

**MANDATORY USE OF LOCAL FORM 4003-2.4-MOTION
FOR CHAPTER 13 DEBTOR MOTIONS TO AVOID
JUNIOR LIEN ON PRINCIPAL RESIDENCE
Judge Deborah J. Saltzman**

Effective December 6, 2010, all motions filed by debtors in Chapter 13 cases to avoid junior liens on the debtor's principal residence (commonly referred to as "lien strip motions," "motions to value," "Lam motions," etc.)¹ must be made on Local Form 4003-2.4-Motion, entitled "Debtor's 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/Rules/General Orders," then "Local Bankruptcy Rules & Forms," and scrolling down to F 4003-2.4-MOTION under "Local Bankruptcy Rules Forms."

All debtors filing a motion to avoid a junior lien on the debtor's principal residence must use Local Form 4003-2.4-Motion, including the proof of service. **If a motion to avoid a junior lien on the debtor's principal residence is not filed using Local Form 4003-2.4-Motion, including the proof of service, the motion will not be set for hearing.**

Use of the form will streamline preparation of motions, lower costs for debtors, and result in motions being granted more quickly. To ensure that motions are granted, debtors and their counsel should fill out the form completely and accurately, including the proof of service, file and serve their papers in a timely manner in accordance with all applicable Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules, deliver a tabbed judge's copy to chambers, and follow the additional guidelines below.

Evidence

As the form indicates, all motions to avoid a junior lien must be supported by evidence regarding the amount and priority of the liens at issue, and the value of the property. 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. A copy of the deed of trust, along with a loan statement, proof of claim or other statement from the current lender will establish the amount and validity of the lien. These documents should be accompanied by a declaration of the debtor, which contains the debtor's testimony regarding the liens and introduces the documents into evidence. No documents will be considered as evidence unless they are accompanied by a declaration. 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.

¹ The form is entitled "Debtor's Motion to Avoid Junior Lien on Principal Residence [11 U.S.C. § 506(d)]." More specifically, the relief sought is the valuation of a secured claim and determination of secured status pursuant to Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(d). This relief may be obtained through a noticed motion; an adversary proceeding is not necessary.

Value. The debtor may testify through a declaration regarding the value of the residence. The declaration should contain the basis for the testimony, which may include, among other factors, the debtor's familiarity with the residence, the neighborhood, and recent sales. It is insufficient for the declaration to state: "I believe that my residence is worth \$xxx,xxx." Please note that the debtor may not rely solely on sources from the internet; this is hearsay. Therefore, a declaration stating "I believe my residence is worth \$xxx,xxx based on the attached report from zillow.com [or cyberhomes.com or other similar website]" is not admissible evidence as to value.

While not always necessary, an appraisal can be persuasive evidence of value. To be admissible evidence, the appraisal must be accompanied by a declaration of the debtor or the appraiser.

The relief requested in these motions – extinguishing the lien of a creditor that extended a loan to the debtor based on the understanding that the loan would be secured – is extensive. The motion must be careful and complete, and must be supported by admissible and persuasive evidence. The failure to have adequate evidence in support of the motion will result in continuance or denial of the motion. Please be sure to review the court's tentative rulings (generally posted by Friday afternoon for hearings on the following Tuesday) to learn whether additional evidence is required before the motion will be granted. Unless specifically noted in the tentative, supplemental evidence will not be considered at the scheduled hearing; the matter will be continued to a date indicated in the tentative or set at the hearing.

Service

Use of the proof of service in Local Form 4003-2.4-Motion is mandatory. The proof of service must be completely filled out to indicate what parties were served, how they were served, and when they were served. Be sure to allow sufficient notice of the hearing to comply with LBR 9013-1(d) (notice to be served not later than 21 days before the hearing date). If a hearing date is chosen that is less than 21 days after service, the motion will be continued at least 21 additional days to allow the full notice period to pass.

Proper service of the motion – including compliance with Fed. R. Bankr. P. 7004 – is critical.

Which parties to serve. The chapter 13 trustee, the affected lienholder, and all other parties asserting a lien on the property must be served. If any party has made an appearance in the case, that party (and counsel, if applicable) must be served at the address used in its notice of appearance.

Compliance with F.R.B.P. 7004(b)(3). This rule applies to domestic and foreign corporations 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 corporation's website or the California Secretary of State website.

Compliance with F.R.B.P. 7004(h). Rule 7004(b)(3), discussed above, is generally applicable to corporations, but its lead-in indicates 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)**.

1. Is the lienholder an FDIC-insured institution? The FDIC website has a feature to search for institutions: <http://www2.fdic.gov/idasp/main.asp>. This feature will provide an address and list of officers for the institution. 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 be served in accordance with Rule 7004(h).
2. How to accomplish service in accordance with Rule 7004(h)? Rule 7004(h) requires that service be made **by certified mail addressed to an officer of the institution**.
 - a. Use Certified Mail. Regular first-class mail, overnight mail or courier, or any other delivery method does not comply with Rule 7004(h); certified mail must be used.
 - b. Address service to an officer. Remember, an officer of the institution is not the registered agent for service of process, or the FDIC itself. The best sources for finding an officer of an FDIC-insured institution are the FDIC website noted above, and the institution’s website. Many courts have held that addressing service to “Officer of the Institution,” “Chief Executive Officer,” or “President” complies with the rule. If the institution’s address is correct, and it is not possible to locate an officer’s name, the court will not find that the motion was served incorrectly (although as a practical matter, it would be rare that an officer’s name could not be found).

As a general rule, if there is any doubt as to whether service needs to comply with Rule 7004(h), serve your motion (1) by U.S. mail, addressed to the agent for service of process and to any other address used for communication with the lienholder; **and** (2) by certified mail, addressed to an officer of the institution. Ultimately, it is to the debtor’s benefit to ensure that service was correct. If, at the time of the debtor’s discharge 3-5 years in the future, a junior lienholder objects to the extinguishment of its lien, the lienholder will have little basis to object if it is clear that service was made in accordance with all applicable rules. Therefore, a motion will not be granted without proper service and the filing of a proof of service clearly describing such service.

Order

When your motion is granted, submit an order within seven days after the hearing date. Use of Local Form 4003-2.4-Order is mandatory (the form replaces the form that was previously on the court’s website under Judge Saltzman’s forms and procedures).