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Home Mortgage Strip Down in Chapter 13 Bankruptcy: A Contextual Approach to Sections 1322(b)(2) and (b)(5)

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Scott M. Reddie**

I. INTRODUCTION

A. *The Question*

In these hard economic times, many homeowners find that their mortgages exceed the value of their homes. This has triggered an intense debate as to whether a homeowner may use bankruptcy to reduce the lien of the mortgage to the value of the home—to “strip down” the mortgage.¹ The Supreme Court recently held in *Dewsnup v. Timm*² that mortgage strip down is not permitted in Chapter 7 bankruptcy.³ The question whether *Chapter 13 bankruptcy* can be used to

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1. Some courts and commentators use the terms “cramdown” or “bifurcation” to describe this process. The authors will follow the Supreme Court’s terminology, *see infra* note 3, and use the term “strip down,” which is an appropriate term because the issue is whether the amount of the lien is reduced, or “stripped down,” to the value of the home. Cramdown is a less specific and therefore less helpful term. Bifurcation may occur without the lien being stripped down; for reasons totally unrelated to a strip down, *see supra* note 215, it may be necessary to bifurcate an undersecured home mortgagee’s claim into a § 506(a) “secured claim” for an amount equal to the value of the home and a § 506(a) “unsecured claim” for an amount equal to the remainder of the debt. *See* 11 U.S.C. § 506(a) (1988); *see infra* note 29 for statutory text. Courts that use the term “bifurcation” when referring to strip down usually use it as shorthand for bifurcating and modifying the § 506(a) unsecured claim.

2. 112 S. Ct. 773 (1992).

3. *Id.* at 778 (holding that “§ 506(d) does not allow petitioner to ‘strip down’

strip down home mortgages remains and is one of the most controversial in all of bankruptcy law.⁴ The question has split the circuits,⁵ the Supreme Court has granted *certiorari* to resolve the issue.⁶ The Court's decision will affect not only lending institutions and current homeowners, but potential homeowners and the economy as a whole.⁷

The authors propose a contextual approach to the question.⁸ The applicable statutory text must remain the centerpiece of any analysis, but that centerpiece must be placed in the appropriate context: in the context of other provisions of the Bankruptcy Code, in the context of the typical fact pattern affected by the language, in the context of unmistakable legislative intent, in the context of the unmistakable policies of the Code, and in the context of non-bankruptcy and pre-Code law. With such a commonsense approach, courts can avoid the "overly technocratic"⁹ reading of Acts of Congress as if they were mathematical puzzles.

Applying a contextual approach, we conclude that in most Chapter 13 cases, the Bankruptcy Code does not authorize home mortgage strip down. That conclusion and five subsidiary conclusions are summarized

respondents' lien"). See *infra* notes 228-95 and accompanying text for a discussion of *Dewsnup*.

4. See, e.g., Erik D. Klingenberg, Note, *Strip Down of Home Mortgages: Undressing 11 U.S.C. § 1322(b)(2)*, 66 ST. JOHN'S L. REV. 443 (1992); Patricia Lindauer, Note & Comment, *Optimizing the "Fresh Start": Mortgage Cramdown Under Chapter 13 of the Bankruptcy Code*, 11 J.L. & COM. 257 (1992); Alexander L. Cataldo, et al., *Residential Mortgage Bifurcation Under Chapter 13 of the Bankruptcy Code*, 96 COM. L.J. 225 (1991); Regina L. Nassen, Note, *Bankruptcy Code § 1322(b)(2)'s No-Modification Clause: Who Does It Protect?*, 33 ARIZ. L. REV. 979 (1991); Vincent J. Canzoneri, "Cramdowns" of Residential Mortgages in Declining Markets: *The Perils and Potentials of Chapter 13*, 35 BOSTON B.J. 17 (1991); Michael S. Polk, *The Chapter 13 Cramdown: New Nightmare for the Lender*, 19 REAL EST. L.J. 279 (1991) [hereinafter Polk, *Chapter 13 Cramdown*]; Peter H. Carroll, III, *Cramdown of Residential Mortgages in Chapter 13 Cases*, 20 COLO. LAW. 881 (1991); Lisa Gayle Minx, Comment, *Section 506 of the Bankruptcy Code and Chapters 7 and 13: The Tenth Circuit Joins the Fray*, 5 CONSUMER FIN. L. Q. REP. 213 (Spring 1991); Michael S. Polk, *Taming the Bankruptcy Beast*, 50 MORTGAGE BANKING 33 (Aug. 1990) [hereinafter Polk, *Bankruptcy Beast*].

5. See *infra* notes 48-227 and accompanying text for a discussion of the key circuit cases.

6. *Nobleman [sic] v. American Sav. Bank (In re Nobleman)*, 968 F.2d 483 (5th Cir.), *cert. granted*, 113 S. Ct. 654 (1992) (No. 92-641). The Nobelmanns' name was misspelled in the Fifth Circuit opinion.

7. See *infra* notes 443-50 and accompanying text for a discussion of these impacts.

8. For a contextual approach limited to the context of the "statutory scheme," see Nassen, *supra* note 4, at 984-85, 988-89, and 996.

9. *In re Sauber*, 115 B.R. 197, 199 (Bankr. D. Minn. 1990).

briefly at the end of this introduction. To provide "context" for the summary, and to set the stage for the remainder of this article, it is necessary to explain briefly the basics of Chapter 13 and to identify the key statutory language: the "other than" clause.

B. Chapter 13 Basics

Chapter 13 of the Bankruptcy Code¹⁰ provides a means for individuals with regular income¹¹ to adjust their debts. The adjustment is accomplished under a Chapter 13 plan drafted by the debtor or the debtor's attorney.¹² The plan must provide for a portion of the debtor's income to be submitted to the bankruptcy trustee¹³ over a period which typically is at least three years but which cannot exceed five years.¹⁴ If the plan meets the statutory requirements, the court must confirm it.¹⁵ After the plan is confirmed, the trustee pays the creditors as directed under the plan, using the funds periodically submitted by the debtor.¹⁶

10. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988 & Supp. II 1990 & Supp. III 1991)). Section references in the text are to the Bankruptcy Code unless otherwise indicated.

11. The Bankruptcy Code defines an individual with regular income as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." 11 U.S.C. § 101(30) (Supp. III 1991). Such an individual may file a Chapter 13 petition if the individual owes noncontingent, liquidated, unsecured debts of less than \$100,000 and noncontingent, liquidated, secured debts of less than \$350,000. 11 U.S.C. § 109(e) (1988). Such an individual and his or her spouse may file a joint petition if their combined debts do not exceed those limits. *Id.*

12. *See* 11 U.S.C. § 1321 (1988) ("The debtor shall file a plan.").

13. *See* 11 U.S.C. § 1322(a)(1) (1988) (stating that the plan shall "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan").

14. *See id.* § 1322(c) (stating that "the plan may not provide for payments over a period that is longer than three years unless the court for cause approves a longer period, but the court may not approve a period that is longer than five years"). Unless the plan provides full payment for unsecured creditors, the plan must provide that all the debtor's projected disposable income for at least the first three years be devoted to the plan; otherwise the trustee or any unsecured creditor can block confirmation of the plan. 11 U.S.C. § 1325(b) (1988).

15. *Id.* § 1325.

16. 11 U.S.C. § 1326 (1988). Thus, the creditors are paid out of future earnings instead of from liquidation of the debtor's nonexempt assets, as in a Chapter 7 bank-

The Chapter 13 plan may modify the rights of holders of unsecured claims.¹⁷ In fact, many plans provide for little or nothing to be paid on account of unsecured claims.¹⁸

The plan may also modify the rights of most holders of secured claims.¹⁹ If the plan does modify a secured creditor's rights, the Bankruptcy Code sets a minimum payment amount; the payments to be made during the plan must have a present value at least equal to the lesser of the amount of the debt or the value of the collateral which secures the debt.²⁰ If, for example, the debtor owed a \$15,000 debt secured by an automobile worth \$10,000, the debtor would have to pay \$10,000 with interest during the plan on account of the \$10,000 secured claim.²¹

In the case of home mortgages, particularly first mortgages, the minimum amount that would have to be paid during the plan typically would be much larger than \$10,000. If the debtor owed a \$150,000 mortgage on a home worth \$100,000, the debtor would have to pay \$100,000 with interest over the three to five years of the plan.²² Even if the Bankruptcy Code permitted the debtor to modify the mortgagee's rights, most debtors could not afford to pay that much that quickly because the payments would be too high. If paying \$100,000 with interest within five years were the only way for the debtor to keep the home, the debtor could not afford to keep it.

Thus, the Code provides an alternative for long-term debts.²³ The

ruptcy. See 11 U.S.C. § 704(1) (1988) (stating that the duty of the trustee in a Chapter 7 case is to "collect and reduce to money the property of the estate"); 11 U.S.C. § 726 (1988) (specifying how the money thus generated should be distributed to creditors). One of Chapter 13's attractive features is that debtors generally do not lose their property; although the Chapter 13 filing creates an estate comprised of the debtor's property, the debtor remains in possession of the property. 11 U.S.C. §§ 541(a), 1306 (1988). Confirmation of the plan reverts the property of the estate in the debtor. 11 U.S.C. § 1327(b) (1988).

17. 11 U.S.C. § 1322(b)(2) (1988).

18. See, e.g., *Nobleman v. American Sav. Bank (In re Nobleman)*, 968 F.2d 483, 485 (5th Cir.) (stating that the unsecured creditors would receive nothing under the plan), *cert. granted*, 113 S. Ct. 654 (1992) (No. 92-641). The unpaid portion of the claims is discharged (with few exceptions) when the debtor completes payments under the plan. 11 U.S.C. § 1328(a) (1988).

19. 11 U.S.C. § 1322(b)(2) (1988).

20. See 11 U.S.C. § 1325(a)(5) (1988); see *infra* notes 318-26 and accompanying text.

21. See *infra* notes 318-26 and accompanying text.

22. See *infra* notes 318-26 and accompanying text.

23. The authors use the term "long-term debts" to refer to claims "on which the last payment is due after the date on which the final payment under the plan is due." See 11 U.S.C. § 1322(b)(5) (1988). See *infra* note 141 for the full text of §

debtor may provide in the plan that any defaults on a long-term debt will be cured during the plan and that regular payments on the claim will be maintained.²⁴ If that is done, the effects of the default will be reversed. Thus, reinstatement of a defaulted mortgage will be permitted, even if it has been accelerated so that, under state law, the entire mortgage debt is due and payable.²⁵ Using this approach, the regular monthly mortgage payments, which will usually be based on a fifteen-, twenty-, or thirty-year amortization schedule, may be low enough for the debtor to afford, especially given the relief from other debts that Chapter 13 will provide.

C. *The "Other Than" Clause and the Meaning of "Secured Claims"*

There are some holders of secured claims whose rights cannot be modified. Under § 1322(b)(2) a plan may "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims"²⁶

It is the meaning of that limitation—the italicized "other than" clause—that has spawned such intense controversy. Its meaning, and thus the degree of protection it gives to home mortgagees, depends in part on the meaning of the two words that precede it: "secured claims."

The meaning of the term "secured claim" as it is used in different contexts in the Bankruptcy Code is therefore one of the key issues discussed in this article.²⁷ The term has a general and a technical meaning. In its general sense, "secured claim" means the entire claim that is, under nonbankruptcy law, secured by a lien on property, without regard to the property's value.²⁸ However, in the technical sense given by § 506(a),²⁹ a debt secured by a lien is considered a

1322(b)(5).

24. *Id.* § 1322(b)(5).

25. *See, e.g.,* Federal Land Bank of Louisville v. Glenn (*In re* Glenn), 760 F.2d 1428 (6th Cir. 1985). The mortgage debt will not be discharged if the plan provides for it under § 1322(b)(5). 11 U.S.C. § 1328(a)(1) (1988).

26. 11 U.S.C. § 1322(b)(2) (1988) (emphasis added).

27. *See infra* notes 350-72 and 400-22 and accompanying text.

28. *See* Dewsnup v. Timm, 112 S. Ct. 773 (1992), *infra* notes 264-66 and accompanying text.

29. Section 506(a) provides, in relevant part:

An allowed claim of a creditor secured by a lien on property in which the

"secured claim" only up to the value of the property which is the subject of the lien.³⁰ A key question is which meaning the term bears in the "other than" clause.³¹

D. Summary of Conclusions

Our major conclusion is that strip down of home mortgages is impermissible in most Chapter 13 cases. It is permissible *only* if both of the following conditions are met: (1) the undersecured mortgagee has taken other collateral for the loan in addition to the home, so that the "other than" clause does not apply,³² and (2) the Chapter 13 plan does not utilize § 1322(b)(5)³³ to cure a mortgage default.

This conclusion follows from five subsidiary conclusions. First, courts permitting strip down routinely argue that their interpretation of the "other than" clause provides "special protection" for mortgagees, consistent with the obvious intent of the "other than" clause.³⁴ In several of the key cases this argument is demonstrably incorrect, as it will be in the typical case.³⁵ These courts "strip" so much meaning from the "other than" clause that their perception of the "plain meaning" of the statutory language cannot be determinative.³⁶

Second, the term "secured claim" is used in its general sense in §

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.

11 U.S.C. § 506(a) (1988). Chapter 5 of the Bankruptcy Code, including § 506(a), applies in cases under chapters 7, 11, 12, and 13. 11 U.S.C. § 103(a) (1988). However, that does not necessarily mean that the term "secured claim" carries the § 506(a) meaning wherever it is used in provisions that apply to such cases. In fact, the Supreme Court held in *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992), that it did not even carry that meaning in § 506(d). See *infra* notes 264-66 and accompanying text.

30. *Dewsnup*, 112 S. Ct. at 778. An undersecured creditor's claim is therefore bifurcated by § 506(a) into a "secured claim" equal in amount to the value of the collateral and an "unsecured claim" equal in amount to the remainder of the debt. *Id.* If the undersecured creditor's lien is junior to one or more other liens on the same collateral, the amount of the other liens must first be subtracted from the value of the collateral before determining the amount of the junior creditor's § 506(a) secured claim. See *infra* note 54.

31. See *infra* notes 350-72 and 400-22 and accompanying text.

32. The "other than" clause applies if the claim is secured "*only* by a security interest in real property that is the debtor's principal residence . . ." 11 U.S.C. § 1322(b)(2) (1988) (emphasis added).

33. *Id.* § 1322(b)(5).

34. See *infra* notes 305-08 and accompanying text.

35. See *infra* notes 309-42 and accompanying text.

36. See *infra* notes 309-42 and accompanying text.

1322(b)(2) to mean the entire claim which is, under nonbankruptcy law, secured by a lien, without regard to the value of the collateral.³⁷ Thus the "other than" clause protects the entire mortgage debt. Accordingly, strip down is prohibited if the "other than" clause applies.

Third (and independent of the second conclusion), the "rights" protected from modification by the "other than" clause include the right to have a lien for the entire mortgage debt, not just for the amount of the "secured claim" in the technical § 506(a) sense.³⁸ Thus again, if the "other than" clause applies, home mortgage strip down is forbidden.

Fourth, the term "secured claim" is also used in its general sense in § 1322(b)(5), which permits the curing of defaults on long-term debts.³⁹ Most homeowners in Chapter 13 must, as a practical and ultimately a legal matter, use § 1322(b)(5) to cure their defaulted home mortgages if they wish to keep their homes.⁴⁰ The use of § 1322(b)(5) is inconsistent with modification of a claim in any way other than by curing defaults; thus most homeowners in Chapter 13 cannot strip down their mortgages even if the "other than" clause does not apply.⁴¹

Fifth, because homeowners in Chapter 13 typically use § 1322(b)(5), the preceding conclusion implies that the "other than" clause is less important than the legislative history suggests.⁴² However, there are still important cases in which the "other than" clause is the only provision which prevents strip down.⁴³ Further, an interpretation that creates some overlapping armor in the obviously intended protection for home lenders should be preferred—even though it creates some redundancy—over a pro-strip down interpretation that makes the "other than" clause largely redundant and harms those whom the clause was intended to protect.

Part II of this article describes the major circuit court decisions concerning home mortgage strip down in Chapter 13.⁴⁴ Part III discusses the implications of the Supreme Court's decision in *Dewsnup v.*

37. See *infra* notes 350-72 and accompanying text.

38. See *infra* notes 356-58 and 373-84 and accompanying text.

39. 11 U.S.C. § 1322(b)(5) (1988).

40. See *infra* notes 310-17 and 402-04 and accompanying text.

41. See *infra* notes 400-22 and accompanying text.

42. See *infra* Section IV.F. following note 422.

43. See *infra* Section IV.F. following note 422.

44. See *infra* notes 48-227 and accompanying text.

Timm.⁴⁵ Part IV presents the authors' suggested interpretation of the Bankruptcy Code sections in question. This contextual interpretation respects the statutory language and makes sense of it in the context of other Code provisions, in the context of the typical case to which the language will apply, in the context of Congress' intent, in the context of the Code's policies, and in the context of the pre-Code law.⁴⁶ Part IV also criticizes the primary pro-strip down circuit cases, discusses the policy implications of allowing strip down, and discusses the high stakes for potential home buyers, the lending industry, and the economy.⁴⁷

II. THE CIRCUIT DECISIONS

A. *The Key Pro-Strip Down Cases*

Prior to 1989, no circuit court had decided whether home mortgages could be stripped down in Chapter 13⁴⁸ despite the existence of the "other than" clause.⁴⁹ A few lower court decisions had permitted strip down,⁵⁰ a few others had not.⁵¹ In 1989, the Ninth Circuit Court of

45. See *infra* notes 228-95 and accompanying text.

46. See *infra* notes 296-433 and accompanying text.

47. See *infra* notes 296-433 and accompanying text (main section criticizing key circuit cases) and 434-50 and accompanying text (discussing policy implications).

48. There were, however, dicta that strongly suggested strip down would not be permitted. See *Seidel v. Larson (In re Seidel)*, 752 F.2d 1382, 1385-86 (9th Cir. 1985); *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 243-46 (5th Cir. 1984). In 1989, two opinions from the Third Circuit included dicta suggesting that strip down was permissible. See *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304, 1311 (3d Cir. 1989), *overruled by Dewsnap v. Timm*, 112 S. Ct. 773 (1992); *In re Lewis*, 875 F.2d 53, 57 (3d Cir. 1989) (deciding procedural matter of whether debtor waived right to seek mortgage strip down and stating that provisions of plan calling for strip down "were obviously crafted in strict compliance with the Code").

49. The "other than" clause is found in § 1322(b)(2), which provides:

(b) Subject to subsections (a) and (c) of this section, the plan may—

(2) modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

11 U.S.C. § 1322(b)(2) (1988) (emphasis added). The italicized language is the "other than" clause.

50. *In re Kehm*, 90 B.R. 117 (Bankr. E.D. Pa. 1988); *In re Jablonski*, 88 B.R. 652 (Bankr. E.D. Pa. 1988); *In re Simmons*, 78 B.R. 300 (Bankr. D. Kan. 1987); *In re Caster*, 77 B.R. 8 (Bankr. E.D. Pa. 1987); *In re Bruce*, 40 B.R. 884 (Bankr. W.D. Va. 1984); *In re Morphis*, 30 B.R. 589 (Bankr. N.D. Ala. 1983); *Spadel v. Household Consumer Discount (In re Spadel)*, 28 B.R. 537 (Bankr. E.D. Pa. 1983); *In re Neal*, 10 B.R. 535 (Bankr. S.D. Ohio 1981).

51. *In re Russell*, 93 B.R. 703 (Bankr. D.N.D. 1988); *In re Brown*, 91 B.R. 19

Appeals in *Houglund v. Lomas & Nettleton Co. (In re Houglund)*⁵² affirmed the confirmation of a Chapter 13 plan which stripped down an undersecured home mortgage. The court held that the "other than" clause protected only the mortgagee's § 506(a)⁵³ secured claim from modification.⁵⁴

1. *In re Houglund*⁵⁵

The debtors in *Houglund* financed their purchase of a home with a loan from Lomas & Nettleton Company (Lomas), secured by a first mortgage on the home.⁵⁶ The loan was made under an Oregon veterans' program; under that program the monthly payments initially were less than the amount needed to pay the interest on the loan.⁵⁷ Under such a negative amortization scheme, the principal amount of the loan increases for some time until the later, larger payments begin to pay it off.⁵⁸ After default, Lomas commenced foreclosure proceedings, and the debtors filed a Chapter 13 petition.⁵⁹ At that time the home was worth \$47,240, but the loan balance was slightly more than \$51,000, leaving Lomas nearly \$4000 undersecured.⁶⁰ The debtors' Chapter 13

(Bankr. E.D. Va. 1988); *In re Catlin*, 81 B.R. 522 (Bankr. D. Minn. 1987); *In re Hemsing*, 75 B.R. 689 (Bankr. D. Mont. 1987); *In re Hynson*, 66 B.R. 246 (Bankr. D.N.J. 1986); *In re Smith*, 63 B.R. 15 (Bankr. D.N.J. 1986).

52. 886 F.2d 1182 (9th Cir. 1989).

53. See *supra* note 29 for statutory text of § 506(a).

54. *Houglund*, 886 F.2d at 1185. The amount of an undersecured first mortgagee's "secured claim," as that term is used in § 506(a), is the value of the home. If the undersecured mortgagee's lien is junior to one or more other liens, the amount of the mortgagee's § 506(a) secured claim is equal to the value of the home less the amount of the senior liens. For example, in *In re Govan*, 139 B.R. 1017 (Bankr. N.D. Ala. 1992), the debtor's home was worth \$12,000. *Id.* at 1019. The balance owing on the first mortgage was \$7450. *Id.* The balance owing on the second mortgage was slightly more than \$8000. *Id.* The court explained that the second mortgagee, therefore, had a secured claim equal to \$4550, the difference between the value of the property and the amount of the first mortgage. *Id.* Unfortunately, in our view, the court then permitted strip down of the second mortgage to the \$4550 figure. *Id.* at 1021.

55. For criticisms of *Houglund*, see *infra* notes 300-42 and accompanying text.

56. *Houglund*, 886 F.2d at 1182.

57. *Id.*

58. *Id.*

59. *In re Houglund*, 93 B.R. 718, 719 (D. Or. 1988), *aff'd sub nom.* *Houglund v. Lomas & Nettleton Co.*, 886 F.2d 1182 (9th Cir. 1989).

60. *Houglund*, 886 F.2d at 1182-83.

plan provided for avoidance of the mortgage lien to the extent of the undersecured amount.⁶¹ Lomas contended that stripping down the lien would be an impermissible modification of its rights in violation of the "other than" clause in § 1322(b)(2).⁶²

The bankruptcy court denied confirmation of the plan,⁶³ but the district court reversed, holding that the "other than" clause did not prevent § 506(a) from bifurcating Lomas's claim into secured and unsecured portions or prevent the lien securing Lomas's resulting § 506(a) unsecured claim from being avoided under § 506(d).⁶⁴ The Ninth Circuit affirmed the district court decision but did not rely on § 506(d).⁶⁵

The Ninth Circuit argued that in this case "the quest for meaning should begin and end 'with the language of the statute itself.'"⁶⁶ The court pointed out that § 506(a) applied in Chapter 13 cases⁶⁷ and concluded that there was "no reason to believe that the phrases 'secured claim' and 'unsecured claim' in section 1322(b)(2) have any meaning other than those given to them by section 506(a)."⁶⁸ Thus, under the court's plain meaning application of § 506(a), Lomas' claim had "a 'secured claim' and an 'unsecured claim' component."⁶⁹

The court then concluded that the "other than" clause only prevents modification of the § 506(a) secured claim component.⁷⁰ The "other than" clause follows language that refers to secured claims and precedes language that refers to unsecured claims.⁷¹ Thus, the court

61. *In re Hougland*, 93 B.R. at 719.

62. *Id.* See *supra* note 49 for the text of § 1322(b)(2), including the "other than" clause.

63. *In re Hougland*, 93 B.R. at 720.

64. *Id.* at 721-22. Section 506(d) provides, in relevant part:

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless . . . such claim was disallowed only under section 502(b)(5) or 502(e) of this title . . . or . . . such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d) (1988). Reliance on § 506(d) for strip down should no longer be possible after the Supreme Court's decision in *Dewsnup v. Timm*, 112 S. Ct. 773 (1992), discussed *infra* at notes 228-95 and accompanying text. See *infra* note 106.

65. See *Hougland v. Lomas & Nettleton Co. (In re Hougland)*, 886 F.2d 1182 (9th Cir. 1989), *aff'g In re Hougland*, 93 B.R. 718 (D. Or. 1988).

66. *Id.* at 1183 (quoting *United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989)).

67. See *supra* note 29.

68. *Hougland*, 886 F.2d at 1183.

69. *Id.* at 1183-84.

70. *Id.* at 1184.

71. *Id.*

reasoned, the clause refers to and limits only the preceding language which addresses the modification of secured claims⁷²—not the subsequent language which authorizes modifying the rights of holders of unsecured claims.⁷³ Therefore, only the § 506(a) secured claim was protected.⁷⁴ According to the court, § 1322(b)(2) authorizes modification of the unsecured claim component of the undersecured mortgagee's claim.⁷⁵ As a result, the court affirmed the district court's decision permitting strip down of the mortgage.⁷⁶

Additionally, the court rejected the argument that affecting the unsecured portion of the claim would impermissibly "modify the rights" of a home mortgagee in violation of section 1322(b)(2).⁷⁷ Apparently the court believed that in addition to bifurcating the claim, § 506(a) operates to bifurcate an undersecured mortgagee's lien rights. This means that the modification of the § 506(a) unsecured claim can eliminate the corresponding lien rights.⁷⁸ Hence, according to the court, the "other than" clause prevents modification of those lien rights only if the clause limits modification of the mortgagee's unsecured claim.⁷⁹

Further, the court impliedly rejected the argument that the "other than" clause's use of the broad term "claims"—which by definition includes both secured and unsecured claims⁸⁰—indicates that the plan can modify neither the mortgagee's § 506(a) secured claim nor its § 506(a) unsecured claim.⁸¹ The court rejected the suggestion that "Congress should have sent the word 'claim' into the 'other than' clause flanked on each side by the word 'secured'" if Congress wanted to make it clear that the "other than" clause dealt only with secured

72. *Id.*

73. *Id.*

74. *Id.* The court stated that "one would think that most residential real estate lenders would see to it that they had a sufficient cushion to avoid finding themselves in an undersecured position." *Id.* The court also noted approvingly that its interpretation would "put a crimp" in the "schemes" of those who were not "true" residential real estate lenders but who merely took a mortgage to gain the benefits of the "other than" clause. *Id.* at 1184-85.

75. *Id.* at 1185.

76. *Id.* at 1184.

77. *Id.* (citing *In re Russell*, 93 B.R. 703, 705-06 (D.N.D. 1988)).

78. *Id.*

79. *See id.*

80. 11 U.S.C. § 101(5) (Supp. III 1991).

81. *Hougland*, 886 F.2d at 1184.

claims.⁸²

Rejecting the suggestion that §§ 506(a) and 1322(b)(2) conflict, the court held instead that they are harmonious when read in the context of the whole Bankruptcy Code.⁸³ The court also summarily noted that the legislative history merely showed that Congress intended the “other than” clause to benefit residential real estate lenders, an intent already obvious from the clause’s language.⁸⁴

Finally, the court rejected the argument that its interpretation would “severely undermine the statute.”⁸⁵ The court apparently conceded that its interpretation of the “other than” clause would be “absurd” and, thus, incorrect if it did not provide “special protection” for the secured claim component.⁸⁶ As this Article will demonstrate, under the court’s interpretation, the “other than” clause failed to provide any special protection for Lomas’ secured claim.⁸⁷

2. *Wilson*

In *Wilson v. Commonwealth Mortgage Corp.*,⁸⁸ the Third Circuit followed *Hougland* and held that debtors could modify the § 506(a) unsecured claims of undersecured mortgagees.⁸⁹ Commonwealth’s first mortgage on the Wilsons’ home covered “not only the real estate but also ‘any and all appliances, machinery, furniture and equipment (whether fixtures or not) of any nature whatsoever now or hereafter

82. *Id.*

83. *Id.*

84. *Id.* at 1185. For cases that discuss the legislative history of § 1322(b)(2), see, e.g., *Nobleman v. American Sav. Bank (In re Nobleman)*, 968 F.2d 483, 488-89 (5th Cir.), *cert. granted*, 113 S. Ct. 654 (1992) (No. 92-641); *Eastland Mortgage Co. v. Hart (In re Hart)*, 923 F.2d 1410, 1412 (10th Cir. 1991); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 127-28 (3d Cir. 1990); *Federal Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d 1428, 1432-35 (6th Cir. 1985), *cert. denied*, 474 U.S. 849 (1985); *In re Seidel*, 752 F.2d 1382, 1385-86 (9th Cir. 1985); *Grubbs v. Houston First Am. Sav. Ass’n*, 730 F.2d 236, 239-46 (5th Cir. 1984) (en banc); *In re Harris*, 94 B.R. 832, 835-37 (Bankr. D.N.J. 1989); *In re Foster*, 61 B.R. 492, 495 (Bankr. N.D. Ind. 1986); *In re Neal*, 10 B.R. 535, 536-37 (Bankr. S.D. Ohio 1981).

85. *Hougland*, 886 F.2d at 1184.

86. *See id.*

87. *See infra* notes 350-72 and accompanying text. In *Lomas Mortgage USA v. Wiese*, 980 F.2d 1279 (9th Cir. 1992), the Ninth Circuit reaffirmed its holding that home mortgages can be stripped down in Chapter 13 cases. The court held that *Dewsnup v. Timm*, 112 S. Ct. 773 (1992), did not require a different result. *Lomas Mortgage USA*, 980 F.2d at 1282.

88. 895 F.2d 123 (3d Cir. 1990).

89. *Id.* at 127.

installed in or upon said premises."⁹⁰ Commonwealth's proof of claim asserted that the entire \$38,176.75 first mortgage debt was a secured claim.⁹¹ As a prelude to stripping down the mortgage, the debtors sought an order that Commonwealth's allowed secured claim was only \$22,000, the stipulated value of the home, plus the value of the other collateral.⁹² In opposition, Commonwealth argued that the "other than" clause "prevent[ed] the Bankruptcy Court from modifying its 'secured claim' by dividing it into secured and unsecured claims."⁹³ The Bankruptcy Court entered the order sought by the debtors, holding that the "other than" clause did not apply because Commonwealth had taken the furniture and appliances as collateral in addition to the home.⁹⁴

The district court affirmed on alternative grounds.⁹⁵ "Under the plain meaning of § 1322(b)(2)," the "other than" clause protected only the rights of a creditor whose claim was a "secured claim," and even then only if the creditor's collateral was limited to the real property that was the debtor's principal residence.⁹⁶ The court concluded that the term "secured claim" in § 1322(b)(2) meant "what 11 U.S.C. § 506(a) says it means,"⁹⁷ and therefore held that the amount of Commonwealth's "secured claim" was \$22,000 plus the value of the furniture and appliances;⁹⁸ the rest of the claim was "unsecured" and hence the "other than" clause did not prevent it from being modified.⁹⁹ Further, Commonwealth could not claim the protection of the "other than" clause in any case, because Commonwealth's mortgage extended to appliances and furniture and was not limited to the real property which constituted the Wilsons' principal residence.¹⁰⁰ The court noted that the unsecured claim was "of course, likely not to be paid in full."¹⁰¹

90. *Id.* at 124.

91. *Id.*

92. *Id.*

93. *Wilson v. Commonwealth Mortgage Corp. (In re Wilson)*, No. Civ.A.89-4203, 1989 WL 89956 (E.D. Pa. Aug. 4, 1989) (setting forth the argument that Commonwealth made in the Bankruptcy Court and "reiterated" in the district court), *aff'd*, 895 F.2d 123 (3d Cir. 1990).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

The court of appeals also affirmed,¹⁰² following *Houglan* and dictum from one of its recent decisions, later overruled by *Dewsnup*.¹⁰³ The Third Circuit stated that "the words of the statute are 'the primary, and ordinarily the most reliable, source of interpreting' its meaning."¹⁰⁴ The court agreed with *Houglan* that "because the 'other than' phrase is best read to refer to secured claims, the 'other than' phrase should be read to limit modification only of that portion of the claim that is secured."¹⁰⁵ Additionally, the Third Circuit relied on another of its recent decisions for the proposition that § 506(a) applies in Chapter 13 cases¹⁰⁶ and stated that § 506(a) "defines allowed secured and allowed unsecured claims."¹⁰⁷ Allowing bifurcation of the mortgagee's claim under § 506(a) and modification of the resulting unsecured claim would make §§ 1322(b)(2) and 506(a) consistent; thus the more specific provisions of § 1322(b)(2) do not prevent the application of § 506(a).¹⁰⁸ Section 1322(b)(2), the court held, "does not preclude the modification of any 'unsecured' portion of an undersecured claim."¹⁰⁹

The court also considered the legislative history of the "other than" clause, concluding that, since the final statute was a compromise between the House¹¹⁰ and Senate,¹¹¹ home mortgage lenders probably

102. *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123 (3d Cir. 1990).

103. *Id.* at 126-27 (relying on *Houglan* and on dictum from *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304, 1311 (3d Cir. 1989), *overruled by Dewsnup v. Timm*, 112 S. Ct. 773 (1992)).

104. *Id.* at 127 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)).

105. *Id.*

106. *Id.* at 125 (citing *In re Lewis*, 875 F.2d 53, 57 (3d Cir. 1989) (deciding procedural matter of whether debtor waived right to seek mortgage strip down and stating that provisions of plan calling for strip down under § 506(d) "were obviously crafted in strict compliance with the Code"). It must be noted that reliance on § 506(d) for home mortgage strip down should no longer be possible after the Supreme Court's decision in *Dewsnup*, discussed *infra* at notes 228-95 and accompanying text. *But see In re Jones*, No. 91-20593, 1993 WL 49925 (Bankr. E.D. Mich. Feb. 23, 1993) (holding that § 506(d) strips down home mortgages in Chapter 13 cases despite *Dewsnup*).

107. *Wilson*, 895 F.2d at 125.

108. *Id.* at 128.

109. *Id.* at 127.

110. The court stated that "[t]he house version of section 1322(b)(2) was more favorable to debtors . . . and provided that the plan could modify the rights of holders of secured or unsecured claims." *Id.* (citing H.R. 8200, 95th Cong., 1st Sess. (1977), *reprinted in* [Appendix 3] *COLLIER ON BANKRUPTCY*, Part III (Lawrence P. King et al. eds., 15th ed. 1992)).

111. The Senate version of § 1322(b)(2) included an exception for real estate mortgages. *Id.* at 128 (citing S. 2266, 95th Cong., 2d Sess. (1978), *reprinted in* [Appendix 3] *COLLIER ON BANKRUPTCY*, Part VII (Lawrence P. King et al., eds., 15th ed. 1992)). The court stated that "[t]he exception was apparently included to protect the home

did not get all the protection they had wanted. This led the court to conclude that the legislative history did not preclude strip down.¹¹² However, in its analysis, the Third Circuit quoted a portion of the Bankruptcy Commission Report out of context and thus mistakenly characterized the Commission Report as supportive of home mortgage strip down.¹¹³ In fact, the Commission Report supports strip down of liens on personal property, but not on real property.¹¹⁴

The court also stated that its interpretation of the "other than" clause of § 1322(b)(2) did not

leave the section without a *raison d'être*. Section 1322(b)(2) continues to prevent modification of the rights of holders of a secured claim secured only by a real estate interest in the debtor's home, rights that in the absence of the exclusionary language of the section could be modified under Chapter 13.¹¹⁵

The court did not specify any particular way in which the "other than" clause might have prevented the Wilsons from modifying Commonwealth's rights. Perhaps that was because the Wilsons' plan was not before the court (or because the court ultimately held that the "other than" clause did not apply to Commonwealth);¹¹⁶ the authors suggest it was because under the facts in *Wilson*, as in the typical case, the "other than" clause provides no added protection to the home mortgagee if it does not prevent strip down.¹¹⁷

The court also relied on an alternative ground to permit modification of Commonwealth's § 506(a) unsecured claim. Because the mortgage agreement gave Commonwealth a security interest on appliances, ma-

mortgage industry." *Id.* (citing *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 245 & n.13 (5th Cir. 1984) (en banc); Einbinder, *Curing Mortgage Defaults Under Chapter 13 of the Bankruptcy Code*, in 1982 Ann. Surv. of Bankruptcy Law 493, 495).

112. *Id.* at 128. For a further discussion of the legislative history, see *infra* notes 385-99.

113. See Lindauer, *supra* note 4, at 271 & n.88.

114. *Id.*

115. *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 128 (3d Cir. 1990).

116. The Wilsons' plan either had not yet been filed when the district court decided the case, or the plan was not part of the record on appeal; the district court opinion indicated that Commonwealth's § 506(a) unsecured claim was "of course, likely not to be paid in full." *Wilson v. Commonwealth Mortgage Corp. (In re Wilson)*, No. Civ.A.89-4203, 1989 WL 89956 (E.D. Pa. Aug. 9, 1989), *aff'd*, 895 F.2d 123 (3d Cir. 1990). The district court thus did not know for certain what the Wilsons' plan would provide; there is no indication the plan was before the Third Circuit, either.

117. See *infra* notes 305-55 and accompanying text.

chinery, furniture, and equipment,¹¹⁸ Commonwealth's claim was not "secured only by a security interest in real property that is the debtor's principal residence."¹¹⁹ The "other than" clause therefore did not apply to prevent modification of Commonwealth's rights and thus could not be the basis for an argument against mortgage strip down.¹²⁰

Although the actual strip down of Commonwealth's mortgage was not before the court,¹²¹ there is little doubt that the court knew strip down would be the next step and approved of that final result. That is why the court found important the language in the Bankruptcy Commission Report—language that the court mistakenly interpreted as supporting home mortgage strip down.¹²²

3. Hart

The Tenth Circuit was the next to address the issue of whether the Code permits strip down of home mortgages. In *Eastland Mortgage Co. v. Hart (In re Hart)*,¹²³ the mortgage encumbered the land to which the debtors' mobile home was attached and various related items of property, such as improvements, "stock," fixtures, rents, and mineral rights.¹²⁴ At the time the Harts filed their Chapter 13 petition, they owed

118. *Wilson*, 895 F.2d at 128.

119. *Id.* at 129.

120. *Id.* In *Sapos v. Provident Inst. of Sav.*, 967 F.2d 918 (3d Cir. 1992), the Third Circuit reaffirmed its decision in *Wilson* allowing home mortgage strip down, again with the alternative holding that the "other than" clause did not apply because the mortgagee took additional collateral. *Id.* at 921. The court argued that *Dewsnup v. Timm*, 112 S. Ct. 773 (1992), did not require a different result from that in *Wilson*, and thus followed *Wilson*. *Sapos*, 967 F.2d at 925. For a discussion of *Dewsnup*, see *infra* notes 228-95 and accompanying text.

121. Only the preliminary step of determining the amount of Commonwealth's § 506(a) secured claim was before the court. *Wilson*, 895 F.2d at 124.

122. See *supra* notes 113-14 and accompanying text.

123. 923 F.2d 1410 (10th Cir. 1991).

124. *Id.* at 1411. The security agreement covered the land "together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock and all fixtures now or hereafter a part of the property." *Id.* The bankruptcy court held that by including rents, royalties, profits, and stock in the mortgage, the mortgagee had taken a lien on items other than the real estate. Hence, it was not entitled to the protection of the "other than" clause. *Id.* at 1415-16. The district court found that the non-realty items did not presently exist and had no value. Therefore, the district court concluded that they did not constitute security for the mortgage. *Id.* at 1416. However, the court of appeals held that the district court could not make a finding of fact—at least one not supported by the record—and then use that finding to *contradict* the bankruptcy court's conclusions. Thus, the district court's decision was reversible. *Id.*

\$55,000.¹²⁵ The debtor's amended plan listed the mortgage as a \$30,000 secured claim¹²⁶ and a \$25,000 unsecured claim.¹²⁷ The plan provided for the \$30,000 § 506(a) secured claim "to be paid in full without adjustment in the interest rate or repayment schedule stated in the loan documents."¹²⁸ Over the mortgage holder's objection, the bankruptcy court approved the plan.¹²⁹ However, the district court reversed, "holding modification of the mortgage to be inappropriate, given the protection of residential mortgagees granted by 11 U.S.C. § 1322(b)(2)."¹³⁰

The Tenth Circuit reversed, stating that the decisions in *Houglund and Wilson* "reflect[ed] the plain meaning of section 1322(b)(2),"¹³¹ which "should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."¹³² The court thus held that "an undersecured mortgage is, for the purposes of the bankruptcy code, two claims, and only the secured claim is protected by [section] 1322(b)(2)."¹³³ In a footnote the court made clear that the secured claim that was protected was the secured claim as defined in § 506(a).¹³⁴ The court then stated:

[W]e recognize that while bifurcation, in the literal sense, may be a modification of the mortgage represented in the secured and unsecured claims, bifurcation is not, of itself, a 'modification' of the secured claim made impermissible by section 1322(b)(2). Indeed, the act of bifurcation recognizes, but does not affect, the secured claim.¹³⁵

The court did not state how the Harts' plan would treat the mortgagee's § 506(a) unsecured claim. However, the court apparently approved treat-

125. *Id.* at 1411.

126. The collateral's stipulated value was \$30,000. *Id.*

127. *Id.*

128. *Id.* at 1415. Presumably, the court meant that the principal amount of the Harts' mortgage would be treated as reduced from \$55,000 to \$30,000, and that the Harts would have to make their regular payments on the regular schedule until they had paid off that \$30,000 with interest.

129. *Id.* at 1411.

130. *Id.*

131. *Id.* at 1415.

132. *Id.* (alteration in original) (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))).

133. *Id.*

134. *Id.* at 1415 n.4.

135. *Id.* at 1415.

ing that unsecured claim the same as other unsecured claims, which may have received nothing under the plan.¹³⁶

4. *Bellamy*

Of the four circuits to embrace home mortgage strip down, the Second Circuit did so with the most comprehensive treatment of the anti-strip down arguments. In *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*,¹³⁷ the Bellamys purchased their home with a \$133,000 loan secured by a first mortgage, payable at \$1329.79 per month for twenty years.¹³⁸ Three years later, they were \$13,000 in arrears and the mortgage debt to Federal Home had risen to \$151,340.85. Not surprisingly, the Bellamys filed a Chapter 13 petition.¹³⁹ The debtors quickly sought to bifurcate Federal Home's claim under § 506(a) and to void Federal Home's mortgage lien under § 506(d) to the extent the mortgage debt exceeded the value of the home.¹⁴⁰ The debtors also sought to reinstate the defaulted mortgage under § 1322(b)(5)¹⁴¹ with a reduced principal amount equal to the fair market value of their home.¹⁴² In addition, the debtors sought a determination that they were entitled to pay off that reduced amount over the original term of the mortgage.¹⁴³ This would have allowed them to reduce their monthly mortgage payments below the \$1329.79 stated in the loan documents.¹⁴⁴ The parties stipulated that

136. The court stated that "[u]nder this plan, payment of only the secured portion of the debt is not a modification of the creditor's rights under the mortgage, and thus is allowed under 11 U.S.C. § 1322(b)(2)." *Id.* Remarkably, neither the two judge majority nor the dissenting judge in *Hart* cited *Dewsnup v. Timm (In re Dewsnup)*, 908 F.2d 588 (10th Cir. 1990), *aff'd*, 112 S. Ct. 773 (1992), which a different Tenth Circuit panel had decided six months before. In *Dewsnup*, at least in dictum, the circuit court indicated that home mortgage strip down would not be permitted under Chapter 13. *See id.* at 591.

137. 962 F.2d 176 (2d Cir. 1992).

138. *Id.* at 178.

139. *Id.* The \$151,340.85 was the amount of the claim filed by the mortgagee. *Id.*

140. *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 122 B.R. 856, 857 (Bankr. D. Conn. 1991), *aff'd*, 132 B.R. 810 (D. Conn. 1991), *aff'd*, 962 F.2d 176 (2d Cir. 1992).

141. Section 1322(b)(5) provides:

Subject to subsections (a) and (c) of this section, the plan may . . . (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

11 U.S.C. § 1322(b) (1988).

142. *In re Bellamy*, 122 B.R. at 857 & n.3.

143. *Id.* at 857.

144. *See id.*

the home's value was \$127,500 and agreed that the reinstatement-with-reduced-payments issue could await later determination.¹⁴⁵ The bankruptcy court voided the mortgage lien under § 506(d) to the extent that it exceeded \$127,500;¹⁴⁶ the district court affirmed, also relying on § 506(d).¹⁴⁷

The Second Circuit also affirmed,¹⁴⁸ but apparently ignored the parties' agreement to deal with the reinstatement-with-reduced-payments issue later.¹⁴⁹ The question before the court should have been limited to whether Federal Home's lien could be bifurcated under § 506(a) and then partially avoided under § 506(d).¹⁵⁰ According to *Dewsnup v. Timm*,¹⁵¹ the lien could not be avoided under § 506(d),¹⁵² and, *a fortiori*, could not be avoided simply by applying § 506(a);¹⁵³ thus the court should have reversed. Even under the pro-strip down approach of *Houglund*, it is not § 506(d) which causes strip down to occur; rather, the Chapter 13 plan modifies the undersecured mortgagee's § 506(a) unsecured claim by eliminating the mortgagee's lien.¹⁵⁴ Only a confirmed plan could have that effect.¹⁵⁵ No plan had been confirmed in *Bellamy*; at least no confirmed plan is mentioned in any of the court opinions. Thus, Federal Home's lien should not have been partially avoided, even under a pro-strip down approach. Nonetheless, the Second Circuit affirmed the order that voided part of Federal Homes' lien.¹⁵⁶

145. *Id.* at 857-58 & n.3.

146. *Id.* at 863.

147. *Bellamy*, 132 B.R. at 811, 813.

148. *Bellamy v. Federal Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176 (2d Cir. 1992).

149. *See id.* at 179-80.

150. *See In re Bellamy*, 122 B.R. at 857 n.3 (stating that the parties agreed not to have this issue decided).

151. 112 S. Ct. 773, 778 (1992).

152. *See infra* notes 263-66 and accompanying text.

153. The Second Circuit in *Bellamy* did not rely on § 506(d) and apparently recognized that § 506(a) by itself could not cause strip down. *Bellamy*, 962 F.2d at 180 ("Federal Home is correct in noting that § 506(a) does not itself affect a creditor's right to payment.")

154. *See, e.g., Houglund v. Lomas & Nettleton Co.* (*In re Houglund*), 886 F.2d 1182, 1183 (9th Cir. 1989) (agreeing with the line of cases holding that a debtor's plan is permitted to modify the undersecured mortgagee's § 506(a) unsecured claim).

155. *See* 11 U.S.C. § 1327(a) (1988) (providing that provisions of a "confirmed plan" bind the parties).

156. *Bellamy*, 962 F.2d at 187.

Bellamy was the first decision on the circuit court level to address home mortgage strip down after the Supreme Court's *Dewsnup* decision.¹⁵⁷ The court rejected the argument that *Dewsnup* prevented strip down under Chapter 13.¹⁵⁸

Stating that it was following *Houglund*, *Wilson*, and *Hart*, the court affirmed the strip down of Federal Home's mortgage.¹⁵⁹ The court stated that § 1322(b)(2) "prohibits modification of a residential mortgage lender's rights only insofar as the mortgagee holds a secured claim. But whether—and the extent to which—the mortgagee holds a secured claim must first be determined according to section 506(a)."¹⁶⁰ Therefore, only the mortgagee's rights with respect to its § 506(a) secured claim are protected from modification.¹⁶¹ Although the court did not say so explicitly, the court must have thought that a debtor's plan could, under the authority of § 1322(b)(2), modify the § 506(a) unsecured claim to eliminate the lien securing it.¹⁶²

The bulk of the opinion dealt with various arguments raised by Federal Home and amici curiae.¹⁶³ First, Federal Home argued that strip down would modify the "rights" of a home mortgage lender in violation of § 1322(b)(2) because those "rights" are broader than just the mortgagee's rights to the amount of its § 506(a) secured claim;¹⁶⁴ Federal Home argued that a home mortgagee's "rights" under the mortgage contract should be protected regardless of the claim's classification.¹⁶⁵ The court rejected that argument, stating that it was "directly contrary to one of the Code's cornerstones, aimed at making a fundamental change from the Bankruptcy Act, that treatment under the Code turns on whether a *claim* is secured or unsecured, not on whether a *creditor* is secured or unsecured."¹⁶⁶ Hence, the court held that "the 'rights' which may not be modified under § 1322(b)(2) must be defined in terms of the claim, not with reference to the claimant's status."¹⁶⁷

157. *See id.* at 182-84.

158. *Id.*

159. *Id.* at 179, 187.

160. *Id.* at 179 (citations omitted).

161. *Id.* at 179-81.

162. *See supra* text accompanying note 75.

163. *See id.* at 179-82, 184-87.

164. *Id.* at 179.

165. *Id.*

166. *Id.* (citing *Barash v. Public Fin. Corp.*, 658 F.2d 504, 507 (7th Cir. 1981)).

167. *Id.* at 180. In a cryptic discussion, the court seemed to assert that even Federal Home's right to payment with respect to its § 506(a) unsecured claim was not modified by strip down. *See id.* The court noted that state law determines the right to payment but that "the manner in which the right to payment must be satisfied is fixed by the [Bankruptcy] Code, which accords different treatment to claims depend-

The *Bellamy* court next addressed Federal Home's related argument that the entire claim could not be modified regardless of the extent to which it was secured.¹⁶⁸ Federal Home asserted that the "other than" clause uses the term "claims" rather than "secured claims," and that the Code's broad definition of a "claim" includes both secured and unsecured claims. Accordingly, Federal Home contended that the "other than" clause protected its entire claim from modification, not merely its § 506(a) secured claim.¹⁶⁹ The court disagreed and, following *Houglan* and *Wilson*, concluded that "[t]he 'other than' clause is most logically read to refer to those words that precede it: 'secured claims.'¹⁷⁰ Thus, the protection of the "other than" clause is limited to the mortgagee's § 506(a) secured claim.¹⁷¹

The court next addressed Federal Home's contention that § 1322(b)(2), as a specific provision, should take precedence over § 506(a), a general provision.¹⁷² The court rejected this argument because "statutory provisions should be construed so as to avoid a conflict." The court found no conflict between these sections.¹⁷³ Rather, "the extent to which one

ing on whether they are secured or unsecured." *Id.* The court recognized that, under its approach, the mortgagee's § 506(a) unsecured claim would "obviously . . . not be fully satisfied." *Id.* at 179. Nevertheless, the court concluded that bifurcating Federal Home's claim (and thus treating the § 506(a) unsecured claim the same as other unsecured claims) "does not, for purposes of § 1322(b)(2), modify its 'rights,' but rather simply determines how, under the Code, its right to payment must be satisfied." *Id.* at 180. The authors submit that Federal Home's state law right to payment would not be "satisfied," but would of course be "modified" with respect to any amount of the § 506(a) unsecured claim that would not be paid. Perhaps the court meant merely that Federal Home's rights with respect to the amount of its § 506(a) secured claim were not modified.

168. *Id.* at 180. Federal Home cited § 101(5)(a) which defines "claim" as any "right to payment, whether or not such right is . . . secured, or unsecured." *Id.*

169. *Id.*

170. *Id.* (citing *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 127 (3d Cir. 1990) (following the Ninth Circuit's view that the "other than" clause is best read to refer to secured claims); *Houglan v. Lomas & Nettleton Co.* (*In re Houglan*), 886 F.2d 1182, 1184 (9th Cir. 1989) (stating that the "other than" clause certainly refers to what precedes it)). Additionally, the court cited *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989), and *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985), for the proposition that "under the rule of the last antecedent, [a] qualifying phrase applies to what immediately precedes it." *Bellamy*, 962 F.2d at 180.

171. *Bellamy*, 962 F.2d at 181.

172. *Id.* See *infra* note 215 for a discussion of why this argument is irrelevant.

173. *Bellamy*, 962 F.2d 176, 181 (citing *Pittsburgh & Lake Erie R.R. Co. v. Railway*

holds a secured claim must in the first instance be determined according to [section] 506(a).¹⁷⁴ In the absence of a conflict, the argument that a specific provision must control a conflicting general provision has no significance.¹⁷⁵

Next, the court considered whether the legislative history of § 1322(b)(2) demonstrated a congressional intent to prevent strip down.¹⁷⁶ The court pointed out that under Chapter XIII of the old Bankruptcy Act a plan could not affect a claim secured by real estate.¹⁷⁷ The court asserted that “in seeking to promote the ‘fresh start’ objective of the bankruptcy law, the House version of [section] 1322(b)(2)¹⁷⁸ was designed to allow debtors to provide for the modification of claims of mortgagees¹⁷⁹ Due to concern over the effect on the home lending industry, “the Senate version of [section] 1322(b)(2)¹⁸⁰ retained Chapter XIII’s exception for mortgagees . . . allowing the Chapter 13 plan to ‘modify the rights of holders of secured and unsecured claims, except claims wholly secured by real estate mortgages.’¹⁸¹

The final version was a compromise¹⁸² between the House and Senate versions.¹⁸³ Because the House version provided no protection and the Senate version kept the full Chapter XIII protection, a “compromise” could have fallen anywhere in between. Thus the most that the legislative history could show is that “[section] 1322(b)(2) was designed to provide greater protection to home mortgage lenders than other secured creditors,” which was “of course, plain on the face of the statute itself.”¹⁸⁴ The legislative history provided no guidance to the extent of that greater protection or whether it included a ban on home mortgage

Labor Executives’ Ass’n, 491 U.S. 490, 510 (1989); *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (explaining that statutory construction is a “holistic endeavor” apparently ambiguous language may be clarified when viewed in context of statutory scheme as a whole)).

174. *Id.*

175. *Id.* (citing *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982)).

176. *Id.*

177. *Id.*

178. *See supra* note 110 for reference to the House version.

179. *Bellamy*, 962 F.2d at 181.

180. *See supra* note 111 for reference to the Senate version.

181. *Bellamy*, 962 F.2d at 181 (citing S. Rep. No. 989, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5927).

182. *See* 124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S.C.C.A.N. 6436, 6481; 124 Cong. Rec. S17406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), reprinted in 1978 U.S.C.C.A.N. 6505, 6550.

183. *Bellamy*, 962 F.2d at 182.

184. *Id.*

strip down.¹⁸⁵ The court concluded that limiting the "protective scope" of § 1322(b)(2) "to the value of the property securing the claim cannot be regarded as in conflict with the legislative history."¹⁸⁶ In the court's view, permitting strip down would still leave the home mortgagee with greater protection than other secured creditors. The secured claim portion of other undersecured creditors' claims could be modified, but not the secured claim portion of home mortgagees' claims.¹⁸⁷ The court determined that "[t]his accords with the only discernible congressional purpose—to give additional protection to home mortgage lenders."¹⁸⁸

The court was simply wrong—as we demonstrate below¹⁸⁹—in stating that the "other than" clause's interpretation provided any "greater protection" or "additional protection" for Federal Home's § 506(a) secured claim.

The court in *Bellamy* also rejected several additional arguments. First, it was not convinced that applying § 506(a) to bifurcate Federal Home's claim was itself a modification prohibited under § 1322(b)(2). Because § 1322(b)(2) protects only bifurcated § 506(a) secured claims from modification, the court determined that the bifurcation itself was not a prohibited modification.¹⁹⁰ Second, the court rejected the argument that a debtor who seeks to cure and reinstate a defaulted mortgage under § 1322(b)(5) must reinstate the entire mortgage. Instead, the debtor may reinstate the mortgage "in its stripped-down form" with a reduced principal amount equal to the § 506(a) secured claim and make the regular payments until that reduced principal amount is paid off.¹⁹¹ Third, the

185. *Id.*

186. *Id.*

187. *Id.* (citing *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 128 (3d Cir. 1990)).

188. *Id.* (citing *Eastland Mortgage Co. v. Hart (In re Hart)*, 923 F.2d 1410, 1415 (10th Cir. 1991)). The court also noted that the Senate Report on the bankruptcy bill supports the proposition that "secured claims" in § 1322(b)(2) means § 506(a) secured claims. *Bellamy*, 962 F.2d at 183. The Senate Report states:

Throughout the bill, references to secured claims are only to the claim determined to be secured under this subsection, and not to the full amount of the creditor's claim. This provision abolishes the use of the terms "secured creditor" and "unsecured creditor" and substitutes in their places the terms "secured claim" and "unsecured claim."

S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5854.

189. See *supra* notes 301-42 and accompanying text.

190. *Bellamy*, 962 F.2d at 184.

191. *Id.* at 184-85. However, it should be noted that this approach creates such

court rejected Federal Home's argument that strip down should not be permitted because it could lead to the absurd result that, among undersecured creditors, only undersecured home mortgagees would not be entitled to payments with a full present value equal to the value of the collateral.¹⁹² Fourth, the court rejected the contention that permitting strip down would give the debtor an unfair "windfall," the right to the value of the home's future appreciation, at the mortgagee's expense.¹⁹³ Fifth, the court was not persuaded that strip down fails to further the Bankruptcy Code's "fresh start" policy.¹⁹⁴ Sixth, the court was not moved by the arguments that if strip down is permitted "available home mortgage funds will shrink,"¹⁹⁵ or that Federal Home should be exempted from strip down because of its status as "an instrumentality of the United States with a statutory mission to increase the availability of residential mortgages."¹⁹⁶

B. *The Key Anti-Strip Down Case: In re Nobelman*

After *Bellamy*, it appeared that Chapter 13 home mortgage strip down would eventually be generally accepted. *Bellamy* was the fourth recent circuit court case to allow strip down,¹⁹⁷ no circuit court had held to the contrary.¹⁹⁸ However, on August 13, 1992, the Fifth Circuit Court of Appeals, in *Nobleman v. American Savings Bank (In re Nobleman)*,¹⁹⁹

complexities that it cannot be correct; debtors who use § 1322(b)(5) cannot strip down their mortgages. See *infra* notes 300-42 and accompanying text.

192. *Bellamy*, 962 F.2d at 185-86. For a further discussion of the "present value" argument, see *infra* notes 424-33 and accompanying text.

193. *Id.* at 186. For a further discussion of the "windfall" argument, see *infra* notes 438-42 and accompanying text.

194. *Id.* In most cases, strip down perverts the fresh start policy by aiding only those debtors who can afford to continue paying their regular mortgage payments at the time of their financial distress. Additionally, strip down provides its only benefit to them years later, presumably long after their financial distress has ended. For a further discussion of the fresh start policy, see *infra* notes 434-36 and accompanying text.

195. *Bellamy*, 962 F.2d at 186. See *infra* notes 447-50 and accompanying text.

196. *Bellamy*, 962 F.2d at 186.

197. The four cases are: *Bellamy v. Federal Home Mortgage Corp. (In re Bellamy)*, 962 F.2d 176 (2d Cir. 1992), decided on April 21, 1992; *Eastland Mortgage Co. v. Hart (In re Hart)*, 923 F.2d 1410 (10th Cir. 1991), decided on January 17, 1991; *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123 (3d Cir. 1990) decided on February 9, 1990; and *Hougland v. Lomas & Nettleton Co. (In re Hougland)*, 886 F.2d 1182 (9th Cir. 1989), decided on October 4, 1989.

198. There had been dicta to the contrary in the Fifth and Ninth Circuits. See *supra* note 48. Nevertheless, in *Hougland*, 886 F.2d 1182 (9th Cir. 1989), the Ninth Circuit ignored its dicta and permitted strip down.

199. 968 F.2d 483 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (U.S. Dec. 7, 1992)

held that § 1322(b)(2)'s "other than" clause prohibited bifurcation of home mortgages under § 506(a).²⁰⁰

In 1984, the Nobelmans gave American Savings Bank a deed of trust on their principal residence—a condominium—to secure a loan of \$68,250.²⁰¹ In 1990, the Nobelmans filed a Chapter 13 petition.²⁰² At that time, the mortgage was in default,²⁰³ the home was worth \$23,500,²⁰⁴ and the Nobelmans owed American Savings \$71,335.04. When the petition was filed, the monthly mortgage payment was \$675.82; the last payment was due on July 1, 2014.²⁰⁵ Under their proposed plan, the Nobelmans would pay American directly "at the contract rate only up to the scheduled value of the condominium," and would also pay the arrearages.²⁰⁶ The plan treated the \$41,257.66 debt balance as an unsecured claim and provided that the unsecured creditors would receive nothing.²⁰⁷

The bankruptcy court denied confirmation, concluding that "[t]he plan impermissibly proposes to modify [American Savings'] claim in violation of § 1322(b)(2)."²⁰⁸ The district court affirmed, stating the issue to be "whether the Nobelmans may bifurcate a claim secured only by a lien on their principal residence and then modify the unsecured claim without violating section 1322(b)(2)."²⁰⁹

The court of appeals also affirmed, "finding that the use of 11 U.S.C. § 506 to bifurcate this claim would impermissibly modify the rights of American Savings Bank under 11 U.S.C. § 1322(b)(2)."²¹⁰ The court of-

(No. 92-641). The Fifth Circuit opinion misspelled the Nobelmans' name.

200. *Id.* at 484.

201. *Id.*

202. *In re Nobelman*, 129 B.R. 98, 99 (N.D. Tex. 1991), *aff'd*, 968 F.2d 483 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (U.S. Dec. 7, 1992) (No. 92-641).

203. *Nobleman*, 968 F.2d at 485 (noting the existence of arrearages that would be paid through the plan).

204. The plan valued the home at that amount. Mr. Nobelman's valuation testimony in support of that value was not controverted. *Id.*

205. Telephone Interview with Michael J. Schroeder, an attorney at Miller, Davis & Opper, in Dallas, Tex., representing American Sav. Bank (Dec. 31, 1992). The mortgage (technically a deed of trust) was a 30-year mortgage with a variable rate of interest. *Id.*

206. *Nobleman*, 968 F.2d at 485.

207. *Id.*

208. *In re Nobelman*, 129 B.R. at 99 (quoting from the bankruptcy court's conclusions of law).

209. *Id.* at 100.

210. *Nobleman*, 968 F.2d at 484. It must be noted that the issue is not strictly

ferred several reasons for its holding.²¹¹

First, the court stated that § 1322(b)(2)'s "other than" clause appeared to conflict with § 506(a).²¹² Specifically, applying § 506(a) to bifurcate American's claim into both a secured claim and an unsecured claim would allow the plan to modify the unsecured portion. That would appear to conflict with the "other than" clause's prohibition on modifying the rights of holders of secured claims secured only by the debtors' principal residence.²¹³ When two provisions conflict, the more specific provision should prevail.²¹⁴ Thus, the "other than" clause prevails and pre-

whether § 506(a) might be applied to bifurcate the undersecured mortgagee's claim. Rather, the issue is whether § 1322(b)(2), or some other provision, authorizes or prohibits the elimination of the lien securing the § 506(a) unsecured claim of an undersecured mortgagee. The district court's statement of the issue acknowledges that determining whether the modification is permissible is a key step in the analysis. Perhaps the Fifth Circuit used the term "bifurcation" as shorthand for "bifurcate and modify the resulting unsecured claim."

211. *Id.* at 487-89.

212. *Id.* at 487-88.

213. *Id.*

214. *Id.* at 488. For cases that rely on this argument to prohibit strip down, see *In re Mitchell*, 125 B.R. 5, 6 (Bankr. D.N.H. 1991) (stating that the better-reasoned cases are those holding that the specific language of § 1322(b)(2) controls over the general language of § 506(a)); *In re Christiansen*, 121 B.R. 63, 64 (Bankr. D. Colo. 1990) (explaining that § 1322(b)(2) is an exception to the general code provision of § 506(a)); *In re Chavez*, 117 B.R. 733, 735 (Bankr. S.D. Fla. 1990) (noting that § 506(a) is a provision of general applicability whereas § 1322(b)(2) only applies to Chapter 13 cases); *In re Sauber*, 115 B.R. 197, 199 (Bankr. D. Minn. 1990) (concluding that "[t]he application of general concepts is not universal in the scheme of the Code, but is subject to specific limitation, and even total disregard, in some instances"); *In re Schum*, 112 B.R. 159, 160-61 (Bankr. N.D. Tex. 1990) (stating that "[t]he specific provisions found in Chapter 13 must be accepted as controlling over the general provisions of Chapter 1, 3, and 5"); *In re Kaczmarczyk*, 107 B.R. 200, 202 (Bankr. D. Neb. 1989) (explaining that "one principle of statutory construction provides that where two statutes in the same enactment conflict, the general language of one section does not apply or prevail over matters specifically addressed in another section"); *In re Russell*, 93 B.R. 703, 705 (D.N.D. 1988) (concluding that "the specific language of § 1322(b)(2) would prevail over the general language of § 506"); *In re Shaffer*, 84 B.R. 63, 66 (Bankr. W.D. Va. 1988) (stating that "[w]hile courts have recognized the general applicability of 11 U.S.C. § 506 in bankruptcy cases, its applicability has been limited where more specific statutory provisions apply"); *In re Catlin*, 81 B.R. 522, 524 (Bankr. D. Minn. 1987) (explaining that to the extent § 1322(b)(2) is inconsistent with and contradictory to Chapter 5 provisions, § 1322(b)(2) should supersede them); *In re Hemsing*, 75 B.R. 689, 691-92 (Bankr. D. Mont. 1987) (stating that "regardless of the inclusiveness of the general language of a statute, it does not apply or prevail over matters specifically dealt with in another part of the same enactment"); *In re Hynson*, 66 B.R. 246, 249 (Bankr. D.N.J. 1986) (concluding that "[t]his court accepts the tenet of statutory construction which provides that regardless of the inclusiveness of the general language of a statute, it does not apply or prevail over matters specifically dealt with in another part of the same enact-

vents bifurcation of the home mortgage claim under § 506(a).²¹⁵

Second, the court asserted that the "rights" protected by the "other than" clause extend beyond the § 506(a) secured claim. The court stated:

[S]ection 1322(b)(2) describes its subject matter as the modification of "the rights of holders of" claims, not as the modification of claims as such; thus, the section can properly be read as *excepting* from its reach modification of "the rights of holders of . . . a claim secured only by a security interest in real property that is the debtor's principal residence . . ." Therefore, even if the entirety of such a claim is not a secured claim (as per section 506(a)), the rights of a holder of such a claim may not be modified under section 1322(b)(2).²¹⁶

The court's argument rests on the proposition that an undersecured home mortgagee who has no other collateral holds a § 506(a) secured claim secured only by the home.²¹⁷ Since the mortgagee is such a holder, § 1322(b)(2) prohibits modifying the mortgagee's "rights." However, the protected "rights" are not explicitly limited in § 1322(b)(2) to the

ment"); *In re Smith*, 63 B.R. 15, 17 (Bankr. D.N.J. 1986) (stating that "[h]owever inclusive may be the general language of the statute, it will not be held to apply or prevail over matters specifically dealt with in another part of the same enactment").

215. *Nobleman*, 968 F.2d at 488. One of two assumptions must be implicit in the court's argument. Either the court assumed that the term "secured claim" bears its general meaning in § 1322(b)(2) (embracing the entire mortgage debt) and not the technical § 506(a) meaning, or else the court assumed that the "rights" of the holder of a § 506(a) secured claim include lien rights with respect to the entire debt. The court asserted the latter of the assumptions as a completely separate argument. *See id.* Hence, the court may have had the first implicit assumption in mind. Although both assumptions are defensible, they also render unnecessary the court's appeal to the "specific prevails over general" rule of statutory construction. Under either of those assumptions, the "other than" clause would bar strip down regardless of whether § 506(a) applied to bifurcate the mortgagee's claim. Even if § 506(a) could be used to bifurcate the claim, the bifurcation could not have any effect on the mortgagee's rights. Although there might be a need to apply § 506(a) in other situations to determine the amounts of the mortgagee's technical § 506(a) secured and unsecured claims, the result would not affect the scope of the "other than" clause's prohibition on modification. For example, if the Chapter 13 debtor decided not to try to keep the home, § 506(a) bifurcation could be used to determine the amount of the mortgagee's unsecured claim for purposes of participation in the Chapter 13 plan while the foreclosure was pending. We believe the practical problems with such an approach are not as great as Professor Howard suggests. *See* Margaret Howard, *Dewsnapping the Bankruptcy Code*, 1 J. BANKR. L. & PRAC. 513, 518 (July-Aug. 1992) (suggesting practical problems in Chapter 7 context).

216. *Nobleman*, 968 F.2d at 488 (alterations in original) (citations omitted).

217. That is, unless senior encumbrances equal or exceed the value of the collateral. *See supra* note 54; *see, e.g., Spadel v. Household Consumer Discount Co. (In re Spadel)*, 28 B.R. 537, 538-39, 540 (Bankr. E.D. Pa. 1983).

mortgagee's rights regarding the portion of the mortgage debt equal to the amount of the § 506(a) secured claim. Rather, the mortgagee's protected "rights" can properly be considered to extend to the entire mortgage debt. Because those rights, under nonbankruptcy law, include the right to have a lien on the home for the entire debt regardless of the home's value,²¹⁸ strip down is prohibited whether or not the term "secured claims" in § 1322(b)(2) bears a technical § 506(a) meaning.²¹⁹

Further, it appears that the court, in the passage quoted above, may have suggested a third reason for prohibiting strip down. The court stated that § 1322(b)(2) can be read as prohibiting "modification of the rights of holders of . . . a claim" secured only by the debtor's home.²²⁰

218. Courts have held that other nonbankruptcy rights include the following: the right to full repayment of the loan; the right to receive the same monthly mortgage payment provided for in the contract; the right to the same interest rate; and the right to benefit from appreciation of the property during the bankruptcy. See, e.g., *In re Gianguzzi*, 145 B.R. 792, 794 (Bankr. S.D.N.Y. 1992) (stating "[m]anifestly, the reduction in interest rate is also an impermissible modification proscribed under 11 U.S.C. § 1322(b)(2)"); *Etchin v. Star Servs.*, 128 B.R. 662, 667 (Bankr. W.D. Wis. 1991) (explaining that one of the rights was the right to benefit from any appreciation during the bankruptcy); *In re Hyden*, 112 B.R. 431, 433 (Bankr. W.D. Okla. 1990) (explaining that the size and timing of the installment payment will not be altered; thus, the scheduled monthly contract payment amount will remain the same); *In re Demoff*, 109 B.R. 902, 920 (Bankr. N.D. Ind. 1989) (same); *In re Ross*, 107 B.R. 759, 762 (Bankr. W.D. Okla. 1989) (same); *In re Brown*, 91 B.R. 19, 22 (Bankr. E.D. Va. 1988) (concluding that even if the claim were undersecured, the creditor would "still receive payment in full because the contract cannot be modified"); *In re Basteder*, 59 B.R. 878 (Bankr. S.D. Ohio 1986) (concluding that a change in the payment schedule violated § 1322(b)(2)); *In re Rorie*, 58 B.R. 162 (Bankr. S.D. Ohio 1985) (concluding that a reduction in the interest rate on residential mortgages was not permitted under § 1322(b)(2)); *In re Ownes*, 36 B.R. 661 (Bankr. D. Tenn. 1984) (explaining that a change in the interest rate improperly modified the mortgagee's claim). But see *In re Diquinzio*, 110 B.R. 628, 629 (Bankr. D.R.I. 1990) (implying that smaller payments can be made by stating that debtors are free to modify their Chapter 13 payments to the secured creditor at least to the extent of the unsecured portion); *In re Neal*, 10 B.R. 535 (Bankr. D. Ohio 1981) (stating that an alteration of the contractual interest rate was not a modification).

219. For further discussion of this argument, see *infra* notes 373-84 and accompanying text. For a discussion of the Second Circuit's rejection of this argument in *Bellamy*, see *supra* notes 164-67 and accompanying text. For cases that rely on this argument, see, e.g., *In re Barnes*, 146 B.R. 854, 855 (Bankr. D. Okla. 1992) (concluding that § 1322(b)(2) forbids the modification of "the rights of holders of secured claims" who have a lien secured only by the principal residence); *In re Etchin*, 128 B.R. 662, 666 (Bankr. W.D. Wis. 1991) (stating that it is the "rights" of the claimholder, not the claim, that cannot be modified); *In re Hayes*, 111 B.R. 924, 925 (Bankr. D. Or. 1990) (explaining that modifying the rights of the claimholder is prohibited); *In re Hynson*, 66 B.R. 246, 253 (Bankr. D.N.J. 1986) (same).

220. The court's ellipsis marks the omission of the section's reference to "secured claims."

The court may be suggesting that the word "claim" in the "other than" clause is not limited in meaning to the "secured claims" referenced earlier in § 1322(b)(2). Thus the "other than" clause could broadly prohibit modification of "claims"—§ 506(a) secured *and* unsecured claims—that are secured under nonbankruptcy law by the debtor's home.²²¹

Finally, the court prohibited strip down because the legislative history showed that Congress did not intend to permit strip down.²²² The court noted that the Senate had "receded from its position that no 'modification' was to be permitted of any mortgage secured by real estate" and instead agreed to the "other than" clause.²²³ The Senate insisted on keeping at least this "limited bar" because of the "valuable social service" performed by home lenders and their need for "special protection."²²⁴ The court noted that the House version was favorable to debtors, allowing modification of the rights of all secured and unsecured creditors, while the Senate version was favorable to lenders.²²⁵ According to the legislative leaders, § 1322(b)(2) was a "compromise."²²⁶ Accordingly, the court held that its interpretation of § 1322(b)(2) properly reflects the compromise that was reached and prevents the intended protection for home mortgagees from being vitiated.²²⁷

221. The authors submit that the *Houglan* court is right on this particular point and the *Nobelman* court is wrong. The term "claim" in the "other than" clause cannot reasonably be read to refer to anything except the "secured claims" referenced in the preceding language in § 1322(b)(2). Thus, the term "claim" in the "other than" clause should be given the same meaning as the term "secured claims" in the preceding language.

222. *Nobleman*, 968 F.2d at 488. The court relied on the legislative history discussion in *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236 (5th Cir. 1984). Dicta in *Grubbs* indicated that strip down should not be permitted. See *id.* at 246. See *infra* notes 385-99 and accompanying text for the authors' analysis of the legislative history.

223. *Nobleman*, 968 F.2d at 488 (quoting *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 245 (5th Cir. 1984)). The Senate "instead agreed to a provision that modification was to be barred only as to a claim 'secured only by a security interest in real property that is the debtor's principal residence.'" *Nobleman*, 968 F.2d at 488. For the Senate version of § 1322(b)(2), see S. 2266, 95th Cong., 2d Sess. (1978), reprinted in [Appendix 3] COLLIER ON BANKRUPTCY, Part VII (Lawrence P. King et al., eds., 15th ed. 1992)).

224. *Nobleman*, 968 F.2d at 489. The Senate felt this special service warranted special protection from modification. *Id.*

225. *Id.* For the House version of § 1322(b)(2), see H.R. 8200, 95th Cong., 1st Sess. (1977), reprinted in [Appendix 3] COLLIER ON BANKRUPTCY, *supra* note 223, Part III.

226. *Nobleman*, 968 F.2d at 489. See also *supra* notes 182-83 and accompanying text.

227. *Nobleman*, 968 F.2d at 489. The court also relied on *Dewsnup v. Timm*, 112 S.

III. THE IMPACT OF DEWSNUP

A. *The Dewsnup Decision*

On January 15, 1992, the United States Supreme Court held in *Dewsnup v. Timm*²²⁸ that a debtor cannot use § 506(d)²²⁹ to strip down a creditor's lien in a Chapter 7 case to the fair market value of the property subject to that lien.²³⁰ Although the *Dewsnup* decision dealt with a Chapter 7 case and the interplay between § 506(a) and (d), the decision has found its way into the controversial Chapter 13 arena. Some bankruptcy judges have come to call *Dewsnup* "the most distinguished case" with regard to the Chapter 13 mortgage strip down issue, not because it is given a place of honor but because so many pro-strip down courts have distinguished it.²³¹ Even so, many courts have relied on *Dewsnup* and refused to permit strip down.²³² In fact, some bankruptcy courts in the Tenth Circuit have held that *Dewsnup* has, in effect, overruled the Tenth Circuit case *Eastland Mortgage Co. v. Hart (In re Hart)*,²³³ a decision that allowed strip down.²³⁴ Other courts have relied on *Dewsnup* to hold that bifurcating undersecured mortgage claims

Ct. 773 (1992), as lending support to its refusal to permit bifurcation. See *Nobleman*, 968 F.2d at 483.

228. 112 S. Ct. 773 (1992).

229. See *supra* note 64 for statutory text.

230. *Dewsnup*, 112 S. Ct. at 778.

231. We thank the Honorable Barry Russell, Bankruptcy Judge for the United States Bankruptcy Court, Central District of California, for providing this information and bit of humor. For cases that have distinguished *Dewsnup*, see, e.g., *Lomas Mortgage USA v. Wiese*, 990 F.2d 1279, 1282 (9th Cir. 1992); *Sapos v. Provident Inst. of Sav.*, 967 F.2d 918, 920-21 (3d Cir. 1992); *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 182-84 (2d Cir. 1992); *In re Jones*, 1993 WL 49925 (Bankr. E.D. Mich. 1993); *Union Mortgage Co., Inc. v. Avret (In re Avret)*, 146 B.R. 47, 49-50 (S.D. Ga. 1992); *Union Planters Nat'l Bank v. Sainz-Dean (In re Sainz-Dean)*, 142 B.R. 784, 786-87 (D. Colo. 1992); *In re Cardinale*, 142 B.R. 42, 42-43 (Bankr. D.R.I. 1992).

232. See, e.g., *Nobleman v. American Sav. Bank (In re Nobleman)*, 968 F.2d 483, 487 (5th Cir.), cert. granted, 113 S. Ct. 654 (1992) (No. 92-641); *In re Barnes*, 146 B.R. 854, 854-55 (Bankr. W.D. Okla. 1992); *In re Dyer*, 142 B.R. 364, 368 (Bankr. D. Ariz. 1992); *In re Doss*, 143 B.R. 952, 954 (Bankr. E.D. Okla. 1992); *In re Strober*, 136 B.R. 614, 618-19 (Bankr. E.D.N.Y. 1992); *Matter of Davidoff*, 136 B.R. 567, 569 (Bankr. M.D. Fla. 1992).

233. For a discussion of *In re Hart*, see *supra* notes 123-36 and accompanying text.

234. *In re Barnes*, 146 B.R. 854, 855 (Bankr. W.D. Okla. 1992). See *Chapter 13 Debtor, Post-Dewsnup, Can't Cramdown Mortgage to Value of Home*, BNA BANKR. L. DAILY, Nov. 24, 1992, at 6 (stating that "[t]he effect of *Dewsnup* on Chapter 13 cases has created confusion in the Western District of Oklahoma . . . as bankruptcy and district judges have held that bifurcation is both permitted and prohibited post-*Dewsnup*").

is permitted, but strip down cannot follow. Thus, the lien remains on the property for the unsecured portion of the claim.²³⁵

Dewsnup is not determinative. However, its rationale helps to support the anti-strip down position.

The facts of *Dewsnup* are unusual. The Dewsnups borrowed \$119,000 from the lenders and gave them a deed of trust on two parcels of Utah farmland as security.²³⁶ A year later the Dewsnups defaulted on the loan, but the lenders waited two more years before commencing the foreclosure process.²³⁷ The Dewsnups filed two successive Chapter 11 bankruptcy petitions, each of which was dismissed²³⁸ because the Dewsnups failed to propose a reorganization plan in a timely manner.²³⁹ The Dewsnups then filed a Chapter 7 petition in 1984.²⁴⁰ The succession of bankruptcy filings had prevented the lenders from foreclosing.²⁴¹ The trustee did not sell the land in the Chapter 7 case, apparently because it was worth less than the amount owed the secured lenders. For some reason the secured lenders apparently did not seek relief from the automatic stay to allow foreclosure, even though they had the right to such relief.²⁴² In 1987, three years after the Dewsnups filed for Chapter 7 liquidation, they filed an adversary proceeding, seeking to strip down the lenders' mortgage lien to the value of the farmland.²⁴³

235. See, e.g., *In re Dyer*, 142 B.R. 364, 369-70 (Bankr. D. Ariz. 1992) (holding that bifurcation was permissible although lien avoidance was not).

236. *Dewsnup v. Timm*, 112 S. Ct. 773, 775 (1992).

237. *Id.* at 775-76.

238. *Id.* at 776.

239. Fruman Jacobson & Brian Bentcover, *Secured Creditors Benefit from Dewsnup*, NAT'L L.J., May 11, 1992, at 21.

240. *Dewsnup*, 111 S. Ct. at 776. The Supreme Court noted the unfortunate fact that at some point Mr. Dewsnup died. *Id.* at 775. Apparently his death was not the cause of the initial financial distress, although his illness may have been. Further, his death did not cause the lenders' two-year forbearance to foreclose. The Tenth Circuit opinion showed that he died after the filing of the Chapter 7 petition. *Dewsnup*, 908 F.2d 588, 589 (10th Cir. 1990) (stating that "Aletha and Lamar Dewsnup filed a Chapter 7 bankruptcy petition in 1984").

241. *Dewsnup*, 112 S. Ct. at 776.

242. See 11 U.S.C. § 362(d)(2) (1988) (providing for relief from the automatic stay to permit "act against property" where debtor has no equity in the property and the property is not necessary to an effective reorganization). The Dewsnups had no equity in the land, and their bankruptcy case was a Chapter 7 liquidation case, not a reorganization of any kind. *Dewsnup*, 112 S. Ct. at 776.

243. *Dewsnup*, 112 S. Ct. at 776.

At that time the *Dewsnups* owed approximately \$120,000 to the lenders,²⁴⁴ but the Utah farmland was worth only \$39,000.²⁴⁵ According to the Dewsnups, strip down was compelled by “the interrelationship of the security-reducing provision of § 506(a) and the lien-voiding provision of § 506(d).”²⁴⁶ Section 506(a) limited the creditors’ “allowed secured claim” to \$39,000.²⁴⁷ Under § 506(d), the lien on the farmland for the remaining \$81,000 would be void, because to that extent the lien would secure a claim which was not an “allowed secured claim.”²⁴⁸

The bankruptcy court refused to grant this relief.²⁴⁹ The court “indulged in the assumption that the property had been abandoned by the trustee pursuant to § 554(a).”²⁵⁰ The court reasoned that the abandoned property “no longer fell within the reach of § 506(a), which applies only to ‘property in which the estate has an interest,’ and therefore was not covered by § 506(d).”²⁵¹ The district court affirmed without an opinion.²⁵²

The Court of Appeals for the Tenth Circuit also affirmed, relying on the same abandonment theory.²⁵³ The Tenth Circuit further asserted that to allow strip down in Chapter 7 would be to allow homeowners greater benefits under Chapter 7 than under Chapter 13,²⁵⁴ which would be inconsistent with Congress’ preference that debtors use Chapter 13 rather than 7. According to the court, homeowners would do better under Chapter 7 than Chapter 13 because § 1322(b)(2) prevents a Chapter 13 plan from modifying “the rights of secured claim holders where the claim is secured only by a security interest in real property which is the debtor’s primary residence.”²⁵⁵ Thus, at least in dictum, the Tenth Cir-

244. *Id.* Presumably if no payments had been made since 1979 on the original \$119,000 debt, the debt in 1987 would have grown by accrual of interest to much more than \$120,000. Either the Dewsnups made some payments, or the lenders received a substantial dividend in the Chapter 7 case out of other property of the estate on account of their § 506(a) unsecured claim.

245. *Id.*

246. *Id.* See *supra* note 29 for the text of § 506(a) and note 64 for the text of § 506(d).

247. See 11 U.S.C. § 506(a) (1988).

248. *Dewsnup*, 112 S. Ct. at 776.

249. *Id.* (citing *Dewsnup v. Timm (In re Dewsnup)*, 87 B.R. 676 (Bankr. D. Utah 1988)).

250. *Id.* Section 554(a) provides in relevant part: “[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. § 554(a) (1988).

251. *Dewsnup*, 112 S. Ct. at 776.

252. *Id.*

253. *Dewsnup*, 908 F.2d 588, 592-93 (10th Cir. 1990), *aff’d*, 112 S. Ct. 773 (1992).

254. *Id.* at 592.

255. *Id.*

cuit indicated that home mortgage strip down was not available in Chapter 13 bankruptcy.²⁵⁶ Moreover, the Tenth Circuit asserted that permitting strip down of real estate mortgages under § 506(d) would sidestep § 722's²⁵⁷ limitation of redemption rights to certain tangible personal property. Therefore, it would inequitably and unfairly expand debtors' rights "far beyond what is contemplated in the Code."²⁵⁸

The Supreme Court granted certiorari²⁵⁹ to resolve the conflict between the Tenth Circuit's holding and a contrary holding by the Third Circuit.²⁶⁰

Over a strong dissent by Justice Scalia,²⁶¹ the Supreme Court affirmed:²⁶² "[W]e hold that § 506(d) does not allow petitioner to 'strip down' respondents' lien because respondents' claim is secured by a lien and has been fully allowed pursuant to § 502."²⁶³ Justice Blackmun's

256. Whether this was dictum or *ratio decidendi*, the panel that decided *Eastland Mortgage Co. v. Hart (In re Hart)*, 923 F.2d 1410 (10th Cir. 1991), ignored it. Neither the majority opinion in *Hart*, which permitted strip down, nor the dissenting opinion, which argued that strip down rendered the "other than" clause "essentially meaningless," *id.* at 1417 (Brorby, J., dissenting), cited to the earlier Tenth Circuit decision in *Dewsnup*. None of the judges from the *Dewsnup* panel was on the panel that decided *Hart*.

257. Section 722 provides:

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such a lien.

11 U.S.C. § 722 (1988).

258. *Dewsnup*, 908 F.2d at 592.

259. *Dewsnup*, 111 S. Ct. 949 (1991).

260. See *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304 (3d Cir. 1989), overruled by *Dewsnup v. Timm*, 112 S. Ct. 773 (1992).

261. *Dewsnup*, 112 S. Ct. 773, 779 (1992) (Scalia, J., dissenting). Justice Souter joined the dissent.

262. *Id.*

263. *Id.* at 778. Section 502 provides, in part:

(a) A claim . . . proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.

(b) . . . if such objection to a claim is made, the court . . . shall determine the amount of such claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount except to the extent that—

(1) such claim is unenforceable against the debtor and property of the

majority opinion adopted an argument put forward by the secured creditors²⁶⁴ that

the words "allowed secured claim" in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a), which by its terms is not a definitional provision. Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured.²⁶⁵

The entirety of the lenders' claim, not just the § 506(a) secured component, therefore was an "allowed secured claim" within the meaning of the term in § 506(d) because the lenders' claim was "secured by a lien" and had been "fully allowed pursuant to § 502."²⁶⁶ Thus, the mortgage could not be stripped down.²⁶⁷

It is important for our purposes to see how the Supreme Court reached the unusual conclusion that the same term ("allowed secured claim") bears a different meaning in two subsections of the same Bankruptcy Code section. The Court found that the Bankruptcy Code was ambiguous; given that ambiguity, the Court was "not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected."²⁶⁸

debtor, under any applicable agreement or applicable law for a reason other than because such claim is contingent or unmaturred; . . .

11 U.S.C. § 502 (1988 & Supp. III 1991).

264. *Dewsnup*, 112 S. Ct. at 778. The majority opinion stated that this was also the position of the United States as *amicus curiae*. *Id.* at 777. Justice Scalia's dissent pointed out that the United States took a different approach (which Justice Scalia severely criticized). *Id.* at 781-82 (Scalia, J., dissenting). As Justice Scalia stated, the United States took the approach that § 506(d) only voids liens to the extent they *secure* a claim which is not an allowed secured claim. According to the United States, the lien of an undersecured mortgagee only *secures* the mortgagee's claim up to the value of the collateral, *for purposes of § 506*. Thus, to the entire extent that the mortgagee's lien *secures* the claim for purposes of § 506, it is an allowed secured claim; there is no extent to which the lien for purposes of § 506 *secures* a claim which is not an allowed secured claim, and thus no part of the lien can be voided under § 506(d). If no part of the lien is avoided, the entire lien, for the entire debt, passes unaffected through the bankruptcy case.

The majority apparently misunderstood the thrust of the United States' argument. The majority assumed that the United States could not simultaneously take the position that "a lien only 'secures' the claim in question up to the value of the security," for purposes of § 506, and the position that the lien should not be reduced to the value of the property. *Id.* at 777 n.2 (citations omitted). The key is that the refusal to consider the entire claim to be *secured* by the lien for § 506 purposes is simply, under the United States' view, a question of bankruptcy terminology which does not remove the lien rights of the mortgagee. On the contrary, it would prevent strip down of the mortgage.

265. *Id.* at 777.

266. *Id.* at 777-78.

267. *Id.* at 778.

268. *Id.*

Justice Scalia suggested that the majority found ambiguity in § 506(d) simply because the litigants disagreed over its meaning.²⁶⁹ The majority opinion could be read that way,²⁷⁰ but the majority probably had in mind the relation between § 506(d) and § 722.²⁷¹ Respondents and the United States had argued that allowing strip down under § 506(d) would render the § 722 redemption provision superfluous and its limitations on redemption ineffective.²⁷² As Justice Blackmun described it, the Tenth Circuit, in the opinion below, also argued that allowing strip down under § 506(d) "would be inconsistent with § 722 under which a debtor has a limited right to redeem certain personal property."²⁷³

Despite Justice Scalia's arguments to the contrary, allowing strip down under § 506(d) probably would render § 722 superfluous and its limitations ineffective.²⁷⁴ Thus, the Court correctly considered that the term

269. See *id.* at 781 (Scalia, J., dissenting).

270. "The foregoing recital of the contrasting positions of the respective parties and their amici demonstrates that § 506 . . . and its relationship to other provisions of the Code do embrace some ambiguities." *Id.* at 777.

271. See *supra* note 257 for the text of 11 U.S.C. § 722 (1988).

272. *Dewsnup*, 112 S. Ct. at 783-84.

273. *Id.* at 776 (citing *Dewsnup*, 908 F.2d 588, 592 (10th Cir. 1990)).

274. If the amount of the lien were stripped down by § 506(d) to the value of the collateral, how could a secured creditor refuse to accept payment of the amount of the lien in satisfaction of the lien? Of course, secured creditors sometimes refuse payment when prepayment would harm them economically, see *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988), but in the bankruptcy context creditors are anxious to accelerate the debt, not to wait for payment. Therefore, if § 506(d) stripped down liens, it would effectively constitute a redemption provision applicable to all collateral, real and personal. Section 722 permits the debtor to redeem property from liens by paying the amount of the § 506(a) secured claim, but that redemption right is limited to exempt or abandoned personal property intended primarily for personal, family, or household use. 11 U.S.C. § 722 (1988). See *supra* note 257 for statutory text.

The Third Circuit argued in *Gaglia* that using § 506(d) to strip down a second mortgagee's lien was not the equivalent of redemption because the debtors would not own the property free and clear even if they paid off the stripped-down second lien. *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304 (3d Cir. 1989). However, the concept of redemption is not limited to the redemption of property free and clear of all liens; it can apply to second liens. Suppose a Chapter 7 debtor owed \$3000 to a bank as first lienholder and \$1500 to a finance company as second lienholder on the debtor's \$3200 automobile. The debtor could use § 722 to redeem the car from the finance company's second lien on payment of \$200 cash. Of course, in *Dewsnup* strip down under § 506(d) would have allowed Mrs. Dewsnup to redeem the property free and clear on payment of the amount of the § 506(a) first mortgage secured claim. See *Dewsnup*, 908 F.2d at 592.

“secured claim” in § 506(d) might have a meaning other than the technical § 506(a) meaning.

Given the textual ambiguity, the Court was “not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.”²⁷⁵ The Court noted that preservation of liens in bankruptcy was clearly established under the Bankruptcy Act of 1898, and that the Court’s prior decisions, going all the way back to *Long v. Bullard*²⁷⁶ in 1886, expressed the Court’s commitment to that principle.²⁷⁷ The Court stated that apart from provisions concerning corporate reorganization proceedings under Chapter X of the Bankruptcy Act,²⁷⁸ “no provision of the pre-Code statute permitted involuntary reduction of the amount of a creditor’s lien for any reason other than payment on the debt.”²⁷⁹ Congress enacted the Bankruptcy Code with a full understanding of that practice; therefore, the Court was reluctant to accept an interpretation of the statute that would effect a major change in pre-Code practice “that is not the subject of at least some discussion in the legislative history.”²⁸⁰ Thus, the Court concluded that

to attribute to Congress the intention to grant the debtors the broad new remedy against allowed claims to the extent that they become “unsecured” for purposes of § 506(a) without the new remedy’s being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.²⁸¹

The Court also was concerned that strip down would divert to the debtor and away from the mortgagee (to whom it should rightly accrue under the parties’ bargain) any increase during the bankruptcy in the value of the property.²⁸²

It is important to note that the Court prohibited strip down even though § 506(a) acted to bifurcate the lenders’ mortgage claim. Of course, in *Dewsnup* itself (and in Chapter 7 cases after *Dewsnup*) § 506(a) allowed (and continues to allow) bifurcation of an undersecured mortgagee’s claim in order to give the mortgagee a proportional share of the estate with regard to the § 506(a) unsecured claim.²⁸³

275. See *Dewsnup*, 112 S. Ct. at 778.

276. 117 U.S. 617, 620-21 (1886).

277. *Dewsnup*, 112 S. Ct. at 778-79.

278. The Court’s reference is to 11 U.S.C. § 616(1) and (10) (1976), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). 11 U.S.C. § 616 was § 216 of the Bankruptcy Act, which was part of Chapter X, the Corporate Reorganizations chapter of the old Act.

279. *Dewsnup*, 112 S. Ct. at 779.

280. *Id.*

281. *Id.*

282. *Id.* at 778.

283. The Court in *Dewsnup* recognized this: “It is true that [the undersecured

B. *The Significance of Dewsnup*

The Court stated that it was focusing only upon the case before it, that hypothetical situations exposed the difficulty of a unified approach to interpreting the statute, and that those hypothetical situations and cases with other facts would have to "await their legal resolution on another day."²⁸⁴ Thus the court in *Dewsnup* did not determine whether the "other than" clause bars home mortgage strip down in Chapter 13 cases or determine the meaning of the term "secured claims" in § 1322(b)(2). However, the Court's holding that the term "secured claim" in § 506(d) bears a general meaning²⁸⁵ rather than the technical § 506(a) meaning is relevant in two ways.

First, the Court's holding should prevent § 506(d) from being used to strip down mortgages in Chapter 13 cases as well as in Chapter 7 cases. Justice Scalia was justifiably concerned that the Court's decision gave the same language two different meanings in the same section, § 506.²⁸⁶ Neither Justice Scalia nor the majority could conceivably countenance giving the same words in § 506(d) a different meaning depending on the Chapter under which the debtor filed the bankruptcy petition. The majority "express[ed] no opinion as to whether the words 'allowed secured claim' have different meaning in *other provisions* of the Bankruptcy

lienholder's] participation in the bankruptcy results in his having the benefit of an allowed unsecured claim as well as his allowed secured claim, but that does not strike us as proper recompense for what petitioner proposes by way of elimination of the remainder of the lien." *Id.* Commentators have misread the Court's statement to mean that, since obtaining an allowed unsecured claim is not enough recompense to make strip down appropriate, the undersecured mortgagee will not have an allowed unsecured claim. *See, e.g.,* Howard, *supra* note 215, at 517-18. The Court did not say that the undersecured mortgagee would not have an allowed unsecured claim for purposes of distribution, but rather that having an allowed unsecured claim simply was not *enough* recompense to make strip down appropriate. *See In re Dyer*, 142 B.R. 364, 368 (Bankr. D. Ariz. 1992) (recognizing that the Supreme Court in *Dewsnup* "determined that Section 506(a) should still be utilized, with an undersecured creditor to have a secured and an unsecured claim").

284. *Dewsnup*, 112 S. Ct. at 778.

285. Under the general meaning of the term, a mortgagee's entire claim is a "secured claim" regardless of the value of the property.

286. *Dewsnup*, 112 S. Ct. at 780 ("When § 506(d) refers to an 'allowed secured claim,' it can only be referring to that allowed 'secured claim' so carefully described two brief subsections earlier.") (Scalia, J., dissenting).

Code,²⁸⁷ but did hold that those words in § 506(d) bore the general meaning, not the § 506(a) technical meaning.²⁸⁸ Therefore, an undersecured creditor in a Chapter 13 case, for purposes of § 506(d), holds a secured claim equal in amount to the entire debt. The result is that to the full extent that the creditor's lien secures the debt under nonbankruptcy law, it is an "allowed secured claim"; none of it may be avoided under § 506(d).

The Court's holding is relevant in a second way. If the term "secured claim" bears the general meaning in § 506(d), then it is at least possible that it bears that general meaning in § 1322(b)(2).

Thus, for our purposes, there are two important lessons from the *Deusnup* holding: (1) home mortgage strip down (in fact strip down of any kind of secured claim) in Chapter 13 cannot be based on § 506(d); and (2) the term "secured claim" does not always bear the technical § 506(a) meaning.²⁸⁹ From the Court's *reasoning* we learn six additional lessons, for a total of eight: (3) given the deeply ingrained principle that liens pass through bankruptcy unaffected and unreduced in amount, liens cannot be stripped down or eliminated absent some specific authority for so doing;²⁹⁰ (4) courts should be slow to interpret ambiguous language as granting such specific authority, absent such authority under pre-Code law or any clear legislative history indicating an intent to grant such authority;²⁹¹ (5) there was such authority under pre-Code law for lien strip down in Chapter X corporate reorganization cases, but not in Chapter XIII cases;²⁹² (6) any increase during the bankruptcy proceeding in the value of overencumbered property "rightly accrues" to undersecured creditors and not to debtors;²⁹³ (7) application of § 506(a) to bifurcate an undersecured claim does not necessarily eliminate the lien which secures the § 506(a) unsecured claim;²⁹⁴ and (8) where a party suggests that Code language has a "plain meaning" which would render another provision superfluous, the language can be considered ambiguous, and other meanings should be considered.²⁹⁵ With these lessons in mind, we turn to a contextual analysis of the "other than" clause and related sections of the Bankruptcy Code.

287. *Id.* at 778 n.3 (emphasis added).

288. *Id.* at 777-78.

289. See *infra* notes 350-72 and accompanying text.

290. See *supra* notes 275-81 and accompanying text.

291. *Deusnup*, 112 S. Ct. at 778-79.

292. *Id.* at 779.

293. See *supra* text accompanying note 282.

294. See *supra* note 283 and accompanying text.

295. See *supra* notes 268-75 and accompanying text.

IV. THE PROPOSED CONTEXTUAL ANALYSIS

The "other than" clause²⁹⁶ prohibits Chapter 13 plans from modifying "the rights of holders of claims secured only by a security interest in real property that is the debtor's principal residence."²⁹⁷ The key question is what the phrase "rights of holders of claims" means. If it includes the right to a lien on the home for the entire mortgage debt, then home mortgage strip down is impermissible.

To determine whether it includes that right, we must place the "other than" clause in the context of related provisions of the Bankruptcy Code; in the context of the unmistakable Congressional intent to give special protection to home mortgage lenders; in the context of the unmistakable policies of the Bankruptcy Code of preserving and encouraging home ownership and providing a "fresh start" to needy and deserving debtors; and in the context of pre-Code law. Placing the "other than" clause in those contexts helps to show why it does not have the "plain meaning" that the pro-strip down courts believe it has.

In order to justify placing it in these contexts and to show why we should not just read the "other than" clause and apply whatever meaning may seem "plain," we will place the clause in the context of the typical fact pattern. This approach should dispel a demonstrably incorrect belief found in the pro-strip down cases: the belief that the "other than" clause provided special protection for the undersecured mortgagees in those cases even though strip down was permitted. Anti-strip down courts have argued that such a belief is incorrect and that allowing strip down "vitiates" the meaning of the "other than" clause.²⁹⁸ However, the anti-strip down courts have not clearly explained how seriously the meaning of the clause is vitiated. It is so seriously vitiated that an unquestioning acceptance of the interpretation given the clause by the pro-strip down courts cannot be justified by any appeal to a supposed "plain meaning."

296. The "other than" clause refers to that portion of § 1322(b)(2) which states "other than a claim secured only by a security in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2) (1988).

297. *Id.*

298. See, e.g., *Nobleman v. American Sav. Bank (In re Nobleman)*, 968 F.2d 483, 489 (5th Cir. 1992) (stating that its interpretation of the "other than" clause to prohibit strip down was proper, because otherwise the protection of § 1322(b)(2) would be vitiated), *cert. granted*, 113 S. Ct. 654 (1992) (No. 92-641); see also Klingenberg, *supra* note 4, at 465.

A. *Why Allowing Home Mortgage Strip Down Removes Almost All Meaning from the "Other Than" Clause in the Typical Case*

To see how allowing home mortgage strip down removes almost all meaning from the "other than" clause in the typical case, we must see how the related sections of the Bankruptcy Code operate in the typical Chapter 13 case involving an undersecured home mortgage.²⁹⁹ We return to the facts of *Houglan*³⁰⁰ and *Bellamy*³⁰¹ as a basis for the analysis.

In *Houglan*, the debtors owed Lomas \$51,000 on their mortgage, but the home was worth only \$47,240.³⁰² In *Bellamy*, the debtors owed Federal Home \$151,340 on a home worth \$127,500.³⁰³ The Ninth Circuit in *Houglan* and the Second Circuit in *Bellamy* permitted the debtors to modify the mortgagees' § 506(a) unsecured claims of approximately \$4000 and \$24,000, respectively, by eliminating the liens securing the unsecured claims and by paying the unsecured claims off at less than full value in the plan.³⁰⁴

In each case, the court argued that the "other than" clause provided special protection for the mortgagee's § 506(a) secured claim.³⁰⁵ Therefore, both courts found that allowing home mortgage strip down did not vitiate the "other than" clause or severely undermine its purpose.³⁰⁶ The court in *Houglan* twice made a point of saying that its interpretation of the "other than" clause gave special protection to the secured claim component of the residential real estate lender's claim.³⁰⁷ Apparently the court recognized that its interpretation of the "other than" clause would be absurd if it did not give special protection to Lomas' secured claim component.³⁰⁸

299. The typical case is one in which the debtor is in default on a first mortgage before the bankruptcy petition is filed, and therefore wishes to cure the default and, if the mortgage has been accelerated, to de-accelerate the mortgage.

300. For a discussion of *Houglan*, see *supra* notes 55-87 and accompanying text.

301. For a discussion of *Bellamy*, see *supra* notes 137-96 and accompanying text.

302. *Houglan v. Lomas & Nettleton Co. (In re Houglan)*, 886 F.2d 1182, 1182-83 (9th Cir. 1989).

303. *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 178 (2d Cir. 1992).

304. *Houglan*, 886 F.2d at 1185; *Bellamy*, 962 F.2d at 179.

305. *Houglan*, 886 F.2d at 1184; *Bellamy*, 962 F.2d at 182.

306. *Houglan*, 886 F.2d at 1184; *Bellamy*, 962 F.2d at 182 (stating that both the legislative history and the facial meaning of § 1322(b)(2) demonstrate an intent to provide additional protection to home mortgage lenders and that the court's holding provided that protection).

307. *Houglan*, 886 F.2d at 1184-85.

308. *Id.* at 1184.

To see whether the interpretation of the "other than" clause provided special protection for the home mortgagees' § 506(a) secured claims in *Houglund* and *Bellamy*, we must determine how the § 506(a) secured claims were actually treated in those cases. We must then ask whether the § 506(a) secured claims would have been treated the same way if the "other than" clause had not existed, or had not applied. If so, the "other than" clause provided no special protection, and as the Ninth Circuit conceded, interpreting the "other than" clause so as to allow strip down would severely undermine the purpose of the clause and would be absurd.³⁰⁹

The plans in *Bellamy* and, almost certainly, in *Houglund* did not modify the mortgagees' § 506(a) secured claims except to provide for curing of defaults and maintaining of payments under § 1322(b)(5).³¹⁰ Under the courts' analysis, the "other than" clause applied to protect the § 506(a) secured claim from modification. The only exception to the "other than" clause's prohibition of modification of the secured claims³¹¹

309. Two student notes may contain the kernel of this argument, but the relevant discussion in the articles is very brief. See Klingenberg, *supra* note 4, at 464 ("However, where the debtor elects to cure his default and maintain payments, the holders of home mortgages are treated identically to other secured creditors under the majority's interpretation of section 1322(b)(2)."); see also Nassen, *supra* note 4, at 990. Nassen's article states:

On the other hand, the repayment period of most home loans extends beyond the life of a Chapter 13 plan. In such cases, the claim secured by the debtor's residence is already immune from the 'cramdown' provisions of § 1325(a)(5) and the debtor must simply cure any defaults and maintain payments during the plan period. If § 1322(b)(2) does not prevent bifurcation under § 506(a), it really does fail to offer creditors any special protection in such cases.

Id. It is not clear whether Nassen believes the long-term home mortgagee's § 506(a) claim is immune from cramdown without regard to the "other than" clause because the debtor could not afford the payments required by a cramdown—which is in fact one of the keys to the analysis—or because long-term claims in general may only be dealt with under § 1322(b)(5). The latter belief would be incorrect. See *infra* note 312.

310. To be precise, the strip down itself may have modified the "rights" of the mortgagees as holders of § 506(a) secured claims, and thus in a sense may have modified the § 506(a) secured claims themselves. Beyond any such modification and the cure permitted under § 1322(b)(5), the plans did not modify the § 506(a) secured claims.

311. In *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236 (5th Cir. 1984), the court permitted cure and reinstatement of a mortgage under § 1322(b)(3) even though the "other than" clause applied and even though § 1322(b)(5) was not applicable. If cure is a modification, then *Grubbs* would constitute a judicial exception to the

would be § 1322(b)(5), which allows the plan to provide for the curing of defaults within a reasonable time and maintenance of payments during the plan, "notwithstanding paragraph (2)" of § 1322(b)(5).³¹² The courts also held that the plans should be confirmed; thus at most the plans modified the secured claims by providing for cure of defaults and maintenance of payments.

The opinion in *Bellamy* makes clear that the Bellamys took advantage of § 1322(b)(5)³¹³ but did not otherwise modify Federal Home's § 506(a) secured claim.³¹⁴ With regard to *Houglan*d, neither the Ninth Circuit

"other than" clause. The Fifth Circuit in *Grubbs*, however, held that cure was not a modification; thus, the "other than" clause was not violated by permitting cure under § 1322(b)(3). However, if it is determined that cure is a modification, as the Tenth Circuit held in *Wade v. Hannon*, 968 F.2d 1036 (10th Cir. 1992), *cert. granted*, 113 S. Ct. 459 (U.S. Nov. 9, 1992) (No. 92-621), the Fifth Circuit should recognize that the "other than" clause does not permit cure under § 1322(b)(3).

If a mortgagee takes additional collateral for a loan besides the real property that is the debtor's principal residence, the "other than" clause simply does not apply. The additional collateral situation is not properly termed an exception to the "other than" clause.

The court in *Houglan*d stated that the lender, Lomas, did not take additional collateral. See *Houglan*d v. Lomas & Nettleton Co., 886 F.2d 1182, 1182 (9th Cir. 1989). Also, there was no suggestion in *Bellamy* that Federal Home took additional collateral. The entire analysis in *Bellamy* proceeded on the assumption that Federal Home was entitled to whatever protection the "other than" clause might provide.

312. A new bankruptcy treatise suggests that use of § 1322(b)(5) for long-term debts may be mandatory as a practical matter. The treatise notes that § 1328(a)(1) excepts from discharge debts "provided for under section 1322(b)(5)." The treatise then argues that long-term debts are "provided for" by the *Bankruptcy Code* under § 1322(b)(5) and hence are not dischargeable, whether or not the debtor's plan uses § 1322(b)(5). See 2 DAVID G. EPSTEIN, ET AL., *BANKRUPTCY* § 9-16, at 663, § 9-18, at 668, 670, 673 (1992) (citing *In re Ramirez*, 62 B.R. 668 (Bankr. S.D. Cal. 1986); *In re Foster*, 61 B.R. 492 (Bankr. N.D. Ind. 1986); *In re Hildebran*, 54 B.R. 585 (Bankr. D. Or. 1985)). However, the weight of the authority is to the effect that a long-term debt is discharged unless it is "provided for" by the debtor's plan by utilization of § 1322(b)(5). The Seventh Circuit so held in a case issued after the treatise was published. *In re Chappell*, No. 91-3116, 1993 WL 5886 (7th Cir. Jan. 14, 1993). Several other cases agree (at least in dictum) as does *Collier on Bankruptcy*. See *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1226 (8th Cir. 1987); *In re Ali*, 63 B.R. 591, 593 (Bankr. D. Wis. 1986); *In re Akin*, 54 B.R. 700, 703 (Bankr. D. Neb. 1985); *In re Smith*, 8 B.R. 543, 547 (Bankr. D. Utah 1981); 5 *COLLIER ON BANKRUPTCY*, *supra* note 223, § 1328.01[1][d][ii], at 1328.10. The cases cited in the new treatise hold that a plan may not modify a long-term debt—other than to cure it under § 1322(b)(5)—and also provide for payments to be made over longer than a five-year period. In that holding they simply follow § 1322(c), which prohibits plans from providing for payments to be made over longer than a five-year period. 11 U.S.C. § 1322(c) (1988). (*Dicta* in *Hildebran* may, however, support the new treatise's position.)

313. *Bellamy*, 962 F.2d at 184-85.

314. *Id.* at 185.

opinion nor the district court opinion expressly states whether the Houglands used § 1322(b)(5), but, as the following analysis shows, they almost certainly did.

If the Houglands' plan did not provide for cure and maintenance of payments, the debtors would have had to pay immediately at least the arrearages in order to keep their home. If Lomas had already accelerated the mortgage debt before the debtors filed their petition, the debtors would have had to pay immediately the entire § 506(a) secured claim of \$47,240. These results follow because the "other than" clause prohibits modification of the lender's rights, at least with respect to the § 506(a) secured claim. Lomas' rights included the right to immediate payment of arrearages, and, if the mortgage had been accelerated, the right to immediate payment of the full \$47,240. Absent payment, Lomas had the nonbankruptcy right to foreclose. If the debtors failed to pay what was owed, and if the bankruptcy court refused to grant Lomas relief from the automatic stay³¹⁵ so as to permit foreclosure, the court would have been allowing the debtors to modify Lomas' rights in violation of the "other than" clause.³¹⁶ Of course, it is very unlikely that the debtors in *Hougland* could have afforded to pay immediately the arrearages or the full \$47,240. If they could have afforded it, they would not have filed for bankruptcy. Thus, to keep their home, the debtors must have provided for cure of the defaults and maintenance of payments in their plan, pursuant to § 1322(b)(5).³¹⁷

Now we must consider how the debtors' plans would have had to treat the mortgagees' § 506(a) secured claims if the "other than" clause did not exist or did not apply. If the "other than" clause gave Lomas' and Federal Home's § 506(a) secured claims special protection, one would

315. See 11 U.S.C. § 362 (1988).

316. See *Western Equities v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986) (holding that second mortgagee was entitled to relief from the automatic stay where debtor's plan was silent as to second mortgage and debtor had failed to make balloon payment due during plan—not granting relief from stay would have resulted in impermissible modification of second mortgagee's rights in violation of "other than" clause of § 1322(b)(2)). But see *In re Franklin*, 126 B.R. 702, 712 (Bankr. N.D. Miss. 1991) (stating that even if the "other than" clause applies, arrearages need not be paid and § 1322(b)(5) need not be invoked to cure defaults if § 506(a) secured claim will be paid off during plan by making of regular monthly payments).

317. It is thus apparent that homeowners who have defaulted before filing their Chapter 13 petitions will almost always have to use § 1322(b)(5) to cure the defaults. See also Canzoneri, *supra* note 4, at 18. This makes the meaning of § 1322(b)(5) very important.

assume that the debtors' plans could have modified those claims in some adverse way beyond curing defaults if the "other than" clause had not existed or had not applied. It is, however, almost certain that the plans could not have done so.

If the debtors' plans had modified the mortgagees' § 506(a) secured claims in any way other than to cure and maintain payments under § 1322(b)(5), the mortgagees would have been entitled to the protection of § 1325(a)(5).³¹⁸ This would have been so because the secured claims would have been "provided for" by the plans.³¹⁹

Thus, the plans could not have been confirmed unless one of the three alternative requirements of § 1325(a)(5) were satisfied.³²⁰ Assuming the mortgagees would not have accepted the plans,³²¹ and assuming the debtors would not have been willing to surrender their homes,³²² the plans would have had to satisfy the requirements of § 1325(a)(5)(B).³²³ How-

318. Section 1325(a)(5) provides:

Except as provided in subsection (b), the court shall confirm a plan if—with respect to each allowed secured claim provided for by the plan— (A) the holder of such claim has accepted the plan; (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or (C) the debtor surrenders the property securing such claim to such holder

11 U.S.C. § 1325(a)(5) (1988).

319. Section 1325(a)(5) by its terms applies to "each allowed secured claim provided for by the plan." *Id.* While there is some question as to whether the term "provided for" has a consistent meaning in the various places it is used, the courts have held that a secured claim is "provided for" and must be treated as required by § 1325(a)(5) if the plan modifies the § 506(a) secured claim in any way other than by curing defaults. Even *Bellamy* says as much. The court there noted that secured creditors whose § 506(a) secured claims are modified (in a "cramdown" to use the court's term) must receive payment within five years under § 1325(a)(5)(B). *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 185 (2d Cir. 1992). The court held that the Bellamys did not have to pay off Federal Home's \$127,500 § 506(a) secured claim in five years as required by § 1325(a)(5)(B) because cure under § 1322(b)(5) is not a modification. *Id.* See *Landmark Fin. Servs. v. Hall*, 918 F.2d 1150, 1153-54 (4th Cir. 1990) (holding that present value requirement of § 1325(a)(5)(B) is "the means by which the Code compensates secured creditors for any modification of their rights," but that cure under § 1322(b)(5) is not a modification); *In re Capps*, 836 F.2d 773 (3d Cir. 1987) (stating that § 1325(a)(5)(B) applies where plan modifies mortgage contract but not where plan effects a cure under § 1322(b)(5)).

320. See *supra* note 318 for statutory text of § 1325(a)(5).

321. See 11 U.S.C. § 1325(a)(5)(A) (1988).

322. See *id.* § 1325(a)(5)(C). The main purpose of the Chapter 13 filings seems to have been to save the homes.

323. See *supra* note 318 for statutory text of § 1325(a)(5).

ever, the debtors almost certainly could not have afforded plans that complied with § 1325(a)(5)(B). Even if the debtors could have afforded it, the courts would not, or at least should not, have been willing to confirm such plans.

To comply with § 1325(a)(5)(B), the Houglands and Bellamys would have had to provide in their plans for payment with interest of an amount equal to the entire value of their homes, that being the amount of the § 506(a) secured claims. The entire amount would have had to be paid during the life of the plan, a period that could not exceed five years.³²⁴ In each case, the monthly payments needed to fund that amount would have been more than double the amount of the regular monthly mortgage payments.³²⁵ The Bellamys would have had to pay an extra \$1500 per month over the amount of their regular mortgage payments.³²⁶

The percentage of homeowners who can afford to more than double their mortgage payments in order to pay the entire value of a home with interest over a five-year period must be vanishingly small.³²⁷ Homeown-

324. See 11 U.S.C. § 1322(c) (1988) (stating that "[t]he plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years").

325. For example, an ordinary 12%, fixed payment, 30-year mortgage for \$50,000 would require monthly payments of \$514.31. In *Hougland*, presumably the debtors' payments were somewhat lower than those needed under an ordinary mortgage because of the special veterans program that allowed for negative amortization. Assuming for comparison the same 12% interest rate, their payments would more than double—to \$1112.23 per month—if they had to pay off \$47,240 over the five-year maximum term of a plan.

In *Bellamy*, the monthly payments also would have more than doubled. The debtors' monthly payment on their 20-year mortgage was \$1329.79. *Bellamy*, 962 F.2d at 178. From that it may be determined that the interest rate was 10.5%. A monthly payment of \$2740 would be required to pay off the \$127,500 § 506(a) secured claim in five years at that rate. This computation assumes that the interest rate (technically the discount rate) needed to ensure that the mortgagees received present value equal to the amount of their § 506(a) secured claims would be the same as the contract rate under the mortgages. Of course, if interest rates had changed substantially since the mortgages were originated, the interest rate applicable under § 1325(a)(5)(B) might be higher or lower than the contract rate. Interest rates would have to drop dramatically for the thrust of the argument to be incorrect. The monthly payment under § 1325(a)(5)(B) would likely be much higher than the regular monthly payments on a long-term mortgage.

326. See *supra* note 325.

327. We suggest that there is not a high level of consumer demand for five-year,

ers in Chapter 13 who could afford that must be even rarer. In fact, the court in *Bellamy* stated that paying the \$127,500 claim off in five years was "most likely an impossible proposition."³²⁸

A plan that called for such high payments would not be confirmable for two reasons. First, as the court in *Bellamy* noted, such a plan would not be feasible.³²⁹ Very few debtors could afford to carry out such a plan.³³⁰ Second, even if the debtor could afford the much higher monthly payments, the plan would probably fail to satisfy the good faith requirement of § 1325(a)(3).³³¹ By modifying the § 506(a) secured claim so as to trigger a massive increase in the monthly mortgage payment, the debtor would be diverting payments away from unsecured claims. As the following analysis shows, such a diversion violates that spirit (although not the letter) of § 1325(b)(1)(B) and would constitute bad faith. If the holder of an unsecured claim objects to confirmation, then, under § 1325(b)(1)(B),³³² the plan must provide for the debtor to pay into the

fully amortized first mortgages.

328. *Bellamy*, 962 F.2d at 185. See also *In re Strober*, 136 B.R. 614, 623 (Bankr. E.D.N.Y. 1992) ("Like the Strobbers, few debtors would have the capacity to pay off their entire mortgage within a five year period, through regular monthly payments, even when reduced by bifurcation to the present value of the debtor's residence), *overruled by Bellamy*; *In re Franklin*, 126 B.R. 702, 712 (Bankr. N.D. Miss. 1991) (describing as "extremely unusual" the situation in which the debtor could afford to pay the mortgagee's bifurcated § 506(a) secured claim in full over the duration of the plan). See also Canzoneri, *supra* note 4, at 18.

329. *Bellamy*, 962 F.2d at 185 (citing the feasibility requirement in § 1325(a)(6) that the debtor must be able to make all payments under the plan).

330. If the plan provided for low, feasible monthly payments with a large balloon payment in five years at the end of the plan, the plan would not be "feasible" and the court could not confirm it. The court would have no way of knowing whether the debtor would be able to obtain (through refinancing the home or otherwise) enough money to make the proposed balloon payment. The court could only speculate about possible appreciation of the home and about the debtor's future creditworthiness. Thus, the court could not find that "the debtor *will be able to make all payments* under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6) (1988) (emphasis added); see, e.g., *In re Strober*, 136 B.R. 614, 623 (Bankr. E.D.N.Y. 1992) (stating that "whether such a plan would qualify for confirmation as feasible is most dubious"), *overruled on other grounds by Bellamy*; but see *In re Foster*, 61 B.R. 492 (Bankr. N.D. Ind. 1986) (suggesting that balloon payment would not render plan unfeasible).

331. Section 1325(a)(3) provides: "(a) . . . the court shall confirm a plan if . . . (3) the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3) (1988).

332. Section 1325(b)(1) provides, in pertinent part:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan . . . (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period

plan all of the debtor's projected disposable income for at least the first three years.³³³ Disposable income includes anything not "reasonably necessary" for the maintenance and support of the debtor or dependents.³³⁴ Debtors are therefore not permitted to live lavishly at the expense of creditors.

A few courts have gone so far as to refuse to confirm plans unless the debtors gave up their homes and moved into rental housing. The monthly mortgage payments, which the courts considered high, were held not to be "reasonably necessary" expenses.³³⁵ Courts should not ordinarily take such an approach (unless the home is extraordinarily luxurious), because one of the purposes of Chapter 13 is to allow debtors to retain their homes.

On the other hand, a decision by the debtor to double the amount of the mortgage payment is in effect a decision to turn a long-term mortgage into a five-year mortgage. Paying off a home mortgage in five years is a luxury very few people can afford outside of bankruptcy. Every extra dollar that goes to paying off the mortgage early is a dollar that could go to pay unsecured claims. The spirit of the § 1325(b)(1)(B) disposable income requirement is violated by a plan under which the debtor intentionally increases the mortgage payment.

Such a plan would not violate the letter of the disposable income requirement. If a mortgagee's § 506(a) secured claim were modified and paid off under § 1325(a)(5)(B), the higher mortgage payments would be made *through the plan*. The debtor would not pay less to the trustee to fund the plan because of the higher payments. The money would not be diverted from the unsecured creditors as a result of the debtor withholding funds from the trustee to pay an unreasonable expense. Rather, the money would go to the trustee and *then* be diverted *under the terms of the plan*. Thus, as a technical matter, the plan would not violate the requirement that all disposable income be devoted to the plan for three years. However, analogous cases show that the plan would not be confirmable under the good faith requirement of § 1325(a)(3).

beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325(b)(1)(B) (1988).

333. *Id.* § 1325(b)(1)(B).

334. *Id.* § 1325(b)(2).

335. See *In re Kitson*, 65 B.R. 615 (Bankr. E.D.N.C. 1986); *In re Jones*, 55 B.R. 462, 467 (Bankr. D. Minn. 1985).

In many cases, Chapter 13 debtors have tried to hold on to luxury items such as expensive autos and recreational boats on which creditors held Article 9 security interests. This was attempted by providing *in the plan* for payment to the secured creditors pursuant to § 1325(a)(5)(B).³³⁶ The better view is that this does not violate the requirement that all projected disposable income be devoted to the plan, even if the luxury items are not "reasonably necessary."³³⁷ The courts that follow the "better view" recognize that all of the debtor's projected disposable income goes into the plan. The problem is what happens to the money under the plan after the trustee receives it. These courts go on to hold that such plans cannot be confirmed because they fail to satisfy the good faith requirement of § 1325(a)(3).³³⁸

Similarly, plans under which debtors would choose to increase substantially their mortgage payments to the detriment of unsecured creditors should not be confirmed. They would fail to satisfy the good faith requirement.

It must also be said that if a mortgage is going to be stripped down anyway, a mortgagee would likely be very pleased if the debtor modified the § 506(a) secured claim and paid it off with interest over five years (rather than curing and reinstating the § 506(a) secured portion only). The interest rates and other terms might be altered, but the mortgagee would get approximately the same amount of present value that it would get if the claims were not modified, and the mortgagee would get that value sooner. Note that under *Bellamy*, the debtors merely had to pay the amount of the § 506(a) secured claim at the regular monthly payment rate and at the original interest rate.³³⁹ If the debtors in such cases

336. See, e.g., *In re Cordes*, 147 B.R. 498 (Bankr. D. Minn. 1992); *In re Gibson*, 142 B.R. 879 (Bankr. E.D. Mo. 1992); *In re Jernigan*, 130 B.R. 879 (Bankr. N.D. Okla. 1991); *In re Jones*, 119 B.R. 996 (Bankr. N.D. Ind. 1990); *In re Reyes*, 106 B.R. 155 (Bankr. N.D. Ill. 1989); *In re Hedges*, 68 B.R. 18 (Bankr. E.D. Va. 1986); *In re Rogers*, 65 B.R. 1018 (Bankr. E.D. Mich. 1986); *In re Nkanang*, 44 B.R. 955 (Bankr. N.D. Ga. 1984); *In re Moore*, 24 B.R. 857 (Bankr. N.D. Ill. 1982); *In re Jenkins*, 20 B.R. 642 (Bankr. E.D. Ark. 1982); *In re Davidson*, 10 B.R. 374 (Bankr. W.D. Mich. 1981); *In re Granger*, 7 B.R. 15 (Bankr. S.D. Ohio 1980); *In re Patterson*, 4 B.R. 239 (Bankr. C.D. Cal. 1980).

337. See, e.g., *Cordes*, 147 B.R. 498 (Bankr. D. Minn. 1992). Other courts ignore the technicalities and hold that such plans cannot be confirmed because they do not require that all the debtor's projected disposable income be devoted to the plan. See, e.g., *In re Gibson*, 142 B.R. 879 (Bankr. E.D. Mo. 1992). There have been varying approaches in the cases, but "the only thing which did not vary in these cases was the conclusion: in all of them the courts held that the debtors were not properly invoking Chapter 13 remedies when they proposed to subordinate unsecured creditors' rights to their time-purchase of specific assets which were not essential to a 'fresh start.'" *Cordes*, 147 B.R. at 501.

338. See *Cordes*, 147 B.R. at 505, 507.

339. *Bellamy v. Federal Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176,

modify the § 506(a) secured claims and pay them off with interest over five years, the mortgagees will get essentially the same amount of value over five years instead of over fifteen or twenty. No mortgagee would prefer to wait for payments from a debtor in bankruptcy whose credit-worthiness is, to put it charitably, doubtful.

Thus, for practical and legal reasons, neither the Houglands nor the Bellamys could have modified their mortgagees' § 506(a) secured claims, even if the "other than" clause did not exist. They could not have afforded to modify the claims. Even if they could have afforded to modify the claims, they would not have been permitted to do so, as it would have triggered a doubling of their home mortgage payments at the expense of the unsecured creditors. If they could have afforded it and had proposed to do it, the mortgagees with their stripped-down mortgages would have been very pleased to have them do it. If the "other than" clause in such a case did not prevent strip down, but did prevent the debtors from increasing the monthly payments to pay off the stripped-down mortgage over five years, the clause's only effect would be to harm the mortgagees rather than to protect them.³⁴⁰

As a result, the Second and Ninth Circuits are thus simply and demonstrably wrong when they state that their interpretation of the "other than" clause provided any special protection for the mortgagees. It did not, and it will not in the vast majority of cases involving first mortgages, which are the mainstay of the home lending industry.³⁴¹ By the

184 (2d Cir. 1992).

340. In fact, at least under one view, the mortgagees in *Bellamy* and *Hougland* would be better off if the "other than" clause did not exist. The Eleventh Circuit relies on the "other than" clause to deny interest to home mortgagees on arrearages that are paid under the cure provisions of § 1322(b)(5); supposedly, to require payment of interest when the mortgage does not require it would be to impermissibly modify the rights of the mortgagee in violation of the "other than" clause. *Foster Mortgage Corp. v. Terry (In re Terry)*, 780 F.2d 894, 897 (11th Cir. 1985); see *Bellamy*, 962 F.2d at 185-86 (rejecting argument that this led to an absurd result). Thus, if the "other than" clause does not prevent strip down, *its only practical effect in the typical case may be to harm the mortgagee*.

The Ninth, Fourth, and Third Circuits have also refused to require payment of such interest, though without relying on the "other than" clause. See *Shearson Lehman Mortgage Corp. v. Laguna (In re Laguna)*, 944 F.2d 542 (9th Cir. 1991); *Landmark Fin. Servs. v. Hall*, 918 F.2d 1150 (4th Cir. 1990); *Appeal of Capps*, 836 F.2d 773 (3d Cir. 1987). The Tenth and Sixth Circuits have held that interest must be paid. See *Wade v. Hannon*, 968 F.2d 1036 (10th Cir. 1992), *cert. granted*, 113 S. Ct. 459 (U.S. Nov. 9, 1992) (No. 92-621); *Cardinal Fed. Sav. & Loan Ass'n v. Colegrove (In re Colegrove)*, 771 F.2d 119 (6th Cir. 1985).

341. The authors concede that there are three cases in which debtors might be able

Houglan court's own standard, its interpretation of the "other than" clause is absurd and must be rejected.³⁴²

to modify the § 506(a) secured claim of an undersecured mortgagee if the "other than" clause did not exist or did not apply. First, if the mortgage carried a very high rate of interest, the plan could modify it to reduce the interest rate to a fair market rate. At that lower rate of interest, the debtor might be able to pay the § 506(a) secured claim off in five years without substantially increasing the monthly payments. A second scenario would arise if the mortgagee were extremely undersecured. An example would be when a first mortgage exhausts nearly the entire value of a home, and a second mortgagee thus has a very small § 506(a) secured claim. The second mortgagee's small secured claim might be paid off over five years without increasing the monthly payments. Third, if the mortgage has only a few years to run—for example, six—it might not take a larger monthly payment to pay off the stripped-down mortgage in five years.

The curious point about all of these examples is that none of them exemplifies the typical long-term purchase money first mortgage case. The courts seem to agree that it is in such cases that Congress intended most clearly to provide protection to mortgagees. Some courts have held that first mortgagees (or at least purchase money mortgagees) are not only the most important creditors Congress sought to protect with the "other than" clause, but the only ones. See Cataldo, *supra* note 4, at 227 (citing cases on both sides of the issue of whether the "other than" clause's protections are limited to purchase money first mortgagees). Such an implied limitation, which is not found in the text or in the interrelation of the various Code sections, should be rejected, just as the Supreme Court in *Union Bank v. Wolas*, 112 S. Ct. 527 (1991), rejected the argument that the protections of 11 U.S.C. § 547(c)(2) were impliedly limited to holders of short-term debts. (11 U.S.C. § 547(c)(2) protects recipients of ordinary course payments on ordinary course debts from having to disgorge those payments as preferences.) Nevertheless, in terms of protecting home lenders who serve an important social purpose, first mortgagees were probably uppermost in Congress' thinking. See *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 246 (5th Cir. 1984) (stating that the "other than" clause was apparently enacted to provide special protection to home lenders, who perform "a valuable social service through their loans"); see also *Nassen*, *supra* note 4, at 1003-04.

Thus, if home mortgage strip down is permitted, the "other than" clause will have significant meaning (by preventing modification of secured claims) only in the marginal cases about which Congress may have cared little.

It is true that there are rare cases in which a home depreciates so greatly that even a first mortgagee's § 506(a) secured claim could be paid off in less than five years. In fact, *Nobelman* is such a case. The \$23,500 § 506(a) secured claim in *Nobelman* could be paid off at the \$675.82 monthly payment amount at 11.5% interest in less than four years. See *infra* notes 408-09 and accompanying text. Presumably Congress did not design the "other than" clause to provide significant protection only in cases in which there had been such a massive decline in property values. Note that the value of the home in *Nobelman* was less than one third the amount of the first mortgage. See *supra* text accompanying note 204.

342. The *Houglan* court also cannot escape criticism for its assumption that "true residential real estate lenders" will see to it that they are not in an undersecured position and thus will not be harmed if mortgage strip down is permitted. *Houglan v. Lomas & Nettleton Co.* (*In re Houglan*), 886 F.2d 1182, 1184 (9th Cir. 1989). It would be hard to devise a better formula for ensuring that potential home buyers who can afford only a 5% or 10% down payment are frozen out of the "true residen-

A brief observation concerning *Wilson*,³⁴³ *Hart*,³⁴⁴ and *Sapos*³⁴⁵ may make the point even more clear. In each of those cases, the courts held that the "other than" clause did not prevent home mortgage strip down. They also held that whether the "other than" clause prevents strip down or not, the mortgages could be stripped down because the mortgagees did not qualify for protection under the "other than" clause.³⁴⁶ Each of the mortgagees had supposedly taken collateral in addition to the home, and thus did not qualify for the protection given by the "other than" clause to secured claim holders "secured *only* by a security interest in real property that is the debtor's principal residence."³⁴⁷ The critical point is that in each of those cases *nothing except the possible ban on strip down--which the courts rejected--turned on the question of whether the "other than" clause applied*. Even if the "other than" clause had applied, it would have made no difference. Unless we assume that the debtors in all three cases voluntarily complied with the "other than" clause, it would seem that something should have turned on whether or not the "other than" clause applied. Nothing did. Even if it had applied, the "other than" clause would have added nothing, under the courts' view that it does not prevent strip down.

One of the lessons of *Dewsnup v. Timm*³⁴⁸ is that if a party claimed that the plain meaning of the "other than" clause permitted home mortgage strip down, and if that result rendered another provision superfluous, it could be concluded that the "other than" clause was ambiguous.³⁴⁹ *A fortiori*, because the supposed "plain meaning" interpretation

tial real estate lending" market. The court also failed to understand how quickly an oversecured mortgage can become an undersecured mortgage if the homeowner stops making payments. For example, on a \$100,000 mortgage carrying a 12% interest rate, the mortgage debt would increase \$1000 per month due to accruing interest. Perhaps the court believes that "true residential real estate lenders" should be quick to foreclose; if they are not quick, they may rapidly end up undersecured and subject to strip down under *Houglund*. See Klingenberg, *supra* note 4, at 464-65; see also Cataldo, *supra* note 4, at 237.

343. 895 F.2d 123 (3d Cir. 1990). See *supra* notes 88-122 and accompanying text for a discussion of *Wilson*.

344. 923 F.2d 1410 (10th Cir. 1991). See *supra* notes 123-36 and accompanying text for a discussion of *Hart*.

345. 967 F.2d 918 (3d Cir. 1992). See *supra* note 120.

346. See *supra* notes 120 and 124.

347. 11 U.S.C. § 1322(b)(2) (1988) (emphasis added).

348. 112 S. Ct. 773 (1992). See *supra* notes 268-75 and accompanying text.

349. See *supra* text accompanying note 295.

of the “other than” clause, permitting strip down, renders the clause itself largely meaningless in the typical case, the clause should be seen as ambiguous, and other meanings should be considered. Therefore, other possible meanings of the “other than” clause should be considered besides the supposed plain meaning interpretation that the clause protects only the § 506(a) secured claim of undersecured home mortgagees.

B. The Meaning of the Term “Secured Claims” in § 1322(b)(2)

The initial question must be what the term “claim” means in the “other than” clause. *Houglund* and the other pro-strip down cases correctly argue that the “other than” clause refers to the preceding language in § 1322(b)(2), the language that permits modification of the rights of holders of secured claims generally.³⁵⁰ Thus, in the context of the rest of § 1322(b)(2), the “claims” to which the “other than” clause refers are “secured claims.”³⁵¹ That is only the beginning of the analysis, however. One of the lessons of *Dewsnup v. Timm*³⁵² is that the term “secured claim” does not always bear the technical § 506(a) meaning.³⁵³ Rather, it has at least two possible meanings.

The term “secured claims” in § 1322(b)(2) may thus bear the general meaning which the Court in *Dewsnup* gave to the term “secured claim” in § 506(d).³⁵⁴ If so, it includes the entire mortgage debt, not just the § 506(a) secured portion. The rights that cannot be modified under the “other than” clause would then include the nonbankruptcy rights³⁵⁵ of the undersecured mortgagee with regard to the entire debt. Strip down would modify those rights by taking away the lien for a portion of the debt; thus strip down would be prohibited.

We must therefore ask which meaning the term “secured claims” bears in § 1322(b)(2), the general meaning or the technical § 506(a) meaning. Initially it may be helpful to see that § 1322(b)(2) speaks of the “rights” of holders of “secured claims.”³⁵⁶ There is a separate issue as to whether the term “rights” may be broad enough to prevent strip down even if the term “secured claims” in § 1322(b)(2) is given a technical § 506(a)

350. *Houglund v. Lomas & Nettleton Co. (In re Houglund)*, 886 F.2d 1182, 1184 (9th Cir. 1989); *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 180 (2d Cir. 1992); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 127 (3d Cir. 1990).

351. “Secured claims” precedes the “other than” clause. See 11 U.S.C. § 1322(b)(2) (1988); see *supra* note 49 for statutory text.

352. 112 S. Ct. 773 (1992).

353. See *supra* text accompanying note 289.

354. See *supra* text accompanying note 288.

355. See *supra* note 218 and accompanying text.

356. 11 U.S.C. § 1322(b)(2) (1988).

meaning. It is also true, however, that the use of the term "rights" helps us to understand what the term "secured claims" may mean.

The "rights" which § 1322(b)(2) may allow a plan to modify obviously cannot be the rights that bankruptcy law gives a holder of a claim. It would make no sense to say that the rights that bankruptcy law gives to the holder may themselves be modified in the bankruptcy case. Thus, the section must refer to the rights which the holder of the claim has under nonbankruptcy law.³⁵⁷ Under § 1322(b)(2), the Chapter 13 plan may modify those rights, except of course in the case of a secured claim secured only by the debtor's principal residence. If the term "rights" refers to nonbankruptcy rights, it would not be unreasonable to ask whether the term "secured claims" refers to secured claims in the general sense, the sense which the term bears outside bankruptcy. Further, under nonbankruptcy law, undersecured mortgagees do not have two separate claims or cleanly separated rights with regard to the value of the collateral and with regard to the amount of the debt in excess of that value.³⁵⁸ It would be peculiar for Congress to refer to the nonbankruptcy rights of a creditor with respect to a separate § 506(a) secured claim when the creditor has no such separate claim or separate rights under nonbankruptcy law.

The above analysis of the flawed reasoning in both *Hougland* and *Bellamy*³⁵⁹ also shows that giving a technical § 506(a) meaning to the term "secured claims" in the "other than" clause leads to absurd results. It drains the "other than" clause of almost all meaning in the typical case in which Congress must have intended it to have an effect.³⁶⁰ The absurdity of *Hougland* and *Bellamy* can be avoided if the term "secured claims" in § 1322(b)(2) carries its general meaning rather than the § 506(a) meaning.

357. See *supra* note 218 and accompanying text.

358. For example, under nonbankruptcy law the mortgagee can bid its entire debt at the foreclosure sale and then hold the property to gain the benefit of future appreciation. Even in bankruptcy that right is respected when property is sold. See 11 U.S.C. § 363(k) (1988). Under nonbankruptcy law, the debtor cannot redeem the property from the mortgage lien by paying the value of the property. At least in Chapter 7, bankruptcy law respects that right as well, except where § 722 explicitly permits such redemption. See *Dewsnup v. Timm*, 112 S. Ct. 773 (1992), discussed *supra* at notes 228-95 and accompanying text.

359. See *supra* notes 300-42 and accompanying text.

360. At least that is true if giving "secured claims" a § 506(a) meaning leads to strip down of home mortgages.

In fact, the terms “secured claims” and “unsecured claims” are used in a different context in § 1322(b)(2) than in many other sections in which they appear. In § 1322(b)(2) they are used to identify persons³⁶¹—those who hold “secured claims” or “unsecured claims.” The section then refers to the prebankruptcy or nonbankruptcy rights of those persons, not to their rights under bankruptcy law as holders of secured or unsecured claims.

Sections such as §§ 722,³⁶² 1325(a)(4),³⁶³ and 1325(a)(5)³⁶⁴ refer to secured and unsecured claims for an entirely different reason: to specify the treatment of the claim or of its holder—based specifically upon either the secured or unsecured claim’s *amount*.³⁶⁵ Sections that deal with the

361. See 11 U.S.C. § 1322(b)(2) (1988) (stating that the plan may “modify the rights of holders of secured claims . . . or of holders of unsecured claims”). The Second Circuit in *Bellamy* argued that one of the Bankruptcy Code’s “cornerstones” is the principal that treatment of claims “turns on whether a *claim* is secured or unsecured, not on whether a *creditor* is secured or unsecured.” *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d at 176, 179 (2d Cir. 1992). That is correct insofar as many sections of the Code refer to the amount of a creditor’s secured or unsecured claim and provide treatment based on that amount. However, § 1322(b)(2) refers to “holders,” meaning creditors themselves, and does not require a determination of any amount of secured or unsecured claim.

362. See *supra* note 257 for statutory text. The Chapter 7 redemption provision, § 722, explicitly demands an answer to the question, “What is the amount of the secured claim?” Section 722 permits redemption of certain personal property on payment of “the amount of the allowed secured claim.” 11 U.S.C. § 722 (1988). Thus the term “secured claim” in it bears the § 506(a) meaning. There is another compelling reason for believing that it bears that meaning. Otherwise, § 722 would be superfluous; it would state the obvious proposition that a debtor who paid the entire debt secured by an item would have paid off the lien.

363. Section 1325(a)(4) provides:

(a) [T]he court shall confirm a plan if—

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. § 1325(a)(4) (1988). The reference to the amount that would be paid on the unsecured claim in a Chapter 7 liquidation is necessarily a reference to the amount of the unsecured claim, because distributions in Chapter 7 are made to unsecured creditors on a pro rata basis. See 11 U.S.C. § 726(b) (1988). A creditor’s pro rata share would depend on the amount of the creditor’s unsecured claim as compared to the total amount of unsecured claims of equal priority.

364. 11 U.S.C. § 1325(a)(5)(B) (1988) (requiring value of distributions on account of allowed secured claim to be “not less than the allowed *amount* of such claim”) (emphasis added). See *supra* note 325 for the statutory text.

365. An example of a section that determines the claimholder’s treatment depending upon the claim’s amount is § 1126(c), which allocates voting power in Chapter 11

treatment of claims based specifically on the amount of the secured or unsecured claims ask the questions to which § 506(a) provides answers: What is the amount of the secured claim? What is the amount of the unsecured claim? When an undersecured creditor is involved, § 506(a) must be invoked with regard to such sections to determine the answers to those questions.

It is not apparent that the terms "secured claims" and "unsecured claims" need be given a technical § 506(a) meaning in sections such as § 1322(b)(2) which are not specifically based on the amount of any secured or unsecured claim. Such a distinction, between sections which specifically require the court to determine the amount of secured or unsecured claims and those which do not, is consistent with the Court's decision in *Dewsnup v. Timm*.³⁶⁶ In *Dewsnup*, the court concluded that the term "allowed secured claim" did not bear the technical § 506(a) meaning.³⁶⁷ As the Court interpreted § 506(d), it does not specifically require a determination of the amount of the secured or unsecured claim a creditor may have. It merely requires a determination of the extent to which the creditor has a lien pursuant to nonbankruptcy law and the extent to which the creditor has an allowed claim, regardless of how much of that allowed claim might be characterized as "secured" or "unsecured" under § 506(a).³⁶⁸

cases based in part on the amount of each creditor's claim. See 11 U.S.C. § 1126(c) (1988).

366. 112 S. Ct. 773 (1992).

367. *Dewsnup*, 112 S. Ct. at 778.

368. See *id.* Of course, if a claim secured by a lien were partially disallowed because it exceeded a statutory limit on the claim's amount or for some other reason, then in order to apply § 506(d) as interpreted by the Court, the amount that was disallowed would need to be known. (For example, if a landlord took an Article 9 security interest in a tenant's personal property to secure all obligations under the lease, the landlord's claim would be disallowed to the extent it exceeded the limit imposed by § 502(b)(6). To that extent, the lien would also be voided under § 506(d).) However, the amount of any "secured" or "unsecured" claim would not need to be known to apply § 506(d), but merely the total amount of the claim and the amount of it that was disallowed.

It may be argued that the first 12 words of § 506(d), "[T]o the extent that a lien secures a claim against the debtor . . .," specifically refer to the amount of a secured claim. However, this amount is the amount of the lien under nonbankruptcy law, not the amount of the § 506(a) secured claim. The United States, as *amicus curiae*, argued that the language referred to the amount of the § 506(a) secured claim; the majority misunderstood this argument and did not adopt it. Also, Justice Scalia rejected it in his dissent. See *supra* note 264. Thus, these 12 words do not explicitly deal with the amount of the "allowed secured claim" referred to later in §

There are other similarities between § 1322(b)(2) and § 506(d). Each deals with liens but not in the context of a specified distribution to creditors.³⁶⁹ In each case, a part of the Code would be vitiated if the term "secured claim" were given a technical § 506(a) meaning. In the case of § 506(d), § 722 would be vitiated; in the case of § 1322(b)(2), its own "other than" clause would be vitiated. In each case, applying a technical § 506(a) meaning would lead to a major reversal of pre-Code law which protected liens from being stripped down in bankruptcy.³⁷⁰ The Court

506(d).

Justice Scalia certainly argued that the amount of the allowed secured claim should be compared to the amount of the lien, with the lien voided to the extent its amount exceeds the amount of the allowed secured claim. The point, however, is that the majority did not accept this approach. As interpreted by the majority in *Dewsnup*, § 506(d) does not deal with amounts of secured or unsecured claims and hence does not ask the questions that § 506(a) is designed to answer. It is consistent with *Dewsnup* to read other sections, which plainly do not refer to amounts of secured or unsecured claims, as not requiring reference to § 506(a).

Such an approach would provide a helpful test that would ensure that courts interpret the term "secured claim" in sections like 722 and 1325(a)(5)(B) as referring to the § 506(a) secured claim. It would help to ensure that the "parade of horrors" suggested by commentators who disagreed with *Dewsnup* remain purely imaginary. See, e.g., Howard, *supra* note 215.

369. The Second Circuit in *Bellamy* suggested that § 1322(b)(2) deals with claims while § 506(d) deals with liens. *Bellamy v. Federal Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176, 183 (2d Cir. 1992). In fact, each section deals with both claims and liens. The pro-strip down courts, including *Bellamy*, use § 1322(b)(2) to eliminate the lien that secures the § 506(a) unsecured claim of an undersecured mortgagee. *But see In re Jones*, No. 91-20593, 1993 WL 49925 (Bankr. E.D. Mich. Feb. 23, 1993) (relying, in the alternative, on §§ 506(d) and 1325(a)(5)(B), not on § 1322(b)(2), for strip down authorization). The "rights" of holders of secured claims referenced in § 1322(b)(2) must of course include lien rights. By the same token, § 506(d) deals with claims as well as liens—by its express language it requires voiding liens (with two express exceptions) where the claims that they secured have been disallowed. The key point is that each section deals with liens, and neither one deals with distributions.

370. See *supra* text accompanying note 268. The Second Circuit in *Bellamy* asserted that such a change in Chapter 13 home mortgage cases would be consistent with *Dewsnup* because "the Code expressly contemplates that a Chapter 13 debtor's plan of reorganization may today, contrary to pre-Code practice, deal with creditors whose claims are secured by real property" and therefore, applying § 506(a) "furthers Congress' scheme under Chapter 13." *Bellamy*, 962 F.2d at 183-84. However, pre-Code law did allow Chapter XIII debtors—though technically not their plans—to affect the rights of real estate mortgagees. Pre-Code law permitted debtors to cure defaults and to maintain payments on real estate mortgages; if the debtor did so, the referee or bankruptcy judge would not permit the mortgagee to foreclose. Thus, by the time the Chapter XIII plan would be completed, the default would be cured and the debtor could continue to enjoy the property. Clearly, the Code contemplates that Chapter 13 debtors can do more with respect to real estate mortgages *other than home mortgages* than Chapter XIII debtors could do; if the "other than" clause does not apply and

held in *Dewsnup* that the term "secured claim" in § 506(d) possessed the general meaning, not the technical § 506(a) meaning,³⁷¹ even though § 506(d) appears only three subsections after § 506(a).³⁷² It would certainly be consistent with *Dewsnup* to interpret the term "secured claims" as used in § 1322(b)(2) to include the entire debt held by undersecured mortgagees.

C. The Meaning of the Term "Rights" in § 1322(b)(2)

As noted above, there is a separate issue as to whether the term "rights" may be broad enough to prevent strip down even if the term "secured claims" in § 1322(b)(2) is given a technical § 506(a) meaning.³⁷³ As also noted above, the term "rights" obviously must refer to the *nonbankruptcy* rights of the holder of the secured claim. It would make no sense to say that the rights that bankruptcy law gives to the holder of a secured claim may themselves be modified in the bankruptcy case.³⁷⁴

Under nonbankruptcy law, the debtor may not satisfy the mortgage lien on the home simply by paying an amount equal to the value of the home. The debtor must pay the entire mortgage debt to satisfy the lien. There is one indissoluble lien securing the entire debt, no matter what the value of the home. That one indissoluble lien is part of the rights of the undersecured mortgagee,³⁷⁵ who holds a secured claim. It would not be unreasonable to think that "the rights of the holder of a secured

the debtor can feasibly and in good faith pay off the mortgagee's § 506(a) secured claim with interest, a mortgage other than a home mortgage can be stripped down. It is not at all clear, however, that Congress intended to make such a major change with respect to home mortgages. As argued below, it appears that Congress intended to retain and codify the pre-Code practice with respect to home mortgages. See *infra* notes 385-99; see also Klingenberg, *supra* note 4, at 467. Thus, the same rationale applies here that applied in *Dewsnup*: without clear language or at least explicit legislative history, it should not be assumed that Congress changed the pre-Code law to permit home mortgage strip down in Chapter 13 bankruptcy.

371. *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992).

372. The Court did so over Justice Scalia's strong dissent. *Dewsnup*, 112 S. Ct. at 780 ("When § 506(d) refers to an 'allowed secured claim,' it can only be referring to that allowed 'secured claim' so carefully described two brief subsections earlier."); see *Union Planters Nat'l Bank v. Sainz-Dean* (*In re Sainz-Dean*), 143 B.R. 784 (D. Colo. 1992) (strongly criticizing the *Dewsnup* majority for refusing to give the words "allowed secured claim" the § 506(a) meaning "three paragraphs later" in § 506(d)).

373. See *supra* notes 356-58 and accompanying text.

374. *Id.*

375. See *supra* note 218.

claim" include the entirety of the lien rights, even if the term "secured claim" meant the § 506(a) secured claim.³⁷⁶ In fact, some courts have considered this to be the plain meaning of the language.³⁷⁷

Further, although § 506(a) may bifurcate the undersecured mortgagee's claim, there is no explicit authority in the Bankruptcy Code for bifurcating the undersecured mortgagee's lien. Claims and liens are not the same; each is defined separately.³⁷⁸ As we learn from *Dewsnup*, bifurcation of a claim does not necessarily entail bifurcation of the lien, and certainly does not necessarily entail strip down.³⁷⁹ Another lesson from *Dewsnup* is that pre-Code bankruptcy law (outside of the corporate reorganization provisions) did not provide for scaling down of liens even when unsecured claims were modified or discharged.³⁸⁰ Two other lessons from *Dewsnup*—that specific authority is needed to strip down liens and that courts should be slow to interpret ambiguous language as providing that authority, at least in the absence of clear legislative history³⁸¹—indicate that mortgage liens should not be bifurcated in the absence of clear textual authority, or at least clear legislative history.³⁸² Certainly, if a mortgagee in a Chapter 7 case obtains relief from the automatic stay³⁸³ and seeks to foreclose, the mortgagee would not be expected to act as though it held two liens on the property. Thus, it would be reasonable to think that all of the nonbankruptcy lien rights of undersecured mortgagees are encompassed within the phrase "rights of holders of secured claims."

Of course it would be possible to read "rights of holders of secured claims" in the context of the undersecured mortgagee to mean "the rights the mortgagee would have had under nonbankruptcy law if the mortgage were only for an amount equal to the value of the collateral." The authors suggest, however, that such a reading is not demanded by the language of § 1322(b)(2).

Further, would Congress have thought that it was authorizing the elimination of liens when it authorized modification of the rights of holders

376. See Klingenberg, *supra* note 4, at 453 n.58 & at 463.

377. See, e.g., *Nobelman v. American Sav. Bank (In re Nobelman)*, 129 B.R. 98, 103 (N.D. Tex. 1991), *aff'd*, 968 F.2d 483 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (U.S. Dec. 7, 1992) (No. 92-641); *In re Sauber*, 115 B.R. 197, 199 (Bankr. D. Minn. 1990); *In re Russell*, 93 B.R. 703, 705-06 (D.N.D. 1988).

378. See 11 U.S.C. § 101(5) (Supp. III 1991) (defining "claim"); *id.* § 101(37) (Supp. III 1991) (defining "lien").

379. See *supra* text accompanying note 283.

380. See *supra* text accompanying notes 278-79.

381. See *supra* text accompanying notes 290-91.

382. See *supra* text accompanying note 290.

383. See 11 U.S.C. § 362 (1988).

of *unsecured claims*?³⁸⁴ That would seem incongruous; the concept that a lien is part of the *unsecured claim* rights of a creditor is at best forced.

D. *Reprise of the Pre-Code Law and the Legislative History*

As some of the courts and commentators have pointed out, the "other than" clause, combined with the cure provision of § 1322(b)(5), probably was designed to codify a practice which had developed under the old Bankruptcy Act.³⁸⁵ Under the Act, Chapter XIII plans were not permitted to deal at all with claims secured by real property.³⁸⁶ The courts nonetheless found a way to permit debtors to cure and reinstate defaulted mortgages. The plan could say nothing about the mortgage, but the courts held that bankruptcy referees³⁸⁷ had authority to enjoin mortgage foreclosures on appropriate terms.³⁸⁸ The appropriate terms were that the debtors had to keep up their regular payments and cure the defaults by paying off the arrearages within a time set by the referee.³⁸⁹ The referees had no authority to strip away liens on real property, and that was not the result of the practice.³⁹⁰ *Dewsnup* teaches no less.³⁹¹

The United States Bankruptcy Commission, which was formed in 1970 to reformulate the bankruptcy laws,³⁹² incorporated that practice into the terms of its proposed bill.³⁹³ It appears that the Senate wished to

384. 11 U.S.C. § 1322(b)(2) (1988).

385. See, e.g., *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 243 n.12 (5th Cir. 1984); *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 29 n.7 (2d Cir. 1982) (explaining § 1322(b)(5) as "a statutory codification of the practice developed under former Chapters XI and XIII"); *In re Brown*, 91 B.R. 19, 22 (Bankr. E.D. Va. 1988); *United Cos. Fin. Corp. v. Brantley*, 6 B.R. 178, 190 (Bankr. N.D. Fla. 1980); 5 COLLIER ON BANKRUPTCY, *supra* note 223, ¶ 1322.09[4], at 1322-25 (stating that "section 1322(b)(5) was intended to codify the practice under which foreclosure was enjoined during the pendency of a Chapter XIII plan under the former Bankruptcy Act, with the debtor given a reasonable amount of time to cure defaults"). *Grubbs* quotes language from *Brantley*, which cites *Hallenbeck v. Penn Mut. Life Ins. Co.*, 323 F.2d 566 (4th Cir. 1963) and *In re Garrett*, 203 F. Supp. 459 (N.D. Ala. 1962).

386. See Bankruptcy Act of 1898, Pub. L. No. 61, 30 Stat. 544-66, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549, 2682.

387. Bankruptcy referees are now bankruptcy judges.

388. See *Grubbs*, 730 F.2d at 243 n.12; see also *Hallenbeck*, 323 F.2d 566.

389. See *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 29 n.7 (2d Cir. 1982).

390. See *Grubbs*, 730 F.2d at 243 n.12; see also *Hallenbeck*, 323 F.2d 566.

391. See *supra* notes 228-95 and accompanying text.

392. *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 127 (3d Cir. 1990).

393. H.R. Doc. No. 137, 93d Cong., 1st Sess., pts. I and II (1973), reprinted in

retain that practice and not otherwise allow debtors to modify any real property mortgagees' rights in any way.³⁹⁴ The House, on the other hand, appears to have wanted to *permit* modification of any and all real property mortgages.³⁹⁵ It appears that the compromise was to allow mortgages *other than home mortgages on the debtor's principal residence* to be modified.³⁹⁶ The old Act practice of cure and maintenance of payments that was codified in § 1322(b)(5) would be the only way for debtors to deal with home mortgages in their plan.³⁹⁷

If Congress indeed intended to codify the old Act practice with regard to home mortgages, then it probably follows that Congress did not intend to allow home mortgage strip down. None of the circuit level authority dealing with that practice allowed strip down of real estate mort-

[Appendix 2] COLLIER ON BANKRUPTCY, *supra* note 110, Part I. Although the *Wilson* court, because it took the Commission Report out of context, thought otherwise, the Commission apparently did not believe that mortgages could be stripped down under its bill. See Lindauer, *supra* note 4, at 272 nn. 91-92.

394. See *supra* note 111. See also *Wilson*, 895 F.2d at 123, 128; *In re Glen*, 760 F.2d 1428, 1433-34 (6th Cir. 1985), *cert. denied sub nom. Miller v. First Fed.*, 474 U.S. 849 (1985); *In re Seidel*, 752 F.2d 1382, 1385-86 (9th Cir. 1985); *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 245 & n.13 (5th Cir. 1984) (en banc); *In re Harris*, 94 B.R. 832, 836 (D.N.J. 1989); *In re Foster*, 61 B.R. 492, 495 (Bankr. N.D. Ind. 1986); Einbinder, *Curing Mortgage Defaults Under Chapter 13 of the Bankruptcy Code*, in 1982 Ann. Surv. of Bankruptcy Law 493, 495.

395. See *supra* note 110. See also *Nobleman v. American Sav. Bank (In re Nobleman)*, 968 F.2d 483, 489 (5th Cir.), *cert. granted*, 113 S. Ct. 654 (1992) (No. 92-641); *Bellamy v. Federal Home Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 181 (2d Cir. 1992); *Wilson*, 895 F.2d at 128. The *Bellamy* court noted that the House version promoted the fresh start objective of the bankruptcy code. *In re Bellamy*, 962 F.2d at 181. It is not at all clear, however, that even the House thought mortgage strip down could be accomplished if the debtor sought to cure and reinstate the mortgage under § 1322(b)(5).

396. See *supra* note 182. See also *Nobleman v. American Sav. Bank (In re Nobleman)*, 968 F.2d 483, 489 (5th Cir.) (noting that the final version was characterized as a compromise agreement), *cert. granted*, 113 S. Ct. 654 (1992) (No. 92-641); *Bellamy v. Federal Home Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 182 (2d Cir. 1992) (stating that obviously the final version of § 1322(b)(2) represented a compromise); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 128 (3d Cir. 1990) (explaining the final version as a compromise agreement).

397. This is suggested by the floor statements of the bill's managers subsequent to the conference committee:

Under the House amendment [which became law] the plan may modify the rights of holders of secured claims other than a claim secured by a security interest in real property that is the debtor's principal residence. It is intended that a claim secured by the debtor's principal residence may be treated with under [sic] section 1322(b)(5) of the House amendment.

124 CONG. REC. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6481; 124 CONG. REC. S17406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6550.

gages.³⁹⁸ The Supreme Court in *Dewsnup* states that strip down was not allowed under the pre-Code law.³⁹⁹

*E. The Meaning of "Secured Claims" in § 1322(b)(5)*⁴⁰⁰

In *Bellamy*, the mortgagee (Federal Home) argued that debtors who chose to use § 1322(b)(5) to cure and maintain payments could not strip down their home mortgages even if the "other than" clause would permit it.⁴⁰¹ The authors submit that Federal Home was right, but for reasons which do not seem to have been previously advanced.

Under § 1322(b)(5), a debtor whose mortgage is in default may cure the default by paying the arrearages within a reasonable time.⁴⁰² If the mortgagee accelerated the debt before the debtor filed the Chapter 13 petition, the cure accomplishes a deacceleration of the debt, reinstating the original payment schedule. But for § 1322(b)(5), the "other than" clause would allow the mortgagee to insist on immediate full payment of the accelerated mortgage debt (or at least payment of the § 506(a) secured claim if the court permits strip down). The cure provision of § 1322(b)(5) allows debtors to pay off the arrearages over the course of the plan instead of requiring immediate payment.⁴⁰³ Without the cure provision of § 1322(b)(5), most debtors in default would be unable to retain their homes in Chapter 13.⁴⁰⁴

398. See, e.g., *Hallenbeck v. Penn Mut. Life Ins. Co.*, 323 F.2d 566 (4th Cir. 1963).

399. See *supra* notes 283-89 and accompanying text. It should be noted, however, that the Senate Report on its version of the bankruptcy bill states, in its discussion of § 506, that the § 506(a) meaning is intended "[t]hroughout the bill." See *supra* note 188. Neither the majority opinion nor the dissent in *Dewsnup* discussed that statement from the Senate Report.

400. Section 1322(b)(5) provides:

Subject to subsections (a) and (c) of this section, the plan may . . . (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

11 U.S.C. § 1322(b) (1988).

401. *Bellamy v. Federal Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176, 184-85 (2d Cir. 1992). See also *Klingenberg, supra* note 4, at 463.

402. 11 U.S.C. § 1322(b)(5) (1988).

403. See *id.* (stating that the plan may provide for the curing of any default within a reasonable time).

404. See *supra* notes 313-17 and accompanying text.

Section 1322(b)(5) is limited in application to “any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.”⁴⁰⁵ To see why that limitation creates problems for the pro-strip down position, we must see how courts that allow home mortgage strip down treat the stripped-down mortgage. As the *Bellamy* court pointed out, the courts do not allow the debtor to reduce the monthly mortgage payment; rather, they require that the debtor maintain the same monthly payments.⁴⁰⁶ Because the debtor is paying on a stripped-down mortgage, the mortgage is paid off much sooner than the parties originally envisioned.⁴⁰⁷ In *Nobelman*, for example, the monthly mortgage payments of \$675.82 would pay off the \$23,500 § 506(a) secured claim at 11.5 percent interest⁴⁰⁸ in less than four years, some twenty years earlier than the original mortgage payment end date of July 1, 2014.⁴⁰⁹

Beyond the obvious point that losing twenty years of payments may be a devastating blow to a creditor, the curious question is when the “last payment” is due on the secured claim for purposes of § 1322(b)(5). It would seem that if the “secured claim” is simply the § 506(a) secured claim, then the last payment in *Nobelman* would not be due in 2014, but in 1994, only four years after the filing of the petition.⁴¹⁰ If the Nobelmans’ plan was a five-year plan, they would pay off the stripped-down secured claim before the end of the plan! Does that mean the Nobelmans in fact should not have been permitted to cure defaults under § 1322(b)(5) because the final payment on the secured claim was due before the last payment under the plan?⁴¹¹ A commonsense reading of §

405. 11 U.S.C. § 1322(b)(5) (1988).

406. *Bellamy v. Federal Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176, 184-85 (2d Cir. 1992).

407. *See id.* at 185 (stating that the debtor must make scheduled mortgage payments only until the § 506(a) secured claim is fully paid); *see also* Klingenberg, *supra* note 4, at 464.

408. Using mortgage tables we determined that for a \$68,250 loan to be paid off in 30 years at \$675.82 per month, the interest rate had to be 11.5%. Of course that is only approximate because it was a variable rate loan. *See supra* note 205.

409. *See supra* text accompanying note 205.

410. The petition was filed in 1990. *Nobelman v. American Sav. Bank* (*In re Nobelman*), 129 B.R. 98, 99 (N.D. Tex. 1991), *aff'd*, 968 F.2d 483 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (U.S. Dec. 7, 1992) (No. 92-641).

411. The Fifth Circuit in *Grubbs v. Houston First Am. Sav. Assoc.*, 730 F.2d 236 (5th Cir. 1984), explained that even if a home mortgage cannot be cured under § 1322(b)(5), it may be able to be cured under § 1322(b)(3). If the court in *Grubbs* is right, and home mortgages can be cured under § 1322(b)(3) when (b)(5) is not available, then the Nobelmans still could have cured and reinstated their mortgage. In *In re Franklin*, 126 B.R. 702, 712 (Bankr. N.D. Miss. 1991), the court stated in dictum that if, pursuant to § 1325(a)(5)(B), the debtor could pay off the home mortgagee’s §

1322(b)(5) shows that it refers to the last date on which payment is due on the whole mortgage claim. To interpret § 1322(b)(5) otherwise would confuse matters and require valuing the collateral so that the amount of the § 506(a) secured claim could be determined in order to see how long it would take for the secured claim to be paid off at the regular monthly payment rate. In addition, if debtors like the Nobelmans were to finish their payments before the end of their plan, could it be said that they had complied with § 1322(b)(5)'s requirement of "maintenance of payments while the case is pending"?

Thus, it seems obvious that Congress meant to refer to the entire mortgage debt, not to some bifurcated portion of it, when it chose to use the term "secured claim" in § 1322(b)(5). Again, this is not a section that specifically requires that an amount of a secured or unsecured claim be determined.⁴¹² Rather, it is perfectly consistent with *Dewsnup* to give "secured claim" in § 1322(b)(5) its general meaning: the entire claim secured by a lien, without regard to the value of the collateral.

It is possible to argue that the "truly" secured portion of an undersecured mortgage is always paid off with the final payment. After all, the lien remains under nonbankruptcy law until the last payment is made; thus, absent strip down, the next few years' worth of scheduled payments on an undersecured mortgage—the payments that would reduce the debt to the value of the property—are payments on the unsecured portion.⁴¹³ Therefore, the final payment date under the mortgage agreement could be seen to be the date on which, if all the payments were made, the final payment would be made on the § 506(a) secured claim.

However, that argument proves too much. If payments on an undersecured claim are initially assignable to the unsecured portion, why

506(a) claim in full with interest during the plan, then the debtor would not need to use § 1322(b)(5) to cure and, thus, would not need to pay arrearages in addition to the § 506(a) secured claim. The court, however, failed to understand that the mortgagee's right to foreclose if the default were not cured could not be taken away from the mortgagee because the "other than" clause would prohibit any such modification of the mortgagee's rights.

412. See *supra* notes 362-65 and accompanying text.

413. Cf. *Barash v. Public Fin. Corp. (In re Dennis)*, 658 F.2d 504 (7th Cir. 1981) (stating that for purposes of preference law, payments on an undersecured debt are considered to be payments on the § 506(a) unsecured claim). *Barash* unnecessarily made a complex matter out of the simple proposition that if a payment on an undersecured claim does not result in a release of collateral, it will by definition reduce the unsecured claim, not the secured claim, which remains by definition static at the value of the collateral.

does a Chapter 13 debtor have to cure by paying all of the arrearages? The arrearages—in part, at least—are due on the § 506(a) unsecured claim, and § 1322(b)(5) allows the debtor to cure and maintain payments on just the secured claim if the debtor wishes.⁴¹⁴ Of course, the arrearages could not be allocated solely to the § 506(a) unsecured claim. The principal portions of the missed mortgage payments would indeed be payments on the § 506(a) unsecured claim, but the interest portions would cover interest on both the secured and unsecured claims. Is it possible that Congress intended the courts to figure out which portion of the arrearages should be allocated to the § 506(a) secured claim, and which to the unsecured claim, and to require cure of only the former amount? The pro-strip down circuits have not taken that position,⁴¹⁵ although it seems to flow logically from their approach of assuming that the words “secured claim” as used in § 1322 bear the technical § 506(a) meaning.⁴¹⁶

This complexity arises out of an apparently easy-to-apply section only if the meaning of “secured claim” in § 1322(b)(5) is the technical § 506(a) meaning. Congress intended no such complexity. Rather, Congress intended to use the term “secured claim” in its general sense, not the technical § 506(a) sense. This conclusion is consistent with the practice under the Bankruptcy Act of allowing cure and maintenance of payments, but not strip down.

This level of complexity also infects and undercuts the pro-strip down argument in other ways. If it is only the § 506(a) secured claim which must be left unmodified, and if all the principal and a portion of the interest charge on current payments to undersecured mortgagees are in fact payments on the § 506(a) *unsecured* claim, why do pro-strip down courts as in *Bellamy* require debtors to maintain the full amount of the monthly payment?⁴¹⁷ If both § 1322(b)(2) and (b)(5) use “secured

414. 11 U.S.C. § 1322(b)(5) (1988).

415. See, e.g., *Sapos v. Provident Inst. of Sav.*, 967 F.2d 918 (3d Cir. 1992) (requiring that debtor pay all arrearages in full to cure under § 1322(b)(5) in addition to maintaining regular monthly payments, and holding that payment on arrearages would not be considered to reduce the principal amount of the stripped-down mortgage).

416. The Second Circuit in *Bellamy* allowed cure and reinstatement of a stripped-down mortgage and required full payment of all arrearages and maintenance of the full monthly payment, even though the debtors had taken the position in the bankruptcy court that they could reduce their monthly payments. *Bellamy v. Fed. Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176 (2d Cir. 1992). See *supra* notes 137-96 for a full discussion of *Bellamy*.

417. See *Bellamy*, 962 F.2d at 184-85. See also *In re Hayes*, 111 B.R. 924, 927-28 (Bankr. D. Ore. 1990) (concluding that bifurcation is permissible, but that the plan cannot alter the interest rate or amount of the installment payment); *In re Shaver*, 58 B.R. 166, 167 (Bankr. S.D. Ohio 1985) (same); *In re Wilkinson*, 33 B.R. 933, 935 (Bankr. S.D.N.Y. 1983) (same).

claim[s]" in the technical § 506(a) sense, why must the debtor do more than maintain the portion of the regular monthly payment which in fact would go toward the § 506(a) secured claim? We suppose the term "maintain" in § 1322(b)(5) leads the courts to refuse to allow reduction of monthly payments. However, if the term "maintain" means that the amount may not be reduced, even though part is on account of the § 506(a) unsecured claim, does that not indicate that what is being maintained is the payment schedule on the entire debt, not just on the § 506(a) claim? And if that is true, then how can we avoid the conclusion that the term "secured claim" in § 1322(b)(5) bears the general meaning rather than the § 506(a) technical meaning?

If the authors are correct, then most home mortgagees cannot strip down their mortgages even if the "other than" clause does not apply. That is a result of the debtor's decision to cure and reinstate. If the "other than" clause does not apply because the mortgagee took more collateral than just the home, and if the debtor does not use § 1322(b)(5), then the debtor can choose to treat the mortgagee's § 506(a) claim under § 1325(a)(5)(B).⁴¹⁸ If the debtor can do so successfully, then the plan can strip down the mortgage. There will be rare cases in which that may be possible, but usually it will not.

If the term "secured claim" in § 1322(b)(5) bears a general meaning, as the above argument demonstrates, then it should also bear that meaning in § 1322(b)(2). Sections 1322(b)(2) and (b)(5) are obviously intended to work together;⁴¹⁹ (b)(5) itself refers to (b)(2), and the legislative history indicates that mortgages which cannot be modified because of the "other than" clause are then to be dealt with (if at all) under (b)(5).⁴²⁰ We do not mean that (b)(5) may only be used with regard to home mortgages, but they are its natural and most common subject.⁴²¹ Common sense suggests the terms "secured claims" in § 1322(b)(2) and "secured claim" in § 1322(b)(5) should bear the same meaning. The authors submit that meaning is the general meaning, not the technical § 506(a) meaning.⁴²²

418. See *supra* note 318 for the text of § 1325(a)(5)(B).

419. See e.g., *Grubbs v. Houston First Am. Sav. Assoc.*, 730 F.2d 236, 241 n.8 (5th Cir. 1984) (stating that Congress provided an exception to (b)(2) in (b)(5)).

420. See *supra* note 397 and accompanying text.

421. This is so because the language of the section restricts it to long-term debt: the last payment must be due after the date on which the final payment under the plan is due. 11 U.S.C. § 1322(b)(5) (1988).

422. Admittedly, this argument is ironic in light of the Supreme Court's decision in *Dewsnup* that "secured claim" did not have the same meaning in subsections (a) and

F. The Remaining Meaning in the "Other Than" Clause

If most debtors must use § 1322(b)(5), and if § 1322(b)(5) prohibits strip down, what meaning is left for the "other than" clause under the authors' approach? We find that question to be troubling. If little meaning is left, the authors' approach would be subject to the same criticism as the pro-strip down approach.

We recognize that the "other than" clause would be more important if § 1322(b)(5) did not itself prohibit strip down in cases in which it is used. However, Congress could not have intended the resulting complexity in application of § 1322(b)(5). Although our conclusions mean that the "other than" clause is less important than the legislative history would suggest, especially in the case in which a debtor must use § 1322(b)(5) to cure arrearages, it leaves intact the result Congress apparently intended and gives the "other than" clause substantial meaning in other cases. It is more acceptable to interpret the "other than" clause as providing "overlapping armor" to protect home mortgagees rather than to interpret it so that it has little meaning and leaves a gaping hole in their protection.

There is one important case in which § 1322(b)(5) cannot prevent strip down but the "other than" clause can: the case in which the debtors have managed to keep up payments on their mortgage even though they are in financial distress. Debtors may default on all other debts before risking their home by defaulting on their home mortgage. If a debtor does not default on the mortgage, or manages to cure any default under nonbankruptcy law, then the debtor will not need to use § 1322(b)(5) to cure and reinstate the mortgage. In such a case, the "other than" clause would appear to provide special protection for the home mortgagee if it is interpreted so as to preclude strip down. Obviously, § 1322(b)(5) cannot provide that protection if it is not applicable.

In the above scenario, the "other than" clause would thus have substantial meaning if interpreted so as to preclude home mortgage strip down. If the debtor does not need to use § 1322(b)(5), then the "other than" clause matters. If the "other than" clause applies, strip down is prohibited. If it does not apply, strip down would be permissible.

G. Further Observations

Next, we provide brief observations on two related questions. If the "other than" clause and § 1322(b)(5) prohibit home mortgage strip down in most cases, under what authority is strip down affirmatively autho-

(d) of § 506. See *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992).

rized in the other cases? What is the extent of that authorization?

Section 1322(b)(2) authorizes the plan to modify the rights of holders of secured and unsecured claims. Section 1327(c) states that "except as provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan."⁴²³ Section 1322(b)(2), alone or in combination with § 1327(c), may authorize strip down when the "other than" clause does not apply and § 1322(b)(5) is not being used.

If §§ 1322(b)(2) and 1327(c) do provide the authorization for strip down, then the "other than" clause has meaning—it will block strip down where it applies even in cases in which the debtor does not use § 1322(b)(5). Thus the "other than" clause will have substantial meaning.

It is not clear, however, that strip down should be permitted where the plan does not provide for payment of the value of the collateral with interest during the term of the plan, pursuant to § 1325(a)(5)(B). Section 1325(a)(5)(B) describes how the plan must treat a secured claim which is "provided for by the plan."⁴²⁴ The creditor's lien must be retained, and the creditor must receive payments with a present value equal to the amount of the § 506(a) secured claim.⁴²⁵ The legislative history makes explicit what is implicit in § 1325(a)(5)(B)—the lien required by § 1325(a)(5)(B) is for the amount of payments required by the section.⁴²⁶ Thus the undersecured creditor whose secured claim is provided for under § 1325(a)(5)(B) will suffer strip down of the lien.

Nothing in the legislative history suggests that liens can be stripped down without the application of § 1325(a)(5)(B), which ensures that the creditor will receive the full present value of its lien. As Professor Howard—a proponent of home mortgage strip down and severe critic of *Dewsnup*—points out, the denial of present value to mortgagees was the reason the Supreme Court held that the Frazier-Lemke Act effected an unconstitutional taking.⁴²⁷

423. 11 U.S.C. § 1327(c) (1988).

424. 11 U.S.C. § 1325(a)(5)(B) (1988).

425. *Id.*

426. "Of course the secured creditor's lien only secures the value of the collateral." 124 CONG. REC. H11107 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 CONG. REC. S17423 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).

427. Howard, *supra* note 215, at 525. She argues, however, that a bankruptcy statute could constitutionally deny full present value to creditors who took mortgages after the effective date of the statute.

Full present value need not be given if the creditor receives the full payments to which the creditor agreed. Thus in Chapter 11 reorganizations, a mortgagee with a long-term debt at a below market interest rate can be held to that bargain even though present value equal to the face amount of the debt—or even equal to the value of the collateral if it is less—is not received. The Chapter 11 plan can leave the creditor's secured claim unimpaired;⁴²⁸ the mortgagee gets what it bargained for and can blame no one else if the interest rate is below market.

The pernicious effect of home mortgage strip down in Chapter 13 however would be that mortgagees with below market interest rates might receive neither what they bargained for nor full present value. The court in *Bellamy* dismissed Federal Home's argument that this would be improper by saying that the mortgagee's "assurance" in this regard "is provided by virtue of the fact that the Chapter 13 plan may not modify what was bargained for in respect to its secured claim."⁴²⁹ The court ignored the fact that a mortgagee who bargained for 30 years of monthly payments is hardly receiving what it bargained for if it receives fewer years of payments because of mortgage strip down. Courts have been careful to limit the apparently broad scope of § 1327(c) to avoid constitutional problems and to stay faithful to the principles of *Long v. Bullard*.⁴³⁰ For example, the court in *In re Simmons*⁴³¹ held that § 1327(c) did not eliminate the creditor's lien even though the plan in a sense "provided for" the creditor's claim—by treating it as an unsecured claim.⁴³²

If the courts ultimately determine that strip down can only occur if the creditor receives full present value during the plan under § 1325(a)(5)(B), then perhaps the "other than" clause will have little meaning.⁴³³ Until then, it serves the important function of prohibiting, as a matter of positive statute law, the strip down of home mortgages.

428. 11 U.S.C. § 1124(1) and (2) (1988). The present value requirement of 11 U.S.C. § 1129(b)(2)(A)(i)(II) only applies to classes of impaired claims. By making the § 1111(b)(2) election, the undersecured creditor can ensure that the entire claim is left unimpaired, see 11 U.S.C. § 1111(b)(2) (1988), thus ensuring that the plan cannot leave only the creditor's § 506(a) secured claim unimpaired and strip down the lien.

429. *Bellamy v. Federal Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176, 186 (2d Cir. 1992).

430. 117 U.S. 617 (1886).

431. 765 F.2d 517, 555 (5th Cir. 1985).

432. *Id.*

433. As noted above, the cases will be rare in which debtors could pay the amount of their first mortgage with interest during a three- to five-year plan. See *supra* text accompanying note 418.

H. Policy Implications

An interpretation of §§ 1322(b)(2) and (b)(5) will also benefit from the context of unmistakable bankruptcy policies. We summarize very briefly here arguments made ably by others.

1. Intrinsic Policy Concerns

There are three relevant intrinsic policies of the Bankruptcy Code—policies that act directly on those who find themselves enmeshed in bankruptcy as debtors or creditors.

First, bankruptcy should help to provide a fresh start for the “honest but unfortunate debtor.”⁴³⁴ Home mortgage strip down does little to advance that policy. In the typical case, home mortgage strip down will provide no immediate benefit to the debtor. For example, the debtors in *Bellamy*⁴³⁵ will have to make their regular monthly payments without reduction for many years; they will not benefit from the strip down for a long time. By the time they see any benefit the financial distress that prompted their Chapter 13 filing will be ancient history. As the commentators have pointed out, this makes little sense in terms of providing a fresh start to debtors in financial distress.⁴³⁶ We may also question whether a debtor who can maintain the mortgage payments is so “unfortunate” as to deserve the benefits of strip down.

Second, debtors should be assisted in maintaining home ownership during times of financial distress. Section 1322(b)(5) was designed to codify pre-Code practices which assisted debtors in curing defaults on home mortgages and maintaining home ownership. That policy is of course consistent with the policy of encouraging home ownership that is reflected in many national programs such as the Veterans' Affairs Department and Federal Housing Administration programs.⁴³⁷ Strip down does little to further this intrinsic policy of the Bankruptcy Code. Only those

434. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

435. *Bellamy v. Fed. Home Loan Mortg. Corp. (In re Bellamy)*, 962 F.2d 176 (2d Cir. 1992).

436. Klingenberg, *supra* note 4, at 464; Lindauer, *supra* note 4, at 277-81; *see also* Canzoneri, *supra* note 4, at 19.

437. *See* Polk, *Chapter 13 Cramdown*, *supra* note 4, at 297; Polk, *Bankruptcy Beast*, *supra* note 4, at 37.

who can afford their mortgage payments benefit from strip down in the typical case. They could keep their homes without strip down, and the benefit they receive does not come for years.

Third, debtors should not receive windfalls at the expense of secured creditors. In particular, *Dewsnup v. Timm*⁴³⁸ identifies a policy of respecting the bargains of debtors and secured creditors to the extent of preserving to the secured creditors the right to look to future appreciation of the collateral.⁴³⁹ Congress specifically protected lenders in this way in Chapter 11 cases by allowing them to make the § 1111(b)(2) election;⁴⁴⁰ Congress probably did not anticipate that eleven years after enactment of the Bankruptcy Code the circuit courts would suddenly decide that home mortgage strip down was permissible in Chapter 13.⁴⁴¹ Judging from the way Congress handled the issue in Chapter 11, Congress probably did not intend to allow Chapter 13 debtors to strip down liens at the bottom of a real estate market and then reap the windfall of riding the market back up.⁴⁴²

2. Extrinsic Policy Concerns

There are also three extrinsic policy concerns—policy concerns that relate to the effect of the bankruptcy laws on those not enmeshed in them.

First, strip down is becoming so widely used that it threatens to further damage the already weak home lending industry. Home mortgage lenders who sell their loans on the secondary market, as most must,⁴⁴³ are being required to buy back stripped-down loans and bear the cost.⁴⁴⁴ One bankruptcy judge has noted that “not a day goes by” that the court is not requested to strip down a home mortgage.⁴⁴⁵ The cost of further weakening of the home lending industry may be borne by the taxpayers, as additional banks and savings and loans fail.⁴⁴⁶

Second, strip down impedes the national policy, reflected in numerous

438. 112 S. Ct. 773 (1992).

439. *Id.* at 777-78.

440. 11 U.S.C. § 1111(b)(2) (1988); see *In re Griffiths*, 27 B.R. 873, 876 (Bankr. D. Kan. 1983) (stating that purpose of 1111(b)(2) election is to prevent “cash out”); *In re Kvamme*, 93 B.R. 698 (Bankr. D.N.D. 1988) (illustrating simply and clearly the operation of the 1111(b)(2) election).

441. The *Houglund* case was decided in 1989, 11 years after the enactment of the 1978 Bankruptcy Code.

442. See, e.g., *In re Woodall*, 123 B.R. 95, 97-98 (W.D. Okla. 1990).

443. See Polk, *Chapter 13 Cramdown*, *supra* note 4, at 296.

444. See Polk, *Chapter 13 Cramdown*, *supra* note 4, at 296.

445. *In re Davidoff*, 136 B.R. 567, 568 (Bankr. M.D. Fla. 1992).

446. See Lindauer, *supra* note 4, at 280, n.142.

government programs, of helping first time home buyers, including those who can afford only a small down payment. Strip down has its greatest effect on lenders who take small down payments. The government does not seem willing to bear the cost of strip down even though government loan guarantee programs are designed to induce lenders to make low-down-payment home loans;⁴⁴⁷ the Federal Housing Administration and the Veterans' Affairs Department have determined that their loan guarantees will not cover losses caused by strip down.⁴⁴⁸ If the government is either unwilling or unable to bear the cost of strip down, it seems likely that many of the financial institutions which have up to now participated in the government programs will pull out or reduce their participation.⁴⁴⁹ Indeed, innovative private programs⁴⁵⁰ for enabling would-be homeowners with low down payments to buy homes will be discouraged. The effect on those who are only marginally able to qualify for home loans may be substantial; by allowing debtors like the *Bellamys* who can afford their mortgage payments to pay off their mortgages years ahead of schedule, the courts may be preventing others from even becoming homeowners.

Third, the effect on the economy may be substantial. One of the reasons the federal government supports home ownership programs is the multiplying effect of home construction spending on the economy. To the extent that strip down reduces the ability of marginal buyers to purchase homes, the economy as a whole may be affected.

V. CONCLUSION

The authors submit that the Bankruptcy Code prohibits home mortgage strip down unless the following two conditions are met: (1) the mortgagee has taken other collateral for the loan in addition to the home, so that the "other than" clause does not apply; and (2) the Chap-

447. Polk, *Chapter 13 Cramdown*, *supra* note 4, at 297.

448. Lindauer, *supra* note 4, at 279.

449. See Polk, *supra* note 4, at 297-98. The default rate on government guaranteed home loans is much higher than on other mortgages. See Debra Cope, *Home Loan Delinquencies Take a Turn for the Worse*, AM. BANKR., Sept. 4, 1992, at 2 (stating that the default rate on all loans is 4.77%, versus 7.31% on FHA loans and 6.73% on VA loans).

450. For example, Countrywide Funding has begun a program under which a 5% down payment (2% of which can be contributed by the seller, by a relative, or by anyone else) is sufficient. Gregory A. Lumsden, *First Time Buyers: the Key to Today's Real Estate Market*, 14 L.A. BUS. J. 11B(1) (Nov. 16, 1992).

ter 13 plan does not utilize § 1322(b)(5) to cure a mortgage default.

Moreover, the issue of home mortgage strip down illustrates a fact about the Bankruptcy Code: its language will not stand up to the stress created by hyper-technical cross-referencing of terms. It must be read with sensitivity to context and with a large measure of common sense.

As a final example, we point out that a hyper-technical cross-referencing of §§ 1322(b)(5), 1325(a)(5)(B), and 1328(a) would lead to the conclusion that no plan could be confirmed in which the debtors used § 1322(b)(5) to cure defaulted home mortgages.⁴⁵¹ The language of the Code is not a mathematical puzzle; it must not be treated as such with an "overly technocratic"⁴⁵² approach.

We do not propose that courts abandon reliance on the Code's language or that they elevate legislative history to the level of law. We merely propose that courts consider a commonsense understanding of what Congress intended to accomplish. If courts will do that, perhaps troubling decisions like the pro-strip down cases criticized here—and others, such as *Durrett*⁴⁵³ and *Levit*⁴⁵⁴—may be avoided.

451. It appears that a mortgagee's secured claim is "provided for" as that term is used in Chapter 13 when defaults are cured and the mortgage is reinstated under § 1322(b)(5). See 11 U.S.C. § 1328(a)(1) (1988) (allowing discharge of "all debts provided for by the plan" except debts "provided for" under § 1322(b)(5)). Section 1325(a)(5) applies "with respect to each allowed secured claim provided for by the plan" 11 U.S.C. § 1325(a) (1988). Thus, on a plain meaning reading of Chapter 13, it would appear that debtors who cure and reinstate their mortgages under § 1322(b)(5) must comply with § 1325(a)(5), which requires that the debtor either obtain the mortgagee's acceptance of the plan, surrender the home, or pay the entire amount of the mortgagee's § 506(a) secured claim during the three to five years of the plan. That is an absurd result.

452. *In re Sauber*, 115 B.R. 197, 199 (Bankr. D. Minn. 1990).

453. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (permitting fraudulent transfer attack on regularly conducted, noncollusive foreclosure sale).

454. *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989) (applying one-year look-back period for insider preferences to noninsider who had obtained guarantee from insider).