The Bifurcation of Undersecured Residential Mortgages Under Sec. 1322(b)(2) of the Bankruptcy Code: The Final Resolution

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The Bifurcation of Undersecured Residential Mortgages Under § 1322(b)(2) of the Bankruptcy Code: The Final Resolution

by

Veryl Victoria Miles

I. INTRODUCTION

One of the most controversial and contested bankruptcy issues addressed by our courts and pondered by the bankruptcy bar in recent years has been whether an undersecured residential mortgage may be subject to bifurcation under chapter 13 of the Bankruptcy Code.¹ The judiciary’s struggle with this debate has been both compelling and frustrating to observe as one speculates how the matter will be ultimately resolved.

The significance of this issue is equally important for the individual debtor seeking relief under chapter 13, who hopes to repay as much of his or her prepetition indebtedness as possible and to save a home from impending foreclosure; and for the creditor, who needs to minimize threatened losses to its claims against the debtor in wake of the debtor’s waning financial condition. This fact has not been lost in the many courts that have had to determine if, and to what extent, bifurcation of undersecured residential mortgages is permitted under chapter 13’s § 1322(b)(2).² The courts have employed various principles of statutory construction to find out exactly what Congress intended when it enacted language under § 1322(b)(2) protecting from modification “the rights of holders of secured claims . . . secured only by a security interest in real property that is the debtor’s principal residence . . . .”³ The courts have searched for the meaning of § 1322(b)(2) in scantily written legislative history, and they have reached back into the annals of our bankruptcy laws to find additional support for their interpretations of § 1322(b)(2). One can also find resuscitations of the basic principles of bankruptcy law, concerning the delicate balance between providing

¹Associate Professor of Law, The Catholic University of America, Columbus School of Law. The author would like to give special thanks and acknowledgment to Ms. Monique Abacherli, her research assistant.


⁴Id.
“equity” for the creditor and a “fresh start” for the debtor, interjected throughout this rich body of judicial opinions.

How this question is to be resolved is uncertain. During the last congressional term, both the House and Senate proposed bankruptcy reform legislation that included amendments to §1322(b)(2) that would have prohibited the bifurcation of such claims under a chapter 13 plan. Although the proposed legislation was generally supported by both houses of Congress, it did not pass due to last minute amendments made to the bill by the Senate before the House was to vote on the bill and adjourn for the term. Nevertheless, there is great expectation that this or similar bankruptcy reform legislation will be introduced in the 103d Congress in 1993. The passage of this legislation or similar legislation would bring this debate to an end soundly in favor of the home mortgage lending industry.

In August of 1992 the Fifth Circuit Court of Appeals, in its decision in Nobleman v. American Savings Bank (In re Nobleman), interpreted §1322(b)(2) of the Code as prohibiting the bifurcation of a claim secured only by a lien against a debtor’s principal residence. This decision is contrary to the position taken previously by the Courts of Appeals for the Second, Third, Ninth and Tenth Circuits on the same question. On December 7, 1992 the Supreme Court granted a petition for certiorari, filed by the debtor in Nobleman, to resolve the split now existing among the courts of appeals. Accordingly, the resolution of this question by Congress or by the Supreme Court is imminent and creates a dramatic pause for the bankruptcy bar.

This article looks critically at the debate as it has been waged in the courts, and how it might be resolved by the Supreme Court or through legislative amendment. The question to be considered is which side of the debate is more correct in its interpretation of §1322(b)(2). The answer is found in the language of the provision, the legislative history, congressional intent, and the fundamental principles of bankruptcy law. Past proposals for legislative amendment are also considered in terms of how they support or slight the basic equitable principles embodied in our bankruptcy law, and whether this proposed resolution represents a fair and reasonable extension of bankruptcy protection, or an inequitable preference for the home mortgage industry.

The first two sections of this article describe the significance of chapter 13 relief under the Bankruptcy Code as an option for individual debtors, and discuss Code provisions that are relevant to the determination of whether bifurcation...
cation is permissible or not permissible under chapter 13. Following these sections is an analysis of the body of case law that has developed over the years addressing this question. The next section reviews the legislative proposals to amend § 1322(b)(2), and the testimony presented to Congress on behalf of creditor and debtor representatives specifically addressing this question and the appropriateness of the proposed amendments. The final section considers how the Supreme Court might resolve the debate in light of recent bankruptcy decisions by the Court; it also provides commentary on the legislation proposed by Congress during the last congressional term, how it fits into the statutory scheme of the Code, and how it could affect the basic bankruptcy principles embodied in chapter 13.

II. CHAPTER 13: A DESIRABLE OPTION FOR BANKRUPTCY RELIEF

Our bankruptcy laws have reflected sensitivity toward the personal struggle that the financially distressed individual wages in making the decision to seek such relief. This sensitivity is found in the availability of two types of relief that an individual debtor may choose from under the Bankruptcy Code.\(^7\)

The first type of relief available to the debtor is commonly known as "straight bankruptcy," and is found in chapter 7 of the Bankruptcy Code.\(^8\) By seeking relief under chapter 7, the debtor elects to have his or her nonexempt assets liquidated by the trustee to go toward the payment of all prepetition debts.\(^9\) This option for relief also entitles the debtor to a discharge of personal liability for any balances remaining against these debts after the proceeds from the liquidation have been distributed to the prepetition creditors.\(^10\) However, relief under chapter 7 may prove to be an undesirable option for the individual who either feels a moral responsibility to make a best effort to repay the entire

\(^7\) Individuals seeking relief under the Bankruptcy Code may file under chapter 7, chapter 11 or chapter 13 of the Code, 11 U.S.C.A. §§ 701–28, §§ 1101–46 and §§ 1301–30 (West 1979 & Supp. 1993). Under chapter 7 the debtor's non-exempt assets are liquidated by the trustee. The trustee creates a fund to distribute to the debtor's creditors who hold prepetition debts against the debtor. The debtor is discharged of his or her prepetition debts, with certain exceptions, and is permitted to retain exempt assets to begin a fresh start. In a chapter 13 case the debtor's assets are not liquidated to pay the claims of prepetition creditors. Instead, the debtor is required to propose a plan to repay these debts within a three to five-year period. Under this plan the creditors are required to receive no less than what they would receive under a chapter 7 liquidation. After the debtor's completion of the payments under the plan, the debtor is given a discharge from the prepetition debts. The debtor's eligibility for relief under chapter 13 is determined by the total amount of the debtor's secured and unsecured debts: the debtor's unsecured debts must be less than $100,000 and secured debts must be less than $350,000. 11 U.S.C.A. § 109(e) (West 1993)). This relief is also available to the nonbusiness and the small business debtor, if the debts do not exceed the statutory limits. If the debts exceed these limits, the debtor is permitted to make a filing under chapter 11. See Toibb v. Radloff, 111 S. Ct. 2197 (1991).


\(^9\) See id. §§ 704(1), 725 and 726.

\(^10\) Id. § 727.
balance due on prepetition indebtedness, or who wants to avoid the loss of valuable nonexempt assets through a liquidation. In such a case, chapter 13 of the Code is the better option.

Under chapter 13 of the Code, the debtor is able to propose a plan for the readjustment or reorganization of his or her prepetition debts and the payment of such debts, in full or partially, from future income, and is also able to retain any valued prepetition property. Petitions for relief under chapter 13 may be filed by "individuals with regular income" who at the time of the filing of the petition have unsecured debts not exceeding $100,000 and secured debts not exceeding $350,000. The term "individual with regular income" includes an individual whose income is "sufficiently stable and regular to enable such individual to make payments under [a Chapter 13 plan]."

The original idea behind this concept of readjustment or reorganization of a debtor's debts was to motivate overburdened debtors to make an effort to repay their prepetition debts from future earnings rather than opt for straight bankruptcy or liquidation. Chapter 13 contains several incentives for the debtor

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11[The debtor's personal sense of morality cannot be ignored in choosing the appropriate insolvency proceeding. The debtor who feels a moral obligation to pay debts may opt for Chapter 13 instead of Chapter 7 for that reason.] BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL, ¶ 9.02, at 9–5 – 9–6 (1986).

12For a description of the significance of exempt and nonexempt property at bankruptcy, see note 24 infra.


14Id. § 1306(b) (West Supp. 1993).

15Id. § 109(e) (West 1993).

16Id. § 101(30) (West 1993). Individuals qualifying for relief under chapter XIII of the Bankruptcy Act, the predecessor of chapter 13, had to be "wage earners." This meant that only "individuals whose principal income [was] derived from wages, salary or commissions" could seek relief thereunder. Bankruptcy Act of 1898, 11 U.S.C. § 606(8), reprinted in App. 1 COLLIER ON BANKRUPTCY 245 (Lawrence P. King, ed., 15th ed. 1992). The impact of this limitation made chapter XIII relief too exclusive. For example, sole proprietors of small businesses were not able to seek relief under chapter XIII, and were limited to liquidation relief or were required to seek reorganization under the more costly and time consuming chapter XI, generally suitable for reorganizations of larger corporate entities. Moreover, individuals receiving regular income through means other than wages and the like were also excluded from chapter XIII relief. This meant that persons receiving regular and steady income from "investments, pensions, social security or welfare," could not apply for relief under chapter XIII and were essentially limited to liquidation. H.R. No. 595, 95th Cong., 1st Sess. at 118–119 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6078–80.

17The first wage earner provision to appear in our bankruptcy laws was in the 1933 amendments to the Bankruptcy Act, which were recommended by Thomas D. Thacher, Solicitor General under the Hoover Administration. As Solicitor General he conducted a study of the bankruptcy system that revealed many shortcomings in relief available to consumers:

Our inquiry has led us to the following conclusions: (1) that most wage earners who fall into debt desire to pay their debts in full and want to avoid the stigma of bankruptcy; (2) that they are driven into bankruptcy chiefly by garnishments and other attachments; (3) that at least a third of the wage earners who are now forced into bankruptcy and released from their debts could, if given time and protection, pay their creditors in full; (4) that if the law offered such relief without stigma, a still larger number of wage earners, who now resort to loan companies in an effort to stave off their creditors and gradually get into debt beyond their capacity to pay, would find a means of relief at a comparatively early stage of indebtedness. . . .
to choose chapter 13 as an option of relief that are not found in a chapter 7 liquidation. This option protects the moral sense of responsibility for the debtor who is reluctant to seek relief under the Code in fear of the stigma that bankruptcy holds for some individuals. By seeking relief under chapter 13, the debtor is able to get much needed financial relief, and, at the same time, demonstrate to creditors a clear desire to pay off his or her debts.

Chapter 13 relief also becomes a better option because the discharge may prove to be greater for a particular debtor than that found under chapter 7. In a chapter 7 liquidation the debtor's discharge may be somewhat limited by the classification of certain debts as "nondischargeable" under § 523 of the Code.

The whole problem of wage-earner bankruptcies is of such major importance that we think it should be dealt with, not by attempting to restrict their bankruptcies or to place new hardships upon small debtors, but to create provisions that will do justice to creditors on the one hand, and on the other, will afford to financially embarrassed wage earners a form of constructive relief from the staggering burdens of loans and interest charges which they are now carrying in an attempt to save themselves from the stigma of the only proceeding now available to them.


It is clear from the following statements concerning the first wage earners provisions recommended for enactment in 1933, and the statements of Senator DeConcini to the Senate regarding the House Amendments to the bill proposing the amendments to the Bankruptcy Act, that wage earners relief was to help lessen the moral burdens of bankruptcy for the debtor and offer a possibility of greater repayment of debts to creditors:

The purpose [of Chapter VI] is to encourage honest debtors, who wish to avoid the stigma of bankruptcy, to seek remedial relief at an early stage of insolvency when there is still something worth saving for their creditors, instead of waiting until all is lost and then being forced into bankruptcy.

Memorandum by Solicitor General relative to S. 3866 and H.R. 9968, to amend the Bankruptcy Act, printed for the use of the Committee on the Judiciary, contained in S. REP. No. 1215, 72d Cong., 2d Sess. 7 (1933).

Debtors under this chapter will be able to voluntarily pay off their debts while being under the protection of the court. This allows for greater payouts to creditors than would probably occur if the debtor took straight bankruptcy, and it preserves the debtors self-esteem by permitting him to pay his debts using his best efforts without incurring undue hardship.


Weintraub & Resnick state:

Although the new Code eliminates the labels "bankrupt" and "adjudication" for all debtors, nevertheless a good faith effort to pay past debts under court protection is looked upon more favorably by the community than a total avoidance of liabilities through a discharge. This factor may be important to individuals who are concerned about personal image as well as the ability to obtain credit in the future. Extending credit to someone who despite past financial misfortunes, has attempted to pay as much as possible from future earnings is much more preferable to creditors than advancing credit to someone who has not even bothered to make the attempt.

Weintraub & Resnick, supra note 11, ¶ 9.02 at 9-5.

Id.
The types of debts that are classified as nondischargeable are debts that may have been incurred by the debtor wrongfully, or are of the type that it would be contrary to the public welfare to allow a debtor to be discharged of continued responsibility for such indebtedness. If the debtor has a significant number of these debts outstanding at the time of bankruptcy, a discharge under chapter 7 may severely impede the debtor's hopes for a meaningful fresh start upon discharge. In the alternative, the debtor might prefer to file for relief under chapter 13 and propose to pay some or all of these obligations under the plan. Upon the completion of the payments under the chapter 13 plan, the debtor will be eligible to receive a discharge from most of the nondischargeable debts falling within § 523(a), as well as all other prepetition debts.

The most compelling incentive under chapter 13 can be found in the ability of the debtor to retain nonexempt assets. This feature of chapter 13 relief is very important to the debtor with significant nonexempt assets. Because these assets do not qualify as "exempt" property under § 522(b) of the Code, the debtor would lose these assets to liquidation under chapter 7 and would be well-advised to seek relief under chapter 13 in order to hold onto these valued assets.

Exempt properties are generally limited by dollar value and to properties that are essential to a debtor's daily needs. One of the most significant types
of exempt property is the debtor's home. Although homestead exemptions are usually available to a debtor and are often generous in amount, chapter 13 relief remains important to the debtor whose home is encumbered by liens against the home that are not avoidable under § 522(f) of the Code, and thus, remain subject to creditor liens after bankruptcy. If a debtor seeks relief under chapter 7 and has exempt property that is subject to an indefeasible lien that survives bankruptcy, the creditor holding the lien may exercise his or her contractual rights to foreclose against the property after the debtor has been discharged and the case is closed.

Because home mortgages are not avoidable under § 522(f) of the Code and survive bankruptcy, a debtor in a chapter 7 liquidation can only avoid the creditor's ultimate foreclosure against the home after bankruptcy by either paying off the mortgage, or by reaffirming the debt with the creditor and paying up any arrearages. The practicality of the debtor paying off the mortgage balance depends upon the debtor's ability to obtain refinancing of the mortgage, which would most likely be at a premium due to higher interest rates charged for such refinancing. Similarly, the debtor's ability to reaffirm the debt with the original creditor depends upon whether the creditor is willing to enter into a reaffirmation agreement with the debtor, and whether the terms of that agreement are in the debtor's best interests.

In situations like this, chapter 13 relief becomes a very attractive option for the debtor. By filing a petition for relief under chapter 13, a debtor may

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27Some of the largest homestead exemptions are in the following states: Alaska, Arizona, California, Massachusetts, Nevada, North Dakota. 7 COLLIER, supra note 16. Collier includes the state exemption laws for all fifty states.


29The purpose of exempt property is to assist the debtor in having a "fresh start" after the bankruptcy. If the debtor is truly to enjoy the benefits of having exempt property, outstanding liens held by creditors against such property must be avoidable. Section 522(f) permits the debtor to avoid certain liens against exempt property. These liens include judicial liens against all exempt property and nonpossessory nonpurchase money liens against personal property only. Accordingly, purchase money liens against personal property and consensual liens against real property, such as mortgage liens, are not avoidable under this section of the Code and survive bankruptcy. Id. See generally Margaret Howard, Multiple Judicial Liens in Bankruptcy: Section 522(f) Simplified, 67 AM. BAR. J. 151 (1993).

30Although the debtor receives a discharge of personal liability for all prepetition debts under § 727(a) of the Code in a chapter 7 liquidation, this discharge does not affect liens that creditors may have against the debtor's assets. Section 506(d) provides for the preservation of liens against allowed secured claims that have not been disallowed by the court or avoided under the Code. 11 U.S.C.A. § 506(d) (West 1993). The Supreme Court recently ruled in Dewsnup v. Timm, 112 S. Ct. 773 (1992), that liens against a debtor's real property may not be avoided under § 506(d) in a chapter 7 liquidation.

31A debtor that would otherwise receive a discharge from a debt may elect to reaffirm that debt if the creditor is willing to do so. In such cases the reaffirmation agreement is negotiated between the parties prior to the discharge, and it is an enforceable agreement if it is filed with the court and clearly represents a "fully informed and voluntary agreement by the debtor" that does not "impose an undue hardship on the debtor or a dependent of the debtor." The debtor has the right to rescind the agreement any time before discharge or within sixty days after the agreement is filed with the court. 11 U.S.C.A. § 524(c), (d) (West 1993).

32Id.
prevent a foreclosure action taken by a home mortgage lender. Section 1322(b)(5) of the Code enables the debtor to decelerate any prepetition defaults on a long-term home mortgage by proposing to pay mortgage arrearages under the plan, and enables the debtor to retain the home if the debtor remains current on postpetition mortgage payments. The debtor will remain personally liable for the payments remaining due on the long-term debts, such as home mortgages, that the debtor is unable to pay within the term of the plan. Although § 1322(b)(2) permits a debtor to "modify" secured and unsecured claims, which usually results in a readjustment of the payment terms of the original contract, this right to modify claims does not include "claim[s] secured only by a security interest in real property that is the debtor's principal residence."35

Accordingly, chapter 13 gives the debtor a chance to save the home from an impending foreclosure by decelerating a defaulted loan, and by permitting a cure of the default under the plan. At the same time, chapter 13 gives protection to the debtor's creditor, who holds a claim secured by a mortgage against the debtor's home, by requiring that all postpetition installments be paid in accordance with the terms of the mortgage contract without any further modification of the terms of the contract.

33Whenever a debtor seeks relief under the Bankruptcy Code, all collection efforts such as foreclosure are stayed under § 362(a). 11 U.S.C.A. § 362 (West 1993). After filing the petition under chapter 13, the debtor is required to propose a plan for the repayment of prepetition debts. Section 1322 of the Code lists the requirements of a plan, which includes the submission of all future earnings or income of the debtor to the trustee necessary for execution of the plan. 11 U.S.C.A. § 1322(a)(1) (West 1979). Under subsection (b)(5) of this provision, for long-term debts such as mortgages the plan may include proposals providing for the cure of any prepetition defaults and the maintenance of postpetition payments. 11 U.S.C.A. § 1322(b)(5) (West 1979).

34The ordinary maximum term allowed for a chapter 13 plan is three years. 11 U.S.C.A. § 1322(c) (West 1979). The bankruptcy court may approve a plan for up to five years upon a finding of "cause". The terms of most home mortgages well exceed these limits, and most debtors are not able to repay a home mortgage within the plan term. Accordingly, § 1322(b)(5) permits the debtor with a long-term claim to bring current the arrearages under the plan and to continue postpetition mortgage payments during the plan and beyond, until the mortgage is repaid. Although § 1328 entitles a debtor to a discharge of prepetition debts upon completion of the plan, that discharge does not include the debtor's liability under the long-term debts remaining unpaid after the plan has expired. 11 U.S.C.A. § 1328 (West 1979 & Supp. 1993).

35Section 1322(b)(2) provides:

[T]he 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 . . . .

This right to modify qualifying debts is significant for the debtor, because he or she can propose a plan that may realign the amount to be paid in installments through a reduction or extension of the installment payments under the plan. However, the right to modify does not extend to claims that are secured only by real property that is the debtor's primary residence. What this means for the debtor is that he or she can seek relief under chapter 13 to stop a creditor from exercising foreclosure rights, but the plan can only cure the default and cannot propose a further readjustment of the claim held by a lender that is only secured by the debtor's home.

36Id.
Until the mid-1980's, most home mortgage lenders could expect their claims to be protected from modification under chapter 13. However, with the dropping property values that occurred throughout many parts of the country during the 1980's, some mortgage holders found claims that had once been fully secured had become undersecured. In cases like this, debtors attempted to divide these claims against their homes into "secured" and "unsecured" claims as defined by § 506(a) of the Code, and proposed modifications of the unsecured portions of these claims as allowed modifications under § 1322(b)(2). If this was permitted by the bankruptcy courts, it typically meant that the debtor's reorganization plan would propose that the creditor's claim be fully paid and protected against modification only to the extent of the actual value of the creditor's security in the property, and not for the full value of the outstanding debt.

This practice, commonly referred to as a "cramdown," has been vigorously contested by many lenders, who have argued that the bifurcation of an undersecured mortgage into secured and unsecured portions is a prohibited modification under § 1322(b)(2). Debtors have argued, to the contrary, that such a bifurcation is not a prohibited modification under § 1322(b)(2), because the only claim that is protected from modification thereunder is the "secured claim" and not the "unsecured claim," as defined under § 506(a) of the Code. Accordingly, the courts have been faced with the task of determining whether a proposed plan is in compliance with the anti-modification provisions of § 1322(b)(2), if the plan includes a reclassification of an undersecured residential mortgage into a secured claim and an unsecured claim pursuant to § 506(a). Or, to put the question more directly on point, are the provisions of § 506 applicable to determinations made under § 1322(b)(2) of the Code?

III. THE RELEVANT LAW GOVERNING MODIFICATION AND BIFURCATION UNDER A CHAPTER 13 PLAN: PROVISIONS IN CONFLICT OR CONGRUENCE?

Section 1322 of the Code is the provision in chapter 13 that governs the contents of the debtor's readjustment plan, and dictates what the debtor must

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38 Moreover, in some cases, the debtors seeking to reclassify the undersecured claim as both a secured claim and an unsecured claim have also gone so far as to assert that the lien or mortgage held by the creditor should also be avoided to the extent of the value of the unsecured claim pursuant to the lien avoidance provision of § 506(d). This section provides that:

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless—

(1) such claim was disallowed only under section 502(b)(2) or 506(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of an entity to file a proof of such claim under section 501 of this title.

11 U.S.C.A. § 506(d) (West 1993). Accordingly, it is argued that, since § 506(d) permits the avoidance of claims that are not "allowed secured claims," the "unsecured" portion of the creditor's claim against the debtor's home should be avoidable.
or may propose under the plan in order for the plan to be confirmed.\footnote{39} Under subsection (a) of this provision, the debtor is required to submit all of the debtor's future earnings or income to the trustee for distribution to the debtor's creditors for the duration of the plan, to provide for the full payment of priority claims, and to treat all claims within a class similarly.\footnote{40}

Subsection (b) of § 1322 instructs the debtor on how creditor claims may be treated under the plan.\footnote{41} The provision that is most useful to the debtor under § 1322(b) is found under paragraph (2). It provides that the debtor may: modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that


\footnote{40} Section 1322 provides:

(a) The plan shall—

(1) 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;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.


\footnote{41} 11 U.S.C.A. § 1322(b) (West Supp. 1993) provides:

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

(1) designate a class or classes of unsecured claims; as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(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;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or other unsecured claim;

(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;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title.
is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.42

It is through this provision that chapter 13 relief achieves great efficacy and substance. The debtor’s ability to modify the terms of prepetition debts that have become too onerous to satisfy, as originally contracted, is an invaluable feature of debt readjustment under chapter 13. The right to modify the debt permits the debtor to propose a change in the original contract payment terms, including a reduction in installment payments or the interest rate, or a change in the due date of the contract.

As the language states, the debtor may modify the rights of holders of secured and unsecured claims. However, this right to modify claims under paragraph (2) does not include “claims secured only by a security interest in real property that is the debtor’s principal residence.”43 Accordingly, claims that may be modified under § 1322(b)(2) include unsecured claims and claims secured by property other than, or in addition to, a debtor’s principal residence.44 Thus, the Code provides a special protection against modification of claims held by lenders holding mortgages only against the debtor’s home.

The exception to the modification of claims secured only by a debtor’s principal residence is the result of a compromise between the House and Senate concerning the extent to which the debtor should be permitted to modify claims under chapter 13.45 The House version of what is now § 1322(b)(2) provided

42This ability to modify is optional. That is, the debtor is not required to modify claims but has the right to do so if necessary for rehabilitation under the plan See id.
43Collier provides the following description of the extent of the debtor’s right to modify secured claims under § 1322(b)(2):

A claim secured by any other real property or by personal property of the estate or of the debtor, or by the property of another may be modified by the chapter 13 plan. Creditors sometimes demand real property and personal property to secure the same debt. Even purchase money mortgages often take additional security interests in appliances, furniture and other personalty. Other creditors may have security interests in other real property, rents, escrow accounts, bank accounts, motor vehicles or insurance proceeds and premium refunds. All such claims may be modified by a chapter 13 plan, and a creditor may not protect its claim from modification by relinquishing its other liens after a bankruptcy is filed. A claim secured by a lien other than a security interest, on real estate that is the debtor’s principal residence, may also be modified by a chapter 13 plan.

A claim secured by a security interest in the principal residence of the debtor may be modified, unless the residence constitutes real property. A mobile home, for instance, often does not constitute real property under applicable nonbankruptcy law.
44Senator De Concini stated:

Section (b)(2) . . . represents a compromise agreement between similar provisions in the House bill and Senate amendment. Under the House amendment, the plan

5 COLLmER, supra note 16, ¶ 1322.06, at 1322-15 – 16.
that the plan could "modify the rights of holders of secured claims or holders of unsecured claims." Contrary to this unrestricted right to modify claims, the Senate version of the same provision provided that the plan could "modify the rights of holders of secured claims (other than claims wholly secured by mortgages on real property) or of holders of unsecured claims." Accordingly, the House version granted the debtor flexibility in readjusting all debts, whereas the Senate had offered the debtor limited authority for modification and provided all real estate mortgage holders with protection against modification of their contracts with the debtor. The compromise under the Code was to limit only the debtor's right to modify the claims of holders of residential real estate mortgages. This compromise reflected a desire by Congress to protect the home mortgage industry from having its claims modified under the plan.

Although the debtor may not propose a modification of the contract terms of these protected mortgages, § 1322(b)(5) does permit the debtor to propose a "cure" of any prepetition default on the mortgages. Section 1322(b)(5) specifically provides that the debtor may:

*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.*

Accordingly, debtors of long-term debts, like the typical home mortgage, may save their homes from foreclosure by proposing to cure any prepetition default under the plan and maintaining postpetition mortgage installments. By electing

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7Section 1322(b)(3) also permits the debtor to cure or waive defaults on unsecured and secured claims that are subject to modification under § 1322(b)(2). 11 U.S.C.A. § 1322(b)(3) (West Supp. 1993). Cases determining that a cure under § 1322 does not constitute a modification under § 1322(b)(2) include Grubbs v. Houston First American Sav. Ass'n, 730 F.2d 236 (5th Cir. 1984); DiPierro v. Taddeo (In re Taddeo), 685 F.2d 24 (2d Cir. 1982).


9Collier describes the practical application of § 1322(b)(5) for all debtors under chapter 13:

Section 1322(b)(5) is concerned with relatively long term debt, such as a security interest or mortgage on the residence of the debtor. It permits the debtor to take advantage of a contract repayment period which is longer than the chapter 13 extension
to cure the prepetition default on the long-term mortgage under § 1322(b)(5),
the debtor is also able to take advantage of the long-term payment schedule
of the mortgage contract for postpetition installments.\textsuperscript{52} At the same time, the
creditor's mortgage remains protected from modification as provided under
§ 1322(b)(2), and the debt is excepted from discharge under § 1328(a)(1) of
the Code.\textsuperscript{53}

The addition of § 1322(b)(5) responded to a critical limitation under chapter
XIII of the Bankruptcy Act. Under the Act, claims secured by real property
could not be affected by the debtor's plan, because § 606(1) of the Act specifi-
cally excluded such claims from the definition of "claims".\textsuperscript{54} In spite of this exclud-
ion, it became the practice of the bankruptcy courts to grant a chapter XIII
debtor injunctive relief against a creditor attempting to foreclose a lien against
the debtor's real property securing the claim.\textsuperscript{55} This relief enabled the debtor

period which may not exceed five years under any circumstances, and may be essen-
tial if the debtor cannot pay the full allowed secured claim over the term of the plan.
The right to cure defaults on long term contracts applies to all long term debt and
thus covers contracts such as land installment sale agreements as well as mortgages.

The debtor may not cure a default under this section if the debt matures earlier
than the due date for the final plan payment. Thus, where a large final balloon pay-
ment is due on a debt prior to the termination of the plan section 1322(b)(5) may
not be utilized and a debtor must look to other Code sections, usually section
1322(b)(3), to cure a default.

Although section 1322(b)(5) is not limited to secured or residential loans, its most
common use by far is to cure defaults on residential mortgages. It may be utilized
to cure postpetition defaults as well as prepetition defaults. . . . It may also be utilized
in cases in which the debtor has no personal liability on the claim, since the term
"claim" in the Bankruptcy Code is construed to include a claim against the debtor's
property. . . .

The debtor may maintain the contract payments during the course of the plan,
without acceleration by virtue of any prepetition default, by proposing to cure the
default within a reasonable time. The debtor may avail himself or herself of the pro-
visions of section 1322(b)(5) even though the long term debt is secured only by a
security interest in real property which is the principal residence of the debtor.

5 COLLIER, supra note 16, ¶ 1322.09[1], at 1322-20 (footnotes omitted).
\textsuperscript{52}Id. at 1322.09[4].
\textsuperscript{53}Section 1328(a)(1) provides for the discharge of the debtor upon the completion of his or her perfor-

mance under the plan:

(a) As soon as practicable after completion by the debtor of all payments under
the plan, unless the court approves a written waiver of discharge executed by the
debtor after the order for relief under this chapter, the court shall grant the debtor
a discharge of all debts provided for by the plan or disallowed under section 502 of
this title, except any debt—

(1) provided for under section 1322(b)(5) of this title . . . .

ter 13 see 5 COLLIER, supra note 16, ¶¶ 1322.09[4], 1328.01[1][d][ii].
\textsuperscript{51}According to the Report of Commission on the Bankruptcy Laws:

[S]ection 614 of the Act authorizes the court to "enjoin or stay until final decree any
act or the commencement or continuation of any proceeding to enforce any lien upon

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5 COLLIER, supra note 16, ¶ 1322.09[1], at 1322-20 (footnotes omitted).
to cure the default on the claim, to resume and maintain payments under the original debt, and thus to avoid foreclosure by the creditor. Section 1322(b)(5) represents a codification of the relief as recommended to Congress by the Commission on the Bankruptcy Laws.\(^5\)

In order for a plan with proposed modifications of secured or unsecured claims to be confirmed by the court, it must meet the requirements of §1325 of the Code.\(^7\) If a plan providing for the modification of claims is to be confirmed, it must propose to pay the unsecured creditors no less than what they would receive in a chapter 7 liquidation,\(^8\) and it must propose to pay the secured creditor the present value of the creditor's interest in the property securing

the property of the debtor." Literally, this provision enables the court to enjoin the enforcement of any lien whether or not it secured a debt dealt with by the plan, and indeed, whether or not the plan could deal with such debt. The courts have given liberal construction to this injunctive power vested in the court. Foreclosures of mortgages on real estate as well as enforcement of security interests in personal property have been enjoined by bankruptcy courts pursuant to this provision, and such injunctions have been sustained though subject to limitations affording protection to the secured creditors enjoined.


\(^7\)Section 1325 provides that the following requirements must be met in order for a plan to be confirmed by the court:

(a) Except as provided in subsection (b), the court shall confirm a plan if—

1. the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

2. any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation has been paid;

3. the plan has been proposed in good faith and not by any means forbidden by law;

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;

5. 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 is not less that the allowed amount of such claim; or
   (C) the debtor surrenders the property securing such claim to such holder; and

6. the debtor will be able to make all payments under the plan and comply with the plan.


111 U.S.C.A. § 1325(a)(4) (West 1979). For a description of the requirements for confirmation under §1325(a)(4) see 5 Collier, supra note 16, ¶ 1325.05.
the creditor’s claim. However, the requirements of § 1325(a)(5) governing the treatment of secured claims do not apply to claims that are not modified under the plan or “provided for under the plan,” such as claims held by home mortgage holders that are protected from modification under § 1322(b)(2). So long as the requirements of § 1325 are met, the plan may be confirmed by the bankruptcy court and will not require any additional vote of acceptance or approval by the creditors affected.

The other provision that is relevant to the application of § 1322(b)(2) is subsection (a) of § 506 of the Code, defining which claims in bankruptcy are deemed to be secured or unsecured. Section 506 is a provision of general appli-

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59 Supra note 57.
60 Collier states:

Section 1325(a)(5) applies only to allowed secured claims provided for by the plan. Although the term "provided for by the plan" is not defined by the Code or in its legislative history, the intended meaning seems clear enough. A chapter 13 plan may, but need not, modify the rights of most holders of secured claims. Since a plan need not modify allowed secured claims, it is discretionary with the debtor whether to make provision in the chapter 13 plan for allowed secured claims. In the event the plan makes no provisions for one or more allowed secured claims, the plan is to be confirmed by the court regardless of its acceptance or rejection by holders of allowed secured claims not provided for by the plan without any other showing being required under section 1325(a)(3).

62 In its decision to revise the bankruptcy laws in 1970, Congress appointed a Commission to study practice under the Bankruptcy Act. In its study of experiences under chapter XIII of the Act, the Commission found that debtors were not using chapter XIII with any consistency nationwide. The Commission found many reasons for this, including how secured creditor’s claims could and could not be affected by a proposed plan of readjustment and the veto power that creditors had over the plan:

The provisions of Chapter XIII respecting secured creditors have limited the usefulness of the chapter. The first difficulty arises out of the fact that a Chapter XIII plan cannot deal with any claim secured by real property. The result is that although a petitioner is frequently obliged to make installment payments on a real estate mortgage or contract for the purchase of his home, the plan itself cannot deal with that indebtedness. . . . The other difficulty arises out of the provisions of Chapter XIII that in effect give each creditor secured by personal property the right to veto any feature of a plan that affects his interest as a secured creditor, without regard to the reasonableness of the provision made for the secured creditor. The courts have gone so far as to give a secured creditor his right of veto without regard to the fact that the secured creditor may be largely unsecured because of the deficiency of the collateral to cover his debt.


The Commission’s recommendations to eliminate these limitations were adopted in the form of §§ 1322(b)(5) and 1325(a)(5) of the Bankruptcy Code, which permit a plan to include a debtor’s “proposal for paying debts secured by liens on his residence and curing defaults thereon within a reasonable time” and “provisions for paying creditors secured by personal property, which protect their interest in the collateral, without affording them a veto of any plan including them.” Id. at 13–14.

62 Section 506(d) has been used in many chapter 13 cases to support a debtor’s plan proposing to avoid a lien against the debtor’s principal residence to the extent that the creditor’s claim exceeds the value of the property securing the claim. Subsection (d) of § 506 provides for the avoidance of a lien to the extent
cation under the Code and, like all other provisions under chapter 5, is relevant in all bankruptcy cases, whether filed under chapter 7, 11, 12 or 13 of the Code.\textsuperscript{64}

Section 506(a) defines secured and unsecured claim as follows:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.\textsuperscript{65}

The significance of § 506(a) is great in any bankruptcy petition where a distinction between a creditor's claim as secured or unsecured is relevant in determining the creditor's right to participate in asset distributions in a chapter 7 liquidation, or the amounts that a creditor is to receive under a chapter 13 plan in order for the plan to qualify for confirmation.\textsuperscript{66} Under § 1325 of the

that it does not secure a claim that is not an "allowed secured claim":

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) 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.

The effect of the application of § 506(a) and (d) to the treatment of the undersecured mortgage against the debtor's home is to protect the claim of the mortgage holder against modification only to the extent that it is an "allowed secured claim," and to preserve the lien against the home only to the extent of the value of the "allowed secured claim." Consequently, the unsecured portion of the claim may be modified under the plan and the value of the creditor's lien against the debtor's home is reduced by the amount of the unsecured portion of the claim. 11 U.S.C.A. § 506(a) and (d) (West 1993).

\textsuperscript{66}Section 103 of the Code states the rules of applicability of the various chapters under the Code. It provides that "chapters 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12 or 13 of this title." 11 U.S.C.A. § 103(a) (West 1993). Accordingly, § 506(a) is applicable to all cases filed under the above numerated chapters of the Code. However, there is one specific exception to its application and that is found under § 1111(b)(1)(A). 11 U.S.C.A. § 1111(b)(1)(A) (West 1979). This provision permits a chapter 11 debtor to elect to have the determination of the allowance of its secured claim to be governed by § 1111(b)(2) as opposed to having it defined by § 506(a). Id. Under § 1111(b)(2) the debtor's secured claim is deemed "a secured claim to the extent that such claim is allowed," the effect of which is to avoid the bifurcation of an undersecured claim into secured and unsecured components as required under § 506(a). 11 U.S.C.A. § 1111(b)(2) (West 1979).

\textsuperscript{61}11 U.S.C.A. § 506(a) (West 1993).

\textsuperscript{65}The effects of § 506(a) determinations under the Code are more broadly described in Collier:

The effect of such bifurcation may be of key importance in the course of a bankruptcy case. The concept of adequate protection and numerous provisions of the Code which afford important protection in respect of secured claims offer no, or a lesser degree of, protection with respect to unsecured claims. Thus, issues as to the application of section 506(a) may arise and be litigated in the context of requests for relief from the automatic stay, demands for adequate protection, disputes as to amounts required for redemption under section 722, requests by professionals for interim or final allowance, and objections to confirmation of chapter 11, 12 and 13 plans.

3 Collier, supra note 16, at ¶ 506-04 at 506-16.
Code, the holder of the unsecured claim must receive no less than what he or she would have received in a chapter 7 liquidation, and the holder of the secured claim must receive payments under the plan that are no less than the value of the creditor's interest in the property securing the claim. The relevance of § 506(a) to the treatment of undersecured claims under the Code is described in the legislative history:

Subsection (a) of [section 506] separates an undersecured creditor's claim into two parts—he has a secured claim to the extent of the value of his collateral; he has an unsecured claim for the balance of his claim. . . . 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.68

As one commentator observes:

[S]ection 506(a) requires a bifurcation of a "partially secured" or "undersecured" claim into separate and independent secured claim and unsecured claim components. . . . [T]he fact that a secured claim and an unsecured claim are held by the same creditor and are parts of what was originally a single liability is not relevant in applying the other provisions of the Code, and will not prevent substantial differentiation in treatment and, where applicable, classification of the secured claim and the unsecured claim.69

Although the Code states that provisions under chapter 5 are applicable to chapter 13 cases,70 there is a split between the courts on whether § 506(a) was intended to be applicable to § 1322(b)(2) for the purpose of dividing undersecured home mortgages into secured and unsecured claims to determine the limitations of the exception to modification of claims thereunder. The arguments against the application of § 506(a) have been stated as follows:

(1) the legislative history mandates protection of the home mortgage lender, and bifurcation impermissibly dilutes that protection; (2) as a matter of statutory construction, the requirements of a specific section, in this case section 1322(b)(2), control those of a general section, in this case section 506(a);

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67 Supra note 57.
69 Collier, supra note 16, ¶ 506.04 at 506–15 – 16 (footnotes omitted).
(3) as a matter of statutory construction, the courts should look to the definition of "claim" from section 101(4), which includes both secured and unsecured claims, rather than the definition of "secured claim" from section 506(a); and (4) analysis of the legislative history should look back to Chapter XIII of the now-repealed Bankruptcy Act, predecessor to the Code, for guidance in the definition of secured claims.\(^7\)

The arguments employed by the courts taking the position that § 506(a) is applicable to § 1322(b)(2), and permitting the separation of undersecured home mortgages into secured and unsecured claims, are founded on similar interpretive approaches. Many of these cases base their interpretation of §§ 1322(b)(2) and 506(a) on four factors. First, the "plain meaning" of the language of § 1322(b)(2) does not exclude the Code’s definition of secured and unsecured claims under § 506(a) from its application. Second, the legislative history and intent indicate that the modification provision was a compromise between the House and Senate, and provided limited protection to claims that were only secured claims against a debtor’s residence. Third, the rule of statutory construction, that the provisions of a whole statute should be read with consistency, requires the use of § 506(a) to determine the extent to which a claim under § 1322(b) is entitled to protection against modification. Finally, bankruptcy policy making chapter 13 relief available to more debtors and providing a "fresh start" supports the application of § 506(a) to claims under § 1322(b)(2).\(^7\)

The debate surrounding the relationship of § 506 to § 1322(b)(2) has recently acquired a new dimension as a result of the Supreme Court’s decision in DeWsnup v. Timm.\(^7\) In this decision the Court rendered an opinion on whether a debtor in a chapter 7 case may reduce or "strip down" a lien held by an undersecured creditor against the debtor’s real property to its fair market value. The Court held that a debtor could not strip down the lien by bifurcating the claim into unsecured and secured portions and avoiding the unsecured portion of the claim pursuant to §§ 506(a) and (d) of the Code. It based its opinion on the belief that the term "allowed secured claim" in § 506(a) did not have the same meaning as the term is used in § 506(d), so as to permit the avoidance of the unsecured portion of the undersecured claim. The Court did not believe that, in enacting § 506(d), Congress intended to "depart from the pre-Code rule that liens pass through bankruptcy unaffected," where there is no

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\(^7\)Eastland Mortgage Co. v. Hart (In re Hart), 923 F.2d 1410, 1414 (10th Cir. 1991) (synopsizing the arguments against bifurcation).

\(^7\)See supra Section III.

\(^7\)112 S. Ct. 773 (1992).
discussion in the legislative history of the Code to suggest such a departure and the language of § 506 is ambiguous as to its relationship to other provisions throughout the Code.\textsuperscript{74} Accordingly, a debtor may not avoid a creditor’s lien under § 506(d) simply because it is an “allowed unsecured claim” as opposed to an “allowed secured claim” as defined under § 506(d); a debtor may only avoid a secured claim if it is a disallowed claim pursuant to § 502 of the Code.\textsuperscript{75} Although the Court specifically stated that its interpretation of § 506 was limited to the facts addressed in that case,\textsuperscript{76} many courts addressing the permissibility of bifurcation of undersecured claims in chapter 13 cases since \textit{Dewsnup} have added this decision to their deliberations on the applicability of § 506 to § 1322(b)(2), with varying results.\textsuperscript{77}

Many pages of interesting arguments have been written on the what is the correct reading of §§ 506 and 1322(b)(2) of the Code, and have provoked the questions that are considered in this article:

1. Which side of the debate is correct in its interpretation of section 1322(b)(2) based on the language of the provision, the legislative history, rules of statutory construction, and the fundamental principles of bankruptcy law?
2. Have proposed legislative amendments to section 1322(b)(2) supported or offended the basic equitable principles of bankruptcy law, or represented a fair and reasonable extension of bankruptcy protection to the home mortgage industry or an inequitable preference to a special interest group?

The following analysis of the cases addressing this issue is designed to bring the different interpretations of § 1322(b)(2) into focus to help facilitate an understanding of this provision, which is so critical to the extent of relief available to debtors under chapter 13, and the appropriateness of legislative revision.

IV. INTERRELATIONSHIP OF §§ 1322(b)(2) AND 506: JUDICIAL INTERPRETATION

The division among the courts on whether a debtor may use subsection (a) of § 506 to bifurcate residential mortgages into secured and unsecured claims under § 1322(b)(a) has reached the Courts of Appeals for the Second, Third, Fifth, Ninth and Tenth Circuits, and several district and bankruptcy courts

\textsuperscript{74}Id. at 778.
\textsuperscript{75}Id. at 777-78.
\textsuperscript{76}Id. at 778.
\textsuperscript{77}See infra notes 183-234 and accompanying text.
in the First, Fourth, Sixth, Seventh, Eighth and Eleventh Circuits. The Courts of Appeals for the Second, Third, Ninth and Tenth Circuits have each agreed that the bifurcation of such claims is permissible under § 1322(b)(2) of the Code, and the secured portion of an undersecured claim is the only part of the claim to be accorded protection against modification thereunder. The Court of Appeals for the Fifth Circuit has taken the contrary position, that the bifurcation of residential home mortgages is not permitted under § 1322(b)(2).

The lower courts in the remaining circuits that have addressed this issue have also divided as to whether bifurcation of such claims is permissible in chapter 13 cases. The following survey of case law reviews the two opposing views on this interpretive question separately. Each position is described according

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79Lomas Mortgage USA v. Wiese, 980 F.2d 1279 (9th Cir. 1992); Bellamy, 962 F.2d 179; Hart, 923 F.2d 1410; Wilson, 895 F.2d 123; Hougland, 886 F.2d 1182.

80Nobleman, 968 F.2d 483.
to the various methods of statutory interpretation used by the courts to support their interpretive conclusions regarding the interrelationship of § 1322(b)(2) and § 506.

A. CASES PERMITTING THE BIFURCATION OF UNDERSECURED MORTGAGES UNDER CHAPTER 13

1. Plain Language

Several of the courts finding bifurcation of the undersecured mortgage permissible under chapter 13 have based these opinions on the “plain language” of § 506 and § 1322. When applying the anti-modification provision of § 1322(b)(2) to home mortgages, these courts have held that, when determining the extent to which a mortgage is a “secured claim”, one must apply § 506(a). Some courts have also permitted the use of § 506(d) to avoid that portion of the home mortgage lien that was not secured.

This interpretation of the Code has been supported by several arguments. The court in In re Demoff stated:

The phrase “modify the rights of holders of secured claims” immediately before the phrase “other than a claim secured only by a security interest in real property that is the debtor’s principal residence, ...” in section 1322(b)(2) clearly indicates that the later phrase refers to the prior phrase, and that only the secured claim portion of the claim as defined in section 506(a) is protected from modification.

Several courts have found the use of § 506 to define the “secured claim” is supported by the fact that § 103(a) of the Code specifically provides that the provisions of chapter 5 of the Code are applicable to chapter 7, 9, 11, 12 and 13 cases.

In Eastland Mortgage Co. v. Hart (In re Hart) the Court of Appeals for the Tenth Circuit read the language of the two provisions to be clear and not in conflict with one another:

In interpreting any statute we “begin with the language

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81Hart, 923 F.2d 1410; Wilson, 895 F.2d 123; Houglan, 886 F.2d 1182; Brouse, 110 B.R. 539; Demoff, 109 B.R. 902; Ross, 107 B.R. 759; Kehm, 90 B.R. 117; Simmons, 78 B.R. 300.
82Hart, 923 F.2d 1410; Wilson, 895 F.2d 123; Houglan, 886 F.2d 1182; Brouse, 110 B.R. 539; Demoff, 109 B.R. 902; Ross, 107 B.R. 759; Kehm, 90 B.R. 117; Simmons, 78 B.R. 300.
83Brouse, 110 B.R. at 543; Demoff, 109 B.R. at 919.
85Id. at 919.
86Demoff, 109 B.R. at 919. Also see Hart, 923 F.2d at 1414; Wilson, 895 F.2d at 128; Houglan, 886 F.2d at 1185.
87923 F.2d 1410 (10th Cir. 1991).
employed by Congress and the assumption that the ordinary meaning of that language accurately express the legislative purpose." "The plain meaning of legislation 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.'" In addition, using a literal reading of 11 U.S.C. § 1322(b)(2) is less speculative and less quasi-legislative than attempting to ferret its meaning from its legislative history, which, as we have seen is not clear enough with respect to this issue to show a "demonstrably" different congressional intent than that indicated by the plain meaning of the statute itself.

We find nothing in the plain language of § 1322(b)(2) which instructs us to go beyond the Code's statutory definition of the term "secured claims" to protect the unsecured portion of an undersecured home mortgage.88

Similarly, views regarding the clarity of the plain language of § 1322(b)(2) were also expressed by the Courts of Appeals for the Third and Ninth Circuits.89 One of the most distinctive readings of the plain language of § 1322(b)(2) was provided by the court in Kehm v. Citicorp Homeowners Service, Inc. (In re Kehm).90 It read § 1322(b)(2) as only prohibiting "a plan from creating certain modifications" and that § 1322(b)(2) did not "prohibit modifications occurring as a result of procedures or vehicles other than the plan."91 The court stated:

Section 1322(b)(2) clearly distinguishes between (1) holders of secured claims, whose rights may be modified; (2) holders of claims secured by a debtor's principal residence, whose rights may not be modified, and (3) holders of unsecured claims, whose rights may not be [sic] modified. The only logical, semantic interpretation of this section is that the § 1322(b)(2)

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88Id. at 1415 (citations omitted).
89Wilson, 895 F.2d at 127 ("To the extent that the issue remains open, we hold today that section 1322(b)(2) does not preclude the modification of any 'unsecured' portion of an undersecured claim. Commonwealth points us to no language of the statute which is inconsistent with such a construction. . . . In determining the meaning of any statute, the words of the statute are 'the primary, and ordinarily the most reliable, source of interpreting' its meaning"); Hougland, 886 F.2d at 1183 ("There are times when the quest for meaning should begin and end 'with the language of the statute itself.' United States v. Ron Pair Enter., 109 S. Ct. at 1030. This is one of those times.").
91Id. at 120.
prohibition against modification is limited to fully secured claims.\textsuperscript{92}

The court read § 506 as providing the "process by which we determine whether a claim is in fact secured."\textsuperscript{93} Accordingly, any creditor's objection to the use of § 506(a) in determining its secured claim for purposes of § 1322(b)(2) could not be regarded as a valid objection against the plan as much as an objection against the "section 506 process which is the prerequisite to the presentation of an effective plan."\textsuperscript{94}

2. Legislative History

The decisions that rely on legislative history and intent to support the bifurcation of undersecured claims against a debtor's principal residence under § 1322(b)(2) focus primarily on (1) the statutory evolution of § 1322(b)(2); (2) the legislative intent behind § 1322(b)(2), to provide special protection for residential mortgages under chapter 13; and (3) the significance of § 506(a), and the distinction made between secured and unsecured claims throughout the Code. Virtually all of the cases considering the legislative history of § 1322 begin their analysis with a discussion of the evolution of the provision as a compromise between the House and Senate.\textsuperscript{95}

These cases generally note that the House version of § 1322(b)(2) proposed a broad grant of power to debtors to restructure any secured or unsecured claim under a chapter 13 plan, including those claims secured by real property. In contrast, the Senate version protected claims secured "wholly" by real property from restructuring or modification under chapter 13.\textsuperscript{96} The cases describe the final version as a compromise that limited the protection against modification to claims secured "only" by a debtor's principal residence, and emphasize that the legislative history offers no explanation as to any significance in the substitution of the word "only" for "wholly."\textsuperscript{97} Thus, it is generally concluded that the extent of the protection against modification is limited to claims "secured" only by a debtor's principal residence, as "secured claim" is defined

\textsuperscript{92}Id. (footnote omitted).
\textsuperscript{93}Id.
\textsuperscript{94}Id. at 121.


\textsuperscript{96}Wilson, 895 F.2d at 127-28; Loader, 128 B.R. at 15; Demoff, 109 B.R. at 906-07; Harris, 94 B.R. at 835-36; Simmons, 78 B.R. at 301-02 (quoting Neal, 10 B.R. at 538-39); Neal, 10 B.R. at 538-39.

\textsuperscript{97}Wilson, 895 F.2d at 128; Loader, 128 B.R. at 15; Demoff, 109 B.R. at 920; Harris, 94 B.R. at 836; Simmons, 78 B.R. at 302-03; Bruce, 40 B.R. at 886-87; Neal, 10 B.R. at 536-40.
under § 506(a). The court in In re Harris stated:

The compromise version, in relevant part, changed the "wholly" in the Senate version to "only" which resulted in the final form of § 1322(b)(2) that the 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..." It is clear that this version represents the intent of Congress to protect home mortgage lenders. However, it remains unclear whether those lenders must hold secured claims under the § 506 definition to be afforded protection.

Reservations about the extent of protection against modification were similarly expressed by the Court of Appeals for the Third Circuit in Wilson v. Commonwealth Mortgage Corporation:

The final version of section 1322(b)(2) was contained in a House amendment and was characterized by the legislative leaders as "compromise agreement." This final version limited the exception to home mortgages rather than any real estate mortgage, as would have been provided by the Senate version. Presumably, the compromise was between those for the House version who supported unrestricted modification on behalf of Chapter 13 debtors and those for the Senate version which excepted certain real estate mortgages from modification. The slight difference in language in the exclusionary phrase between the Senate's version ("wholly secured") and that ultimately adopted ("secured only") does not appear to have been given any significance. Thus, although it is clear that the anti-modification provision of the Act was inserted on behalf of the home mortgage industry, the fact that the provision itself was a compromise suggests that the residential mortgage providers did not emerge with all the protection they may have sought.

Related to this discussion of the legislative history and intent behind § 1322, several courts have described the anti-modification clause in § 1322(b)(2) as a congressional reaction to fears that, if debtors were allowed to readjust all types of secured debts, including home mortgage loans, this would severely affect the stability of the home mortgage finance industry and the availability

98See cases cited in note 97, supra.
100Id. at 836 (emphasis added) (citation omitted).
101905 F.2d 123 (3d Cir. 1990).
102Id. at 128 (emphasis added) (citation omitted).
of financing by the industry to consumers. Some courts have interpreted the protection against modification in a narrow way, and have adopted the view that Congress intended to limit the protection to long-term home mortgages as opposed to short-term loans that are secured by a debtor’s principal residence. However interpreted, the courts have concluded that the protection afforded the home mortgage industry was intended to cover the fully secured claim from modification, and that the right to modify under § 1322(b)(2) would include the unsecured portion of the home mortgagee’s claim.

In order to complete the analysis of the legislative history supporting the argument that bifurcation of undersecured home mortgages is permitted under § 1322(b)(2), some courts have specifically raised the question whether Congress intended residential mortgages to be protected from modification regardless of the secured status of the claims as defined under § 506(a). The court in In re Demoff noted that “[t]he legislative history to § 506(a) states that ‘throughout the bill, references to secured claims are only as to the claim determined by the [subsection], and not to the full amount of the creditor’s claim.” Another court described the legislative history and intent of § 506 as providing priority status throughout the Code only for secured creditors that are “in fact” secured and preventing creditors that are undersecured from unjustly enjoying priority status over other unsecured creditors. Accordingly, based on the general purpose of § 506(a) to define what constitutes a secured claim and an unsecured claim, and the lack of any clear mandate from Congress in its enactment of § 1322(b)(2) to override the general definition and distinctions made between secured and unsecured claims throughout the Code, these deci
ions conclude that the unsecured portions of residential mortgages are not entitled to enjoy the anti-modification protection afforded secured mortgage claims.\textsuperscript{110}

3. Statutory Construction

One of the principles of statutory construction used by the courts in interpreting §§ 1322(b)(2) and 506, and the interplay between the provisions, is to read the statutes consistently and in a complementary manner, if possible.\textsuperscript{111} In applying this principle of statutory construction, some courts focus on whether the statutes "conflict" with one another and are incapable of being read together.\textsuperscript{112} In all of these cases the courts have uniformly concluded that the provisions are not in conflict.\textsuperscript{113} In \textit{Hougland v. Lomas & Nettleton Company (In re Hougland)}\textsuperscript{114} the Ninth Circuit Court of Appeals discussed this principle of construction:

It has . . . been suggested that sections 506(a) and 1322(b)(2) are in conflict. As our discussion shows, they are not. They are in harmony when read in the context of the whole statute. That is the way they must be read.

It is true that if our construction led to an absurdity, we would be bound to eschew it and look for other guidance. No such absurdity appears here. The truly secured portion of the residential real estate lender's claim does have special protection. Only the unsecured portion does not. That does not conflict with any of the purposes of the statute, nor does it conflict with the intent of Congress. We are comforted in this decision by the fact that a leading treatise on bankruptcy law agrees with this construction of the statute.\textsuperscript{115}

Another example of a case considering the interplay between §§ 1322(b)(2) and 506 by applying principals of statutory construction is found in \textit{Brouse v. CBS Mortgage Corp. (In re Brouse)}.\textsuperscript{116} The court in this case concluded that there was no reason to bar § 506 from being applicable to § 1322(b)(2), and

\textsuperscript{110}See supra note 106.


\textsuperscript{112}See cases cited in note 111, supra.

\textsuperscript{113}See cases cited in note 111, supra.

\textsuperscript{114}886 F.2d 1182 (9th Cir. 1989).

\textsuperscript{115}Id. at 1184 (citations omitted).

\textsuperscript{116}110 B.R. 539 (Bankr. D. Colo. 1990).
found no inconsistencies between the provisions. It stated that § 1322(b)(2) includes a prohibition against the modification of the secured portion of a creditor's claim against the debtor's primary residence as defined by § 506(a), and that the debtor can only modify the unsecured portion of the claim, which is not protected against modification by § 1322(b)(2), as allowed under § 506(d) through lien avoidance.

Allowing a debtor to use Section 506(d) to avoid the lien on the unsecured portion of the debtor's principal residence does not negate the Section 1322(b)(2) prohibition of modifying the security interest in real property that is the debtor's principal residence. Section 1322(b)(2) will continue to provide protection to the holder of a security interest in a debtor's principal residence that is not provided to a holder of a security interest that is not the debtor's principal residence.

The court in In re Frost held that, because the claim protected from modification under § 1322(b)(2) was a secured claim, § 506(a) had to be applicable to determine whether there was a secured claim to be entitled to the protection afforded under § 1322(b)(2). Moreover, it noted that, if the term "secured claim" in § 1322(b)(2) was intended to mean something other than the general definition found in § 506(a), Congress would have so indicated.

Some courts have held that, because the provisions can be read together consistently, there is no need to apply the principle of statutory construction requiring that a specific statute, like § 1322(b)(2), be the controlling provision, and thus preclude the definition of "secured claim" as defined under the general

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117 Id. at 543.
118 Id.
119 Id. at 543–44.
121 The court stated:

The Court has reviewed other court decisions on this issue and agrees with those opinions which hold that § 506(a) and § 1322(b)(2) must be interpreted in a complementary manner. A claim must be allowable as a secured claim pursuant to § 506(a) before it may be protected under § 1322(b)(2) as a "claim secured only by a security interest in real property that is the debtor's principal residence." . . . The secured claim protected by § 1322(b)(2) is determined only after application of the principles of § 506(a). If the meaning of "secured claims" in the first phrase of § 1322(b)(2) were different from the meaning of "claim secured" in the second portion of § 1322(b)(2), surely Congress would have indicated such a distinction by the insertion of necessary qualifiers. The Court believes the two phrases express identical legal concepts: a claim allowed as secured after application of the principles of § 506(a).

96 B.R. at 807.
122 Id.
Contrary to the contentions of the creditor in *Wilson v. Commonwealth Mortgage Corporation*, that the specific provision of § 1322(b)(2) superseded the general provision of § 506(a), the Third Circuit Court of Appeals held:

> [C]onstruing section 1322(b)(2) to allow bifurcation of secured and unsecured portions of a claim and to allow modification of the unsecured portion makes it consistent with section 506, a section of general applicability. Nor does reading section 1322(b)(2) in this manner 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.

### 4. Bankruptcy Policy and Congressional Intent

When interpreting the statutory relationship between §§ 1322(b)(2) and 506, courts have also considered whether the right to bifurcate undersecured claims, or to avoid liens against residential property of a debtor, support the "fresh start" policy that underlies the bankruptcy system and is carried forth under chapter 13. Some courts describe the congressional intent behind chapter 13 as designed to "make available the Chapter 13 remedy to a wide range of financially distressed debtors, including those who may have one or more

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124895 F.2d 123 (3d Cir. 1990).

125Id. at 128.

126In re Honett, 116 B.R. 495, 497 (Bankr. E.D. Tex. 1990) ("The court is of the opinion that 11 U.S.C. § 506(a) is a universal concept to be employed throughout all the bankruptcy chapters in addition to being in keeping with the spirit of the Chapter 13 'fresh start.'"); In re Gadson, 114 B.R. 453, 456 (Bankr. E.D. Va. 1990) ("In a broader view of the problem, consideration ought to be given to the 'fresh start' principal [sic] of the Bankruptcy Code and in particular the Congressional intent to encourage debtors to file for adjustment of debts under chapter 13 rather than liquidation under chapter 7."); Brouse v. CSB Mortgage Corp. (In re Brouse), 110 B.R. 539 at 542 (Bankr. D. Colo. 1990) ("Simply stated, this Court is persuaded that the majority view allowing a debtor to employ Section 506(d) is correct in legal terms, sound in terms of statutory construction, and unavoidable under the fresh start concept of the Bankruptcy Code."); In re Harris, 94 B.R. 832, 836 (D.N.J. 1989) ("The court's holding attempts to reconcile the different policies behind the bankruptcy code. First, the decision will 'promote [the] fresh start purpose' of bankruptcy law 'by not strapping the debtor with preexisting unsecured debt.'") (citation omitted); In re Simmons, 78 B.R. 300, 304 (Bankr. D. Kan. 1987) ("This Court reaches its decision being ever mindful that the Bankruptcy Code is to be equitably interpreted to accomplish its purposes; and that one of the primary purposes of bankruptcy law is to give the honest debtor 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' My ruling certainly promotes this fresh start purpose by not strapping the debtor with preexisting unsecured debt.") (citation omitted).
mortgages on their homes.” These courts have considered the suggestion, that an undersecured creditor’s claim against a debtor’s home could not be modified to the extent of the unsecured portion of the claim, to violate the “fresh start” policy of bankruptcy and the intent of Congress to protect creditor claims that are “fully secured” from modification.

It has been noted that chapter 13 makes bankruptcy relief more appealing to the debtor with liens against his or her property by allowing the debtor to repay his or her debts without being burdened by “liens that lack equity security in the property.” If the bifurcation of an undersecured mortgage held against a debtor’s residence were not permitted, junior creditors would be able to obtain mortgages in a debtor’s residence that may be overburdened by liens, and be able to assert protection against modification of the unsecured portion of the claim. The court in In re Neal rejected this interpretation of chapter 13:

It is not consistent with the statutory scheme of Chapter 13, and the Bankruptcy Code’s bifurcated treatment of a [sic] secured and unsecured claims, for instance, to assume that a junior mortgagee on real property which is already overburdened by senior mortgages, could insist on being treated as a creditor with a secured claim and insist on full payment of its claim based upon the pre-petition contractual arrangement with the debtor. It would appear that in that instance the Court would be constrained to find, pursuant to § 506(a) of the Bankruptcy Code, that the junior mortgagee was in fact the holder of an unsecured claim and thus unable to invoke the protection of § 1322(b)(2) and prevent confirmation of a Chapter 13 plan.

In general, courts considering bankruptcy policy and congressional intent when interpreting the interrelationship between §§ 1322(b)(2) and 506 have stated that § 1322(b)(2) was intended to protect only the secured portion of a mortgage, as defined under § 506(a), from modification. Accordingly, the creditor’s rights are not impermissibly modified under § 1322(b)(2), if the claim is bifurcated into a secured and unsecured claim pursuant to § 506.

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128 In re Neal, 10 B.R. at 540; In re Harris, 94 B.R. 832, 836–37 (D.N.J. 1989).
129 In re Harris, 94 B.R. at 836. Also see In re Shaffer, 84 B.R. 63, 66 (Bankr. W.D. Va. 1988); Simmons, 78 B.R. at 304.
130 See cases cited in note 129 supra.
131 10 B.R. at 537.
132 See supra note 126.
B. Cases Prohibiting the Bifurcation of Undersecured Claims under § 1322(b)(2)

Many of the courts prohibiting the bifurcation of undersecured claims under § 1322(b)(2) use the same approaches to statutory interpretation that are employed by the courts expressing the view that bifurcation of such claims is permissible under § 1322(b)(2). As in the cases summarized above, these courts also look to the "plain meaning" of the language of §§ 1322(b)(2) and 506, the legislative history of section chapter 13, principles of statutory construction, and underlying bankruptcy policy and congressional intent to support their interpretation of these provisions under the Code.

1. Plain Language.

Several of the courts prohibiting the bifurcation of undersecured residential mortgages under § 1322(b)(2) have also focused on the "plain language" of § 1322(b)(2) and § 506 in interpreting the meaning and interplay between these provisions. Some courts have found the language of § 1322(b)(2) to be "straight-forward" and unambiguous in protecting the entire claim secured by a debtor’s home, without regard to whether the claim was a secured claim as defined under § 506. These courts essentially have concluded that the language in § 1322(b)(2) prohibiting the modification of "a claim secured only by a security interest in real property that is the debtor's principal residence" is not a protection limited to "secured claims" as defined by § 506(a).

In reaching this conclusion, the courts have rejected the argument that the extent of the protection against modification provided under § 1322(b)(2) is based on whether the claim is a "secured claim" or an "unsecured claim." It is argued that the language most significant in determining the extent of protection under § 1322(b)(2) are the "rights of holders of secured claims ... secured only by a security interest in real property that is the debtor's principal residence." As the court in In re Hussman explained:

The debtors, as well as other courts, have confused the issue of the type of claim holder with the analysis of a deter-

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133 Christiansen, 121 B.R. at 64; Sauber, 115 B.R. at 199; Catlin, 81 B.R. at 527. The court in Schum, 112 B.R. at 159, took the position that, while the language of the statute is "key" to the task of construing a statute, it expressed the opinion that § 1322(b)(2) was nevertheless ambiguous because of Congress' failure to define the term "modify". Id. at 160-61.

134 Hussman, 133 B.R. at 492; Christiansen, 121 B.R. at 64; Sauber, 115 B.R. at 199; Russell, 93 B.R. at 705.

135 See cases cited in note 135 supra.


mination of a secured claim under § 506(a). Courts which have reached the opposite result look first to the result of applying § 506 to the claim and then look to § 1322 to allow the debtors to modify the unsecured portion of the claim. Determination of the secured claim under § 506(a) is irrelevant to § 1322(b)(2). Section 1322(b)(2) deals with modifying the rights of holders of certain claims. Section 1322(b)(2) protects creditors whose claims are secured by a security interest in real property that is the debtor's principal residence. This language does not limit the protection to a secured claim secured only by a security interest in such real property. Debtors need only look to the holder of the claim to determine if they may modify that claim. Only the rights of holders of claims secured by an interest other than the debtor's principal residence and holders of unsecured claims may be modified. The holders of claims secured by an interest in real property which is the debtors' principal residence can be modified only to the extent that defaults may be cured within a reasonable time. The court further noted that § 1322(b)(5) was the only provision specifically defining the extent of permitted modifications under § 1322(b)(2), by allowing a debtor to cure a prepetition default on the secured claim under the chapter 13 plan.

2. Legislative History

In considering the legislative history, some courts have looked to the history of the wage earner's relief provided under the Bankruptcy Act, as well as the legislative history of § 1322(b)(2). In In re Kaczmarczyk the court noted that relief for the debtor under Chapter XIII of the Bankruptcy Act was insignificant in cases where the debtor's prepetition creditors held secured claims against a debtor's real or personal property. This was largely due to the fact that the claims secured by real property were not handled under the chapter XIII bankruptcy plan, and a claim secured by a debtor's personal property could only be included under the plan if the creditor consented.

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139Id. at 492 (emphasis deleted). Other cases expressing similar views include Christiansen, 121 B.R. at 64; Sauber, 115 B.R. at 199; and Russell, 93 B.R. at 705.
140Hussman, 133 B.R. at 492; Christiansen, 121 B.R. at 64; Chavez, 117 B.R. at 735; Sauber, 115 BR. at 199.
143Id. at 202–03.
Under the Bankruptcy Act, the predecessor of the current Bankruptcy Code, a Chapter XIII plan could not deal with claims secured by real property. Although the Chapter XIII plan could deal with secured claims, the statutory definition of the term "claim" expressly excluded "claims secured by estates in real property or chattels real." Furthermore, Chapter XIII did not provide a debtor with a viable opportunity to "deal with" claims secured by personal property unless the secured creditor consented. Under the Bankruptcy Act, a Chapter XIII plan could not be confirmed unless every secured creditor "dealt with" by the plan consented to confirmation. Chapter XIII was thus of limited utility respecting secured claims.\(^\text{145}\)

The court noted that the Bankruptcy Code was enacted to eliminate some of the restrictions against modification that existed under the Bankruptcy Act, and to make the Code available and useful to more individuals by permitting the modification of both secured claims and unsecured claims under \(\S\) 1322(b)(2).\(^\text{146}\)

Some courts found that Congress did not intend to change the protection against modification of claims secured by a debtor's principal residence in its enactment of \(\S\) 1322(b)(2).\(^\text{147}\) The courts in In re Hussman\(^\text{148}\) and Boullion v. Sapp (In re Boullion)\(^\text{149}\) adopted the analysis of the legislative history of \(\S\) 1322(b)(2) provided by the Fifth Circuit Court of Appeals in Grubbs v. Houston First American Savings Association\(^\text{150}\):

The final amendments to H.R. 8200 and S.B. 2266 (the latter being the Senate's amended version of the House bill) were accomplished by a series of agreed-upon floor amendments in both houses, by which differences between the two versions were reconciled and compromised. With regard to \(\S\) 1322(b)(2), the Senate receded from its position that no "modification" was to be permitted of any mortgage secured by real estate; it instead agreed to a provision that modification was to be barred only as to a claim "secured only by a security interest in real

\(^{145}\)Id (citations omitted).
\(^{146}\)Id. at 203.
\(^{150}\)730 F.2d 236 (5th Cir. 1984).
property that is the debtor's principal residence." This limited bar was apparently in response to perceptions, or to suggestions advanced in the legislative hearings . . . that, home-mortgagor lenders, performing a valuable social service through their loans, needed special protection against modification thereof (i.e., reducing installment payment, secured valuations, etc.)\(^{151}\)

As the court in *In re Kaczmarczyk* concluded, "[i]f Congress had intended to change the manner in which a claim secured by a debtor's residence would be treated under the Code it would have specifically limited § 1322(b)(2) to claims secured pursuant to § 506."\(^{152}\)

3. *Statutory Construction*

Each of the courts relying on principles of statutory construction applied the general rule that provisions of specific application supersede provisions of general applicability.\(^{153}\) This rule was described and applied by the court in *In re Hynson*:\(^{154}\)

In reconciling these two statutory sections, it must be noted that 11 U.S.C. § 506 is a provision of general applicability in cases under Chapters 7, 11 and 13 of the Bankruptcy Code. See, 11 U.S.C. § 103(a). On the other hand, 11 U.S.C. § 1322 applies only in cases under Chapter 13. See, 11 U.S.C. § 103(h). This 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 enactment. Accordingly, while 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, or where such application is inconsistent with the policy of the Bankruptcy Code.\(^{155}\)

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\(^{151}\)Boullion, 123 B.R. at 551 (quoting Grubbs v. Houston First Am. Sav. Ass'n., 730 F.2d 236 at 246) (emphasis deleted).

\(^{152}\)107 B.R. at 203.


\(^{154}\)Hynson, 66 B.R. at 246.

\(^{155}\)Id. at 249-50 (citation omitted).
Several of these courts generally conclude that, because §§ 1322(b)(2) and 506 conflict, the more specific language of § 1322(b)(2) must prevail over the general language of § 506. \(^{136}\) As the court in *In re Catlin*\(^{137}\) stated:

> [Sections 1322(b)(2) and (b)(5)] constitute an impairment statute. As the statute relates to claims secured only by a debtor’s principal residence, it is a limitation on a debtor’s ability to impair, or leave impaired, the rights of holders of those claims. The rights of such holders, and in effect the claims themselves, can be impaired by a plan only to the limited extent of a provision affording a debtor the bankruptcy remedy of a reasonable period to repay prepetition defaults.

11 U.S.C. §§ 502(b) and 506(a) and (b) are more general claim impairment statutes. To the extent that § 1322(b)(2) and (5) are inconsistent with and contradictory to these Chapter 5 statutes, the § 1322(b)(2) and (5) provisions supersede them.

Accordingly, in a Chapter 13 case, the allowed amount of a claim secured only by a security interest in the principal residence of a debtor is, at filing, the balance owing on the debt without regard to the value of the collateral—§ 506(a) notwithstanding. Application of § 506(a), where the value of the collateral is less than the debt, would modify the rights of the holder of a claim secured only by a security interest in the principal residence of a debtor beyond the permissible impairment provided in § 1322(b)(2) and (b)(5). \(^{158}\)

In its application of these principles of statutory construction, the court in *In re Sauber*\(^{159}\) expressed criticism of the Ninth Circuit’s decision in *Hougland v. Lomas & Nettleton Co.* (*In re Hougland*)\(^{160}\) and its failure to appreciate these concepts:

> The Ninth Circuit, in *Hougland*, takes an overly technocratic approach in both analyzing the language of § 1322(b)(2) and (b)(5), and in relating § 506(a) to it. Although ostensibly undertaken in search of the plain meaning of these statutes, that meaning, and the proper setting of the statutes in the context of the overall scheme of the Code, is as clearly missed as the proverbial forest might be missed in examining the trees.

\(^{136}\)Chavez, 117 B.R. at 735–37; Russell, 93 B.R. at 705; Catlin, 81 B.R. at 524; Hemsing, 75 B.R. at 691–92; Hynson, 66 B.R. at 249.


\(^{158}\)Id. at 524.

\(^{159}\)115 B.R. 197 (Bankr. D. Minn. 1990).

\(^{160}\)886 F.2d 1182 (9th Cir. 1989).
As the *Hougland* court noted, we are not concerned with the significance of misplaced or omitted commas here, as was the Supreme Court in *United States v. Ron Pair Enterprises*.

But what the *Hougland* court did not seem to appreciate, is that we are dealing with general and specific concepts that are intended to apply to, and govern, the rights of debtors and their creditors in different situations, and with different applications, depending upon particular Code purposes to be served. The 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.161

4. Bankruptcy Policy and Congressional Intent

When considering the congressional intent behind chapter 13 and § 1322(b)(2), none of the decisions reviewed, prohibiting the bifurcation and avoidance of undersecured claims under § 1322(b)(2), discusses the impact of this position on the “fresh start” principles of the Code. The extent of discussions concerning congressional intent or policy underlying § 1322(b)(2) is limited to general statements that the provision was intended to protect the rights of home mortgagees by preserving the “integrity of the mortgage contract” within the limited exceptions of § 1322(b)(5), and permitting the cure of defaults on such loans.162 Accordingly, the focus of the protection provided under § 1322(b)(2) was on the creditor’s “claim”, or right to payment of the holder of the contract, and not the status of the claim as defined under § 506(a).163 In a frequently quoted statement, the court in *In re Hynson*164 made the following observation:

To apply the cramdown provisions of 11 U.S.C. § 506 to creditors whose claims are secured solely by the debtor’s principal residence, would in large part vitiate the protections of 11 U.S.C. § 1322(b)(2). It would also be at odds with the clear intent of Congress to protect a lender’s security when a lender is secured only by a security in a Chapter 13 debtor’s home.

... The concept that only a “secured claim” and not an “unsecured claim” of a mortgagee is protected within the ambit of 11 U.S.C. § 1322(b)(2), carries the syntax of the Bankruptcy Code to an absurd conclusion which is at odds with the general

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161115 B.R. at 199 (citation omitted).
163See cases cited in note 162 supra.
principles of statutory construction and with the clear intent of 11 U.S.C. § 1322(b)(2).165

V. BIFURCATION AND LIEN STRIPPING UNDER § 1322(b)(2): POST-DWE SNUP

The Supreme Court's decision in the case of Dewsnup v. Timm166 caused the bankruptcy bar and courts to reconsider whether the bifurcation of undersecured claims, and the avoidance of liens secured only by a debtor's primary residence is permissible under § 1322(b)(2) of the Code. Although Dewsnup v. Timm did not involve a chapter 13 case, it did require the Court to determine whether § 506(d) could be used by a debtor in a chapter 7 case to "strip down" a lien held by a creditor to the fair market value of the security, where the creditor's claim was undersecured at the time of the filing of the petition. This case was brought before the Supreme Court on appeal from the Tenth Circuit Court of Appeals, and was granted certiorari because it represented a split from the Third Circuit's opinion in Gaglia v. First Federal Savings & Loan Association.167

The debtors in Dewsnup sought to avoid part of an undersecured creditor's lien against their real property by having the claim classified into secured and unsecured portions, pursuant to § 506(a), and then avoiding the unsecured portion of the claim under § 506(d). This requested relief was denied by the bankruptcy court, which held that, since the property had been abandoned by the trustee and was no longer "property in which the estate has an interest," it was not subject to the classification of § 506(a) and similarly "not covered by § 506(d)."168 This decision was affirmed by the district court on appeal without an opinion, and by the Tenth Circuit in agreement with the bankruptcy court's finding that the provisions of § 506 could not be applied where the property in question had been abandoned.169

On appeal the debtor argued that § 506(a) and (d) are "complementary and to be read together," to permit the bifurcation of claims allowed under § 502 into allowed secured and allowed unsecured claims, as well as to permit the avoidance of any lien to the extent that the claim is unsecured.170 The creditor

165Id. at 252–53.
167889 F.2d 1304 (3d Cir. 1989).
168112 S. Ct. at 776.
169Id.
170Id. at 777. Arguing on behalf of the debtor, the amicus curiae argued that this reading of the interrelationship of § 506(a) and (d) should not be affected by the abandonment of the property by the trustee. Amicus curiae claimed that any other reading of the provisions would be inconsistent with § 722, which permits a debtor to redeem exempt property from the creditor based on the creditor's interest in the property, that is, to the extent that it is a secured claim as defined under § 506(a), and not on the amount of the creditor's claim.
countered by arguing that § 506(d) is not to be "rigidly tied" to section 506(a):"171 that is, subsection (a) is designed to provide for the classification of claims by secured status for the purpose of ensuring "fairness to unsecured claimants,"172 whereas subsection (d) is designed to preserve a creditor's lien up until the time the creditor exercises his or her right to enforce the lien through a foreclosure.173

Writing for the majority, Justice Blackmun began his analysis of § 506 by noting that its relationship to other provisions of the Code raised "some ambiguities," and thus, caused the Court to limit its interpretation of § 506 to the particular facts of the case before it.174 Persuaded by the arguments of the creditor and its supporters, the Court held that § 506(d) did not permit a debtor to strip down the lien to the value of the collateral as suggested by the debtor:

[S]ection 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. Were we writing on a clean slate, we might be inclined to agree with petitioner that the words "allowed secured claim" must take the same meaning in § 506(d) as in § 506(a). But given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.175

Moreover, Justice Blackmun wrote that, if a creditor's secured interest is to be frozen at a judicially determined value, then the creditor would be deprived of the benefits of any future appreciation in the property value that might exist at the time of the actual foreclosure on the property.176 This, the Court added, would result in a "windfall" to the debtor and deprive the creditor the benefits of appreciation, a right the creditor bargained for under the mortgage agree-

171 Id. at 777.
172 Id.
173 Id. Arguing on behalf of the creditor, the United States filed an amicus curiae brief and interpreted § 506(a) as a provision simply providing a "term of art," and argued that this term was not applicable to subsection (d), which provides for the avoidance of liens against "claims that have not been allowed and secured." Id. at 776-77.
174 Id. at 778. ("Hypothetical applications that come to mind and those advanced at oral argument illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day.")
175 Id. (footnotes omitted).
176 Id. ("The practical effect of petitioner's argument is to freeze the creditor's secured interest at the judicially determined valuation. By this approach, the creditor would lose the benefit of any increase in the value of the property by the time of the foreclosure sale. The increase would accrue to the benefit of the debtor, a result some of the parties describe as a 'windfall.'")
The Court cited its past decisions, Farrey v. Sanderfoot and Johnson v. Home State Bank, for the rule that "a lien on real property passes through bankruptcy unaffected," and stated that no provision in pre-Code law permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt. It stated further that, "[w]hen Congress amends bankruptcy laws, it does not write on a clean slate," and that the "Court has been reluctant to accept arguments that would interpret the Code "to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history," where there is ambiguity in the language of the relevant provisions.

After Dewsnup courts considering the permissibility of bifurcation and cramdown of residential mortgages under § 1322(b)(2) were faced with the additional question of what impact Dewsnup would have on the question. In a few instances case opinions reflected no consideration of Dewsnup, in other decisions, Dewsnup was found to be so limited to chapter 7 liquidation proceed-

177Id.
180112 S. Ct. at 779.
181Id.
182Justice Scalia wrote a dissenting opinion in which he stated that, when one reads § 506(d) "naturally and in accordance with the other provisions of the statute, [subsection (d)] voids a lien to the extent the claim it secures is not both an 'allowed claim' and a 'secured claim.'" 112 S. Ct. at 780. He added that, to read the provision otherwise, "would be to replace what Congress said with something that the Court thinks Congress ought to have said" and ignores principles of statutory construction. Id. He stated that the resolution of the case turned on the meaning of one phrase, "allowed secured claim." Id. Justice Scalia believed that § 506(d) "unambiguously" provides for when a lien secures and does not secure a claim, and to the extent it is void thereunder. Id. He stated that the meaning of the allowed secured claim was not left to "speculation," but was clearly provided for in § 506(a). Therefore, "allowed secured claim," as stated in § 506(d), is in reference to allowed "secured claim" as defined in § 506(a). Id.

Moreover, Justice Scalia added that, when the Code uses the term "allowed claim," it refers to the "secured party's entire allowed claim, i.e., to both the 'secured' and 'unsecured' portions under § 506(a) . . . ." Id. However, he did not agree with the majority, that the term "allowed secured claim" in § 506(a) need not be read as an indivisible term of art defined by reference to § 506(a). Id. (quoting the majority at 112 S. Ct. at 777). In support of this, he cited the rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." Id. (citations omitted). He also criticized the majority for offering no basis for overlooking the textual or structural basis of the plain meaning of § 506(d), and resting its decision on "policy intuitions of a legislative character, and upon the principle that a text which is 'ambiguous' . . . cannot change pre-Code law without the imprimatur of legislative history."

183The courts in In re Torrez-Lopez, 138 B.R. 348 (D. P.R. 1992), and Lomas Mortgage USA v. Roberts, 137 B.R. 343 (D. Alaska 1992), only referred to and followed the decision of the Court of Appeals for the Ninth Circuit in Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182 (9th Cir. 1989), and held that the bifurcation of undersecured claims that are secured by a debtor's residence into secured and unsecured claims was permissible under § 1322(b)(2). Both courts agreed that only the secured portion of the claim was protected against modification and not the unsecured portion. The court in Torrez-Lopez stated that this interpretation of § 1322(b)(2) was correct and would prevent creditors from trying to secure loans with mortgages against a debtor's home regardless of the equity in the property in order to get protection against modification under § 1322(b)(2).
ings that it was not believed to be relevant to reorganizations under chapter 11 or 13.\textsuperscript{186} Some courts regarded \textit{Dewsnup} as strengthening, or clarifying with certainty, case precedents prohibiting the bifurcation and cramdown of residential mortgages under § 1322(b)(2).\textsuperscript{185} Other courts took the view that \textit{Dewsnup} clearly prohibited lien stripping under § 1322(b)(2), but did not prohibit the bifurcation of undersecured claims under § 1322(b)(2).\textsuperscript{186}

Several courts, including the Second Circuit Court of Appeals, have read \textit{Dewsnup} to be limited to chapter 7 liquidations, and not dispositive on the question of the applicability of § 506 to provisions in the Code's reorganization chapters.\textsuperscript{187} In the case of \textit{Bellamy v. Federal Home Loan Mortgage Co. (In re Bellamy)}\textsuperscript{188} the Second Circuit held that § 1322(b)(2) only prohibits the modification of a creditor's claim, secured by a mortgage against the debtor's principal residence, to the extent that it is a secured claim, as the term is defined under § 506(a) of the Code.\textsuperscript{189}

The court in \textit{Bellamy} rejected the creditor's argument that the Supreme Court had precluded reading the term "secured claim" as used in § 1322(b)(2) to have the same meaning as it does in § 506(a).\textsuperscript{190} The court further noted that the Supreme Court had been very clear that its decision in \textit{Dewsnup} did not attempt to determine the extent to which the definition of the term "secured

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\textsuperscript{187} \textit{See supra} note 186. The court in \textit{In re Govan}, 139 B.R. 1017 (Bankr. N.D. Ala. 1992), similarly found \textit{Dewsnup} to be limited in its interpretation of § 506 to the facts of that case. The debtor in this case had filed a chapter 7 petition prior to a chapter 13 petition. In the chapter 7 case the debtor received a personal discharge of his prepetition liabilities, including the creditor's claim, and subsequently filed a chapter 13 petition to save the property from foreclosure by the creditor. The court cited the Supreme Court in \textit{Johnson v. Home State Bank}, 111 S. Ct. 2150 (1991), for its position that a debtor receiving a chapter 7 discharge may file a subsequent chapter 13 plan proposing the payment of the amount of the lien that secured the creditor's prepetition claim and survived the debtor's chapter 7 discharge.
\textsuperscript{188} \textit{Id. at} 176 (2d Cir. 1992).
\textsuperscript{189} \textit{Id. at} 180 ("Although [the creditor] is correct in noting that § 506(a) does not itself affect a creditor's right to payment, it does not follow that § 1322(b)(2) operates without reference to § 506(a). . . . But the manner in which the right to payment must be satisfied is fixed by the Code, which accords different treatment to claims depending on whether they are secured or unsecured. Hence, bifurcating [the creditor's] claim into unsecured and secured portions 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.") (citations omitted).
\textsuperscript{190} \textit{Id. at} 182.
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claim" was applicable to other provisions of the Code. It emphasized that what the Supreme Court did was to determine that the term "secured claim" as defined in § 506(a) was not the same term used in § 506(d). The Court of Appeals then noted that the way that the term "secured claim" is used in § 506(d) is different from the way it is used under § 1322(b)(2), which is more similar to the way it is used in § 506(a).

The term "secured" indicates whether the claim is secured, not (as in § 506(a)) the extent to which the claim is secured. If "secured claim" in § 1322(b)(2) is read to mean only whether the claim is secured, the drafter's choice of phraseology is difficult to comprehend and would render it in conflict with the Code's overall scheme. There are several reasons for this.

First, § 1322(b)(2), unlike § 506(d), refers to unsecured as well as secured claims. It seems that "unsecured claims" has the same meaning in § 1322(b)(2) as it does in § 506(a); and, by a parity of reasoning, that its counterpart—secured claims—should also be understood as they are defined in § 506(a). Second, and more importantly, § 506(d), unlike § 506(a), is concerned with liens, § 1322(b)(2)—as does § 506(a)—addresses claims.

Further, this reasoning is in contrast to that motivating the Supreme Court in Dewsnup not to apply § 506(a)'s definition in § 506(d), which was § 506(d)'s failure to evince an unequivocal legislative purpose to alter pre-Code practice respecting the voiding of liens. Under the Bankruptcy Act liens on real property were unaffected by bankruptcy proceedings. Hence, [the Court] rejected, in the absence of any clear legislative directive to do so, applying the definition of "secured claim" in § 506(a) to § 506(d), because to do so would "depart from the pre-Code rule that liens pass through bankruptcy unaffected."

Dewsnup's analysis of § 506(d) is thus inapposite in interpreting § 1322(b)(2). Past bankruptcy practice precluded the debtor from affecting the claims of creditors holding real property as security. Yet, distinct from its treatment of liens, 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.

191 Id.
192 Id.
193 Id.
As a result, applying § 1322(b)(2) in light of § 506(a) does not alter well-settled bankruptcy principles. To the contrary, it furthers Congress' scheme under Chapter 13 by allowing the adjustment of claims secured by real property.

Moreover, as a further distinction, a Chapter 7 debtor's personal liability generally is extinguished upon liquidation, while a Chapter 13 debtor does not obtain discharge from personal liability until payments under the plan of reorganization are completed. This suggests that, as distinct from the more limited concerns implicated when lien avoidance is sought in Chapter 7, allowing Chapter 13 debtors to strip down an undersecured residential mortgagee's claim forwards the legislative purpose of furthering reorganizations for individuals with regular income to enable them to retain their homes.9

Similarly, the court in In re Weber95 held that bifurcation was a "basic premise of the Bankruptcy Code," and that § 506(a) determines the extent to which a creditor's claim is to be protected against modification under § 1322(b)(2). The court felt that, if Congress had intended to prohibit the modification of the rights of the holder of a claim secured only by a debtor's residence, regardless of the secured status of the claim, it would have specifically provided for such in the statute.96 Agreeing with Justice Scalia's dissenting opinion in Dewsnup, it saw no reason to interpret the terms "secured claim" or "claim secured" as used in § 1322(b)(2) differently from the manner used elsewhere in the Code.97

In re Davidoff98 is one of the first post-Dewsnup cases to find Dewsnup to "bolster" the interpretation of courts that find bifurcation and avoidance of undersecured claims to be prohibited under § 1322(b)(2).99 In its reading of § 1322(b)(2) the court held that the relevant language of the provision is "to modify the rights of holder of secured claims," and that the bifurcation of a creditor's claim does not pay the creditor "pursuant to its note and mortgage

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94Id. at 183–84 (citations omitted).
96Id. at 712.
97Id.
99Id. at 569. See In re Strober, 136 B.R. 614 (Bankr. E.D.N.Y. 1992). The court in In re Ireland, 137 B.R. 65 (Bankr. M.D. Fla. 1992), took the position that bifurcation and lien stripping of residential mortgages is not permitted under § 1322(b)(2). Although the court discussed Dewsnup, it did not believe it resolved the questions of lien stripping under chapter 13, and felt that it did not provide much guidance toward resolution. In a similar vein, the court in In re Sainz-Dean, 139 B.R. 739 (Bankr. D. Colo. 1992), seemed to believe that the Tenth Circuit would probably reverse its position on bifurcation in Eastland Mortgage Co. v. Hart (In re Hart), 923 F.2d 1410 (10th Cir. 1991), after Dewsnup. However, because Hart had not been reversed by Dewsnup it continued to follow Hart in allowing bifurcation of undersecured home mortgage claims under § 1322(b)(2).
and thus is a modification prohibited under § 1322(b)(2).” On the significance of Dewsnup to its finding, the court stated that the:

Supreme Court [had determined] that a lien could not be avoided under Section 506(d) through the valuation mechanism in Section 506(a) where such claim was allowed pursuant to Section 502. In this case, the [creditor] has an allowed secured claim and therefore the [creditor's] lien cannot be avoided under 506(d).201

The court felt that this was consistent with § 1322(b)(2), where the secured creditor's interest is not modifiable if secured only by the principal residence of the debtor.202

The court in In re Strober203 also found Dewsnup to undermine support for the position that bifurcation is permitted under § 1322(b)(2).204 The court stated that, although the Supreme Court did not address whether § 506(d) could be used to strip down a claim under chapter 13, it believed that it was “almost impossible to reconcile the decision's rationale with any different result in Chapter 13.”205 This court was in complete agreement with the Supreme Court that stripping down of a claim would deprive the creditor of any right to increases in value occurring before foreclosure, which is what the creditor has bargained for.206 It also agreed that, because of the ambiguities in § 506, it would not read the section to broaden the debtor's authority to avoid an allowed claim to the extent that it is unsecured under § 506(a).207 Moreover, the court felt that there was even less reason to permit bifurcation and lien avoidance under chapter 13, which has a prohibition against modification of claims secured by a debtor's principal residence.208 The court also found support for its position against bifurcation and lien avoidance under § 1322(b)(2) in the plain language of the provision, the legislative history of § 1322, and the statutory scheme of the provision.209

200136 B.R. at 569.
201Id.
202Id.
2041d. at 618-19.
205Id. at 615-16.
206Id. at 619.
207Id.
208Id.
209Id. In its reading of § 1322(b)(2), the court felt that the provision was clear in protecting claims only secured by the lender's home mortgage. It felt that those who read the provision as limiting § 1322(b)(2) to the secured portion of the claim confuse:

the term "secured claim" with the phrase "claim secured only" by a home mortgage and disregard the difference in the function of the word "secured" in the two phrases. In the phrase "secured claim" the word "secured" is an adjective modifying "claim," so that the entire phrase can legitimately be read as meaning a wholly secured claim.
Most recently, in *Nobleman v. American Savings Bank (In re Nobleman)*[^210] the Fifth Circuit Court of Appeals joined the post-*Dewsnup* cases finding bifurcation to be a prohibited modification of § 1322(b)(2). It also split with the

> In the latter phrase, "a claim secured only by," the phrase "secured only by" performs an adverbial function describing a characteristic of the claim, i.e., that it is secured only by a residential mortgage. That a claim is "secured only by" a residential mortgage does not mean that it is necessarily a "secured claim." Even if the mortgage exceeds the value of the residence so that the claim is not a secured claim, in the sense of wholly secured, it is still correctly described (if the creditor holds no other security) as "secured only by" a residential mortgage.


The court also found support in the legislative history, particularly the testimony of Edward J. Kulik of the Real Estate Division of the Massachusetts Mutual Life Ins. Co. and Robert E. O'Malley of Covington & Burling. The court stated that § 1322(b)(2) was compromise legislation between the House and Senate, and was the result of testimony from the banking industry "deploring lien stripping." *Id.* at 620. It noted that Kulik expressed specific concern that, if cramdowns were allowed in chapter 13 cases, it would make lenders much more conservative in making home financing available. *Id.* at 621. In response to Senator DeConcini's "skepticism" regarding the extent of a possible decrease in the availability of home mortgage financing that would result from the allowance of cramdowns, O'Malley stated that "savings and loans will continue to make loans to individual homeowners, but they will tend to be, I believe, extraordinarily conservative and more conservative than they are now in the flow of credit." *Id.* (citing *Hearings Before the Subcommittee on Improvements of the Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 1st Sess.* 709, 715). The court also added that the substitution of the word "only" for "wholly" was made to make it clear that the provision protected from modification a mortgage secured "only" by a debtor's principal residence, whereas the term "wholly" emphasized whether the claim was secured to the extent of the value of the residence. *Id.* at 622.

The court held that bifurcation or lien stripping of long term mortgages under § 1322(b)(2) was inconsistent with many other provisions under chapter 13. *Id.* at 622–23. The court noted, for example, that under § 1322(b)(5) a debtor is required to cure a default within a reasonable time and to maintain mortgage payments under the original contract. A bifurcation of a claim that "provide[s] for the cure of any default only the extent of such default, together with the unpaid principal, does not exceed the present value of the debtor's residence," and thus does not satisfy the requirement that the total amount in default be cured where amounts of the default exceeding the present value of the property are not included under the plan. *Id.* at 623.

The court also felt that the bifurcation of the long term mortgage conflicts with § 1322(b)(5), which requires the plan to preserve the creditor's lien in the property and to pay under the plan the present value of the property (the amount of the allowed secured portion of the claim). The court noted that, because a plan under chapter 13 cannot exceed five years, the payments would have to be made within that time, which the court stated most debtors would be unable to do given the large amount usually owed on the long term home mortgage. *Id.* at 623. It held that courts permitting bifurcation have refused to apply § 1325(a)(5) on the ground that it would "nullify the use of section 506(a) in Chapter 13 cases." *Id.* at 623.

The court found the bifurcation of long term loans incompatible with the discharge provisions of 1328, which prohibit the discharge of long term loans covered by § 1322(b)(5). It also found bifurcation inconsistent with § 1307, permitting the conversion of a chapter 13 case to a chapter 7 case, and the fate of a bifurcated claim in a subsequent chapter 7 conversion in light of *Dewsnup*; as well as with the Code's avoidance provision under § 522(f)(1), which limits a debtor's right to avoid a lien against a home to "judicial liens" impairing a homestead exemption. *Id.* at 624. The court also noted that another inconsistency may be found where bifurcation of a debtor's secured debt will increase the unsecured debt above the limit of unsecured debts under chapter 13, and make the debtor ineligible for chapter 13 pursuant to § 109(c). *Id.* at 625.

Courts of Appeals for the Second, Third, Ninth and Tenth Circuits. In its discussion of the impact of Dewsnup on the question of the permissibility of bifurcation under § 1322(b)(2), the court briefly summarized the main findings of the Supreme Court in Dewsnup and concluded that Dewsnup lent “support to this view that bifurcation is impermissible.” The bulk of its decision was based on several methods of statutory interpretation used by many courts addressing the interplay of § 506(a) and § 1322(b)(2). Accordingly, the court in Nobleman believed that the words of the statute provide the best source for determining the meaning of the provision; that the principles of statutory construction require that, where a provision of general construction, such as § 506, conflicts with a provision of specific application like § 1322(b)(2), the specific statute prevails; and that the legislative history of § 1322(b)(2) indicates congressional intent to provide a special protection and preservation of the rights of home mortgage lenders.

The final group of post-Dewsnup cases is those interpreting Dewsnup as not forbidding the bifurcation under § 1322(b)(2), but clearly prohibiting lien avoidance thereunder. Harris v. Barclay’s American Mortgage Corp. (In re Harris) and Taras v. Commonwealth Mortgage Corp. (In re Taras) are companion cases that were decided by the Bankruptcy Court for the Eastern District of Pennsylvania. This court held that Dewsnup did not overrule the Third Circuit in Wilson v. Commonwealth, and continued to follow the Third Circuit decision finding bifurcation of undersecured claims, secured only by a debtor’s principal residence, to be permissible under § 1322(b)(2). The court did not believe that the Supreme Court’s decision in Dewsnup had overruled Wilson for several reasons. First, it noted that the Court’s decision was based on a chapter 7 liquidation, and was limited to the question of the permissibility of lien stripping under § 506(d) in such cases. It also pointed out that the Supreme Court did not believe that Congress, in enacting § 506(d), had intended to overrule the pre-Code position that liens survive bankruptcy in liquidation. Moreover, Lomas Mortgage USA v. Wiese, 980 F.2d 1279 (9th Cir. 1992); Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy), 962 F.2d 176 (2d Cir. 1992); Eastland Mortgage Co. v. Hart (In re Hart), 923 F.2d 1410 (10th Cir. 1991); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123 (3d Cir. 1990); Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182 (9th Cir. 1989).


Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182 (9th Cir. 1989).

1Lomas Mortgage USA v. Wiese, 980 F.2d 1279 (9th Cir. 1992); Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy), 962 F.2d 176 (2d Cir. 1992); Eastland Mortgage Co. v. Hart (In re Hart), 923 F.2d 1410 (10th Cir. 1991); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123 (3d Cir. 1990); Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182 (9th Cir. 1989).


3Id. at 489.


7895 F.2d 123 (3d Cir. 1989).


9136 B.R. at 949. Additionally, the court noted that the Supreme Court in Dewsnup was concerned that by using § 506(a) and (d), “valuation of the secured property would be frozen pending a post-bankruptcy foreclosure of the property, thereby according a debtor a ‘windfall’ in the event of appreciation of value.”
it noted that the Court found a distinction between the term "allowed secured claim" as used in § 506(d) and the way it is used in § 506(a). From these points, the court concluded that the Supreme Court recognized that bifurcation of a claim in a reorganization is distinct from lien stripping in a liquidation, and that the Supreme Court had not determined that the bifurcation of claims was prohibited in a reorganization.

Similarly, the court in In re Dyer did not believe that Dewsnup had overruled the Ninth Circuit in Hougland v. Lomas & Nettleton Co. (In re Hougland), which permitted the bifurcation of an undersecured home mortgage under § 1322(b)(2). In this case the court looked at the Supreme Court's decision in Johnson v. Home State Bank, in addition to Dewsnup.

In Johnson the Supreme Court was required to determine whether a creditor that held a claim, that had been discharged in a prior chapter 7 case and was secured by the debtor's principal residence, would have a "claim" against the debtor in a subsequent chapter 13 reorganization. The Supreme Court held that, although the debtor had received a discharge of personal liability for the debt to the creditor in the chapter 7 case, the creditor's lien against the real property securing the claim survived the chapter 7 discharge under § 506(d), and would be an enforceable "claim" against the property in the subsequent chapter 13 case. The court in Dyer found Dewsnup to be an extension of Johnson, by preserving the validity of the liens in a chapter 7 liquidation under

\[\text{Id. (quoting Dewsnup v. Timm, 112 S. Ct. at 778). The court stated that these two points reflected concerns not relevant to the use of § 506(a) in reorganization cases, because valuation in the reorganization process is fixed at the time of confirmation; whereas in the chapter 7 case valuation is fixed at the time of the filing of the petition. Moreover, the court noted that Congress was clear that § 506(a) was to be used in reorganization cases. Id.}
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\[\text{\textsuperscript{200}Id.}
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\[\text{\textsuperscript{201}Id.}
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\[\text{\textsuperscript{202}142 B.R. 364 (Bankr. D. Ariz. 1992).}
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\[\text{\textsuperscript{203}886 F.2d 1182 (9th Cir. 1989).}
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\[\text{\textsuperscript{204}The court in Dyer identified three approaches to analysis applied by the courts considering the interpretation of § 1322(b)(2) since Dewsnup: (1) cases permitting bifurcation but prohibiting lien avoidance if the debtor does not propose to pay the entire claim in reorganization; (2) cases that prohibit bifurcation and lien avoidance and cite Dewsnup as support for this interpretation; and (3) cases permitting bifurcation as well as lien avoidance. In re Dyer, 142 B.R. 364, 369 (Bankr. D. Ariz. 1992).}
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\[\text{\textsuperscript{205}Id. at 372–73. It noted further that Bellamy concluded that the creditor did not have to be paid within five years as required under §§ 1322(c) and 1325(a)(5)(B). This the court believed was inconsistent with the "in rem analysis in Johnson and Dewsnup" because "it implied that the debtor may reinstate the mortgage in a stripped down form, or a reduced principal balance equal to the value of the residence at the time of the Section 506 or confirmation hearing, pay the arrearages pursuant to a plan of reorganization, and make regular monthly payments until the reduced principal balance or secured claim is paid in full." Id. at 373 (emphasis deleted).}
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\[\text{\textsuperscript{206}111 S. Ct. 2150 (1991).}
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\[\text{\textsuperscript{207}111 S. Ct. at 2153.}
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The court felt that these cases could be interpreted to give Hougland "continued vitality," and noted that Hougland did not focus on § 506(d), as the Supreme Court did in Dewsnup and Johnson, but only based its decision on § 506(a).

Accordingly, the court in Dyer held that the debtor proposing a chapter 13 plan could bifurcate the undersecured claim under § 506(a), but could not void the unsecured portion under § 506(d). What this would mean for the debtor is that he or she would make payments on the secured portion of the claim during the plan, the unsecured portion would be paid like other unsecured claims, and the lien securing the claim would continue to secure the entire bifurcated claim. At the end of the term of the plan, the debtor would receive a discharge of personal liability under § 1328 of the Code; if any amount of the creditor's claim remained unpaid, it would be secured by the lien against the property under § 506(d). The court held that this would correspond with the ruling of Dewsnup and Johnson that the creditor should get the benefit of any appreciation in the property before foreclosure.

The court also described the benefit of permitting bifurcation of the undersecured claim under the chapter 13 plan, without the benefit of lien avoidance for the unsecured portion of that claim:

The benefit to the Debtors is that during the term of the Chapter 13 plan, the unsecured claim may be treated in a different manner than the secured claim. The Debtors may propose a minimal repayment to all unsecured creditors, including the creditor with a bifurcated claim. Thus, the Debtors may pay less to the creditor over the term of the Chapter 13 plan than the Debtors would have paid if the creditor had a fully secured claim, with interest accruing on the full amount of the secured claim.

VI. RECENT LEGISLATIVE DEVELOPMENTS

This debate regarding the permissibility of bifurcating undersecured residen-
tial mortgages under § 1322(b)(2) has not gone unnoticed by Congress. On June 16, 1992 the Senate passed S. 1989 by a 97–0 vote. This bill proposed to establish a national bankruptcy commission to study issues and problems that have developed under the Bankruptcy Code; to amend the Code "in certain aspects of its application to cases involving commerce and credit and individual debtors." 

Section 310 of Title III of the bill included a provision to address specifically the permissibility of bifurcation of undersecured mortgages under § 1322(b)(2):

Section 1322(b)(2) of title 11, United States Code, is amended by striking "claims;" and inserting "claims, but the plan may not modify a claim pursuant to section 506 of a person holding a primary or a junior security interest in real property or a manufactured home (as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5402 (6)) that is the debtor's principal residence, except that the plan may modify the claim of a person holding such a junior security interest that was undersecured at the time the interest attached to the extent that the interest remains undersecured;".

Accordingly, the new proposed amendment would have prohibited the cram-down of all claims secured only by a debtor's primary residence regardless of its secured status under § 506 of the Code. This prohibition would not only cover first liens against the property but would also include any junior lien that was fully secured at the time of origination of the mortgage.

Senator Helfin, who introduced the bill in the Senate in November, 1991, expressed his views on the importance of this proposed amendment:

I believe that § 310 is one of the most important provisions of this bill. This section would protect the mortgage-backed securities market, and address the issue of cramdowns in chapter 13 bankruptcies. . . . This section would completely protect the entire claim in cases of first mortgages on residential real estate that is the debtor's primary residence. The section would generally protect junior security interests except

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236 138 Cong. Rec. S8249 (daily ed. June 16, 1992). S.1985 was first introduced in the Senate in November, 1991. The original version of § 310 of the bill was less prohibitive regarding the applicability of § 506 under § 1322(b)(2): it limited the prohibition against the bifurcation of undersecured claims to the claim of "a person holding a primary security interest" in property serving as a debtor's principal residence, and did not extend the prohibition to junior mortgages as provided under the final version of the bill. S.1985, 102d Cong., 2d Sess. § 310 (1991).
in circumstances where the security interest was undersecured at the time of contracting, and only could be subject to a cramdown to the extent that it remains undersecured at the time of the bankruptcy. By inference, this section does acknowledge a court’s ability to bifurcate residential real estate under section 1322 by the operations of section 506 of the Bankruptcy Code. By protecting these important interests, the mortgage marketplace is protected, stability of this marketplace enhanced, and therefore, the consuming public who are currently faced with uncertainty regarding residential real estate is served.237

On September 24, 1992 similar bankruptcy legislation was introduced in the House Judiciary Committee by Congressman Jack Brooks.238 H.R. 6020 contained many of the same provisions found in S. 1985, including a proposal to amend § 1322(b)(2).239 Section 202 of H.R. 6020 specifically provided:

Section 1322(b)(2) of title 11, United States Code, is amended
(1) by striking "other than a claim secured only by a security interest in real property that is the debtor’s principal residence", and (2) by inserting before the semicolon at the end the following:
"except that the rights of the holder of a claim secured only by the most senior security interest in real property that is the debtor's principal residence may not be modified to reduce the secured claim to a value that is less than the value, as of the date the security interest arose, of the creditor's interest in the estate's interest in such property.”

Unlike the Senate version of § 310, this provision limited the prohibition against modification of claims secured only by a debtor’s principal residence to senior security interests as opposed to junior security interests that might also be outstanding against the same property.240

240Id.
241The section-by-section analysis of the committee report accompanying the bill described the amended as follows:

The Federal circuit courts of appeal are currently split as to whether individuals filing for chapter 13 protection may bifurcate an undersecured home mortgage into secured and unsecured portions. The issue has arisen because of the apparent conflict between Section 506 of the Bankruptcy Code (which allows bifurcation of allowed claims into secured and unsecured claims and the avoidance of the lien on the unsecured), and Section 1322(b)(2) of the Bankruptcy Code (which prevents modification of claims secured only by a security interest in real property that is the debtor’s principal residence). This section amends Section 1322(b)(2) to specify that senior
This provision and others were proposed as amendments to S. 1985. On October 7, 1992 the Senate adopted all of the amendments proposed under H.R. 6020, and added some new provisions to the bill as well. Although this legislation was supported in both houses of Congress from the beginning, it failed to pass the House due to the controversial nature of some of the last-minute amendments made by the Senate.

A. Testimony

In June, 1991 the Senate Committee on the Judiciary's Subcommittee on Courts and Administrative Practice held hearings to consider the impact of the cramdown of residential mortgages in chapter 13 cases. Several representatives of the residential mortgage industry appeared before the subcommittee to explain the effect these cramdowns had on the industry, and to appeal to Congress to make it clear that cramdowns of residential mortgages are not permitted under chapter 13 in any case, including instances where the mortgagor is undersecured. Only one individual appeared before the committee to speak in favor of the bifurcation of undersecured mortgage in chapter 13 cases. On July 8, 1992 the House Subcommittee on Economic and Commercial Law held special hearings on “Consumer Issues in Bankruptcy.” At these hearings representatives from consumer financial institutions and consumer interest groups offered testimony on the proposed consumer bankruptcy amendments, including the proposed amendment to § 1322(b)(2). The testimony of the mortgage lienors may not be bifurcated under Section 506 to the extent they were not undersecured when they were originated.


244 Representatives of the residential mortgage industry appearing before the subcommittee on June 6, 1991 included: Frank Keating, General Counsel, Department of Housing and Urban Development; Dean S. Cooper, Associate General Counsel, Federal Home Loan Mortgage Corporation; John P. Davey, Draper & Kramer, Inc., Chicago, Illinois, on behalf of Mortgage Bankers Association of America; Larry Gilmore, Oakwood Acceptance Corporation, Greensboro, North Carolina, on behalf of the Manufactured Housing Institute and the National Manufactured Housing Federation. Id. at 44–77. Alvin O. Wiese, Jr. of Indian Wells, California, appeared before the subcommittee on behalf of the National Consumer Bankruptcy Coalition on June 27, 1991. Proposed Consumer Bankruptcy Reform Amendments to the Bankruptcy Code, Focusing on the Effects of Bankruptcy on Individual Consumers: Hearings Before Subcommittee on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 94–123 (1991) (hereinafter Consumer Bankruptcy Reform).


246 The participants included: Barbara L. Clore, President, Associated Industries Credit Union, Deer Park, Texas, representing the National Consumer Bankruptcy Coalition; Martin J. Kelly, Chairman and Chief Executive Officer, ITT Consumer Financial Corporation, Minneapolis, Minnesota; Willard Gourley, Jr., Barclay's American Mortgage Corporation, Charlotte, North Carolina, representing the Mortgage Bankers Association of America; Henry J. Sommer, Supervising Attorney, Consumer Law Project, Community Legal Services, Inc., Philadelphia, Pennsylvania, representing the National Bankruptcy Conference; Gary Klein,
several speakers appearing before these committees provide different perspectives of the effect of cramdowns on creditors and debtors.

1. Hearings Before the Senate Subcommittee on Courts and Administration

During the hearings on the effect of cramdowns of residential mortgages under § 1322(b)(2) of the Code before the Senate Subcommittee on Courts and Administration, three witnesses appeared to testify in favor of a legislative amendment to the Code specifically prohibiting cramdowns of claims secured by a lien against a debtor’s principal residence: Dean Cooper, Associate General Counsel of the Federal Home Loan Mortgage Corporation (“Freddie Mac”); Frank Keating, General Counsel of the Department of Housing and Urban Development on behalf of the Government National Mortgage Association (“GNMA”); and Larry Gilmore of the Oakwood Acceptance Corporation on behalf of the Manufactured Housing Institute and the National Manufactured Housing Federation.247 Henry Sommer of the Community Legal Services, Inc. testified against any prohibition of cramdowns of undersecured claims in chapter 13 cases.248

Dean Cooper, speaking on behalf of the Federal Home Loan Mortgage Corporation, expressed concerns about the adverse impact that the allowance of cramdowns has on residential mortgages in chapter 13 cases. Cooper stated that, “[a]s a purchaser of residential mortgages which guarantees the payment of principal and interest to investors in [its] securities, Freddie Mac ultimately absorbs the cost of cramdowns.”249

Cooper stated that cramdowns result in a windfall for the bankrupt debtor and a loss to the lender by allowing the debtor to keep a mortgaged home, “cram down the debt to the depressed value of the property, and enjoy the benefit of appreciation of value of the property when market conditions improve, while having no obligation to pay the lender anything more than the reduced amount of the debt.”250 It was his view that the courts permitting cramdowns of undersecured mortgages had misinterpreted the meaning of § 1322(b)(2), and that cram-

Managing Attorney, New Hampshire Legal Assistance, Manchester, New Hampshire, representing the National Consumer Law Center. Id.

247 Alvin O. Wiese, Jr. appeared before the subcommittee on June 27, 1991, to testify on behalf of the National Consumer Bankruptcy Coalition (“NCBC”). Consumer Bankruptcy Reform, supra note 244 at 94–123. Wiese expressed the view that the cramdown of residential mortgages was never intended to be allowed under § 1322(b)(2) by Congress, and was definitely “not sound policy if the residential housing credit market is to be preserved.” Id. at 111. He also stated that he did not agree with the courts limiting the application of the anti-modification provisions of § 1322(b)(2) to long-term residential mortgages and excepting second mortgages or junior liens against a debtor’s residence from the anti-modification protection, regardless of the secured status of the claim under § 506 of the Code or the length of the term of the junior claim. Id. Accordingly, it was the recommendation of the NCBC that the Code be amended to prohibit any modification of a claim secured only by a debtor’s principal residence. Id.

248 Cramdown Hearing, supra note 243, at 28–44.

249 Id. at 45.

250 Id.
downs were not intended to be permitted under this provision as enacted by Congress. Accordingly, it was his recommendation that Congress amend the Code for "technical clarification of section 1322(b)(2) of the Bankruptcy Code to reassert in the clearest statutory language that home mortgages may not be crammed down in chapter 13 plans."251

Frank Keating, General Counsel for the Department of Housing and Urban Development, presented the views of the Government National Mortgage Association on court decisions permitting the cramdown of undersecured residential mortgages in chapter 13 cases.252 As a guarantor of the payment of principal and interest on privately-issued investment securities secured by FHA-insured or VA-guaranteed mortgages, it too has a direct interest in the determination of whether cramdowns of residential mortgages are to be permitted under chapter 13.253

Keating explained that, when a bankrupt debtor is allowed to cramdown an undersecured residential mortgage under a chapter 13 plan, the lender will most likely receive very little payment under the "newly unsecured portion of the mortgage."254 Unfortunately for the lender/GNMA issuer, it remains obligated "to make pass-throughs of all required principal and interest to the investors in the mortgage-backed security."255 Accordingly, GNMA expressed concern that the lending community would become soured by the cramdown and perhaps reduce home lending activities to individuals in communities where

251Id.
252Keating was accompanied by Robert P. Kalish, Executive Vice President of GNMA, and Guy S. Wilson, GNMA's Vice President for Mortgage-Backed Securities. Cramdown Hearing, supra note 243, at 2-27.
253In his testimony Keating described the role of GNMA in the mortgage finance industry as follows:

GNMA guarantees the timely payment of principal and interest on privately-issued investment securities that are backed by pools of FHA-insured or VA-guaranteed mortgages. GNMA's principal mission is to support the Government's housing objectives by establishing secondary markets to channel funds from the securities market into the mortgage market, thereby increasing the supply of credit available for housing.

Under the GNMA mortgage-backed securities program, issuers are responsible for collecting principal and interest payments from borrowers and passing these payments PLUS ANY SHORTFALL (e.g. amounts not received from mortgagors) through to the GNMA investors. Payments to the investors are based on the initial principal balance and the stated coupon rate of the securities, which is further correlated to the interest rate on the underlying mortgages. Unlike the respective mortgage-backed securities programs of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC), GNMA does not hold the mortgages in trust; rather, GNMA serves only as a guarantor of the timely payment of principal and interest by the issuers. The issuers, in the GNMA program, hold the underlying mortgage documents and are compensated for searching the loans to a greater extent than are FNMA or FHLMC program participants because they are required to pass-through full monthly payments to investors regardless of whether or not they received such payments from the mortgagors.

Id. at 24-25.
254Id. at 25.
255Id.
the property values are at "potential cramdown risk."

Like Cooper and other commentators on this question, Keating asserted that the result of the cramdown is an unfair windfall to the debtor because the creditor's secured claim will not be increased in the event of a future appreciation in the value of the collateral.

He also stated that the effects of the cramdowns have already materialized for the GNMA issuers:

Both FHA and VA have adopted the position that claims would be paid only on the secured indebtedness as it may have been reduced by the court. GNMA has determined, based on the contractual obligations with its approved issuers, that the issuers are responsible for the shortfall in principal due the GNMA investors caused by a cramdown. Furthermore, GNMA has determined that the payment differential—or to put it another way, the unsecured portion of the mortgage debt—is due upon bankruptcy discharge. This means that not only would the GNMA issuer lose the payments from the mortgagor representing the unsecured portion of the debt, but upon discharge of the Chapter 13, the issuer must pass-through this now unsecured portion of the debt to the investors in the mortgage-back security. The issuer is required to advance these funds from its capital to keep the mortgage-backed security in balance with the underlying secured loan backing that security.

Keating added that this result could be very adverse for the issuer if it is required to make large "cash outlays" to meet its liability for the unsecured portions of the mortgages. In the event that the issuer is unable to meet these payments and defaults on its obligations to GNMA, GNMA, as guarantor, would have to bear the burden of the shortfalls to the investors. Keating noted that not only does the effect of the cramdown present a serious risk of loss to the issuer but there is also the possibility of great loss for GNMA.

While the current risk is minimal since the slide of property values in various parts of the country has significantly abated, the opportunity for swift losses in an unexpectedly severe economic downturn in one or more regions of the country could have a material impact on the financial stability of

\[258\]
\[259\]Id. at 26.
\[260\]Id. at 26-27.
numerous GNMA issuers. In turn, each defaulted GNMA issuer would constitute a drain on the resources of GNMA.261

The ultimate result of this situation is that it may make lenders leery about making home mortgage financing available to individuals in areas where the risk of cramdowns in the event of a borrower's bankruptcy is high.262 Keating recommended that Congress amend the Code "to clarify the intent of the bankruptcy law" so that cramdowns of undersecured residential mortgages are not permitted under § 1322(b)(2).263

Larry Gilmore appeared on behalf of the Manufactured Housing Institute and the National Manufactured Housing Federation, and represented various interests in the manufactured housing industry including lenders.264 In his testimony he stated that his organizations were "generally opposed to chapter 13 bankruptcy cramdowns" and felt that such practices by the courts were contrary to the intent and purpose of Congress when it enacted the Code in 1978. He urged Congress to make it clear that such modification of home mortgages is impermissible under chapter 13.265

With respect to the manufactured housing industry, Gilmore noted a unique problem faced by its member lenders: although manufactured homes serve as primary residences like site-constructed housing, and loans obtained to purchase these homes are financed with a first lien, they are nevertheless treated as consumer loans and not real estate mortgage loans.266 Most often the borrower/homeowner either does not own the property on which the home is to

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261 Id. at 27.
262 Id. at 25-26.
263 Id. at 27.
264 In his testimony Gilmore defined manufactured housing and described the nature of the business:
Manufactured homes are built entirely in a factory. Today there are several forms of factory built homes, including modular, panelized, and manufactured homes. My remarks concern themselves with the form of factory-built housing known as manufactured homes, formerly known as mobile homes.
Manufactured homes are delivered from the factory in one or more sections. The sections are completely assembled at the factory and require only minimal labor to make them ready for occupancy once delivered to a home site.
Manufactured homes are built to federal standards prescribed by Congress in 1974 and implemented by the Department of Housing and Urban Development in 1976. Since developing the standards, HUD has maintained its surveillance of the manufactured housing industry, primarily through its agent the National Conference of States on Building Codes and Standards.
In the decade of the 1980's, manufactured home builders produced 2.5 million homes, accounting for 14.2 percent of the 17.4 million privately-owned housing construction started during the decade. This included manufactured homes. Manufactured homes provide permanent shelter to over 12 million Americans, most of who are families of modest means.

Cramdown Hearing, supra note 243 at 67.
265 Id. at 66.
266 Id.
be located, or has financed the purchase of the land on which the home is to be located separately.\textsuperscript{267} Accordingly, the manufactured housing industry was greatly affected by the allowance of cramdowns of loans secured by such mobile homes and viewed this as a serious threat to future funding for such housing.\textsuperscript{268}

Gilmore further explained that the likelihood of the collateral being appraised lower than the loan balance is greater for manufactured homes than for permanent housing due to the nature of the property and loan.\textsuperscript{269} In the foreclosure of a permanent home, the lender can foreclose on the real property. In the case of manufactured housing often the lender can only foreclose on the mobile home, which requires that it be moved from the site and a dealer be hired to sell it for the lender, or it is sold to a dealer at a wholesale value versus its retail market value.

Thus it is the wholesale value that is used in appraising the property in a chapter 13 cramdown.\textsuperscript{270} Gilmore argued that this was not fair because the chapter 13 bankrupt is not losing the home but is keeping it and receives a windfall through the bifurcation of the claim against the home. The lender's secured claim is reduced to the wholesale value and not the retail value that it would be worth to a purchaser. Gilmore saw this as an "unfair result for the lender" and no practical relief for the bankrupt's cash flow problems because the monthly payments of the secured claim are not reduced through the cramdown. He said that what is happening through the cramdown is "the borrower is enriched at the expense of the lender."\textsuperscript{271}

\textsuperscript{267}Id.
\textsuperscript{268}Gilmore stated:

\begin{quote}
It is our opinion that allowing portions of loans to be "crammed down" in a Chapter 13 bankruptcy proceeding could lead to serious disruption in the supply of funds for home financing. This is true for all kinds of home financing, whether the homes are treated as real estate or as personal property. In fact, because manufactured homes treated as personal property represent an important source of unsubsidized affordable housing in the country, it is very important that the flow of credit to that portion of the housing industry not be disrupted.

We urge Congress to clarify that it never intended for loans secured by first liens on an owner-occupied home that is the borrower's principal residence to be subject to modification in a bankruptcy proceeding; and to make clear that this applies equally to real estate mortgages and loans on manufactured homes, whether those homes are treated as real or personal property.
\end{quote}

\textit{Id. at 66–67.}
\textsuperscript{269}Id. at 67.
\textsuperscript{270}Id.
\textsuperscript{271}Gilmore gave an example of how the cramdown affected his organization in a bankruptcy decision from the Bankruptcy Court in the Western Division of Texas:

\begin{quote}
To give you an example of a recent cramdown that we experienced at Oakwood Acceptance, the [court] ordered the amount of our claim be reduced from $25,200, which was the customer's balance, to $9,000 resulting in an unsecured claim due Oakwood of some $16,000. The home in question was a multisection home of some 1,120 sq. ft. and similar homes were selling in that market for $25,000 to $30,000.
\end{quote}

\textit{Id. at 68.}
The only testimony before the subcommittee recommending the application of § 506 in determining the extent of the anti-modification protection allowed under § 1322(b)(2) was provided by Henry Sommer, staff attorney with Community Legal Services, Inc. of Philadelphia, Pennsylvania, which represents low income families and individuals seeking to save their homes from mortgage foreclosures. Sommer testified that the ability to use § 506 to cram down mortgages in chapter 13 plans is critical to these debtors' ability to rehabilitate under the Code and achieve the "fresh start intended by Congress for bankruptcy debtors." Moreover, Sommer stated that the distinction between secured and unsecured claims under § 506(a) is essential to "insure fairness in the distributions to creditors," and § 506(a) of the Code essentially "duplicates the result [in bankruptcy] that would occur if the property were liquidated.

Sommer identified several consequences that would probably result from a decision by Congress to restrict the applicability of § 506 determinations of secured status under § 1322(b)(2). He stated that the ability of the debtor to strip down an undersecured residential mortgage in a chapter 13 plan is essential to preventing creditors from avoiding the effects of a possible bankruptcy discharge by taking a mortgage lien to secure all loans with the debtor. He pointed out that creditors are able to, and often do, require that a debtor secure a debt with his or her property even in cases where the property is so encumbered with liens that there is no equity in the property at the time of the loan to actually provide security. For example, if a chapter 7 debtor is not able to cram down the undersecured or unsecured mortgagee's claim, and is required to treat the unsecured or undersecured claim as a fully secured claim, the debtor's property would remain liable for the full value of the debt after discharge, even though it is not a secured claim entitled to such protection under the Code. This would frustrate the fresh start the debtor originally sought in

272Cramdown Hearing, supra note 243 at 35. In explaining the purpose of § 506, Sommer noted that in a chapter 7 liquidation the creditor holding a secured claim, as defined under § 506(a), is generally entitled to a priority claim in the proceeds resulting from the liquidation of the property superior to the claims of unsecured creditors; in the event the debtor elects to retain the encumbered property, by seeking relief under the reorganization and rehabilitation provisions of chapters 11, 12 or 13, the secured creditor is entitled to receive the value of the secured claim plus interest. He noted that, where the creditor's claim exceeds the value of the collateral, resulting in the creditor's claim being either "partially secured, or even totally unsecured", § 506(a) "assures that creditors receive special treatment as secured creditors only to the extent they really have collateral securing their claims." That part of the claim that is unsecured, appropriately, is not entitled to special treatment and is appropriately treated as other unsecured claims.

Id. at 36.

273Id. at 35.

274Id. at 36.

275Id. at 38.

276Id.

277Id.
turning to bankruptcy for relief.\textsuperscript{278}

Sommer stated that the same result would occur under chapter 13 if § 506 is not applicable to § 1322(b)(2). That is:

\begin{quote}
[i]f the debtor cannot strip down the mortgage lien, he or she may be required to pay the entire secured claim, plus interest on that claim, in order to obtain plan confirmation under the Code section 1325(a)(5). In effect, the debtor is required to pay more to save his or her home than anyone else would have to pay to buy it, because the debtor would have to pay the total amount of the mortgages on the home even if they far exceeded the value of the property.\textsuperscript{279}
\end{quote}

Sommer expressed concern that, if residential mortgages protected under 1322(b)(2) cannot be crammed down, in spite of the fact that they are partially secured or unsecured, creditors desiring to avoid the effects of a discharge will simply require that all loans be secured by a debtor’s primary residence. The sense in this eluded him:

\begin{quote}
[I]t makes no sense to prevent a family that is struggling to save its home from paying the secured creditors the full value of that home in a chapter 13 case, with interest, when that is all the creditors would receive if they foreclosed on the property. What justification is there for forcing upon a family the hardship of losing its home and moving when the family is willing and able to pay the full value of the home to its creditors?\textsuperscript{280}
\end{quote}

Sommer also stated that a prohibition against the use of § 506 under § 1322(b)(2) would frustrate bankruptcy policy to ensure equitable treatment among creditors.\textsuperscript{281} He noted that, under chapter 13, secured creditors are entitled to have their claims paid in full under the plan or to have prepetition arrearages cured under the plan while the debtor continues mortgage payments unchanged; unsecured creditors are entitled to receive whatever the debtor has left after paying secured claims and his or her reasonable living expenses.\textsuperscript{282} After the debtor completes performance under the plan, any amounts remaining unpaid on unsecured claims are discharged.\textsuperscript{283} If the debtors are not able to bifurcate residential mortgages held by creditors that are unsecured or under-

\textsuperscript{278}Sommer made reference to § 522(f) avoidance provisions, which were designed to eliminate the result of such liens by consumer finance companies against all of a debtor’s household goods. \textit{Id.} at 38.

\textsuperscript{279}\textit{Id.}

\textsuperscript{280}\textit{Id.} at 38–39.

\textsuperscript{281}\textit{Id.} at 39.

\textsuperscript{282}\textit{Id.}

\textsuperscript{283}\textit{Id.}
secured, the creditors' claims will be treated as secured under chapter 13, allowing the creditors to receive payments exceeding the actual value of their liens. Sommer noted that the effect of this special treatment of this group of unsecured claims reduces the funds that might be available for distribution to other creditors with unsecured claims.284

One other consequence of prohibiting the bifurcation of claims under § 1322(b)(2) is that the mortgage lender will be encouraged to engage in questionable transactions, because it will be able to collect on governmental or private mortgage insurance. Sommer explained that the availability of governmental guarantees through FHA and VA mortgage insurance has often led to "shaky transactions:"

There have been a number of scandals over the years where realtors and appraisers have inflated the appraisals of homes to be financed by FHA and VA mortgages, victimizing both the family who then pays too much for the property and the government if it later becomes the owner of the property after a foreclosure, perhaps because the family could not afford the payments on the inflated price. Because they know that any defaulted mortgage will be paid in full by mortgage insurance, lenders have had little incentive to be concerned about whether the appraisals they receive exaggerate the real value of the property and have happily passed all of the risk on to the government.285

According to Sommer, lenders have become concerned that, if the property is saved from foreclosure as a result of the debtor's chapter 13 filing and the cramdown of the undersecured mortgage, they will not be able to foreclose and thus not be able to collect on the FHA or VA insurance and will have to bear the loss resulting from properties that have more than likely been overap-

284Sommer stated:

If a creditor holding a mortgage that is in reality fully or partially unsecured can prevent the bifurcation of its claim into an allowed secured claim and allowed unsecured claim, that creditor must be treated as the holder of a fully secured claim in the chapter 12 or 13 case. To the extent that creditor is paid more than the real value of its lien, i.e. is paid in full on the portion of its claim that is in reality unsecured, it is taking money from the pot of income available for distribution to all the unsecured creditors. It thereby gains an advantage over the general unsecured creditors that is not warranted by the value of its security and which it would not have in a liquidation of the debtor's property. In many cases, a requirement that such undersecured creditors be paid in full would also make it impossible to propose a feasible chapter 13 plan to save a family's home.

Id. at 40.

286Id.
praised. Sommer viewed this risk of loss as having a sobering and therapeutic effect on an abusive industry practice:

[If lenders realized that they were at least at some risk for these losses, they might be more concerned about making sure they obtained conservative appraisals, to the benefit of both homebuyers and the government insurers. As a taxpayer, I certainly hope that the FHA program, which is losing billions of dollars already, and other governmental guarantors will recognize that it is not in their interest to allow lenders to avoid the effects of a stripdown and thereby pass their losses on to the government.

As noted by Sommer, the mortgage lending industry has suggested that the risk it faces through the use of § 506 to strip down residential mortgages could adversely affect the availability of financing for home mortgage loans. He did not believe, however, that the availability of such financing would be reduced if undersecured mortgages could be stripped down under § 506. His opinion is based on the fact that residential mortgage cramdowns under § 1322(b)(2) have been occurring in some parts of the country since 1981, without any evidence of a reduction of lending in these areas. Another reason supporting Sommer’s doubts about a threatened decrease in mortgage lending is that the number of debtors using § 506 to cram down purchase money residential mortgages is small. He also stated that very few of the homeowners who seek relief in bankruptcy have mortgages that exceed the value of their

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287 Id. at 41.
288 Id.
289 Sommer stated:

[S]ection 506 has been used to strip down liens in the Eastern District of Pennsylvania, where I practice, since at least 1982, in the Western District of Pennsylvania since at least 1981, and in other areas of the country as well for many years. To my knowledge, nobody has yet suggested that the use of section 506 has had any impact at all on mortgage lending in these areas. Mortgage credit in these areas has been freely available and has been influenced by the same market trends that influence mortgage credit elsewhere.

Id.

290 Sommer stated:

Homeowning debtors rarely file bankruptcy cases at all unless they are in danger of losing their homes through foreclosure or suffering other severe financial distress. At any given time well under one percent of all mortgage holders are in foreclosure proceedings. Thus, the pool of bankruptcy debtors who would even have section 506 available to them is very small. There is no evidence that families without deep financial problems file bankruptcy cases, which carry with them costs, risks and still some stigma, simply to utilize section 506 to strip down liens.

Id. at 42.
Sommer believed that most cases involving strip downs of residential mortgages are the result of overappraisals, or involve cases where junior creditors have taken mortgages against property of the debtor that has little or no equity:

No public policy is served by protecting the lenders in either of these situations. Indeed, public policy should discourage such practices, and the current provisions of Bankruptcy Code section 506, as most courts have interpreted it, do exactly that. The case has not been made that significant numbers of homeowners in declining real estate markets are utilizing lien stripping where they are not facing foreclosure, much less that the availability of lien stripping has had any measurable effect on the home mortgage market.

Even if the Congress were satisfied that a change were warranted, any limitation on lien stripping should be carefully circumscribed to address only the problems that might, if shown, be described as legitimate—those arising with respect to purchase-money mortgages where the property value has fallen. Congress should not create new ways for creditors to circumvent the bankruptcy discharge nor should it encourage creditors to be careless about obtaining accurate appraisals.

Any limitation on lien-stripping should be applicable only to purchase-money mortgages and should only come into play where the mortgage demonstrates that it is undersecured solely because the value of the encumbered property has actually declined since the mortgage was granted. To go beyond such a change would only serve as an open invitation for the abuses I have discussed.

2. *Hearings Before the House Subcommittee on Economic and Commercial Law*

The individuals that testified before the House Judiciary’s Subcommittee

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291 Sommer stated:

Of those homeowners who do file bankruptcy cases, only a very small number are in the position of having mortgages, especially purchase money mortgages, exceeding the value of their properties. Remember that most people make down payments on their home purchases of 5% to 20%. Even in areas where property values have declined, except for the small percentage of people who bought at the absolute peak of the market (or whose properties were overappraised) and who made little or no down payment, there are likely to be few whose purchase money mortgages exceed the value of their home.

Id.

292 Id. at 43–44.
on Economic and Commercial Law on the question of cramdowns of residential mortgages under chapter 13 included Barbara Clore, speaking for the National Consumer Bankruptcy Coalition; Martin J. Kelly of ITT Consumer Financial Corporation; and Willard Gourley, Jr., representing the Mortgage Bankers Association of America. Uniformly, these individuals expressed support for the proposed amendment to § 1322(b)(2) prohibiting the cramdown of undersecured residential mortgages. Speakers testifying in support of the debtor's right to cram down such mortgages included Gary Klein of the National Consumer Law Center of Boston, Massachusetts and Henry Sommer of Community Legal Services, Inc. of Philadelphia. The legislation that was the subject of the hearings included consumer amendments proposed under both S. 1985 and H.R. 5321, both of which included amendments to § 1322(b)(2).

Clore stated that the amendment was "critical to assuring the free flow of credit to housing finance." She also felt that the amendment would resolve the conflicts existing in between the courts on the "use of section 506", as well as "codif[y] a resolution to the problems raised by the Supreme Court's recent Dewsnup decision." She also stated that limiting the protection against modification of junior mortgages to those actually secured at the time the loan originated would curb potential abuse by lenders to offer home equity loans "based on inflated home values," where in actuality there is little or no equity in the property for security.

Willard Gourley, Jr., speaking on behalf of the Mortgage Bankers Association of America, felt that the proposed amendment to § 1322(b)(2) would reflect exactly what Congress intended for the treatment of home mortgages in its enactment of the Bankruptcy Code in 1978. Gourley found support for this position in the legislative history of the Bankruptcy Reform Act of 1978. In particular, he cited the testimony of Edward J. Kulik before the Senate Subcommittee on Improvements in the Judicial Machinery in November of 1977, in which he objected to the original House version of § 1322 that proposed to allow debtors in chapter 13 to modify rights of holders of secured and unse-

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293 Consumer Bankruptcy Issues, supra note 245 (statement of Barbara Clore at 12).
294 Id.
295 Id. This sentiment was echoed by Martin Kelly. He also expressed the view that cramdowns resulted in an "injustice" to creditors by allowing debtors to "file bankruptcy during a downturn in the real estate market, avoid the unsecured portion of the mortgage (due to loss of market value) and then ride the appreciation back up when the real estate market rebounds." Id. (statement of Martin Kelly at 9).
296 Willard Gourley, Jr. stated:

Such a language clarification does not require a change in the balance of public policies intended by Congress in 1978; it does not require a review of the scope and availability of Chapter 13 for an individual who finds himself in an otherwise unmanageable debt situation; and it does not require any alterations whatsoever in any other chapters of the Code. It requires only a reassertion by Congress that mortgages that support homeownership may not be modified in Chapter 13 plans.

Id. (statement of Willard Gourley, Jr. at 3).
cured claims without restriction. In his testimony Kulik had warned the Senate that, if debtors were allowed to modify claims secured by home mortgages, it would threaten the future availability of home mortgage financing. Gourley quoted Kulik’s recommendation to the Senate that “[s]erious consideration should be given to modifying [the legislation] so that at the least . . . a mortgage on real property other than an investment property may not be modified.”

Gourley believed that § 1322(b)(2) was enacted to provide protection against modification of home mortgages as suggested by Kulik to continue a long recognized effort by Congress to preserve the availability of home mortgage financing.

In his comment on the decisions by the Courts of Appeals that have permitted bifurcation and modification of undersecured home mortgages, Gourley found that such a position undercuts the interests of unsecured creditors under the chapter 13 plan:

Curiously, while the Courts have held that the ultimate obligation of the debtor to repay the mortgage may be reduced in Chapter 13 cramdowns, they say that the monthly payment called for in the mortgage must be preserved. Unless the home mortgage were to be paid off in the three to five years allowed by the Code for the life of Chapter 13 plans, the cramdown approved by the Courts would seem to have no possible positive effect on the ability of the debtor to pay unsecured creditors during the plan period.

Gourley listed specific adverse results that may occur if cramdowns are permitted. The first is the impact that it would have on lenders participating in the mortgage-backed securities market, an important secondary market for home mortgages. He noted that, if mortgage lenders are to be motivated to issue such securities, they must have some assurance that the mortgages securing the securities are going to yield a “predictable flow of principal and interest.”

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297Id. at 5.
298Willard Gourley, Jr. stated:

Of considerable importance in understanding the legislative history of the treatment of home mortgages in Chapter 13, is the recognition that the enactment of Section 1322(b)(2) did not occur in a vacuum. In a series of Acts over almost six decades, Congress has developed programs, institutions, favorable tax treatment, and a broad legislative intent to encourage homeownership and efficient financing for homeownership for Americans of modest means. . . . A reading of the legislative history of Section 1322(b)(2) that argues that Congress recognized that home mortgages needed protection, but then limited that protection without being explicit in doing so, is contrary to the sweep of Congressional public policy to develop the home finance markets.

Id. at 6–7.
299Id. at 9.
300Id. at 10.
The ability of a debtor to reduce the amount of the liability on the mortgage to the market value of the collateral would "introduce an element of uncertainty in the mortgage credit markets that would adversely affect the efficiency of the market."\(^{\text{301}}\)

Gary Klein, who spoke on behalf of the National Consumer Law Center and the Massachusetts Bankruptcy Shelter Preservation Clinic, expressed the general view that H.R. 5321 was a "creditors' wish list" representing changes proposed by consumer credit lenders that tipped the scales of balance and equity of the Code in favor of creditors at the expense of debtors.\(^{\text{302}}\) He also commented on § (2)(g) of H.R. 5321, which proposed to prohibit the cramdown of undersecured residential mortgages.\(^{\text{303}}\) He stated that this provision would severely restrict the ability of a consumer to save a home by failing to "limit a creditor's secured claim to the value of its collateral."\(^{\text{304}}\) He noted, as did Sommer, that limiting the value of a creditor's secured claim to the value of the collateral is exactly what the creditor would get upon foreclosure and sale of the property.\(^{\text{305}}\) Section 2(g) of H.R. 5321 extended the protection against modification to junior creditors with liens against a debtor's home. Klein objected to such protection, on the grounds that a junior creditor assumes a greater risk that the value of the junior lien is likely to depreciate and accounts for this risk in charging higher interest rates, and thus does not warrant the protection proposed under § (2)(g).\(^{\text{306}}\)

Much of Sommer's testimony echoed the views he expressed a year earlier when he appeared before the Senate Judiciary's Subcommittee on Courts and Administration for the same purpose. With respect to the legislative proposals prohibiting the cramdown of undersecured residential mortgages under chapter 13, he reiterated the position that the support for this legislation was found in the mortgage banking industry on the supposition that the allowance of cramdowns would "dry up mortgage credit."\(^{\text{307}}\) Sommer once again argued that there was little evidence that cramdowns had "any discernible effect on the mortgage market" and that, if such evidence had existed, the mortgage banking industry would have marshalled it forth, which it had not succeeded in doing at that time.\(^{\text{308}}\)

He also reaffirmed the view that the stripdown of such mortgages was critical to the relief of families trying to save homes from foreclosure that were overencumbered by junior mortgages against property with little or no equity. The

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\(^{\text{301}}\)Id.

\(^{\text{302}}\)Id. (statement of Gary Klien at 1).

\(^{\text{303}}\)H.R. 5321, 102d Cong., 2d Sess. § 2(g) (1992).

\(^{\text{304}}\)Consumer Bankruptcy Issues, supra note 245 (statement of Gary Klein at 9).

\(^{\text{305}}\)Id.

\(^{\text{306}}\)Id.

\(^{\text{307}}\)Id. (statement of Henry Sommer at 3).

\(^{\text{308}}\)Id.
allowance of the cramdown did not adversely affect a secured creditor because it would receive an amount equal to the amount it would obtain in a foreclosure sale.\textsuperscript{309} He noted that to require the debtor to pay the full value of the outstanding unsecured or undersecured claim of a junior mortgagor would require the debtor to use monies to pay those unsecured claims that would have been paid to other unsecured claimants.\textsuperscript{310} He also warned that the advocacy against cramdowns was motivated by the fear of loss of FHA and VA insurance by mortgage lenders against depreciated property that a chapter 13 would be able to save from foreclosure through the remedy of cramdown.\textsuperscript{311}

VII. RESOLVING THE QUESTION OF BIFURCATION UNDER § 1322(b)(2)

A. A COMPARATIVE ANALYSIS OF JUDICIAL INTERPRETATIONS

While the number of decisions rendered addressing this question are divided, the approaches to interpreting § 1322(b)(2) and its relationship to the bifurcation provision of § 506(a) have been similar and consistent. Courts permitting bifurcation under § 1322(b)(2), as well as those courts prohibiting bifurcation thereunder, have decided the question in most cases by (1) interpreting the "plain language" of § 1322(b)(2); (2) analyzing the legislative history of the provision; (3) applying special rules of statutory construction; and (4) analyzing the congressional intent behind the provision and the basic principles of bankruptcy law. In some cases the courts have used all of these approaches to statutory interpretation to resolve the question, and in other cases the courts have limited their interpretive efforts to one or more of these methods of interpretation. For the most part, most of these cases both offer useful perspectives on the interpretive evolution of this issue, and present useful analysis and arguments in making a distinction between the conflicting views and choosing the view that gives the best interpretation of § 1322(b)(2).

When comparing the analysis of statutory construction made by the courts in considering the question of the permissibility of bifurcation under § 1322(b)(2), courts taking the position that bifurcation is permissible are the most persuasive.\textsuperscript{312} This is based on the fact that several of these courts have read the plain language of § 1322(b)(2) in a direct and grammatically supportive fashion, whereas the courts prohibiting bifurcation are compelled to render a forced reading of § 1322(b)(2) to support their position.

Section 1322(b)(2) begins by identifying those claims that are modifiable under the provision as "secured claims" and "unsecured claims." It provides that

\textsuperscript{309}Id. at 4.
\textsuperscript{310}Id.
\textsuperscript{311}Id.
\textsuperscript{312}See supra notes 81–132 and accompanying text.
the debtor 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, or leave unaffected the rights of holders of any class of claims.\[313\]

As suggested by the court in *In re Demoff*,\[314\] the affirmative phrase granting the debtor the authority to modify the rights of holders of secured claims modifies the phrase immediately following it, which prohibits the debtor from modifying claims held by creditors that are secured by an interest only in the debtor's principal residence.\[315\] This court further held that, because the focus of the first phrase is the secured claim, it follows that the prohibition against modification is also limited to the "secured claims" against the debtor's home.\[316\] Furthermore, the term "secured claim" is applied as defined by § 506(a) of the Code. Moreover, these courts generally note that § 103(a) of the Code is quite unambiguous in stating that all provisions of chapter 5, which would include § 506, are applicable to cases brought under chapter 13.\[317\] Thus, this reading of the text of § 1322(b)(2) is grammatically correct and conforms with the statutory scheme of the Code.

However, the courts holding that the language of § 1322(b)(2) prohibits bifurcation have strained to conclude that the text of the provision prohibits bifurcation.\[318\] These courts find that the language of § 1322(b)(2) is unambiguous in protecting the entire claim secured by the debtor's home, regardless of the secured status of the claim.\[319\] They hold that the contractual "rights of the holders" of claims secured only by the debtor's principal residence are protected from modification under § 1322(b)(2).\[320\] Such a selective reading of the text of § 1322(b)(2) cannot constitute a complete reading of the plain language of § 1322(b)(2), because it deemphasizes or ignores the terms "secured claims" and "unsecured claims", which have special significance under the Code.

This view against the use of § 506(a) to bifurcate undersecured residential mortgages under § 1322(b)(2) is also contrary to a reading of the plain language of § 103(a), which directs readers to use the administrative provisions of chapter 5 throughout the Code. If Congress had meant for the prohibition against the modification to protect the rights of all holders of claims secured

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\[312\] See supra text accompanying note 85.
\[313\] See supra notes 133–40 and accompanying text.
\[314\] See cases cited supra note 86.
\[315\] See cases cited supra note 134–35.
\[316\] See supra notes 137–39 and accompanying text.
by a debtor's home, regardless of the secured status of the claim as a secured claim or unsecured claim, it would not have been necessary to use the terms "secured claims" and "unsecured claims" in § 1322(b)(2). Section 1322(b)(2) could have been drafted to provide that the debtor may "modify the rights of holders of all claims, with the exception of the rights of holders of claims secured only by a security interest in real property that is the debtor's principal residence."

Courts prohibiting the bifurcation of residential mortgages also hold that the only modification of the protected claim permitted under chapter 13 is the right to cure prepetition mortgage installment delinquencies under § 1322(b)(5). Such an argument requires that one rewrite § 1322(b)(5) so that its purpose is to define the term "modify" in § 1322(b)(2), which it clearly is not. The term "modify" is not defined under the Code. The purpose of § 1322(b)(5) is to provide the debtor with both secured and unsecured long-term debt a means to include these debts under the plan, by allowing the debtor to cure any prepetition delinquencies on such debts under the plan and to permit the debtor to continue to pay postpetition installments during the plan and thereafter. It does not provide that the "cure" of the prepetition delinquencies on such debts is the only modification of home mortgages permitted under § 1322(b)(2).

If one concludes that the language of § 1322(b)(2) is unambiguous, the general rule of statutory construction requires that the inquiry of interpretation end with the plain language of the statute. However, many courts, including those finding the language of § 1322(b)(2) to be unambiguous, have considered the legislative history in their interpretation of the provision. Courts finding the bifurcation of undersecured residential mortgages to be permissible under § 1322(b)(2) have found that the legislative history reflects an intent to protect residential mortgages from modification. When tracing the evo-

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321 See cases cited supra note 140.
322 See supra notes 49–56 and accompanying text.
323 Crawford states:

Since the legislature must express its intention by a written statute, that intention, in any instance, must primarily be ascertained from the language used in the statute itself, and not from conjectures aliunde. In other words, before the court can resort to any other source for assistance, it must first seek to find the legislative intention from the words, phrases and sentences which make up the statute subject to construction. If the meaning of the language of the statute is plain, then according to the rule announced in innumerable cases, there is really no need for construction as the legislative intention is revealed by the apparent meaning, that is, the meaning clearly expressed by the language of the statute. In this case, the statute is given a literal interpretation. It is interpreted to mean exactly what it says. Only where the statute is of doubtful meaning can the court endeavor to determine the legislative intention from elements beyond the language of the statute.

324 See supra notes 95–110 and accompanying text.
olution of this provision, it has been clear to these courts that Congress wanted to expand the availability of chapter 13 relief to debtors with secured claims against real property by permitting these claims to be included under the plan and to permit modification of these claims. What is also clear from the legislative history is that the home mortgage lending industry is to receive special protection against modification under § 1322(b)(2). However, several of these courts were not willing to conclude from the legislative history that there was any specific intent by Congress to override the application of § 506 to define the extent of a secured claim, when applying the provisions of § 1322(b)(2) to undersecured residential mortgages.

To the contrary, the courts prohibiting bifurcation have held that the legislative history is clear in prohibiting property valuation of residential mortgages to determine the extent to which modification is prohibited under § 1322(b)(2). Again, this reading of the legislative history requires some rewriting on the part of these courts. What the legislative history indicates is that § 1322(b)(2) was designed to expand chapter 13 relief for debtors to the extent of allowing a debtor to modify both secured and unsecured claims against the debtor’s real and personal property, while providing protection against modification to claims secured by an interest against a debtor’s principal residence. There is no language in the legislative history explicitly defining the term “modify” to include determinations of property value or the secured status of claims as defined under § 506(a).

When comparing the courts’ application of the rule of statutory construction that the provisions of a statute be read as consistently as possible, the results of course are predictable. That is, courts permitting bifurcation have determined that, because the secured portion of the claim is protected against modification under § 1322(b)(2), it is not inconsistent to apply § 506(a) to determine to what extent the claim is a secured claim entitled to protection against modification. Courts prohibiting bifurcation have asserted that § 1322(b)(2) is designed to protect the rights of holders of residential mortgages without any distinction between the secured and the unsecured portion of the claim, and have held that the application of § 506(a) would prevent this protection and constitute a prohibited modification. These courts have concluded that, because of this conflict between § 1322(b)(2) and § 506(a), the more specific provision of § 1322(b)(2) must supersede § 506(a), a provision of general appli-

325 See supra notes 96–102 and accompanying text.
326 Id.
327 See supra notes 101–02, 106–10 and accompanying text.
328 See supra notes 141–52 and accompanying text.
329 See supra notes 43–48 and accompanying text.
330 See supra notes 111–25 and accompanying text.
331 See supra notes 153–61 and accompanying text.
The application of this principle of statutory construction is clearly result-oriented, and is used by the courts to support their interpretive conclusion. Yet, it is the goal of the rule to encourage readings of provisions of a code or statute with consistency; that is, one must assume that the drafters of the law knew what they were doing and not intending to create any inconsistencies between provisions.333

The final method of interpretation employed in the analysis of § 1322(b)(2) involves an analysis of how the two views support the basic principles of bankruptcy law and congressional intent behind chapter 13. The courts finding bifurcation under § 1322(b)(2) to be permissible assert that bifurcation is in accord with the “fresh start” principle of bankruptcy relief, the need to provide equitable treatment to the debtor’s creditors, and is supportive of the objectives of Congress in its enactment of chapter 13.334 In the view of these courts, bankruptcy relief is designed to provide a debtor with a fresh start. Bifurcation of an undersecured claim supports the fresh start policy by limiting the debtor’s liability under the plan to repay the secured claim to the extent of market value, and to restrict the creditor’s right to payment to that which a secured claim is entitled under the Code.335 That is, the prohibition against bifurcation of the undersecured claim would permit the unsecured portion of the undersecured claim to be fully paid, while other unsecured claims may not be entitled to full payment under the plan. Moreover, bifurcation and the separate treatment of secured claims and unsecured claims is a critical part of the statutory

332Id.

333According to Crawford, an authority on principles of statutory construction:

[T]he court should, when it seeks the legislative intent, construe all of the constituents parts of the statute together, and seek to ascertain the legislative intention from the whole act, considering every provision thereof in the light of the general purpose and object of the act itself, and endeavoring to make every part effective, harmonious, and sensible. This means, of course, that the court should attempt to avoid absurd consequences in any part of the statute and refuse to regard any word, phrase, clause or sentence superfluous, unless such a result is clearly unavoidable. . . . [T]he court should seek to avoid any conflict in the provisions of the statute by endeavoring to harmonize and reconcile every part so that each shall be effective. It is not easy to draft a statute, or any other writing for that matter, which may not in some manner contain conflicting provisions but what appears to the reader to be a conflict may not have seemed so to the drafter. Undoubtedly, each provision was inserted for a definite reason. Often by considering the enactment in its entirety, what appears to be on its face a conflict may be cleared up and the provisions reconciled. Consequently, that construction which will leave every word operative will be favored over one which leaves some word or provision meaningless because of inconsistency.

CRAWFORD, supra note 323, §§ 165–166 (footnotes omitted).

334See supra notes 126–32 and accompanying text.

335See supra notes 129–31 and accompanying text.
scheme of the Code, and the inclusion of such relief under § 1322(b)(2) reflects congressional intent to extend chapter 13 relief to debtors with encumbered real property as well as encumbered personal property.\textsuperscript{336}

The ability of the courts prohibiting bifurcation to forge a connection between this interpretation of § 1322(b)(2) and basic bankruptcy policy is lacking. At the most, these courts simply refer to the intent of Congress to provide some protection to the home mortgage industry by preserving the terms of the original contract.\textsuperscript{337} This limited consideration of bankruptcy policy and congressional intent is unsatisfactory: it makes the arguments in favor of prohibiting bifurcation less supportive, and presents § 1322(b)(2) as a preferential provision favoring home mortgage lenders, devoid of any meaningful balancing of interests between these protected creditors and the debtor or other unsecured creditors of the debtor. Such an interpretation seems implausible in view of the reference in § 1322(b)(2) to “secured claims” and “unsecured claims,” terms having important significance when determining the obligations and rights of debtors and creditors throughout the Code.

B. Resolution Through the Supreme Court

This spring the United States Supreme Court will resolve this issue concerning the permissibility of bifurcation under § 1322(b)(2), when it considers Nobleman v. American Savings Bank (In re Nobleman),\textsuperscript{338} an appeal from the Fifth Circuit Court of Appeals. Nobleman is the only decision from the federal courts of appeals to hold that bifurcation of undersecured residential mortgages is an impermissible modification under § 1322(b)(2), and represents a split from decisions by the Courts of Appeals for the Second, Third, Ninth and Tenth Circuits, which have held that bifurcation of such claims is permissible under § 1322(b)(2).\textsuperscript{339}

Nobleman, like the other cases, involved debtors who filed a petition under chapter 13. Under the plan the debtors, Leonard and Harriet Nobleman, proposed to bifurcate an undersecured mortgage against their principal residence held by American Savings Bank into secured and unsecured claims pursuant to § 506(a). The original debt was secured by a deed of trust against the property that was valued at $68,250. The debtors listed the property to be valued at $23,500. The creditor filed a proof of claim against the property for $71,355.04.

\textsuperscript{336}Id.

\textsuperscript{337}See supra notes 162–65 and accompanying text.

\textsuperscript{338}968 F.2d 483 (5th Cir. 1992), cert. granted, 113 S. Ct. 654 (1992).

\textsuperscript{339}Lomas Mortgage USA v. Wiese, 980 F.2d 1279 (9th Cir. 1992); Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy), 969 F.2d 172 (2d Cir. 1992); Eastland Mortgage Co. v. Hart (In re Hart), 923 F.2d 1410 (10th Cir. 1991); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123 (3d Cir. 1990); Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182 (9th Cir. 1989).
Under the plan the debtors proposed to treat the claim as a secured claim to the extent of the uncontested value of the property, $23,500, and proposed to pay the creditor the "mortgage contract rate only up to the scheduled value" of the property. The remaining balance of the claim would be treated like all other unsecured claims, for which the plan proposed no payments.

Both the bankruptcy court and district court denied confirmation of the plan, on the grounds that the bifurcation of an undersecured mortgage was not a permissible modification under § 1322(b)(2). The Fifth Circuit affirmed the decisions of the bankruptcy and district courts. In its opinion the court recognized the division that its position represented from the other federal courts of appeals that have considered this issue, that have held that claims under § 1322(b)(2) must "first be analyzed under section 506(a) to determine the part that is fully secured" before the protection against modification could be applied against the secured portion of the claim under § 1322(b)(2); that the "application of § 506(a) was a recognition of the legal status of the creditor's interest in the debtors' property and not a modification of the mortgage"; and that "nothing in section 1322(b)(2) affects the determination under section 506(a) that an undersecured claim can be divided into a secured portion and an unsecured portion." However, the court felt that the Supreme Court's decision in Dewsnup v. Timm supported its view that bifurcation is an impermissible modification under § 1322(b)(2). Yet, in making this proclamation the court noted that the Dewsnup decision was limited to whether the term "allowed secured claim" as used in § 506(d) permitted a debtor in a chapter 7 liquidation to strip down a lien securing an undersecured claim against a debtor's real property to the market value of the property; and that the Supreme Court specifically stated its decision in Dewsnup did not address whether the term "allowed secured claim" as defined under § 506(a) would have the same meaning in other provisions of the Code.

The part of the Fifth Circuit's opinion that provides the most significant analysis to support its position is its analysis of the "plain meaning" of § 1322(b)(2); the principle of statutory construction that the more specific provision of § 1322(b)(2) supersedes a general provision like § 506(a) where they are in conflict; and its reading of the legislative history of § 1322(b)(2). Much

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340 Nobleman, 968 F.2d at 485.
341 Id.
342 Id.
343 Id. at 486.
344 Id.
345 Id.
347 968 F.2d at 487.
348 Id.
349 Id.
350 Id. at 487–89.
of this discussion is similar to that of the other courts that also find that bifurcation is prohibited under § 1322(b)(2).

First, the court quotes the Supreme Court from United States v. Ron Pair Enterprises, Inc.,351 regarding the principle of statutory interpretation that the "plain meaning of the language of legislation 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 intent of its drafters.'"352 The court also refers to the principle of statutory construction that, if two provisions of a statute are in conflict, then the more specific provision supersedes the provision of general application.353 Applying these principles the court reads § 1322(b)(2) as:

[C]learly prohibit[ing] the modification of rights of holders of secured claims if the claim is secured only by a security interest in the debtors' principal residence. However, this prohibition set forth in section 1322(b)(2) appears to conflict with section 506(a), which would allow the modification. If two statutes conflict, generally accepted tenet of statutory construction is that the general language of a statute does not "prevail over matters specifically dealt with in another part of the same enactment." . . . We accordingly hold that the specific language of section 1322(b)(2) prevails over the general language of section 506(a).

Moreover, section 1322(b)(2) describes its subject matter as the modification of "the rights of holder 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).354

With respect to the court's analysis of the legislative history of § 1322(b)(2), the court looked to its earlier interpretation of the legislative history of § 1322(b)(2) in Grubbs v. Houston First American Savings Association.355 In that case the court recognized § 1322(b)(2) as a compromise between the House and Senate versions of the provision, and noted that, unlike the Senate ver-

353968 F.2d at 488.
354Id. (citations omitted).
355730 F.2d 236 (5th Cir. 1984) (en banc).
sion which would have prohibited the modification of mortgages against all real estate property of a debtor, the compromise resulted in a provision limiting the prohibition against modification to claims "secured only by a security interest in the debtor's principal residence."\textsuperscript{356} In \textit{Grubbs} the court had noted that the purpose of this limited prohibition was to provide protection for the claims of the home mortgage industry, which has been seen as providing an invaluable "social service" with such loans.\textsuperscript{357} However, the court in \textit{Nobleman} noted that its holding regarding § 1322(b)(2) in \textit{Grubbs} did not "specifically deal with the interplay between section 506(a) and section 1322(b)(2)."\textsuperscript{358} Nevertheless, it felt that its "analysis of section 506(a) and section 1322(b)(2) [was] consistent with the legislative history of section 1322(b)(2) of the bankruptcy code—the desire to afford some protection to the home mortgage industry."\textsuperscript{359}

How the Supreme Court will interpret § 1322(b)(2) and its relationship to § 506(a) is an intriguing question to ponder. The court in \textit{Nobleman}, along with several others, seem to believe that \textit{Dewsnup} supports the position that the bifurcation of undersecured residential mortgages is a prohibited modification under § 1322(b)(2), and that the term "allowed secured claim" as defined in § 506(a) is not applicable to determinations under § 1322(b)(2).\textsuperscript{360} \textit{Dewsnup}, however, only addressed whether a chapter 7 debtor could use § 506(d) to strip down an undersecured real estate mortgage to its market value through the bifurcation of the mortgage into a secured claim and an unsecured claim pursuant to § 506(a). In its analysis of the issue, the Court was required to determine if the term "allowed secured claim" in § 506(a) had the same meaning under § 506(d) to permit a lien avoidance of the claim classified as "unsecured" under § 506(a). The Court concluded that the term "allowed secured claim" as defined in § 506(a) did not have the same meaning as used in § 506(d).\textsuperscript{361} Justice Blackmun, writing for the majority, specifically stated that its decision in \textit{Dewsnup} was limited to the facts of that case.\textsuperscript{362}

In spite of the statement by the Court limiting the scope of \textit{Dewsnup}, \textit{Nobleman} stated that \textit{Dewsnup} supports its position that bifurcation was a prohibited modification under § 1322(b)(2). Unfortunately, the discussion of \textit{Dewsnup} by the court in \textit{Nobleman} lacks any significant analysis of why \textit{Dewsnup} is relevant to the question of bifurcation under § 1322(b)(2). In fact, most of the other court decisions finding \textit{Dewsnup} to bolster the argument that bifurcation is prohibited under § 1322(b)(2) were not very convincing in explaining or rationalizing the nexus between the Court’s analysis in \textit{Dewsnup} and

\textsuperscript{356}968 F.2d at 488.
\textsuperscript{357}Id. (citing \textit{Grubbs v. Houston First American Sav. Ass'n}, 730 F.2d 236, 246 (5th Cir. 1984)).
\textsuperscript{358}968 F.2d at 489.
\textsuperscript{359}Id. (citing \textit{Grubbs}, 730 F.2d at 245–46).
\textsuperscript{360}See supra notes 198–213 and accompanying text.
\textsuperscript{361}112 S. Ct. at 778.
\textsuperscript{362}See supra note 174.
the issue of the interrelationship between § 1322(b)(2) and § 506(a).

Like the court in Nobleman, these cases simply restate the findings of the Court in Dewsnup about the interplay between § 506(a) and § 506(d); and the Court's statements about the impact of lien stripping on creditors, that is, depriving creditors of their bargain with the debtor, and lien stripping constituting an unfair windfall to the debtor.

The other post-Dewsnup cases interpreting the interplay between §§ 1322(b)(2) and 506(a) are more persuaded by Justice Blackmun's statement limiting the application of Dewsnup. There are two different views about the impact of Dewsnup on the interpretation of the interrelationship between § 1322(b)(2) and § 506. One group of cases express the opinion that Dewsnup does not overrule the application of § 506(a) to § 1322(b)(2) determinations, but that it does prohibit lien stripping and the use of § 506(d) under § 1322(b)(2). These courts note that Dewsnup was limited to chapter 7 cases, and that the Supreme Court focused on the permissibility of lien stripping in such cases, and recognized that bifurcation in a reorganization is distinct from lien stripping in liquidation cases. One court has concluded that, by allowing the debtor to bifurcate the unsecured portion of the claim, the debtor could treat that portion of the claim like all other unsecured claims under the plan. The court held that (1) this would benefit the debtor by reducing the amounts the debtor would have to pay on the claim during the term of the plan; (2) the creditor's interest in turn would be protected to the extent that the lien securing the claim would survive to cover the entire claim; (3) at the end of the plan, the debtor would receive a discharge of personal liability under § 1328, but, if any amount remained unpaid it would be secured by the lien pursuant to § 506(d).

The other view of the effect of Dewsnup on the question of bifurcation under § 1322(b)(2) is that Dewsnup is not determinative in resolving this issue. The Second Circuit offered the most substantive analysis of any court concerning the impact of Dewsnup on this question in Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy). In Bellamy the court found that the term "secured claim" is used differently in § 506(d) than it is used in § 506(a) and § 1322(b)(2): in § 506(a) the term "allowed secured claim" is more concerned with the extent to which a claim is actually secured, which is how the term is used in § 1322(b)(2); whereas, in § 506(d) the concern is with liens and the

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363 See supra notes 198–213 and accompanying text.
364 See supra notes 214–34 and accompanying text.
365 Id.
366 In re Dyer, 142 B.R. 364, 369 (Bankr. D. Ariz. 1992); also see supra notes 224–34 and accompanying text.
367 Id.
368 See supra notes 187–97 and accompanying text.
369 962 F.2d 176 (2d Cir. 1992).
370 See supra notes 193–94 and accompanying text.
The court in Bellamy also noted a distinction between the legislative history behind § 506(d) and 1322(b)(2). It stated that, while there was insufficient legislative history behind § 506(d) for the Supreme Court to satisfy its concern that pre-Code practice regarding the survival of liens had been changed by Congress under § 506(d), this was not the case with § 1322(b)(2), because the legislative history was explicit in providing that debtors be able to deal with creditor claims that are secured by real property under chapter 13. Thus, the language of § 1322(b)(2) did not alter a well-settled principle of bankruptcy law, but furthered a stated scheme of Congress. The court also noted that under chapter 13 the debtor's personal liability continues under the plan, and beyond the term of the plan to the extent that the long-term debt remains unpaid, whereas in chapter 7 the debtor's liability is terminated. Moreover, it noted that stripdowns furthered the purpose of reorganization by enabling the debtor to keep his or her home.

How the Supreme Court will view the relevance of its decision in Dewsnup in considering the appeal of Nobleman is an opportunity for great speculation. Because the Court was explicit in limiting its decision in Dewsnup to the facts of that case, it seems reasonable to assume that the Court will follow its words of limitation and begin its consideration of the interplay between § 506(a) and § 1322(b)(2) with a clean slate. In recognizing the numerous ways that § 506 might be applied throughout the several chapters of the Code, Justice Blackmun stated, "Hypothetical applications that come to mind... illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day."

Assuming the Court will interpret the interplay between § 506(a) and § 1322(b)(2) with a fresh viewpoint, and apply the rules of statutory construction that it has employed in recent decisions requiring an interpretation of Bankruptcy Code provisions, it would seem most persuasive for it to adopt the position that bifurcation is permissible under § 1322(b)(2). In several of its recent bankruptcy cases it has consistently begun the process of analysis by looking
to the plain language of the relevant statutory provisions to find meaning, and has noted that where the language is clear and unambiguous that is where the Court's analysis should stop.\textsuperscript{377} In cases where the statutory language is found to be unclear and ambiguous the Court has consulted the legislative history. As the Court stated in \textit{Toibb v. Radloff},\textsuperscript{378} "[T]his Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.'"\textsuperscript{379}

Even where the legislative history may make some suggestion of an intent contrary to the plain language of the statute, the Court has been unwilling to alter the meaning of the language of the statute where the legislative history is scant and not clear in stating an intent contrary to the language of the statute.\textsuperscript{380} In \textit{Toibb v. Radloff} the Court held that the language of § 109 of the Code did not preclude nonbusiness debtors from filing a petition in bankruptcy for relief under chapter 11. However, the respondents in that case suggested that the legislative history intended to exclude nonbusiness debtors from chapter 11 relief. The Court held, "even were we to consider the sundry legislative comments—urged in support of a Congressional intent to exclude a nonbusiness debtor from Chapter 11, the scant legislative history on this precise issue does not suggest a 'clearly expressed legislative inten[t] ... contrary ... to the plain language of § 109(d).'"\textsuperscript{381}

The language of section 1322(b)(2) states that the debtor 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 holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.\textsuperscript{382}

As noted above, courts supporting the bifurcation of undersecured residential mortgages have argued that the plain language of § 1322(b)(2) clearly permits a debtor to modify secured claims in personal and real property with the exception of claims secured by a debtor's principal residence. They argue that this prohibition against modification is limited to the secured portion of the claim secured by the debtor's principal residence, and requires the application of

\textsuperscript{378}111 S. Ct. 2197 (1991).
\textsuperscript{379}Id. at 2200 (quoting Blum v. Stenson, 465 U.S. 886 (1984)).
\textsuperscript{380}Id. at 2200 (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 337 U.S. 102, 108 (1980)).
§ 506(a) to determine the extent to which the claim is secured. This reading of§ 1322(b)(2) is based on the fact that the phrase “modify the rights of holders of secured claims” is placed immediately before the phrase “other than a claim secured only by a security interest in real property that is the debtor’s principal residence.” It can be argued that this is the grammatically correct and natural reading of the provision, that is clear, straightforward and unambiguous. This application of § 506(a) is also suggested as natural and appropriate in the context of the statutory scheme of the Code, and the fact that § 103 of the Code directs one to use the provisions of chapter 5 throughout chapters 7, 11, 12 and 13 of the Code.384

Courts taking the contrary position focus on the language in § 1322(b)(2), “rights of holders . . . of the claim secured by a security interest in real property that is the debtor’s principal residence”. Thus, they direct emphasis on the rights of these claimants as opposed to the status of the claims they hold as secured claims or unsecured claims. Again, the problem with this reading is that it is selective and ignores or deemphasizes the drafters’ use of the terms “secured claims” and “unsecured claims” in the provision, and would appear to violate the interpretive mission of a court to give meaning to the complete statutory provision and not selectively chosen parts of the provision.

Should the Court find the language of § 1322(b)(2) to be conclusive and feel justified in ending its interpretive mission with the plain language of the provision, it may nevertheless elect to review the legislative history of the provision, as it has done in other cases where it had held the plain language of the provision to be clear.386 If this review and analysis of legislative history is made by the Court, it will find a history that expresses a clear intent to alter pre-Code practice of excluding claims held by creditors that are secured by an interest in the debtor’s real property from chapter 13 relief.387 It will find discussions of a legislative compromise to provide some protection against modification of home mortgages to protect the home mortgage lending industry.388 In its comparison of the language of the provision with its legislative history, it will not find the language of the statute to be “demonstrably at odds with the intention of the drafters” as expressed in the legislative history.389 When reviewing the legislative history of § 1322(b)(2), it will not find an expression of clear intent by the drafters to prohibit the use of § 506(a) and the determin-
nation of the secured status of the home mortgage when applying the protections provided to home mortgages under § 1322(b)(2).

Had Congress intended to prohibit the use of § 506(a) under § 1322(b)(2), it would have specifically provided for such a restriction as it did under § 1111(b)(2)(A) of the Code. A prohibition against the use of § 506(a) to determine the secured portion of the undersecured residential mortgage under § 1322(b)(2) would be contrary to the plain language of § 1322(b)(2) and the language and statutory scheme of the Code as provided under §§ 103 and 506. At the most, the question concerning the treatment of undersecured mortgages against a debtor's principal residence under § 1322(b)(2) is an example of an "unforeseen circumstance" by its drafters, which does not justify judicial revision of the meaning of the provision. As the Court stated in Union Bank v. Wolas, "The fact that Congress may not have foreseen all of the consequences of an enactment is not a sufficient reason of refusing to give effect to its plain meaning." 390

392 Id. at 531. Although the question to be addressed by the Court in considering Nobleman will concern the permissibility of using § 306(a) to bifurcate undersecured residential mortgages under § 1322(b)(2), the Court may elect to determine whether the lien avoidance provision of § 306(d) may also be used by debtors to avoid the lien against the unsecured portion of such a claim under § 1322(b)(2). While it has been persuasively argued that lien avoidance would be prohibited in such cases by virtue of the Court's decision in Dewsnup, the Court has given itself some leeway to consider separately the question of lien avoidance under chapter 13, independent of its ruling in Dewsnup, which was specifically limited to the determination of the permissibility of lien avoidance of undersecured residential mortgages in a chapter 7 liquidation. 112 S. Ct. at 778.

Should the Court decide to consider this question in Nobleman, one might argue that, if the debtor's relief under chapter 13 is to be truly meaningful, the debtor should be permitted not only to bifurcate the undersecured residential mortgage, but also to avoid the lien to the extent of the unsecured portion of the claim. This position might be supported by making a distinction between the objectives of a chapter 7 liquidation and a chapter 13 rehabilitation, and the relief to be provided to the debtor and the protections to be afforded the creditor thereunder.

After a case is closed under a chapter 7 liquidation, the debtor receives a discharge from personal liability on the unpaid amounts on the mortgage obligation. 11 U.S.C.A. § 727 (West 1979 & Supp. 1993). In contrast, the debtor in a chapter 13 rehabilitation remains personally liable for all mortgage payments made under the plan and payments that will be due on the mortgage after the completion of the plan. 11 U.S.C.A. § 1322(a)(1) (West Supp. 1993). Accordingly, in a chapter 13 case the debtor remains liable for the remaining amounts due on the mortgage, and the lien remains against the property to secure that obligation. If, however, the lien is not avoided to the extent of the unsecured portion of the claim, the debtor's property will remain overburdened to that extent, just as it was before the relief in bankruptcy was sought by the debtor.

Unlike chapter 7 relief, chapter 13 specifically gives debtors the right to "modify" the secured claims of creditors holding liens against the debtor's real and personal property, as well as unsecured claims. 11 U.S.C.A. § 1322(b)(2) (West 1979). The purpose of this provision is to make chapter 13 available to more debtors so that they might elect relief under chapter 13 to rehabilitate their financial condition as opposed to seeking relief through straight liquidation under chapter 7. Because the term "modify" has not been defined or limited by the Code, the avoidance of the lien against the unsecured portion of the residential mortgage would not be contrary to the expressed grant of authority to the debtor to "modify" the unsecured portion of the residential mortgage under chapter 13, but arguably would be allowable and in harmony with the chapter 13 mission to assist the debtor in reorganizing and rehabilitating his or her financial obligations.
C. Resolution Through Legislative Amendment

If the bifurcation of undersecured residential mortgages is to be a prohibited modification under § 1322(b)(2), then it should be a mandate by Congress. During the 102d Congressional term several bills were introduced in the Senate and the House proposing major revision to the Bankruptcy Code. Included among these bills was H.R. 6020,393 which came very close to being passed by both houses of Congress. This bill included a provision to amend § 1322(b)(2) to prohibit the bifurcation of undersecured residential mortgages.394 This proposed legislation was not passed by the House due to last minute changes made to the bill by the Senate, none of which related to the proposed change to § 1322(b)(2). There is however, reason to believe that similar legislative revision will be introduced in the new Congress this spring.

Much of this proposed legislation received its support from the creditor community. The home mortgage lending industry provided a strong voice in favor of prohibitions against the bifurcation of undersecured residential mortgages during hearings conducted by the Senate and House subcommittees responsible for the proposed bankruptcy legislation. Although there were only a few consumer/debtor representatives testifying during the hearings, they offered sound and thoughtful arguments in favor of the bifurcation of undersecured residential mortgages in chapter 13 cases.

Representatives of the mortgage backed securities market from Freddie Mac and GNMA argued that the continuation of cramdowns of undersecured mortgages would have an adverse affect on this market, an important source of financing for home mortgage funding.395 They stated that the market is affected in two ways by cramdowns. First, the lender/issuer of the security remains obligated to pay the full value of the security principal and interest to investors regardless of the fact that a chapter 13 debtor/mortgagor's liability for the mortgage debt has been reduced to the actual market value of the security through a cramdown. This potential risk of loss to the issuer lessens the attractiveness of these mortgages and securities. Moreover, the risk could ultimately

394Section 202 of the bill provides:

Section 1322(b)(2) of title 11, United States Code, is amended (1) by striking "other than a claim secured only by a security interest in real property that is the debtor's principal residence," and (2) by inserting before the semi-colon at the end the following:

except that the rights of the holder of a claim secured only by the most senior security interest in real property that is the debtor's principal residence may not be modified to reduce the secured claim to a value that is less than the value, as of the date the security interest arose, of the creditor's interest in the estate's interest in such property.

395See supra notes 249–63 and accompanying text.
rest on the guarantor if the lender/issuer is unable to make these payments to the investors. Although the actual losses sustained by the guarantors and issuers has been minimal, representatives of Freddie Mac and GNMA urged Congress to prohibit cramdowns to avoid mass losses to this market in the event of an unforeseen economic downturn.

These commentators, along with other representatives of the mortgage lending industry, have consistently argued that the cramdown of residential mortgages was not intended by Congress, and results in an unfair windfall to the debtor, through the reduction of the debt to its actual value and in allowing the debtor to keep his or her home. Moreover, they contend that the cramdown deprives the creditor of the benefits of property appreciation. They have also suggested that, if cramdowns were not prohibited, the availability of home mortgage loans would be threatened.

The commentators appearing before the House and Senate subcommittees in support of the cramdown of undersecured residential mortgages have responded in kind to the arguments made by the mortgage lending industry representatives. In response to the mortgage lending industry’s suggestion that cramdowns are unfair to creditors and provide windfalls to debtors, these commentators argue that cramdowns are critical to a debtor’s ability to rehabilitate under chapter 13, and to achieve the fresh start that Congress intended for a debtor as a result of filing bankruptcy. They have also noted that the application of § 506 in chapter 13 and throughout other chapters of the Code is essential to achieve fair distribution of a debtor’s estate to creditors. The cramdown simply duplicates the result of liquidation and prevents creditors from avoiding the effects of discharge by taking a lien against a debtor’s property to secure all loans with a debtor.

Cramdown supporters have also argued that a prohibition against cramdowns would insulate lender/issuers from liability on undersecured mortgages by removing the risk of not being able to collect on government or private insurance against these mortgages. Because of the FHA and VA policy to pay only the secured portion of the claim in the event of a cramdown, the mortgage lender is more likely to assure that overappraisal of property does not occur. However, without the cramdown, the mortgage lender would have

396 See supra notes 255–61 and accompanying text.
397 See supra note 261.
398 See testimony set forth in part V.A. supra.
399 Id.
400 Id.
401 See supra notes 272–92, 302–11 and accompanying text.
402 See supra notes 272–80 and accompanying text.
403 See supra notes 272–84 and accompanying text.
404 See supra notes 285–88 and accompanying text.
405 Id.
little incentive to see that appraisals are not inflated, and this would allow the lender to pass to guarantors the potential risks of guaranteeing overappraised property.406

In response to the threat of declining home mortgage financing, cramdown supporters have noted that the home mortgage lending industry has offered no hard evidence to show that cramdowns have in fact caused a reduction in mortgage lending.407 Moreover, the number of debtor homeowners with mortgages exceeding the value of the property and debtors using § 506 to cramdown mortgages has been low.408 Furthermore, most cases involving a cramdown are cases where the property has been overappraised or junior lienholders have taken mortgages against oversecured property, examples of creditor abuse in mortgage lending that do not merit protection by Congress.409

Fortunately, for chapter 13 debtors, this legislation was not passed. And while the reason for its failure had nothing to do with the merits of permitting or prohibiting bifurcation of undersecured residential mortgages under § 1322(b)(2), the fact that it was not passed gives Congress more time to consider the effect an amendment prohibiting the bifurcation of such claims at bankruptcy. Perhaps, as one commentator has suggested, such an amendment is an unnecessary part of a "creditor's wish list."410 Perhaps more evidence needs to be brought forth to justify protecting undersecured residential mortgages against the debtor's need for a "fresh start" and the general principle supporting creditor equality under the Code.

406Id.
407See supra notes 289–90 and accompanying text.
408See supra notes 290–92 and accompanying text.
409See supra note 292 and accompanying text.
410See supra note 302 and accompanying text.