IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

IN RE: **CHAPTER 11**

LOUIE A. ROBINSON **CASE NO. 9102049JC**

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing on the Debtor's *Objection To Allowance Of Claim* and Pioneer Funds Distributor, Inc.'s (Pioneer) *Motion To Strike Objection To Allowance Of Claim And Response Thereto*. Having reviewed the evidence presented at the trial and the legal briefs submitted by the parties, the Court finds that the objection to Pioneer's claim should be sustained and the motion to strike denied.

FINDINGS OF FACT

On May 31, 1991, Louie A. Robinson (Debtor) filed a petition for relief under chapter 11 of the Bankruptcy Code. At the time the Debtor filed his petition, Pioneer held a promissory note in the approximate amount of $19,000 which is secured by a third deed of trust on the Debtor's homestead.

A *Combined Disclosure Statement And Plan Of Reorganization of Louie A. Robinson* was filed on December 16, 1991. In response to the Debtor's proposed disclosure statement and plan, Pioneer filed an *Objection to the Adequacy of The Debtor's Combined Disclosure Statement* and *Pioneer Financial Corporation's Notice of Election Pursuant to 11 U.S.C. §1111(b)(2)*.

After the Debtor filed an *Amended Combined Disclosure Statement And Plan Of Reorganization*, Pioneer withdrew its objection to the Debtor's disclosure statement. The Court approved the disclosure statement, and the plan was then set for a hearing on confirmation.

Subsequent to the approval of his disclosure statement, the Debtor filed a second and a third amended plan. In his *Third Amended Plan Of Reorganization of Louie A. Robinson*, the Debtor attempts to utilize § 1129(b)[1] to cramdown[2] the secured claims against his homestead to the value of the property. The three creditors which hold deeds of trust against the Debtor's homestead are, in order of priority: GE Capital Asset Management Corporation (GE Capital); Security Pacific Savings (Security Pacific); and Pioneer. As previously stated, in response to the Debtor's proposed plan, Pioneer made its § 1111(b)(2) election in order to

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[1]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

[2]The terms *cramdown* and *lien stripping* are used interchangeably in this opinion.

prevent the Debtor from cramming-down its lien to an unsecured claim.

Prior to the confirmation of the Debtor's third amended plan, the Debtor filed an *Objection To Allowance of Claim* of Pioneer. In response to the Debtor's objection, Pioneer filed a *Motion To Strike Objection To Allowance Of Claim And Response Thereto*. On October 27, 1992, the *Order Confirming Plan* was entered. In order to confirm the third amended plan despite the pendency of the Debtor's objection to Pioneer's claim and Pioneer's motion to strike, the confirmed plan contains a "cut-out" provision for Pioneer's claim which states:

> This claim has not yet been allowed by the Court. The treatment this class will receive under the Plan is unresolved due to pending litigation. If such claim is allowed as a 'secured' claim, PFDI (Pioneer) will be paid, in semi-annual installments, deferred cash payments totalling the amount of its allowed secured claim. This class is unimpaired.

On November 6, 1992, a trial was held on the *Objection To Allowance Of Claim* and the *Motion To Strike Objection To Allowance Of Claim And Response Thereto*.

At the trial, the parties stipulated that GE Capital holds a first deed of trust on the Debtor's homestead in the amount of $242,000 and that Security Pacific holds a second deed of trust on the Debtor's homestead in the approximate amount of $83,000. It should be noted that under the confirmed plan, GE Capital has agreed to accept a compromised amount of $200,000 in full satisfaction of its promissory note and deed of trust.

After considering all the testimony and evidence presented at the trial, the Court set the fair market value on the Debtor's homestead at $250,000.

As a result of the Court's ruling as to the fair market value of the Debtor's homestead, the Debtor argues that pursuant to section 1111(b)(1) Pioneer cannot make a § 1111(b)(2) election because Pioneer's interest in the Debtor's property is of inconsequential value. Pioneer argues that due to the United States Supreme Court's ruling in the case of Dewsnup v. Timm, ___ U.S. ___, 112 S.Ct. 773, 116 L.Ed.2d 903, (1992), it is not necessary for Pioneer to make the § 1111(b)(2) election in order to preserve its lien. Pioneer argues that Dewsnup does not allow the Debtor to use § 506(d) to strip down its lien. While the Debtor agrees that Dewsnup prohibits lien stripping, he argues that the prohibition only applies to chapter 7 cases and not to chapter 11 cases.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(B)(C) and (L).

II.

A.

The issues which must be addressed by the Court are:

1. Whether Pioneer is eligible to make a section 1111(b)(2) election; and

2. If Pioneer is not eligible to make a § 1111(b)(2) election, whether the United States Supreme Court's decision in Dewsnup v. Timm, 112 S.Ct. 773 (1992), prohibits the Debtor from cramming-down Pioneer's claim to the value of its security.

The three Code sections which must be considered in this matter are 506, 1111(b), and 1129(b). The pertinent provisions of these sections are as follows:

> **11 U.S.C. § 506 Determination of secured status**
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> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.
>
> . . . .
>
> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . .
>
> **11 U.S.C. § 1111 Claims and interests**
>
> (b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless
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> > (i) the class of which such claim is a part elects . . . application of paragraph (2) of this subsection;
> >
> > . . . .
> >
> > (B) A class of claims may not elect application of paragraph (2) of this subsection if--

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; . . . .

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

11 U.S.C. § 1129 Confirmation of plan

(b)(1) (I)f all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court . . . shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class included the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)(I) that the holders of such claims retain the liens securing such claims . . . to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

. . . .

B.

Section 1111(b) is one of the most complex sections in the Bankruptcy Code. A simple explanation of the operation of a section 1111(b)(2) election is that "section 1111(b) offers a

secured creditor the option of having its claim secured to the full value of the claim, rather than secured to the value of the collateral and unsecured for the deficiency under section 506(a)." Charles D. Booth, *The Cramdown on Secured Creditors: An Impetus Toward Settlement*, 60 Am. Bankr. L.J. 69, 88 (1986) (footnote omitted).

However, not every creditor is eligible to make a § 1111(b)(2) election. Section 1111(b)(1)(B)(i) prohibits creditors from making the election if "the interest on account of such claims of the holders of such claims in such property is of inconsequential value." 11 U.S.C. § 1111(b)(1)(B)(i).

Collier on Bankruptcy cites an example, which is almost identical to the facts of the case at bar, of how section 1111(b)(1)(B)(i) prohibits a creditor from making a § 1111(b)(2) election:

> (I)f the creditor has an allowed claim for $1,000,000 which is secured by a third lien on property worth approximately $5,000,000 and which is encumbered by a first morgage *(sic)* of $3,000,000 and a second mortgage of $4,000,000, the holder of the third mortgage cannot exercise the section 1111(b)(2) election since that interest in the property securing the claim is of inconsequential value.

5 *Collier on Bankruptcy* ¶ 1111.02, at 1111-35 (Lawrence P. King ed., 15th ed. 1993).

In determining what constitutes inconsequential value, the Court must focus on the value of the property to which the creditor's lien attaches. Section 1111(b) applies only to a claim which is secured by a lien. In re Rosage, 82 B.R. 389, 390 (Bankr. W.D. Pa. 1987). In the present case, Pioneer has a claim for

$19,000. In exchange for the loan proceeds, the Debtor granted Pioneer a deed of trust on his homestead. As previously stated, the Court set the value of the Debtor's homestead at $250,000. The parties stipulated that GE Capital has a first lien in the amount of $200,000 and that Security Pacific has a second lien in the approximate amount of $83,000. Without considering Pioneer's third lien of $19,000, the liens of the first and second mortgage total approximately $33,000 over and above the value set by the Court. Thus, there is no value to which Pioneer's lien can attach. Consequentially, Pioneer is not eligible to make a section 1111(b)(2) election because its claim is of inconsequential value. *See* In re Atlanta West VI, 91 B.R. 620, 624 (Bankr. N.D. Ga. 1988); In re Wandler, 77 B.R. 728, 732-33 (Bankr. N.D. 1987); In re Baxley, 72 B.R. 195, 198-99 (Bankr. S.C. 1986).

c.

Having found that Pioneer is not eligible to make a section 1111(b)(2) election, the Court must now turn to Pioneer's argument that Dewsnup v. Timm, 112 S.Ct. 773 (1992), is applicable to chapter 11 cases, and therefore, the Debtor cannot use § 506(d) to cramdown its lien.

Section 506 pertains to the determination of the secured status of a creditor. In Dewsnup the Supreme Court held that a chapter 7 debtor could not use § 506(d) to strip down the lien of a creditor even if the creditor holds a junior lien on property in which the value of the collateral is totally consumed by senior

liens. Pioneer argues that this prohibition on lien stripping also applies in chapter 11 cases.

This Court does not agree with Pioneer's argument that Dewsnup is applicable in chapter 11 cases. In reading Dewsnup, there is no indication that the Supreme Court intended for the prohibition against lien stripping to apply to chapter 11 cases. The Supreme Court stated in Dewsnup that it was not attempting to address every possible factual situation in its opinion.

> (H)ypothetical applications that come to mind and those advanced at oral argument illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day.

Dewsnup, 112 S.Ct. at 778.

One commentator writing on the applicability of Dewsnup in chapter 11 cases stated:

> If Dewsnup is indeed applicable in Chapter 11 cases, an inconsistency with Section 1111(b) is created. Section 1111(b) allows undersecured creditors to elect to hold a secured claim in the amount of the total debt rather than suffer bifurcation under Section 506(a). Dewsnup would produce the same result without the requirement of an election; *all* undersecured creditors would be treated as holders of secured claims in the amount of the debt
> . . . .
>
> Furthermore, Section 1111(b) denies the election to a creditor whose interest in property is of "inconsequential value," but Dewsnup does not distinguish between creditors on that basis . . . .(I)f Dewsnup applies in Chapter 11 cases, creditors that cannot use Section 1111(b) because the property available for their claims is of inconsequential value are nonetheless protected from bifurcation and strip down. In addition, this protection would be automatic, rather than available only through election.

Margaret Howard, *Dewsnupping the Bankruptcy Code*, 1 J. Bankr. L.

& P. 513, 521 (1993) (footnote omitted).

The Court finds that Dewsnup's prohibition against lien stripping does not apply in chapter 11 cases. "To determine otherwise would, in essence, gut the sum and substance of the reorganization and rehabilitation of debt concept under the Bankruptcy Code." In re Butler, SSN, 139 B.R. 258, 259 (Bankr. E.D. Okla. 1992).

In addition, in a chapter 11 case, a debtor may cramdown an impaired creditor's claim if the plan meets the enumerated conditions stated in § 1129(b). *See* Matter of Briscoe Enterprises, Ltd. (Heartland Federal Savings & Loan Association v. Briscoe Enterprises, Ltd.), 994 F.2d 1160 (5th Cir. 1993). Prior to Dewsnup, the only way a chapter 7 debtor could cramdown or strip down a creditor's claim was by utilizing the provisions of section 506(d). There is no provision similar to § 1129(b) available to debtors filing a petition under chapter 7 of the Bankruptcy Code.

In reality, the Debtor in the case at bar is not attempting to use § 506(d) to strip down Pioneer's lien. The Debtor is attempting to use the provisions of § 1129(b) to cramdown Pioneer's lien. Since the Debtor's plan impairs Pioneers claim[3], the Debtor may cramdown Pioneer's claim to the amount of its allowed secured claim pursuant to the provisions of § 1129(b).

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[3]It should be noted that the Debtor states in his plan that the claim of Pioneer is unimpaired. However, a reading of § 1124 shows that in reality Pioneer's claim is impaired under the plan.

CONCLUSION

Because Pioneer's claim against the Debtor's property is of inconsequential value, Pioneer is not eligible to make a section 1111(b)(2) election.

Having found that Pioneer is ineligible to make a § 1111(b)(2) election and that Dewsnup's prohibition against lien stripping does not apply in chapter 11 cases, the Court finds that the Debtor may cramdown Pioneer's lien under § 1129(b) to the amount of its allowed secured claim as determined by § 506(a). In other words, the Debtor may cramdown Pioneer's lien to the extent it is secured by the value of the Debtor's homestead. Since the first and second liens against the Debtor's homestead total approximately $283,000 and the Court set the value at $250,000, Pioneer does not hold an allowed secured claim against the Debtor's homestead. Therefore, Pioneer has a totally unsecured claim in the amount of $19,000.

A separate judgment consistent with this opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 30th day of July, 1993.

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

IN RE: **CHAPTER 11**

LOUIE A. ROBINSON **CASE NO. 9102049JC**

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the *Objection to Allowance of Claim* filed by the Debtor is hereby granted and that the *Motion to Strike Objection to Allowance of Claim and Response Thereto* filed by Pioneer is hereby denied.

This is a final judgment for purposes of Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 30th day of July, 1993.

UNITED STATES BANKRUPTCY JUDGE