity with each's strengths and defects — can make or break many a debtor's chances at success.

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Statutory Framework

Chapter 13 "accommodate[s] competing goals": financial rehabilitation for the debtor and preservation of the bargained-for rights of secured creditors.[4] More narrowly tailored, § 1322(b)(2) reflects Congress's view of "private individual ownership of homes as a traditional and important value in American life."[5] It thus privileges traditional mortgages so as "to encourage the flow of capital into the home lending market"[6] and promote "the increased production of homes."[7]

To fit within § 1322(b)(2),[8] a creditor must prove three elements: (1) "the security interest must be in real property"; (2) "the real property must be the *only* security for the debt"; and (3) "the real property must be the debtor's principal residence."[9] As elsewhere,[10] nonbankruptcy law typically establishes what interests constitute "real property."[11] The definition of "secured claim" comes from § 506(a)(1), clearly incorporating the common mortgage.[12] Lastly, the property securing the creditor's interest must be "the debtor's principal residence," as defined in § 101(13A).[13]

Majority View

Most courts employ the petition date for making this determination.[14] Generally, these courts see no need to examine § 1322(b)(2)'s history or purpose.[15] Rather, despite its absence of any "explicit reference to ... timing," two words within § 1322(b)(2) supply this majority with a sufficiently unambiguous answer.[16] First, by law, a Bankruptcy Code "claim" arises as of the date of the underlying petition's filing.[17] That the noun "claim" appears in § 1322(b)(2), unqualified and unmodified, thus "signif[ies] that the petition date should be ...

1 11 U.S.C. § 1322(b)(2).
2 *In re Holmes*, 573 B.R. 549, 565 (Bankr. D.N.J. 2017).
3 *See Benafel v. OneWest Bank (In re Benafel)*, 461 B.R. 581, 590 (B.A.P. 9th Cir. 2011) (canvassing debate).
4 *Johnson v. GMAC (In re Johnson)*, 165 B.R. 524, 528 (S.D. Ga. 1994); *see also, e.g., Dean v. LaPlaya Inv. Inc. (In re Dean)*, 319 B.R. 474, 478 (Bankr. E.D. Va. 2004).
5 *Fed. Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d 1428, 1434 (6th Cir.), *cert. denied*, 474 U.S. 849 (1985).
6 *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J., concurring).
7 *In re Glenn*, 760 F.2d at 1434; *accord*, *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 292-93 (5th Cir. 2000).
8 *Cano v. GMAC Mortg. Corp. (In re Cano)*, 410 B.R. 506, 529 (Bankr. S.D. Tex. 2009) (citing *Padilla v. Wells Fargo Home Mortg. Inc. (In re Padilla)*, 379 B.R. 643 (Bankr. S.D. Tex. 2007)).
9 *Wages v. J.P. Morgan Chase Bank NA (In re Wages)*, 508 B.R. 161, 167 (B.A.P. 9th Cir. 2014) (emphasis added) (so reading 11 U.S.C. § 1322(b)(2)).
10 *Butner v. U.S.*, 440 U.S. 48, 54-55 (1979).
11 *Green Tree Servicing LLC v. Coleman (In re Coleman)*, 392 B.R. 767, 771-73 (B.A.P. 8th Cir. 2008); *In re Atchison*, 557 B.R. 818, 821 (Bankr. M.D. Ala. 2016).
12 11 U.S.C. § 506(a)(1); *In re Demoff*, 109 B.R. 902, 919 (Bankr. N.D. Ind. 1989).
13 11 U.S.C. § 101(13A); *In re Manning*, No. BK 07-70190-CMS-13, 2007 Bankr. LEXIS 2595, at *10-11, 2007 WL 2220454, at *2-3 (Bankr. N.D. Ala. Aug. 2, 2007).
14 *See, e.g., In re Benafel*, 461 B.R. at 589; *In re Wages*, 508 B.R. at 164; *In re Brinkley*, 505 B.R. 207, 213 (Bankr. E.D. Mich. 2013); *In re Christopherson*, 446 B.R. 831, 835 (Bankr. N.D. Ohio 2011).
15 *In re Baker*, 398 B.R. 198, 203 (Bankr. N.D. Ohio 2008); *In re Churchill*, 150 B.R. 288, 289 (Bankr. D. Me. 1993); *In re Williams*, 109 B.R. 36, 42 (Bankr. E.D.N.Y. 1989); *United Cos. Fin. Corp. v. Brantley*, 6 B.R. 178, 189 (Bankr. N.D. Fla. 1980).
16 *In re Baker*, 398 B.R. at 203; *see also In re Brinkley*, 505 B.R. at 211 (joining majority).
17 *In re Wetherbee*, 164 B.R. 212, 215 (Bankr. D.N.H. 1994).

[a c]ourt's focus."[18] Second, reliance on the petition date conforms to this provision's utilization of the present tense "is."[19] Section 1322(b)(2) does not talk about "real property" that once "was" a principal residence, and it references neither such property's regular pre-petition function nor its classification at the time of the security interest's inception.[20] Instead, it is explicitly written in the present tense.[21] By virtue of only these two textual features, the "plain language" of § 1322(b)(2) "point[s] to the present and not the past."[22]

Occasionally, snippets of policy accompany this view of the statute's language. Outside of bankruptcy, creditors regularly demand real and personal property to secure the same debt,[23] and creditors sometimes freely release part of any collateral securing their claims.[24] Post-petition, however, any lender who releases all security, except for the debtor's principal residence, for their claim might confidently appeal to § 1322(b)(2), thereby eliminating the threat of bifurcation or other modifications.[25] Because § 1322(b)(2) constitutes "[a] narrow exception to a debtor's right to restructure his debts" meant solely for "the traditional home mortgage lender,"[26] no court should allow a creditor to obtain this status due to such "post-petition actions and ... residual security."[27] It is this mingled dislike and fear of such "creditor manipulation" — and belief that § 1322(b)(2) "specifically protect[s] institutional lenders engaged *only* in providing long-term home mortgage financing" — that lies behind some of the majority view's proponents.[28]

Minority View

Conversely, a clear minority of courts opt for the date on which the mortgage came into being, usually the date of execution or closing.[29] This approach relies on one threshold assumption: that § 1322(b)(2)'s text is ambiguous as to this issue, thereby authorizing a court to parse extrinsic evidence of legislative purpose and congressional intent.[30] Two purposive rationales constitute the principal pillars of this approach.

For this school of thought, the interpretive key comes from § 1322(b)(2)'s intent: "to encourage and sustain a flow of affordable capital into the home lending market."[31] Construing § 1322(b)(2) as referring to a property's status at the time of the relevant mortgage's establishment can serve this "'flow of capital' purpose," for only "[u]nder such a construction, a lender supplying financing on an owner-occupied single-family home would be assured that its rights under the subject mortgage could not be modified through bifurcation in a future Chapter 13 case involving its borrowers."[32] It is when the mortgage loan is executed — not before or after — that the underwriting decision is made. Therefore, it is at that point in time that the lender must know whether the loan it is making might be subject to modification in a chapter 13 proceeding at some later date.[33] In permitting a debtor to alter his/her principal residence after a mortgage's execution, the majority view not only rejects this reality but also "injects additional creditor risk into the mortgage loan transaction."[34] Hence, it could dampen creditor enthusiasm for further lending, which is the very opposite of what Congress likely intended.[35] Consequently, a court honors § 1322(b)(2)'s objectives, "the ultimate goal of statutory construction," when it ignores "the serendipitous or manipulated facts existing on the date of the filing of the petition."[36]

In addition, these courts tend to highlight the dangers posed by debtors' possible mischief.[37] If any date other than the transaction date is utilized, these courts fear that a debtor could alter its prior pattern of use immediately pre-petition so as to circumvent § 1322(b)(2).[38] "A debtor could easily ... add ... a second living unit to the property on the eve of the commencement of his Chapter 13 proceeding," one court speculated.[39] "[A] homeowner ... could seek temporary tenants prior to ... filing," another imagined.[40] The "critical" date must be when the creditor actually took the security interest in the debtor's principal residence if such "manipulation" is to be deterred.[41] After all, § 1322(b)(2) has always focused on protecting secured lenders — not debtors.[42]

Hybrid View

A few courts have formulated a "hybrid" approach.[43] Under this rarely utilized method,[44] the circumstances as they exist on the petition date and the underlying agreement are considered.[45] For its defenders, this route offers two advantages over the other existing approaches.

First, it allows for policing all attempts, whether by debtor or creditor, to misuse § 1322(b)(2). Second, it does not ignore purpose and favor text, or vice versa.[46] One such court helpfully collected the six factors often central to this holistic inquiry: (1) a debtor's primary residence at the time of filing; (2) the timing of any departure from a prior residence; (3) the encumbered property's pre-petition actual usage or classification; (4) the debtor's intended residence for the bankruptcy's duration; (5) the circumstances and nature of the property's titled owner; and (6) the temporal gap between the decision to shift usage and the petition date.[47]

18 *In re Baker*, 398 B.R. at 203 (citing *In re Wetherbee*, 164 B.R. at 215).
19 *Id.* (citing *In re Churchill*, 150 B.R. at 289).
20 *In re Berkland*, 582 B.R. 571, 577-78 (Bankr. D. Mass. 2018).
21 *In re Churchill*, 150 B.R. at 289; *accord, e.g., In re Leigh*, 307 B.R. 324, 331 (Bankr. D. Mass. 2004); *In re Boisvert*, 156 B.R. 357, 359 (Bankr. D. Mass. 1993); *In re Amerson*, 143 B.R. 413, 416 (Bankr. S.D. Miss. 1992); *In re Ivey*, 13 B.R. 27, 29 (Bankr. W.D.N.C. 1981).
22 *In re Berkland*, 582 B.R. at 577.
23 *In re Dent*, 130 B.R. 623, 630 (Bankr. S.D. Ga. 1991).
24 *In re Ivey*, 13 B.R. 27 (Bankr. W.D.N.C. 1981).
25 *See In re Seidel*, 752 F.2d 1382, 1387 (9th Cir. 1985) (noting that Congress intended to exclude such creditors from § 1322(b)(2)), cited in, *e.g., In re Groff*, 131 B.R. 703, 706 (Bankr. E.D. Wis. 1991).
26 *In re Howard*, 220 B.R. 716, 718 (Bankr. S.D. Ga. 1998).
27 *In re Dinsmore*, 141 B.R. 499, 505 (Bankr. W.D. Mich. 1992).
28 *In re Howard*, 220 B.R. at 718 (emphasis added).
29 *In re Williamson*, 387 B.R. at 940; *In re Smart*, 214 B.R. 63, 67 (Bankr. D. Conn. 1997).
30 *In re Smart*, 214 B.R. at 67-68.
31 *Id.* at 68; *see also In re Coyle*, 559 B.R. 25, 29-31 (Bankr. D. Conn. 2016) (following *Smart*).
32 *In re Smart*, 214 B.R. at 68.
33 *In re Bulson*, 327 B.R. 830, 846 (Bankr. W.D. Mich. 2005); *see also In re Scarborough*, 461 F.3d 406, 411-12 (3d Cir. 2006) (adopting this approach and quoting this case).
34 *In re Smart*, 214 B.R. at 68; *cf. In re Moore*, 441 B.R. 732, 741 (Bankr. S.D.N.Y. 2010) (looking to property's historical use).
35 *In re Smart*, 214 B.R. at 68.
36 *Id.*; *see also, e.g., In re Coyle*, 559 B.R. at 30; *GMAC Mortg. Corp. v. Marenaro (In re Marenaro)*, 217 B.R. 358, 361 (B.A.P. 1st Cir. 1998) (Carlo, J., concurring); *Parker v. Fed. Home Loan Mortg. Corp.*, 179 B.R. 492, 494 (E.D. La. 1995); *In re Hildebran*, 54 B.R. 585, 586 (Bankr. D. Ore. 1985).
37 *In re Baker*, 398 B.R. at 202.
38 *In re Kelly*, 486 B.R. 882, 885 (Bankr. E.D. Mich. 2013).
39 *In re Bulson*, 327 B.R. 830, 846 (Bankr. W.D. Mich. 2005).
40 *In re Baker*, 398 B.R. at 202 (citing *In re Guilbert*, 176 B.R. 302, 305 (D.R.I. 1995)).
41 *In re Scarborough*, 461 F.3d at 411; *accord*, *In re Baker*, 398 B.R. at 201-02.
42 *In re Perez*, 339 B.R. 385, 402 (Bankr. S.D. Tex. 2006).
43 *In re Baker*, 398 B.R. at 203.
44 *Salmeron v. One West Bank (In re Salmeron)*, No. 09-25864-TJC, 2010 Bankr. LEXIS 1440, at *6-7, 2010 WL 1780119, at *82 (Bankr. D. Md. May 3, 2010).
45 *In re Baker*, 398 B.R. at 203; *see also In re Brinkley*, 505 B.R. at 212 (discussing this approach).
46 *In re Baker*, 398 B.R. at 203.
47 *In re Kelly*, 486 B.R. at 886; *see also In re Collins*, No. 14-34816, 2015 Bankr. LEXIS 1158, at *6-7, 2015 WL 1650973, at *2-3 (Bankr. S.D. Tex. April 7, 2015) (quoting *Kelly*). Arguably, *Kelly* pioneers a fourth approach. *In re Brinkley*, 505 B.R. at 212-13.

Conclusion

Each of these approaches has pluses and minuses.[48] The majority arguably places excessive weight on a helping verb ("is"). However, the minority could just as readily be faulted for manufacturing dubious ambiguity by minimizing the significance of both this present tense verb and § 1322(b)(2)'s use of "claim." A handful within the majority fear unscrupulous creditors, yet simultaneously seem unconcerned about crafty debtors. The minority appears inordinately moved by nightmarish visions of debtor misdeeds, but indifferent to equally objectionable exploitation by creditors. For its part, the hybrid view disdains any "precise definition" and thus foments "disruption in the home mortgage capital market" inconsistent with § 1322(b)(2)'s perceptible ends.[49]

Meanwhile, chapter 13 can be mined for contrary hints. Statutorily, a claim's allowance is determined on the petition date, underscoring that date's appropriateness.[50] Favoring the date of execution, however, honors the property's projected role at the time of the pertinent encumbrance's creation.[51] On that date, the debt covered by § 1322(b)(2) was born based on the facts known and representations made by the original contracting parties. On the other hand, this reading assumes an unnatural permanence in a property's typical function over a period of years — if not decades — that is inconsistent with "the realities of modern life."[52] Just as badly, it defers to a dated pre-petition understanding struck without regard to the debtor's most recent financial travails and the Bankruptcy Code's specialized hierarchy of values.

Fittingly, § 506(a) does not alleviate this confusion. It indicates that date of confirmation should control for the valuation of collateral.[53] If so, that same point in time should govern the determination of secured status under chapter 13 — and § 1322(b)(2).

Section 1322(b)(2)'s failure to specify a date for its application is but one example of the Code's chronic ambiguity. Unfortunately, this fact does not eliminate the judicial obligation to balance prose and purpose, creditor and debtor, in electing the requisite date. At present, most judges follow one of three flawed paths. For now, until Congress or the U.S. Supreme Court speaks, these imperfect interpretations will have to do. abi

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48 *Cf. In re Brinkley*, 505 B.R. at 213 ("Any approach to this issue that one takes is subject to manipulation by either the debtor or the creditor.").
49 *In re Bulson*, 327 B.R. at 842.
50 *In re Benafel*, 461 B.R. at 584-85.
51 *In re Scarborough*, 461 F.3d at 411.
52 *In re Collins*, 2015 Bankr. LEXIS 1158, at *5-8, 2015 WL 1650973, at *2-3.
53 *Norton Bankr. L. & Prac.* § 149:7 (January 2019 update).