ODD MAN OUT: THE SURVIVAL OF JUNIOR LIEN STRIP-OFFS IN CHAPTER 13 FOLLOWING THE *CAULKETT* DECISION

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The bankruptcy system seeks to strike a balance between promoting a fresh start for a debtor in financial distress and a fair and equitable distribution of the debtor's assets to its creditors.[1] But among creditors, equitable does not mean equal, and some creditors enjoy more protection both within and outside of the bankruptcy system.[2] Among the most protected creditors in bankruptcy are those with a prepetition security interest in the debtor's assets,[3] and among the most protected of these secured creditors are those with a lien on the debtor's residential property in a Chapter 13 case.[4] Yet those creditors—ones with a residential lien in Chapter 13—may find themselves losing the protection of that lien in bankruptcy. Lien-stripping may occur in individual cases at any time, but an interest in lien-stripping particularly increases any time the housing market declines, such as when the debts secured by those homes may

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1. Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade (*In re* Wade), 523 B.R. 594, 605–06 (Bankr. W.D. Tenn. 2014) (citing Burlingham v. Crouse, 228 U.S. 459, 473 (1913)).

2. *See, e.g.*, U.C.C. §§ 9-322(a)(2), 9-317 cmt. n.3 (AM. L. INST. & UNIF. L. COMM'N 2021) (providing that perfected security interest enjoy priority over unperfected security interest and "*[a] fortiori*" both enjoy priority over unsecured interest).

3. *See, e.g.*, 11 U.S.C. § 506(b) (allowing oversecured creditors to recover certain post-petition interest and fees); *id.* § 724(b) (providing that holder of allowed and unavoidable lien is first to receive property); *id.* § 1129(b)(2)(A)(i) (providing that secured creditors retain liens or are paid full value of claim in cramdown absent acquiescence); *id.* § 1325(a)(5)(B)(i)(I) (same).

4. *See id.* § 1322(b)(2) (allowing modification of most secured claims in Chapter 13, but not claims of those holding lien in debtor's primary residence); *see also id.* § 1123(b)(5) (providing similar rules for individual Chapter 11 filings).

exceed the value of the collateral itself.[5] While Supreme Court case law denies the ability to undo liens in any Chapter 7 case[6] and in some Chapter 13 cases,[7] the Court still must determine the ability to strip off "wholly unsecured" liens in Chapter 13 cases. The circuit courts overwhelmingly allow such a strip-off, leaving creditors in those cases singularly unprotected.[8] While previous law review articles and legal scholarship have analyzed this issue,[9] many did so prior to the most recent Supreme Court decision in 2015,[10] and these articles often consider the impact on strip-off generally. This Article reconsiders the result of that decision and the impact of seemingly inconsistent results, both on Chapter 13 strip-off cases and on Chapter 20 cases,[11] where courts frequently disagree on the appropriate result.[12]

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5. *See* Mary Josephine Newborn, *Unsecured Creditors in Bankruptcy:* Dewsnup*,* Nobelman*, and the Decline of Priority*, 25 ARIZ. ST. L.J. 547, 552–53 (1993) (discussing the 1980s housing crash and its impact on lien-stripping issues). At the time of writing this Article, home prices are in a period of rapid escalation, with the possibility that home values will flatten or decline in coming years. Combined with inflation and stagflation, the possibility of increased bankruptcy filings and decreasing home values could lead to under-secured or wholly unsecured mortgage liens in the future. *See, e.g.*, Ingo Winzer, *When Will the Home Price Bubble Burst?*, FORBES (Apr. 20, 2022, 8:15 AM), https://www.forbes.com/sites/ingowinzer/2022/04/20/when-will-the-home-price-bubble-burst/?sh=2faa7c045100; Matt Egan, *Home Prices Can't Go Straight Up Forever. But This Probably Isn't a Bubble*, CNN BUS. (July 27, 2021, 10:09 AM), https://www.cnn.com/2021/07/27/economy/housing-bubble-fears-overblown/index.html; Benjamin Keys, *Why the U.S. Housing Boom Isn't a Bubble*, KNOWLEDGE AT WHARTON (Oct. 12, 2021), https://knowledge.wharton.upenn.edu/article/why-the-u-s-housing-boom-isnt-a-bubble/.

6. *See* Dewsnup v. Timm, 502 U.S. 410, 417 (1992); Bank of Am., N.A. v. Caulkett, 575 U.S. 790, 792 (2015).

7. Nobelman v. Am. Sav. Bank, 508 U.S. 324, 332 (1993).

8. *See infra* Part IV.

9. *See* Newborn, *supra* note 5; *see* sources cited *infra* notes 40, 50, 51, 59, 148. Both the Schreiber & Cisar article (cited *infra* note 51) and the Warshell & Harrell article (cited *infra* note 59) were written after *Caulkett*.

10. *Caulkett*, 575 U.S. 790. *Caulkett* is the only Supreme Court case to consider the issue of strip-off of liens, as each of the *Dewsnup* and *Nobelman* cases considered strip-down of liens. *Dewsnup*, 502 U.S. at 412; *Nobelman*, 508 U.S. at 325–26.

11. A Chapter 20 case is a colloquial term involving a completed Chapter 7 case followed by a Chapter 13 case. Branigan v. Davis (*In re* Davis), 716 F.3d 331, 332 n.1 (4th Cir. 2013).

12. *See infra* Part IV.

I. The Bankruptcy Code Provisions Regarding Claims and Secured Creditors

A. Section 502 and Section 506

When considering the rights of undersecured[13] creditors generally, three provisions of the Bankruptcy Code apply: § 502's "claim allowance" provisions; § 506(a)'s "bifurcation" provision; and § 506(d)'s "lien avoidance" provision.

Section 502 of the Bankruptcy Code governs the allowance of claims of creditors.[14] It provides that a creditor's claim "is deemed allowed" once properly filed, absent an objection to the claim.[15] In the event of an objection, the bankruptcy court determines whether to disallow the claim based on one of several statutory bases.[16] These bases for disallowance comprise an exclusive list given the prefatory language in § 502(b).[17] While some of the bases for disallowance provide for complete disallowance of the claim, others provide for partial disallowance to the extent that the claim exceeds a particular threshold amount.[18] This claims-allowance process first asks if the creditor filed its proof of claim, then if any party objects to the claim, and finally if any of the nine bases for disallowance apply. The only basis for disallowance involving a question of valuation of the collateral versus the amount of the claim applies when property taxes exceed the value of the property.[19]

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13. Undersecured creditors refer to creditors for whom the value of the collateral cannot cover the entirety owed to the creditor, while fully secured creditors enjoy sufficient value in the collateral to recover the entire value owed to them. THERESA J. PULLEY RADWAN ET AL., BANKRUPTCY LAW IN CONTEXT 204 (2020).

14. 11 U.S.C. § 502.

15. *Id.* § 502(a).

16. *Id.* § 502(b).

17. *Id.*

18. The bases for disallowance include unenforceability of the claim, a claim made for "unmatured interest" or debt, a tax claim against property in excess of the property's value, a claim for professional services in excess of their "reasonable value," a lessor's claim for damages due to termination of a real property lease to the extent that the claim exceeds certain thresholds, a terminated employee's damage claim to the extent that the claim exceeds certain thresholds, claims related to late payment of certain taxes by the debtor, or claims filed late. *Id.* § 502(b)(1–9).

19. *Id.* § 502(b)(3).

Section 506(a) of the Bankruptcy Code provides: "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*[[20]] of the value of such creditor's interest in the estate's interest in such property . . . ."[21] As noted by the Supreme Court, this provision first asks courts to determine whether § 502 disallows the creditor's claim.[22] The statute then requires consideration of whether the creditor holds a lien on property of the estate—a determination made under nonbankruptcy law. If the creditor holds an allowed claim and has a lien on estate property, the creditor holds a secured claim, but only *to the extent* of the value of the creditor's interest in the property. Legislative history suggests that by this language, which differed from language in the Bankruptcy Act, Congress sought to clarify the rights of undersecured creditors and to limit the security interest to the value of the collateral itself.[23] The separation of the secured and unsecured portion of a claim for undersecured creditors is commonly referred to as "bifurcation" of a claim.[24]

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20. The phrase "to the extent" is widely used in the Bankruptcy Code. *See, e.g.*, *id.* § 101(12A)(C) (definition of debt relief agency); *id.* § 547(c)(1) (preferential transfers); *id.* § 524 (effect of discharge); *id.* § 523 (non-dischargeability); *id.* § 522(f)(1) (lien impairment). In other places in the Bankruptcy Code, the language is more explicit about limiting the impact of the section to the amount that something else applies by using the term "only" in conjunction with the phrase "to the extent." *See, e.g.*, *id.* § 363(d)(2) (limiting ability of trustee to use property of the estate "only to the extent not inconsistent with" other code sections); *id.* § 541(b)(5) (limiting educational account funds excluded from the estate "only to the extent" that they are not pledged to an entity and do not exceed tax limitations); *id.* § 507(a)(4) (priority claims for wages and benefits limited to only a fixed dollar value). But in each context, "to the extent" has been used to limit applicability. *See, e.g.*, David Dorsey Distrib., Inc., v. Sanders (*In re* Sanders), 39 F.3d 258, 261 (10th Cir. 1994) (interpreting "to the extent" to permit lien impairment in the amount that the lien "actually impairs an exemption" and not beyond that amount); Nat'l Plastics, Inc. v. Hanlin Grp., Inc. (*In re* Hanlin Grp., Inc.), 176 B.R. 329, 334 (Bankr. D.N.J. 1995) (noting that "[n]ot all wages are entitled to priority" and limiting priority "only to the extent of" the monetary limit provided in the Bankruptcy Code).

21. 11 U.S.C. § 506(a)(1) (emphasis added).

22. *See infra* Part III (discussing *Dewsnup*).

23. Newborn, *supra* note 5, at 569; *see also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 239 (1989) ("Subsection (a) of § 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured.").

24. *See, e.g.*, Berger v. Pennsylvania (*In re* Berger), 600 B.R. 491, 499 (Bankr. W.D. Pa. 2019), *aff'd*, No. 2:19-cv-00417, 2019 WL 5310145 (W.D. Pa. Oct. 21, 2019); Hurlburt v. Black, 925 F.3d 154, 159 (4th Cir. 2019); Am. Gen. Fin., Inc. v Paschen (In re Paschen), 296 F.3d 1203, 1204 (11th Cir. 2002).

Section 506(d)'s "lien avoidance" provision avoids a lien "[t]o the extent that a lien secures a claim . . . that is not an allowed secured claim."[25] Thus, avoiding a secured creditor's lien requires a determination of whether the creditor's claim qualifies as an "allowed secured claim." Unfortunately, while § 502 provides guidance as to the meaning of an "allowed claim," and § 506(a) provides guidance on how to define a "secured claim," courts struggle with how to combine the two to determine the amount of an "allowed secured claim." The prefatory language of § 506(d) further complicates this determination, stating that such a claim is void "[t]o the extent" that the claim is not an allowed secured claim, suggesting that the determination is not absolute. Section 506(d) lacks significant legislative history to provide insight into its role.[26]

The Bankruptcy Code allows claims absent objection and a basis for disallowance. None of the cases at issue involved disallowance of a claim under these elements. The issue arises when a claim that was clearly allowed under § 502 included a lien on which the value of the property could not cover the amount due to that particular creditor. Turning to § 506, note that both provisions of that section provide the qualifying language "to the extent." A creditor holds a secured claim "to the extent of the value of such creditor's interest in the . . . property,"[27] but is void "to the extent that a lien secures a claim against the debtor that is not an allowed secured claim."[28] Thus, § 506 suggests that an undersecured creditor's claim may be partially void and partially valid. Courts have been left to decide how to apply these provisions in avoiding undersecured claims, including those which are "wholly unsecured" because no collateral value exists to support repayment of the claim.

B. Section 1322(b)'s "Anti-modification" Provision[29]

For Chapter 13 and Chapter 20 cases, § 1322(b) also becomes relevant to the analysis. Generally, § 1322 dictates what must and what may be included in the debtor's repayment plan.[30] Section 1322(b)(2) specifically

25. 11 U.S.C. § 506(d).

26. Newborn, *supra* note 5, at 570–71.

27. 11 U.S.C. § 506(a)(1).

28. *Id.* § 506(d).

29. *See id.* § 1322(a)–(b); *see also id.* § 1123(b)(5) (allowing modification in Chapter 11 cases).

30. *Id.* § 1322(a)–(b). Subsection (a) indicates what the plan must provide, while subsection (b) indicates what the plan may provide.

allows plans to "modify the rights of holders of secured claims," except "a claim secured only by a security interest in real property that is the debtor's principal residence."[31] Of course, determining what constitutes a "secured claim" that may generally be modified requires consideration of § 506(a). The statute provides for a secured claim "to the extent of the value of" the interest of "a creditor secured by a lien on" property of the estate.[32] Interestingly, the Supreme Court's first case to discuss this issue highlights the canon of statutory construction that assumes that the same words share the same meaning throughout a statute.[33] The two sections at issue in the case actually differ slightly in their phrasing, with § 1322(b)(2) referencing "holders of secured claims" and "claim[s] secured by . . . real property", while § 506(b) references "secured claim[s] . . . secured by property". Despite those minor differences, the Court's decision focused on the similar language in both sections regarding "a creditor secured by a lien on property"[34] rather than a "secured claim."[35] That focus is important, as a "secured claim" could include only the portion of the claim supported by collateral under § 506(a).

II. Strip-Down Versus Strip-Off

Section 506(a)'s bifurcation provision allows for the division of a claim into the portion of the claim secured by value in the collateral, rendering the remainder as an unsecured claim.[36] This bifurcation process is

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31. *Id.* § 1322(b)(2).

32. *Id.* § 506(a).

33. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

34. 11 U.S.C. § 506(a) ("claim . . . secured by a lien on property"); *id.* § 1322(b)(2) ("a claim secured . . . by . . . real property").

35. *Cf. id.* § 506(d) ("allowed secured claim . . . secured by property"); *id.* § 1322(b)(2) ("holders of secured claims").

36. The court in *In re Pruitt* explained bifurcation of claims and the role of § 506:

> Section 506(a)—titled "*Determination of secured status*"—serves its characterization function through utilization of the unique bankruptcy methodology of claim *bifurcation*—the separation of an allegedly collateralized claim into two component parts: (i) a *secured* claim—reflecting the "value" of the creditor's bankruptcy estate collateral and/or (ii) an *unsecured* claim—reflecting the residual debt, or "deficiency", after accounting for such collateral . . . .

401 B.R. 546, 557 (Bankr. D. Conn. 2009).

commonly referred to as "lien-stripping."[37] Lien-stripping further divides into two types of bifurcation.[38] When the value of the collateral provides some security for the creditor, the secured portion of the claim is "stripped down" to the value of the collateral.[39] When the value of the collateral is such that the creditor will receive no value from it (which always involves a second-priority or a later claim against the collateral), the lien might be "stripped off."[40]

III. Supreme Court Cases

Considering Chapters 7 and 13, where most cases involving the ability to lien-strip undersecured creditors arise, four possibilities exist. The Supreme Court has rendered decisions on three of those possibilities, leaving just one unresolved:

	Chapter 7	Chapter 13
Strip-down	Not permitted *Dewsnup v. Timm (1992)*	Not permitted *Nobelman v. American Savings Bank (1993)*
Strip-off	Not permitted *Bank of America, N.A. v. Caulkett (2015)*	**Undecided**

The Court first considered the treatment of undersecured creditors in a Chapter 7 bankruptcy in *Dewsnup v. Timm*.[41] The debtor and her late husband granted a lien on two pieces of property to secure a loan.[42] After they defaulted on their repayment obligation, the creditor started the foreclosure process, but could not finish due to the debtor's bankruptcy

37. *See* Berger v. Pennsylvania (*In re* Berger), 600 B.R. 491, 499 (Bankr. W.D. Pa. 2019), *aff'd*, 2019 WL 5310145 (W.D. Pa. Oct. 21, 2019).

38. *Id.* at 498 (citing Johnson v. IRS (*In re* Johnson), 386 B.R. 171 (Bankr. W.D. Pa. 2008), *aff'd*, 415 B.R. 159 (W.D. Pa. 2009).

39. *See* Dewsnup v. Timm, 502 U.S. 410, 418–19 (1992) (recognizing strip down in reorganization style cases); *see also* Wade v. Bradford, 39 F.3d 1126, 1128 (10th Cir. 1994).

40. Wells Fargo Bank, N.A., v. Scantling (*In re* Scantling), 754 F.3d 1323, 1326 (11th Cir. 2014). *See generally* David N. Saponara, Note, *Lien-Stripping in Consumer Bankruptcy: Debtors Cannot Strip Liens Down Partially, but Can They Strip Them Off Entirely? The Answer Should Be No*, 21 AM. BANKR. INST. L. REV. 257 (2013).

41. 502 U.S. 410 (1992).

42. *Id.* at 412.

filing.[43] The debtor then sought to avoid the undersecured portion of the creditor's lien on the property.[44] Each of the lower courts denied the debtor's request to strip down the secured claim to the value of the property.[45] Affirming the Tenth Circuit's decision, the Supreme Court considered the interplay between the claim allowance, bifurcation, and lien avoidance provisions of the Bankruptcy Code. The Court particularly focused on the difficult language in § 506(a)'s claim allowance provision and § 506(d)'s lien avoidance provision.[46] The Court separated the functions of these two subsections:

> There is no question that the claim at issue here has been "allowed" pursuant to § 502 of the Code and is secured by a lien with recourse to the underlying collateral, [and, thus,] it does not come within the scope of § 506(d), which voids only liens corresponding to claims that have *not* been allowed and secured.[47]

Essentially, the Court looked to § 502 to determine whether any of the bases for disallowance provided in the Code applied to the claim. It then examined § 506's bifurcation provision and lien avoidance provisions to determine whether the creditor qualifies as secured. To the Court, if the creditor holds a lien under state law on the property it qualifies as secured, even if the lien cannot cover the entire claim.[48] The Court did recognize some concerns with the statutory language, noting that "[w]ere 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)."[49] The Court determined, however, that given ambiguity in

43. *Id.* at 413.

44. *Id.*

45. *Id.* at 413–14. The Court granted certiorari to resolve a circuit split between the Tenth Circuit's decision in *Dewsnup v. Timm (In re Dewsnup)*, 908 F.2d 588 (1990), and the Third Circuit's opinion in *Gaglia v. First Federal Savings & Loan Ass'n*, 889 F.2d 1304 (1989). *Dewsnup*, 502 U.S. at 414.

46. *See id.* at 414–15.

47. *Id.* at 415.

48. *See id.* at 414–15, 417.

49. *Id.* at 417. Interestingly, these subsections use slightly different phraseology. Subsection 506(a) discusses "a creditor secured by a lien on property" and "a secured claim", while subsection 506(d) uses the phrase "allowed secured claim." 11 U.S.C. § 506(a), (d). While that distinction has no relevance in the *Dewsnup* decision, since the court suggests that even if each subsection had used the exact same phrase, the court could interpret its usage in each part differently, that phrasing might justify different interpretations of which type of creditor is discussed in each provision. *See* Empire Health

the Code, it must defer to the pre-Code practice that did not allow modification or strip-down of secured claims.[50] The "to the extent" language appears in both the bifurcation and lien avoidance provisions of § 506 and seemingly suggests some limitations in the determination of the amount of a secured claim. Nevertheless, the Court denied the ability to use that language to strip down undersecured claims.[51]

The Court also noted policy reasons for declining strip-down of secured claims. Per the Court, the debtor should not receive a windfall in stripping down part of the secured claim or enjoy additional equity in the property if its value increases in the future.[52] Courts since *Dewsnup* have recognized that in prohibiting strip-down of undersecured Chapter 7 claims, the Court inherently recognized that the creditor holds *in rem* rights against the property itself. Regardless of the property's value, creditors have *in rem* rights, not just an *in personam* claim, that survive the bankruptcy and may be collected upon post-petition.[53]

Justice Scalia drafted the dissent, finding the language of the bifurcation and lien avoidance provisions unambiguous in capping a

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Found., for Valley Hosp. Med. Ctr. v. Price, 334 F. Supp. 3d 1134, 1150 (E.D. Wash. 2018) ("[Canons] of statutory construction [suggest] that 'identical words used in different parts of the same act are intended to have the same meaning' . . . [and] [c]onversely, the use of different language by Congress creates a presumption that Congress intended the terms to have different meanings." (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995))), *rev'd*, Beccera v. Empire Health Found., for Valley Hosp. Med. Ctr. 142 S. Ct. 2354 (2022). *But see* Env't Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) ("Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." (quoting Atl. Cleaners & Dryers, Inc. v. United States 286 U.S. 427, 433 (1932))).

50. *Dewsnup*, 502 U.S. at 417, 419; *see also* Michael Myers, Note, Dewsnup *Strikes Again: Lien-Stripping of Junior Mortgages in Chapter 7 and Chapter 13*, 53 ARIZ. L. REV. 1333, 1349–50 (2011) (discussing cases citing *Dewsnup* on this point); Saponara, *supra* note 40, at 260. *But see* Newborn, *supra* note 5, at 556–57 (arguing that pre-Code practice lacked relevance to the extent that the practice fell under the Bankruptcy Act because the Bankruptcy Code shifted from "in rem" to "priority" model for undersecured creditors).

51. *See Dewsnup*, 502 U.S. at 417; *see also* Christopher J. Schreiber & David I. Cisar, *Is* Dewsnup *Unravelling Due to Lien-Stripping Cases Under § 1322(B)(2)?*, AM. BANKR. INST. J., Feb. 2017, at 28, 28.

52. *Dewsnup*, 502 U.S. at 417. The Court did find an end to the creditor's right to have its claim treated as secured in all aspects. Once foreclosure occurs, the creditor's security interest is set in stone, and any remainder unpaid through the value of the collateral necessarily becomes unsecured. *Id.*

53. Johnson v. Home State Bank, 501 U.S. 78, 82 (1991) (citing Long v. Bullard, 117 U.S. 617, 620–21 (1886)).

secured claim at the value of the property.[54] Because § 506(a)'s bifurcation provision provides for a secured claim "to the extent of the value" of the collateral, it cannot be secured in excess of the collateral value.[55] To hold otherwise creates a linguistic dichotomy, where the meaning of "allowed secured claim" differs between sections of the Code.[56] Under the dissent's approach, § 506(a) bifurcates a claim by calculating the secured claim based on the value of the property and the remainder becomes unsecured. Subsection 506(d) then takes the secured portion, calling it an "allowed secured claim," and voids the lien over whatever remains (e.g., the unsecured portion of the claim). Thus, a claim must be both "allowed" and "secured," based on the bifurcation methods in § 506(a), to prevent avoidance of the lien with regard to that portion of the claim. This approach would allow stripping of the lien to the value of the collateral in all cases.

One year later, the Court returned to further consider strip-down in a Chapter 13 case in *Nobelman v. American Savings Bank*.[57] Chapter 5 of the Bankruptcy Code is the source of the claim allowance, bifurcation, and lien avoidance provisions, and it falls within the chapters of general applicability.[58] So, it would at first seem that the *Dewsnup* result applies equally to a Chapter 13 case.[59] However, because Chapter 13 includes § 1322(b)(2)'s anti-modification provision on residential mortgage liens, the Court considered the impact of that provision on the final result.[60] In

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54. *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting). *But cf.* Saponara, *supra* note 40, at 274 ("The Supreme Court's opinion in *Dewsnup* brushes aside the ambiguous language in the text of section 506 and focuses on longstanding bankruptcy policy.").

55. *See Dewsnup*, 502 U.S. at 420–21.

56. *Id.* at 423. The dissenting opinion does note the language difference in subsections 506(a) and 506(d). *Id.* at 423–24; *see also* Newborn, *supra* note 5, at 571–72 (arguing that § 506(a) is intended "to function as a definitional section").

57. 508 U.S. 324 (1993).

58. 11 U.S.C. § 103. Generally-applicable chapters, like Chapters 1, 3, and 5, apply regardless of the chapter in which the bankruptcy case is filed. Thus, the provisions in those chapters apply equally to Chapter 7 and Chapter 13 bankruptcy cases, except to the extent that a more specific provision within the filing chapter's provisions supersedes that statute. *See In re* Bonds, No. 13–12497, 2014 WL 1796691, at *2 (Bankr. E.D. La. May 6, 2014).

59. *See* Ashley Warshell & Alvin C. Harrell, Dewsnup *III:* Bank of America v. Caulkett, 68 CONSUMER FIN. L.Q. REP. 466, 466 (2014) ("Together *Dewsnup*, *Nobelman*, and now *Caulkett* represent a nearly comprehensive three part tutorial by the United States Supreme Court on the treatment of mortgage liens in bankruptcy, in effect stating: When we said it the first time (in *Dewsnup*), we meant it.").

60. *See Nobelman*, 508 U.S. at 327. Section 1322(b)(2) generally allows modification of secured claims in a Chapter 13 bankruptcy case but provides a specific exception for "a

Nobelman, the debtors' home value totaled \$23,500 and secured a loan debt, including interest, totaled \$71,335.[61] The debtors sought to strip down the debt to \$23,500 of secured debt, with the remainder qualifying as an unsecured loan subject to discharge following successful completion of the bankruptcy case.[62] The case clearly involved a mortgage on the debtor's primary residence, triggering § 1322(b)(2)'s anti-modification provision.[63] The debtors argued, however, that the strip-down did not modify the lien because § 502's bifurcation provisions essentially already stripped down the lien to the secured portion of the claim—\$23,500.[64] Under this argument, their secured claim remained unaffected in the Chapter 13 repayment plan; only the remaining now-unsecured debt would be discharged in the bankruptcy case.[65] The Court disagreed, noting that § 1322(b)(2) prohibits the modification of "rights" of "holders of secured claims."[66] Since the creditor held a secured claim under § 506, the plan could not modify *any* of its rights.[67] Further, the Court held that the use of the phrase "claim secured . . . by" rather than "secured claim" in § 1322(b)(2) prohibits modification of the claim as a whole, not just the secured portion of the claim, and thus protects even the unsecured component of the secured creditor's claim.[68] In his concurrence, Justice Stevens focused on the policy of favoring mortgage lenders in order to encourage home lending.[69]

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claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2).

61. *Nobelman*, 508 U.S. at 326.

62. *Id.*

63. *Id.* at 326–27.

64. *Id.* at 328.

65. *Id.*

66. *Id.* at 327–28. As the Court frequently noted, rights are determined by state law and to the extent that the claimant holds a secured claim on a residence under state law, all rights of that claimant are protected by § 1322(b)(2). *See* Warshell & Harrell, *supra* note 59, at 468.

67. *Nobelman*, 508 U.S. at 328–29.

68. *Id.* at 331. While not phrasing it as such, the Court further noted that the debtors' interpretation of §§ 502, 506, and 1322 would essentially render the anti-modification clause useless. *See id.* To allow a strip-down to the secured value of the claim would mean that the only rights that could not be modified would be the other contractually based rights, such as receipt of interest and monthly payments. *Id.* But modification of the amount of principal owed would necessarily modify the interest payments and the number of monthly payments remaining—leaving very little untouched. *See id.*

69. *See id.* at 332 (Stevens, J., concurring). Justice Stevens' concern presents less of an issue in the strip-off context, as the liens stripped off are inevitably second-, third-, or even

While seemingly following its own precedent in *Dewsnup*, the *Nobelman* Court leaned more on § 506 than in its prior decision, noting that "[p]etitioners were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim."[70] *Nobelman* recognized the ability to bifurcate claims but did not allow that bifurcation to prompt an ability to lien-strip under § 506(d). In doing so, the *Nobelman* Court set up the possibility of a strip-off of a junior creditor's interest if wholly unsecured by any collateral value.[71]

Though both *Dewsnup* and *Nobelman* denied strip-down, the bases for those two decisions differ. The *Dewsnup* Court interpreted § 506(d)'s avoidance provision as separate from § 506(a)'s bifurcation provision. As one court put it, "[i]n *Dewsnup,* the statutory language of 'not an allowed secured claim' under § 506(d) was interpreted by the Supreme Court with reference to § 502 and not § 506(a)."[72] The *Nobelman* Court did the opposite, using § 506(a) to establish the existence of a secured claim at all, and then using that existence to protect all rights associated with that claim in the Chapter 13 context. Both decisions ultimately determine that if a creditor holds a claim, and state law provides a security interest to support that claim, lien-stripping is not permitted. But they reach that conclusion using very different analyses that some argue contradict each other:

> The *Nobelman* line of cases . . . contradict *Dewsnup* by ignoring § 506(d) and the *Dewsnup* definition of 'allowed secured claim,' focusing instead on the value of the collateral under § 506(a) and determining whether the junior lienholder has 'a claim secured . . . by' instead of an 'allowed secured claim' under § 506(d) . . . .[73]

The apparent contradiction set the stage for a determination of how those provisions apply in the context of a strip-off when a lien exists, but

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lower- priority liens, and such liens are more likely to be (though not always) the result of home equity loans than loans used to purchase the encumbered property. *See What Is a Second Mortgage Loan or "Junior-Lien"?*, CONSUMER FIN. PROTECTION BUREAU (Sept. 4, 2020), https://www.consumerfinance.gov/ask-cfpb/what-is-a-second-mortgage-loan-or-junior-lien-en-105/.

70. *Nobelman*, 508 U.S. at 328; *see also In re* Hornes, 160 B.R. 709, 713 (Bankr. D. Conn. 1993) ("[T]he [*Nobelman*] Court did not rely on *Dewsnup* to any significant degree.").

71. Schreiber & Cisar, *supra* note 51, at 29 (citing McDonald v. Master Fin. Inc. (*In re* McDonald), 205 F.3d 606, 611–12 (3d Cir. 2000)).

72. IRS v. Johnson, 415 B.R. 159, 165–66 (W.D. Pa. 2009).

73. Schreiber & Cisar, *supra* note 51, at 29.

the collateral's value does not support any of the claim (herein, a "wholly unsecured"[74] claim). Under *Nobelman*, some value in the collateral must exist for a creditor to hold a secured claim at all. Without any value, a wholly unsecured claim would have no basis for being secured and, thus, no basis for protection. *Dewsnup* instead focuses on whether the claim is allowed and if there is a lien, without consideration of the value of that lien under § 502. As a result, a wholly unsecured claim would still be considered "secured" under state law and, if also allowed under § 502, protected from the possibility of lien avoidance.

More than a decade after its strip-down cases, the Court considered strip-off and clarified what makes a claim "secured" to prevent lien stripping. In *Bank of America, N.A. v. Caulkett*, the Supreme Court extended *Dewsnup* to prohibit debtors in Chapter 7 from stripping off wholly unsecured junior liens.[75] Strip-off involves completely eliminating a creditor's lien when the collateral lacks value to pay anything on the junior lienholders' claims.[76] *Caulkett* involved consolidated cases with the same, relatively simple facts. In each case, the debtors' residence secured two mortgages, and the amount due to the senior mortgage holder exceeded the value of the residence, leaving no value for the junior mortgage holder.[77] The Court began by noting that "[t]he Code suggests that the Bank's claims are not secured" under § 506's bifurcation provisions.[78] Such a determination would be consistent with *Nobelman*'s determination of whether a claimant holds a "secured" claim under § 506(a). Though the Court indicated that "[u]nder that straightforward reading of the statute, the debtors would be able to void the Bank's claims," it determined that *Dewsnup* precluded such a reading of the statute.[79] The Court concluded that "*Dewsnup* defined the term 'secured

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74. While such a claim is not "wholly unsecured" under *Dewsnup* because *Dewsnup* did not allow for bifurcation to support lien-stripping, courts routinely call these types of claim "wholly unsecured" or "wholly underwater", or the like. *See, e.g.*, Fisette v. Keller (*In re* Fisette), 455 B.R. 177, 179 (B.A.P. 8th Cir. 2011); *In re* Gerardin, 447 B.R. 342, 343 (Bankr. S.D. Fla. 2011); *In re* Miller, 462 B.R. 421, 423 (Bankr. E.D.N.Y. 2011); *In re* Travers, 541 B.R. 639, 640 (Bankr. E.D. Ky. 2015); *In re* Jennings, 454 B.R. 252, 253 (Bankr. N.D. Ga. 2011); *In re* Wapshare, 492 B.R. 211, 213 (Bankr. S.D.N.Y. 2013).

75. *See* 575 U.S. 790 (2015).

76. Minn. Hous. Fin. Agency v. Schmidt (*In re* Schmidt), 765 F.3d 877, 880–81 (8th Cir. 2014) (defining strip-off as a situation in which "there [exists] no collateral value for a mortgage" (quoting *Fisette*, 455 B.R. at 179 n.1)).

77. *Caulkett*, 575 U.S. at 792.

78. *Id.* at 793.

79. *Id.* at 794.

claim' in § 506(d) to mean a claim supported by a security interest in property, *regardless of whether the value of that property would be sufficient to cover the claim*."[80] Thus, the *Caulkett* Court affirmed *Dewsnup*'s definition of an "allowed secured claim" as one in which the claim has been allowed and the claimant holds a lien on property, regardless of whether that lien enjoys *any* underlying value under § 506(a).

Though the debtors sought to distinguish *Caulkett* because the junior mortgage holder held *no* value in the residence, the Court felt constrained to adopt such a distinction based on *Dewsnup*'s interpretation of § 506.[81] The *Caulkett* Court determined that *Dewsnup* defined a secured claim as one that is "'secured by a lien' and had been 'fully allowed.'"[82] Secured status "does not depend on whether a lien is partially or wholly underwater."[83] Once allowed and secured, § 506(d)'s lien avoidance provision becomes irrelevant.[84] Further, the Court held that defining "secured claim" under § 506(d) to require that the claim's collateral hold some value for the creditor would then create a conflict with the definition of an allowed secured claim in § 506(a).[85] Finally, the Court noted that the debtors' distinction between mortgages secured by some value versus mortgages secured by no value could create an inequity among essentially similarly situated creditors:

> [I]f a court valued the collateral at one dollar more than the amount of a senior lien, the debtor could not strip down a junior lien under *Dewsnup*, but if it valued the property at one dollar less, the debtor could strip off the entire junior lien. Given the constantly shifting value of real property, this reading could lead to arbitrary results.[86]

80. *Id.* (citing Dewsnup v. Timm, 502 U.S. 410, 416 (1992)) (emphasis added).

81. *Id.* at 795–96.

82. *Id.* at 795 (quoting *Dewsnup*, 502 U.S. at 417).

83. *Id.* at 796. The Court also rejected the debtors' argument that the policy concerns outlined in *Dewsnup* do not apply in *Caulkett*. *See id.*

84. *Id.* at 794 ("[I]f a claim 'has been "allowed" pursuant to § 502 of the Code and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d).'" (quoting *Dewsnup*, 502 U.S. at 415)).

85. *Id.* at 796.

86. *Id.* at 797. The Court also considered whether *Nobelman* creates a different result but found the decision inapposite because it focused on how § 506 interplays with § 1322. *Id.* at 796 (citing Nobelman v. Am. Sav. Bank, 508 U.S. 324, 327–32 (1993)).

In doing so, the Court—as it did in *Dewsnup*—relegated § 506(d) to a section which only "void[s] a lien whenever a claim secured by the lien itself has not been allowed."[87] It did, however, disagree with one key aspect of *Dewsnup*. While the *Dewsnup* Court treated the phrase "allowed secured claim" differently in § 506's subsections, the *Caulkett* Court felt it necessary to ensure that these two subsections defined "allowed secured claim" in the same way:

> The debtors next contend that the term "secured claim" in § 506(d) could be redefined as any claim that is backed by collateral with *some* value. Embracing this reading of § 506(d), however, would give the term "allowed secured claim" in § 506(d) a different meaning than its statutory definition in § 506(a). We refuse to adopt this artificial definition.[88]

The Court did not consider *Nobelman*'s focus on § 506(a)'s bifurcation process in interpreting the same phrase under § 506(d).[89]

In the end, this trio of Supreme Court cases leaves a confused web of statutory interpretations and cross-references. While each of the three cases declines to allow lien-stripping in their particular fact scenarios, they lack consistency in their analysis of the Code provisions. Two of the three define an "allowed secured claim" as a claim that is allowed under § 502 and supported by a lien, regardless of the value of the collateral compared to the value of the claim. All three holdings seem to suggest that both subsections of § 506 refer to the same concept of "allowed secured claim[s]," but disagree as to whether to treat those in an identical fashion and as to what would make them identical. All three decisions recognize the ability to bifurcate secured claims but fail to provide an impact of bifurcation, other than the ability to terminate the *in personam* deficiency liability of the debtor through discharge of debt.[90] The only

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87. *Id.* at 795 (quoting *Dewsnup*, 502 U.S. at 416).

88. *Id.* at 796.

89. *See id.*

90. One of the bases for denying strip-off in a Chapter 7 case, as stated by a court decision prior to *Caulkett*, is to further *Dewsnup*'s focus on maintaining a creditor's rights against the property and giving "the debtor a fresh start, but not a head start." *In re* Caliguri, 431 B.R. 324, 328 (Bankr. E.D.N.Y. 2010) (citing Pomilio v. Mers (*In re* Pomilio), 425 B.R. 11, 17 (Bankr. E.D.N.Y. 2010)). The *Caliguri* court emphasized that while bankruptcy operates to eliminate a debtor's personal liability, bankruptcy does not eliminate any in rem cause of action the creditor could enforce against property itself with a valid lien. *Caliguri*, 431 B.R. at 327–28 (citing *Pomilio*, 425 B.R. at 17); *see also Dewsnup*, 502 U.S. at 418 ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an

consistency between the opinions is the end result; no lien-stripping, but an allowance of bifurcation for the purpose of discharging a debtor's personal liability.

IV. The Circuit Courts and Strip-Off in Chapter 13[91]

The circuit courts[92] stray from the Supreme Court precedent when considering the final issue of whether to allow strip-off in a Chapter 13 case. Given that the three Supreme Court opinions all deny the ability to lien-strip in bankruptcy, it might seem logical to deny strip-off in Chapter 13.[93] But the circuit courts deciding the issue generally find just the opposite: they allow strip-off in the Chapter 13 context even though strip-

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action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*." (quoting Johnson v. Home State Bank, 501 U.S. 78, 84 (1991))).

91. While the Supreme Court cases, as well as the circuit court cases, focus on lien-stripping in the residential mortgage context, *Dewsnup* and its progeny impact other types of lien-stripping. For example, *In re Lee* involved treatment of a lien on the debtor's car. 156 B.R. 628 (Bankr. D. Minn. 1993), *aff'd*, 162 B.R. 217 (D. Minn. 1993). The lienholder, Ford Motor Credit, held a claim of almost $5,000, secured by a vehicle worth just $3,725. *Id.* at 629. The Chapter 13 plan proposed to pay Ford Motor Credit the $3,725 owed on the secured portion of the claim and, upon completion of the plan, vest in the debtors the car "free and clear of any lien." *Id.* While Ford Motor Credit focused on the *Dewsnup* decision to argue that its lien could not be bifurcated and stripped, the court instead focused on *Nobelman* in determining that § 1322(b)(2) allows modification of the claim because the claim is not secured by a residential property. *See id.* at 630 (citation omitted); *cf. In re* Scheierl, 176 B.R. 498 (Bankr. D. Minn. 1995) (prohibiting confirmation of Chapter 13 plan bifurcating and releasing lien without full payment to secured creditor).

And while most of the attention to this issue focuses on the Chapter 13 context, courts struggle with the same issues in individual Chapter 11 bankruptcy cases because § 1123(b)(5) contains language identical to that of § 1322(b)(2). *Compare* 11 U.S.C. § 1123(b)(5) *with id.* § 1322(b)(2); *see, e.g.*, IRS v. Johnson, 415 B.R. 159 (W.D. Pa. 2009) (affirming bankruptcy court decision permitting strip-off in Chapter 11 context). To the extent that the rule applies in one of these chapters, the same rule should apply in the other. *See* Saponara, *supra* note 40, at 272 ("The legislative history of § 1123(b)(5) reveals that Congress deliberately tracked the antimodification language of § 1322(b)(2) and intended conformity of treatment between Chapter 13 and Chapter 11." (quoting Lomas Mortg., Inc. v. Louis, 82 F.3d 1, 6 (1st Cir. 1996))).

92. While every circuit court deciding the issue has allowed strip-off in the Chapter 13 context, and it is the majority rule, some lower courts not bound by a circuit-level decision have held the opposite. *See* Etheridge v. CitiMortgage Inc. (*In re* Etheridge), 546 B.R. 896, 898 (Bankr. S.D. Ga. 2016) ("This view is the overwhelming majority, but by no means the universal view of modification of wholly unsecured second liens.").

93. *See* Saponara, *supra* note 40, at 272 (arguing, prior to *Caulkett*, that *Dewsnup* and *Nobelman* precedent prevent strip-off generally); Warshell & Harrell, *supra* note 59, at 466 (arguing that *Dewsnup*, *Nobelman*, and *Caulkett* together prevent strip-off generally).

down is not permitted in Chapter 13 and strip-off is not permitted in Chapter 7.[94] Courts allowing strip-off in the Chapter 13 context do so by returning to § 506(a)'s bifurcation provisions for the definition of a secured claim, as supported by collateral.[95] In allowing bifurcation, the wholly unsecured creditor loses its secured claim altogether, which in turn means that § 1322(b)(2) cannot protect the creditor from the modification of its claim.[96] The courts choose this path despite the Supreme Court's decision in *Caulkett* declining to use the bifurcation provision to deem a wholly unsecured creditor as lacking a secured claim.[97]

The Eighth Circuit addressed the issue in *Minnesota Housing Finance Agency v. Schmidt (In re Schmidt)*.[98] *Schmidt* involved the typical strip-down situation in which a junior lienholder (here, the third lienholder) held a lien secured by property with value insufficient to pay the senior lienholders in full.[99] In other words, absolutely no value existed in the collateral to pay the junior lienholder. The debtors' repayment plan treated the junior lienholder as a wholly unsecured creditor and provided that the lien would be stripped from the property and the debt discharged upon successful completion of the plan.[100] As the Supreme Court did in the *Nobelman* case, the Eighth Circuit considered the interplay of the

94. Minn. Hous. Fin. Agency v. Schmidt (*In re* Schmidt), 765 F.3d 877, 880 (8th Cir. 2014) (noting that at time of decision "[e]ach of our sister circuits that has addressed this question [whether to allow strip-off in Chapter 13] has answered in the affirmative" (first citing Davis v. Davis (*In re* Davis), 716 F.3d 331, 334–39 (4th Cir. 2013); then citing Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1222–27 (9th Cir. 2002); then citing Lane v. W. Interstate Bancorp (*In re* Lane), 280 F.3d 663, 665–69 (6th Cir. 2002); then citing Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122, 124–27 (2d Cir. 2001); then citing Tanner v. FirstPlus Fin., Inc. (*In re* Tanner), 217 F.3d 1357, 1358–60 (11th Cir. 2000); then citing Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 284–95 (5th Cir. 2000); and then citing McDonald v. Master Fin., Inc. (*In re* McDonald), 205 F.3d 606, 609–15 (3d Cir. 2000))); *see also* Myers, *supra* note 50, at 1336, 1345 n.83 (2011) (adding three additional Bankruptcy Appellate Panel decisions to this list) (first citing Lam v. Invs. Thrift (*In re* Lam), 211 B.R. 36 (B.A.P. 9th Cir. 1997); then citing Griffey v. U.S. Bank (*In re* Griffey), 335 B.R. 166 (B.A.P. 10th Cir. 2005); and then citing Domestic Bank v. Mann (*In re* Mann), 249 B.R. 831 (B.A.P. 1st Cir. 2000)).

95. *See Schmidt*, 765 F.3d at 880.

96. *In re* Hornes, 160 B.R. 709, 711 (Bankr. D. Conn. 1993) ("[N]o holder of a claim is protected by the other than clause unless that holder falls within the secured claims clause.").

97. *See* Bank of Am., N.A. v. Caulkett, 575 U.S. 790, 795 (2015) (declining to use bifurcation provision to treat wholly unsecured creditor as "unsecured" due to *Dewsnup* precedent).

98. 765 F.3d 877.

99. *Id.* at 879.

100. *Id.*

bifurcation and avoidance provisions of § 506 and the anti-modification provision of § 1322.[101] The district court had construed *Nobelman* narrowly, concluding that *Nobelman* required that the lienholder hold a "secured claim" under § 506(a)'s bifurcation provision in order to fall within § 1322's anti-modification provision.[102] Since the creditor in *Nobelman* held a secured claim under § 506(a) because the collateral had some value securing its debt, the creditor could shield itself from modification under § 1322.[103] In the case at hand, however, the creditor undisputedly held no secured claim under § 506(a).[104] The Eighth Circuit determined that *Nobelman* not only lacked precedential effect, but also found its strip-off reasoning irrelevant.[105] In short, the creditor in the strip-off situation is effectively unsecured and thus does not hold a claim "secured by" the residence that can be protected by the anti-modification provision.

Schmidt recognized conflicting policy objectives in the strip-off determination. On the one hand, allowing the strip-off creates the potential windfall for debtors that the *Dewsnup* Court cautioned against should the property increase in value after discharge of the debt.[106] But allowing strip-off also encourages debtors to utilize the Chapter 13 process as opposed to the Chapter 7 process since *Caulkett* denied the ability to strip off in those cases.[107] Most other circuits similarly hold that *Nobelman* only protected creditors with some value in the property and thus allow strip-off in Chapter 13.[108] The Ninth Circuit Bankruptcy Appellate Panel also noted that protecting the senior lienholder, who will always have at least *some* value securing its repayment, while not guarantying such protection to junior

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101. *Id.* at 880; *see supra* notes 66–71 and accompanying text.

102. Minn. Hous. Fin. Agency v. Schmidt (*In re* Schmidt), No. BR 12–33918, 2013 WL 2470218, at *6 (D. Minn. 2013), *aff'd*, 765 F.3d 877.

103. *See id.*

104. *Schmidt*, 765 F.3d at 882.

105. *Id.*

106. *See supra* note 52 and accompanying text.

107. *See Schmidt*, 765 F.3d at 883–84; Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 294–95 (5th Cir. 2000).

108. *See* Domestic Bank v. Mann (*In re* Mann), 249 B.R. 831 (B.A.P. 1st Cir. 2000); Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122 (2d Cir. 2001); McDonald v. Master Fin., Inc. (*In re* McDonald), 205 F.3d 606 (3d Cir. 2000); *Bartee*, 212 F.3d 277; Lane v. W. Interstate Bancorp (*In re* Lane), 280 F.3d 663 (6th Cir. 2002); Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220 (9th Cir. 2002); Griffey v. U.S. Bank (*In re* Griffey), 335 B.R. 166 (B.A.P. 10th Cir. 2005); Am. Gen. Fin., Inc. v. Dickerson (*In re* Dickerson), 222 F.3d 924, 925 (11th Cir. 2000); Tanner v. FirstPlus Fin., Inc. (*In re* Tanner), 217 F.3d 1357 (11th Cir. 2000).

lienholders furthers the policy of encouraging the type of debt used to purchase a home.[109]

Courts permitting strip-off in Chapter 13 look to *Nobelman* as setting up a two-step process described as follows by a bankruptcy court:

> *Nobelman* sets forth a statutory sequence concerning the claims of mortgagees seeking protection under § 1322(b)(2). First, *determine under § 506(a) whether the mortgagee possesses a secured claim*. If so, then the only modification permitted by the Code is the cure of a default under § 1322(b)(5).[110]

Under this line of cases, § 506(a) treats a wholly unsecured creditor as completely unsecured, which eviscerates any protection offered by § 1322. As one court noted, a leading treatise on bankruptcy law interpreted *Nobelman* as setting up exactly that process of determining the existence of a secured claim before determining whether to permit the protections of § 1322(b)(2).[111] That court went on to restate the majority's position, noting that "[w]hether a lien claimant is the holder of a 'secured claim' or an 'unsecured claim' depends, thanks to § 506(a), on whether the claimant's security interest has any actual 'value.'"[112] But the first step of the two-step process requires determining the existence of a secured claim based on § 506(a). The *Dewsnup* court rejected the use of § 506(a) for the purpose of bifurcating a lien for lien-stripping, a decision that *Caulkett* extended to wholly unsecured liens. The circuit courts' reliance on *Nobelman* when allowing strip-off but not strip-down highlights how the *Nobelman* and *Dewsnup* decisions reach the same result (no lien-stripping) but with different legal bases that are difficult to reconcile in the Chapter 13 strip-off context. *Dewsnup* and *Caulkett* seemingly reject the ability to bifurcate and lien-strip, while *Nobelman* places great emphasis on the valuation of the

109. Lam v. Invs. Thrift (*In re* Lam), 211 B.R. 36, 41 (B.A.P. 9th Cir. 1997); *see also* Myers, *supra* note 50, at 1345 (noting that *Lam* Court cited to Justice Steven's concurring opinion in the *Nobelman* case regarding the policy and history basis for protecting mortgage holders). But there are situations in which even a purchase-money financer is wholly unsecured and would be potentially eligible for lien-stripping in Chapter 13 under the majority rule espoused by the circuit courts. *See, e.g.*, *In re* Dyer, 142 B.R. 364, 365 (Bankr. D. Ariz. 1992) (noting that Wagners had a $2,000 purchase-money interest in home, while first-priority purchase-money lender's claim of $79,202 exceeded the $77,000 value of home), *vacated*, 153 B.R. 601 (B.A.P. 9th Cir. 1993).

110. *In re* Peppers, 397 B.R. 880, 882 (Bankr. S.D. Ohio 2008) (emphasis added).

111. *Lane*, 280 F.3d at 667 (quoting COLLIER ON BANKRUPTCY ¶ 1322.06[1][a][i] (15th ed. rev. 2001)).

112. *Id.* at 669.

property in determining whether a creditor holds secured status and thus has rights to protect.[113]

While following the majority rule and allowing strip-off in Chapter 13, the Eleventh Circuit indicated that "were we to decide this issue on a clean slate, we would not so hold."[114] As a policy matter, the Eleventh Circuit noted that distinguishing between strip-down and strip-off "places too much weight upon the valuation process," that the court described as imprecise and uncertain.[115] The court also focused on the phrasing of § 1322(b)(2), which protects "claims secured by" a mortgage, not "secured claims."[116] It suggested that any claim protected by a state-law security interest enjoys the protections of the anti-modification provision regardless of the value of the collateral supporting that lien.[117] The court also determined, however, that its prior decision in *Tanner* precluded it from following its own policy and statutory interpretation intuitions, and so the court rendered the opposite result.[118]

Then-Judge Neil Gorsuch wrote the opinion for *In re Woolsey*, which denied strip-off in Chapter 13 based on the reasoning of the *Dewsnup* case.[119] As with the other circuit cases, *Woolsey* involved the debtors'

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113. *See supra* Part I.

114. Am. Gen. Fin., Inc. v. Dickerson (*In re* Dickerson), 222 F.3d 924, 926 (11th Cir. 2000). *Dickerson* predated the *Caulkett* case. *See* Etheridge v. CitiMortgage Inc. (*In re* Etheridge), 546 B.R. 896, 899 (Bankr. S.D. Ga. 2016) (quoting Davis v. Springleaf Fin. Servs., Inc. (*In re* Davis), 547 B.R. 480, 482 n.4 (Bankr. S.D. Ga. 2015)).

115. *Dickerson*, 222 F.3d at 926. *But see McDonald*, 205 F.3d at 613 (noting that arbitrary results "are common in the law" and cannot be the basis for a different result); Minn. Hous. Fin. Agency v. Schmidt (*In re* Schmidt), 765 F.3d 877, 883 (8th Cir. 2014). See Hawkins v. Santander Bank (*In re* Hawkins), 606 B.R. 632 (Bankr. E.D. Pa. 2019), for a case highlighting some of the challenges in the valuation process. *Hawkins* involved strip-off in the Chapter 13 context, and the primary contested issue was the value of the debtors' residence for the purpose of determining whether the junior lienholder held a secured claim in the property. *Id.* at 634. While the debtors' appraisal offered a value of $105,000, the creditors' appraisal returned at $131,000. *Id.* at 635. While both appraisers used the same method for reaching a valuation of the property, and the "dilapidated and very poorly maintained" state of the property clearly diminished its value, they reached very different results. *Id.* at 635-36. The court's opinion spent considerable time detailing the methods of the appraisals, and in particular the need to adjust comparables to account for the unusual state of disrepair of the property. *Id.* at 644-46. The court eventually accepted the lower valuation for the property, causing the junior lienholder to be wholly unsecured and allowing the debtor to strip-off the junior lien. *Id.* at 646.

116. *Dickerson*, 222 F.3d at 926.

117. *Id.*

118. *Id.*

119. *In re* Woolsey, 696 F.3d 1266 (10th Cir. 2012).

attempt to strip off a junior lien in a Chapter 13 case.[120] The court reviewed § 506(a)'s bifurcation provision and noted that the bank's "junior lien isn't backed by any value in the home, [and thus it] holds only an allowed *unsecured* claim and its lien would appear to be voidable."[121] But regardless of that Code interpretation, the court felt bound by the *Dewsnup* holding, which interpreted §§ 502 and 506 so as to *not* create an unsecured and avoidable claim for such a creditor.[122] As a result, the court denied the ability to strip-off the lien because the creditor was not actually "unsecured" by *Dewsnup* standards.[123] Yet the court simultaneously criticized the reasoning of the *Dewsnup* decision and suggested that § 1322(b)(2) might allow for modification.[124] The *Woolsey* case highlights the difficult choice that courts face in the Chapter 13 strip-off context. They can follow *Dewsnup*'s separation of § 506(a) bifurcation from avoidance under § 506(d) and *Caulkett*'s extension of *Dewsnup* in the strip-off context, which prevents strip-off in Chapter 13 cases. Alternatively, they can follow *Nobelman*'s focus on how § 1322(b)(2) might change the rules of § 506 in the Chapter 13 context, and use that process to strip-off the wholly unsecured lien.

V. Reconsidering the Arguments Regarding Lien-Stripping to Justify a Different Result in Chapter 13 Strip-Off

A. Statutory Arguments

1. Sections 502 and 506

In rejecting the ability to strip off a wholly unsecured lien in a Chapter 7 case, the *Caulkett* Court relied in large part on *Dewsnup*'s reading of § 502's claim allowance provision and § 506's bifurcation and avoidance provisions. That reading required first determining whether the claim constituted an allowed claim under § 502 that was also secured by a lien under state law, and then protecting the rights of creditors holding such a claim.[125] *Caulkett* determined that *Dewsnup* did not permit strip-off of a

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120. *Id.* at 1267.

121. *Id.* at 1273.

122. *Id.* at 1273–79.

123. *Id.* at 1279 (noting that debtors in this case failed to bring up arguments about use of § 1322 to strip off lien).

124. *Id.*

125. One recent circuit court case considered a preliminary issue to even valuing the secured and unsecured portions of a creditor's claim. Burkhart v. Grigsby, 886 F.3d 434, 437 (8th Cir. 2018). The bankruptcy and district courts in *Burkhart* denied strip-off in Chapter 13

wholly unsecured claim when the creditor holds a lien on the property because the creditor holds an allowed claim secured under state law regardless of the lack of value.[126] Once the claim is both allowed and secured, it enjoys all the protections of a secured creditor. The challenge in the Chapter 13 context arises because the *Nobelman* Court seemingly approached these provisions differently than *Dewsnup* and *Caulkett* by emphasizing the role of bifurcation under § 506(a).

Sections 502 and 506 fall within a chapter of general applicability and apply to Chapter 13 bankruptcy cases just as they apply to Chapter 7.[127] The only Supreme Court case to consider the impact of § 1322's anti-modification provision on this analysis is *Nobelman*. The *Nobelman* Court used the same sections of the Code that were used in *Dewsnup* and *Caulkett*[128] in protecting a lienholder from strip-down in a Chapter 13 case, *despite* the existence of § 1322. Each of the Chapter 7 cases focuses primarily on an interpretation of §§ 502 and 506 that separates the bifurcation of a secured claim from claim allowance and lien avoidance. On the other hand, the *Nobelman* case denied § 1322(b) as a basis for changing those rules in a Chapter 13 case, which suggests that lien-stripping of *any*

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because to do so first required valuation of the "claim" under § 506(a), a process that is only triggered by the claims allowance process which, in turn, is only triggered by the filing of a proof of claim. *Id.* at 438. As a result, the courts held that without proof of claim, the chain of events necessary to lead to strip-off never began and could not lead to strip-off. *Id.* The Fourth Circuit, allowing strip-off, held that the claims allowance process was not necessary to provide for valuation of the secured portion of the claim and strip-off of wholly unsecured claims. *Id.* at 440–41.

126. *See supra* notes 78–86 and accompanying text.

127. Schreiber & Cisar, *supra* note 51, at 28 ("The anti-lien-stripping precedent of *Dewsnup v. Timm*, a Chapter 7 case, is frequently disregarded in Chapter 13 cases . . . . This evolution continues even though Chapter 7 and 13 cases are interpreting the same statute applicable in both chapters: § 506."). One court argued that preventing strip-off in Chapter 13 cases renders § 506(a) superfluous. *See In re* German, 258 B.R. 468, 470 (Bankr. E.D. Okla. 2001) ("If the minority's view is accepted, there would be no need for § 506(a)."). While that may be true in the Chapter 13 context with regard to residential properties because the bifurcation would have no impact on the ability to use Chapter 13's modification provisions, § 506(a) would still be effective in a variety of other contexts, including the ability to modify non-residential loans or to bifurcate claims outside of the Chapter 13 context for payment purposes.

128. *Cf.* Myers, *supra* note 50, at 1355–56 (arguing that "allowed secured claim" in § 506 can be interpreted to require some value in the property for the creditor rather than "simply a piece of paper claiming a security interest" and that it "can be read in its ordinary meaning to mean that the lien must have some value").

sort should not apply in either chapter.[129] The circuit court cases that permit strip-off in Chapter 13 do so by relying on an interpretation of § 506(a)'s bifurcation provision that denies a wholly unsecured creditor secured status. This reading of § 506(a) is unsupported by *Caulkett*'s extension of the *Dewsnup* precedent.[130]

A bankruptcy court decision—now overturned by its circuit court's decision—accepted exactly that argument. *Barnes v. American General Finance (In re Barnes)* involved an attempt to strip off a lien on the debtors' residence.[131] At the time of the decision, *Nobelman* had declined to allow strip-down in the Chapter 13 context.[132] The bankruptcy court, however, rejected the debtors' argument distinguishing strip-down from strip-off.[133] In so doing, the court recognized that § 1322(b)(2) provides a debtor the ability to modify the rights of secured claimants, something not permitted in the general rules of § 506.[134] That exception only applies when the collateral is *not* the debtor's residence and "[s]ince Debtor's residence is the only collateral involved here, § 1322(b) does not allow modification of this creditor's rights."[135] In other words, § 1322(b) simply changes the generally applicable rules (the ones that apply in a Chapter 7 case) when the collateral is something other than the debtor's residence. But when the collateral is the residence, the general rules remain in effect. And, per *Caulkett*, that general rule prohibits strip-off if the creditor both holds an allowed claim under § 502 and a secured claim under state law. To hold otherwise would impact the *Nobelman* statement that a creditor's "rights" under § 1322 follow from state law.[136] To bifurcate for the purpose of either

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129. Warshell & Harrell, *supra* note 59, at 469 ("[T]he Supreme Court's unequivocal and consistent articulation of the limited roles of section 506(a) and (d) in the modification of liens is clearly inconsistent with the analytical basis for modifying underwater mortgage liens in the Chapter 13 cases . . . . [T]here is no basis anywhere in the Supreme Court opinions . . . for voiding underwater home mortgage liens in Chapter 13 cases on the basis of section 506.").

130. *See supra* Part I.

131. 207 B.R. 588, 589 (Bankr. N.D. Ill. 1997) (noting that creditor held home equity loan, not a purchase-money loan on the home).

132. *See id.* at 591.

133. *Id.* at 591–92.

134. *Id.* at 590.

135. *Id.*

136. Nobelman v. Am. Sav. Bank, 508 U.S. 324, 329–30 (1993) (noting that rights under state law include right to be paid, retain a lien on the property, accelerate upon debtor's default, foreclose, sell, or recover a deficiency, and that such rights are "protected from modification by § 1322(b)(2)").

strip-down or strip-off modifies the state law "rights" of a creditor.[137] Those state-law rights remain the same regardless of how secured a creditor is, because the rights include the ability to accelerate payment obligation and foreclose,[138] not necessarily a right to be paid from the proceeds of the sale of the collateral.

The cases relying on *Nobelman* in allowing strip-off in Chapter 13 misunderstand the holding of *Nobelman*. That case did not interpret § 506(a) to allow for bifurcation of claims that can then be used for strip-off purposes. Rather, that case rejected the debtors' attempt to use § 506(a)'s bifurcation provision to undo the protections offered to mortgage holders under § 1322(b)(2). The holding recognized that even if § 506(a) allows for bifurcation of a claim, § 1322(b)(2) prevents that bifurcation from being used to harm an undersecured creditor. The courts relying on *Nobelman* extend that limited disallowance of § 506(a) in the strip-down situation to indicate that § 506(a) does allow such strip-off. But the *Caulkett* Court expressly rejected that result. Because *Caulkett* arose after the date of each of the circuit court decisions permitting strip-off in Chapter 13 cases, the decision places doubt on the reasoning of the circuit courts.

Determining that the *Dewsnup* reasoning applies to all lien-stripping cases in any chapter would resolve the inconsistency. Another possible way, however, to still allow strip-off in Chapter 13 would be to determine that the *Caulkett* Court's overreliance on *Dewsnup*'s definition of an allowed secured claim led to an incorrect result when considering wholly unsecured claims after bifurcation. The bifurcation provision clearly allows for separation of a claim into its secured and unsecured portions, as noted by several courts in a variety of contexts and as referenced in the legislative history.[139] Once bifurcated, if no secured portion remained, the creditor's lien could be avoided under § 506(d) and would not enjoy any of the protections offered to true secured creditors, including the ability to protect its rights under § 1322(b)(2)'s anti-modification provision.[140] While

137. *See Barnes*, 207 B.R. at 592–93.

138. *See id.* at 593.

139. *See* Veryl Victoria Miles, *The Bifurcation of Undersecured Residential Mortgages Under § 1322(b)(2) of the Bankruptcy Code: The Final Resolution*, 67 AM. BANKR. L.J. 207, 223 (1993) ("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." (quoting H.R. REP. No. 595, 95th Cong., 1st Sess., 356 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6311)).

140. There are other sections within the Bankruptcy Code designed to protect secured creditors, even if undersecured. *See, e.g.*, 11 U.S.C. § 1129(b)(2)(A) (retention of lien); *id.* §

tempting, such a reading lacks consistency with *Dewsnup*. *Dewsnup* rejected the argument that the unsecured portion of a claim under § 506(a) would not qualify as an allowed secured claim under § 506(d).[141] Recall the decision also relied on state law for the existence of a lien:

> We think, however, that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee. The voidness language sensibly applies only to the security aspect of the lien and then only to the real deficiency in the security. Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed and who had nothing to do with the mortgagor-mortgagee bargain.[142]

Two other more extreme, but likely appropriate, results would provide more consistency both in the Code and in the treatment of undersecured claims across the board: (1) for the Court to reverse its own decision in *Dewsnup*, or (2) for Congress to clarify that bifurcation of claims under § 506(a) should then apply to § 506(d)'s lien avoidance provision. These changes would allow lien stripping (both strip-down *and* strip-off) in all chapters of bankruptcy.[143] Such a result would resolve the *Dewsnup* Court's unease with seemingly different interpretations of allowed secured claims within § 506 by expanding the definition of an allowed secured claim. The resulting definition would include a claim that is both allowed under § 502 *and* has not been bifurcated and avoided under § 506.[144] Overturning the *Dewsnup* result, whether judicially or legislatively, would also help resolve the apparent inconsistency between the Supreme Court's first two cases, *Dewsnup* and *Nobelman*.[145]

363(e) (right to adequate protection for use of secured collateral); *id.* § 363(k) (right to credit bid for collateral).

141. Dewsnup v. Timm, 502 U.S. 410, 414–15, 417 (1992).

142. *Id.* at 417.

143. While it seems that lien avoidance would be allowed even in Chapter 13, the courts could feasibly determine that § 1322(b)(2) does not permit the strip-down because it protects all rights of a secured creditor. But courts could also allow strip-down of the unsecured portion of the claim, using § 1322(b)(2) to protect other rights associated with the secured *portion* of the claim, such as modification of the payment schedule.

144. *See supra* note 49 and accompanying text.

145. *See supra* note 73 and accompanying text.

Regardless of the differences in these paths, each would lead to a consistent conclusion among the cases, either allowing lien-stripping in all cases or in no cases. Doing so makes sense. If *Dewsnup* was correctly decided, any claim that is both allowed under § 502 *and* secured by a lien recognized under state law is protected from modification regardless of the chapter. If the court decided *Dewsnup* incorrectly because the lien avoidance provision of § 506(d) must be read in conjunction with the bifurcation provision of § 506(a), lien-stripping of any form should be allowed in any chapter. Either way, §§ 502 and 506 should be read consistently for all forms of lien stripping and in all bankruptcy Code chapters.[146]

2. Section 1322

Courts and commentators note Code and policy differences between Chapter 13 and Chapter 11 cases as compared to Chapter 7. Section 1322(b)(2) specifically prohibits modification of the claims of certain secured creditors in Chapter 13 cases.[147] This prohibition suggests that Chapter 13 plans may modify other secured creditors' claims, even if not allowed pursuant to § 506(d).[148] Chapter 11 and 12 cases include similar provisions that prevent lien-stripping in certain cases while otherwise permitting modification of secured creditors' claims.[149] Further, from a

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146. One challenge is that either of these readings could render a provision of the Code superfluous. Following *Dewsnup*'s rule renders § 506(d) superfluous because it fails to allow for any lien avoidance. But tying § 506(d) to § 506(a)—stating that an allowed secured claim is only the secured claim post-bifurcation—runs the risk of rendering § 1322(b)(2) largely superfluous. Arguably for most secured creditors, the most significant antimodification would be protection of the amount of the claim, and lien-stripping takes away that most significant protection.

147. See 11 U.S.C. § 1322(b)(2) (listing as not subject to modification "a claim secured only by a security interest in real property that is the debtor's principal residence").

148. Margaret Howard, Essay, *Secured Claims in Bankruptcy: An Essay on Missing the Point*, 23 CAP. U. L. REV. 313, 330 (1994) (noting that *Nobelman* left open a determination of whether non-mortgage secured creditors, who are not included in 1322(b)(2)'s protections, are protected by the *Dewsnup* holding); *id.* at 331–33 (noting that § 1322(b)(2)'s protections are rendered superfluous if lien-stripping isn't generally permitted) (quoting Dever v. IRS (*In re* Dever), 164 B.R. 132, 141 (Bankr. C.D. Cal. 1994)).

149. As noted by Howard, these provisions include: § 1141's confirmation requirements that property belongs to debtor "free and clear" of claims upon confirmation of the plan, § 1129(b)(2)'s and § 1225(a)(5)(B)'s provisions that a creditor's lien is based on the allowed amount of its claim, and the history of the § 1111(b) election by secured creditors to have the entire claim treated as secured being based on a lien-stripping case. Howard, *supra* note 147, at 323–26, 333–34.

policy perspective, Chapter 13 (as well as Chapters 11 and 12) envision the debtor keeping property to successfully reorganize, and success in reorganization often relies on lien-stripping:

> If a lien cannot be stripped down in reorganization to the value of the available collateral and satisfied by payment of the stripped down value, then no encumbered assets can be retained by a reorganizing debtor unless the full amount of debt owed each and every lienholder is paid. . . . Debtors in bankruptcy simply will not be able to do that.[150]

By contrast, Chapter 7 liquidations envision the debtor relinquishing assets to pay debt. Arguably, when a Chapter 7 debtor intends to keep that property instead, the debtor off-sets the ability to keep property by allowing the creditor to retain its full bargained-for rights to payment, even if the debtor owes more than the property's value. If the debtor wants to effectively terminate the creditor's right to the full repayment, the debtor can do so by turning over the property to the creditor in satisfaction of the secured portion of the claim. However, these Bankruptcy Code and policy justifications for different results justify different results for *all* forms of lien-stripping, whether strip-down or strip-off, in Chapter 7 versus Chapter 13. Specifically, they do not justify a distinction between strip-*off* and strip-*down* within the Chapter 13 context.

B. Policy-Based Arguments

1. Rights upon Foreclosure and Benefit of the Bargain

One argument put forth in support of allowing Chapter 13 strip-off involves the rights of wholly unsecured claims outside of the bankruptcy context. Given the reliance of the Supreme Court on state-law rights as the basis for a secured claim,[151] it makes sense to consider the rights of creditors at the state law level. A junior creditor with no value in the property would not have any rights at state law in the event of a foreclosure, and bankruptcy should not give the creditor *more* rights than it would enjoy

150. *Id.* at 335; *see also* Woolsey v. Citibank, N.A., (*In re* Woolsey), 696 F.3d 1266, 1275 (10th Cir. 2012) ("While voiding a lien may afford few benefits in a Chapter 7 proceeding, it may be more integral to achieving Chapter 13's goals. . . . [A] debtor hoping to keep his property would have to provide for full repayment of a lien . . . . Faced with the prospect of paying much more than the property is worth under a Chapter 13 plan, many more debtors would likely throw up their hands and simply opt for liquidation.").

151. Dewsnup v. Timm, 502 U.S. 410, 415, 417 (1992).

under state law.[152] While true that a wholly unsecured junior creditor would essentially hold an unsecured claim upon foreclosure and sale of the property, the analogy falters in a bankruptcy case where the debtor retains the property and continues to pay for it. In reality, the property at issue in Chapter 13—the debtor's primary residence—often remains with the debtor instead of being sold and the debtor makes payments on the property through the Chapter 13 repayment plan.[153] In a state-law foreclosure, the moment of sale finalizes the claims of the creditors of sale because at that moment no additional value can be obtained for the property. Rather, dividing the proceeds among the creditors in the proper order remains the final item to complete. But in a Chapter 13 bankruptcy case involving a strip-off, the debtor will continue to own the property and to pay off the senior lienholder. Under state law, as the debtor pays off the senior lienholder and the property potentially increases in value, the junior lienholder could potentially move from being wholly unsecured to partially unsecured to perhaps even fully secured by the value of the property. While the date of filing typically freezes the claims of creditors,[154] that does not need to apply to secured creditors who, even under state law, might become more secure based on events as they actually happen in the bankruptcy case.

A related policy concern expressed in denying strip-off in the Chapter 7 context involves protecting the bargain of the parties.[155] The same bargain holds true in the Chapter 13 context as in the Chapter 7 context. After all, the pre-bankruptcy contract that the parties entered did not change. Only the chapter that the debtor, usually voluntarily,[156] changes from the debtor's

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152. Myers, *supra* note 50, at 1346 ("Essentially, wholly unsecured mortgagees have no practical rights to the collateral property under nonbankruptcy law, so they should not get more than what they are entitled to simply because the debtor is in bankruptcy.").

153. *See, e.g.*, Fisette v. Keller (*In re* Fisette), 455 B.R. 177, 180 (B.A.P. 8th Cir. 2011) (noting that plan vested property in the debtor upon completion of payments due under plan); *In re* Cain, 513 B.R. 316, 318 (B.A.P. 6th Cir. 2014) (explaining that debtor's plan was to cure default on primary mortgage obligation, while stripping second mortgage off of house).

154. *See* 11 U.S.C. § 502(b); *In re* Gilpin, 479 B.R. 905, 908 (Bankr. M.D. Fla. 2011) (describing petition date as "watershed date" for determining rights of creditors).

155. *See, e.g.*, Myers, *supra* note 50, at 1348 ("[T]he mortgagor and mortgagee bargained for a consensual lien on the real property that would pass through bankruptcy." (citing Talbert v. City Mortg. Servs. (*In re* Talbert), 344 F.3d 555, 561 (6th Cir. 2003)).

156. *See* Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 IOWA L. REV. 1127, 1128 (2020) ("Involuntary petitions filed by creditors now account for less than 0.05 percent of all petitions."); 11 U.S.C. § 303 (limiting involuntary filings to Chapter 7 and 11).

original choice when filing a bankruptcy petition. To the extent that protection of the parties' bargain matters in the Chapter 7 context, no basis exists for differentiating that bargained-for understanding in the Chapter 13 context. This argument also meshes with the idea from *Dewsnup* that any future increase in value of the property that it gains should be to the benefit of the creditor rather than the debtor. Such a policy should apply to any creditor, whether value currently exists for the creditor in the property or not.[157] Further, no difference exists between the rights bargained for by undersecured creditors and those bargained for by wholly unsecured creditors in the Chapter 13 context, except for the order of payment in the event the collateral is used by the trustee. Whether wholly unsecured or simply undersecured, the creditor bargained for a right to seek repayment from foreclosure and sale of the real property securing its repayment.[158] Denying the wholly unsecured creditor any secured creditor status or protection in a Chapter 13 case undermines the idea supported by the Court in *Dewsnup* of allowing liens to pass through bankruptcy untouched[159] and undermines the *Caulkett* rationale that once a creditor holds an allowed secured claim (as defined by *Dewsnup*), such a claim cannot be modified.[160]

2. Intent to Protect Mortgage Lenders

As Justice Stevens noted in *Nobelman*, protecting mortgage lenders, whose willingness to loan allows people to purchase homes, serves as one basis for the anti-modification provisions.[161] Certainly, preventing lien-stripping of the first lien on a residence serves that purpose, as mortgage lenders who enable purchase of the home generally hold a first-priority lien in that home.[162] Since the first lender will never be wholly unsecured, strip-

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157. *See* Saponara, *supra* note 40, at 274.

158. This argument has been rejected by courts. *See In re* Hornes, 160 B.R. 709, 715 (Bankr. D. Conn. 1993) (noting that unsecured creditor has same rights and priority lienholder, but that bankruptcy only protects such rights *after* determining that secured creditor status exists).

159. *See* Dewsnup v. Timm, 502 U.S. 410, 417, 419 (1992). *But see* Newborn, *supra* note 5, at 572 (arguing that legislative history cited by *Dewsnup* court only indicates that lien "may," not "must," pass through bankruptcy) (citation omitted).

160. Bank of Am., N.A. v, Caulkett, 575 U.S. 790, 793–94 (2015) (noting that while the Code suggests that "if the value of a creditor's interest in the property is zero—as is the case here—his claim cannot be a 'secured claim,'" *Dewsnup* prevents such a reading of the Code).

161. *See* Nobelman v. Am. Sav. Bank, 508 U.S. 324, 332 (1993) (Stevens, J., concurring).

162. Determining what is an "enabling loan" provides its own challenges. One of the cases cited by the *Dewsnup* court as establishing the pre-Bankruptcy Code practice of

off could never be used against that lender. But in the strip-down context, even an enabling mortgage lender could suffer an impact since strip-down can impact any undersecured lienholder.[163] Thus, it makes sense to avoid strip-down in all circumstances in order to protect enabling lenders. Since the lien stripped off will always be a second (or lower) priority lender,[164] enabling mortgage lenders will be unaffected unless multiple mortgagors provided enabling loans.[165]

Closely related to the goal of protecting mortgage lenders is the goal of incentivizing debtors to choose Chapter 13 over Chapter 7 filings. Little doubt exists as to Congress' preference for Chapter 13.[166] In a sense, § 1322(b)(2)'s enactment fits within that congressional scheme. While it does not itself provide an incentive to the debtor to file under Chapter 13, it provides the balance so often sought by the Bankruptcy Code.[167] Debtors

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allowing liens to go through bankruptcy untouched demonstrates this difficulty. In *Long v. Bullard*, the lien sought to be modified supported a loan given after purchase of the house, but to save the house from foreclosure. 117 U.S. 617, 618 (1886). The Court in that decision did not focus, however, on whether the lien enabled the debtors to own the home, instead finding that

> [t]he setting apart of the homestead to the bankrupt . . . did not relieve the property from the operation of liens created by contract before the bankruptcy. It is not the decree in this case which constitutes the lien on the property, but the conveyance of Long and wife before the bankruptcy.

Id. at 621; *see also* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 573 (1935) (noting that debtors gave two mortgages on farm to support loans given in two different years by bank with no indication that even initial loan allowed purchase of the farm).

163. *See e.g.*, *Nobelman*, 508 U.S. at 326 (noting that loan to be stripped down was one that allowed purchase of the home).

164. *See* Saponara, *supra* note 40, at 258.

165. For example, borrowers sometimes borrow from multiple lenders in order to avoid the need to pay for mortgage insurance if the borrowers cannot make a substantial downpayment on the home. *See What Is a "Piggyback" Second Mortgage?*, CONSUMER FIN. PROTECTION BUREAU (Sept. 4, 2020), https://www.consumerfinance.gov/ask-cfpb/what-is-a-piggyback-second-mortgage-en-1955/.

166. *See, e.g.*, *In re* Barrera, 620 B.R. 645, 653 (Bankr. D. Colo. 2020) (discussing congressional intent in enacting § 348 as part of the 1994 amendments "to incentivize Chapter 13 filings by ensuring that debtors will be no worse off than they would have been had they filed for Chapter 7"), *aff'd*, 22 F.4th 1217 (10th Cir. 2022); Dewsnup v. Timm (*In re* Dewsnup), 908 F.2d 588, 592 (10th Cir. 1990) ("Congress has manifested a strong preference for reorganization rather than liquidation in the bankruptcy setting."), *aff'd*, 502 U.S. 410 (1992).

167. *See* Dist. 2, United Mine Workers of Am. v. Hinks, 67 B.R 883, 887 (Bankr. W.D. Pa. 1986) ("It is axiomatic at this point to state that the policy behind the restricting of this nation's bankruptcy laws was to create a balance between protecting the rights of creditors

frequently choose Chapter 13 over Chapter 7 in order to protect assets, such as a house[168] from being taken by the trustee for the benefit of creditors.[169] But the secured creditors with an interest in the house, who would receive the first payment from the proceeds of the house in a Chapter 7 bankruptcy,[170] must instead remain lienholders on a house that will not be sold and will revert to the debtor after the bankruptcy case. To ensure that those creditors would not suffer loss because of the debtor's choice to file Chapter 13, those creditors receive the protection of § 1322(b)(2)'s anti-modification provision.

The current version of § 1322(b)(2) represents a compromise between the House and Senate. The House version of that section permitted modification of the rights of any secured creditors, while the Senate version prohibited modification of any interest secured by real property, even if not residential property.[171] The initial proposal by the Commission on the Bankruptcy Laws of the United States likewise focused on the ability to modify "claims secured by personal property," while leaving liens on real property free from such modification.[172] In the end, the compromise prohibited modification of claims secured by a lien on residential property only,[173] primarily to encourage lending to homeowners.[174]

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and offering the overwhelmed debtor a 'fresh start' in life, free of many of his economic burdens.").

168. *See Chapter 13 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Jan. 29, 2023).

169. In a Chapter 7 case, the trustee's role is "to liquidate the debtor's nonexempt assets in a manner that maximizes the return to the debtor's unsecured creditors." *See Chapter 7 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Jan. 29, 2023).

170. 11 U.S.C. § 724(b)(1).

171. Nobleman v. Am. Sav. Bank (*In re* Nobleman), 968 F.2d 483, 489 (5th Cir. 1992), *aff'd*, Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993) (citation omitted). (The Fifth Circuit misspelled the appellants' names as "Nobleman" instead of "Nobelman.") The Senate version prohibited modification of "claims wholly secured by mortgages on real property." Lomas Mortg. v. Louis, 82 F.3d 1, 5 (1st Cir. 1996) (quoting S. 2266, 95th Cong. § 1322(b)(2) (1978)).

172. *Lomas Mortg.*, 82 F.3d at 4 (quoting REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. II, at 204 (1973)).

173. 11 U.S.C. § 1322(b)(2).

174. *See Lomas Mortg.*, 82 F.3d at 5 (discussing testimony at Senate Judiciary Committee subcommittee meetings regarding concerns that mortgage lending would become "conservative" if changes to residential mortgages could be made in Chapter 13 bankruptcy cases). At least one court has noted that encouraging such lending through the anti-modification provision can have unintended consequences in that lenders who otherwise

While this history suggests that § 1322(b)(2) protects enabling loans on residences for the purpose of encouraging such lending on favorable terms, Congress did not elect to protect only that class of lenders. Congress could have written the anti-modification provision to only prevent changes of such enabling loans if it had wanted to do so. Instead, as written, the provision protects *any* lender with a lien in the primary residence.[175] Further, *Nobelman* prohibits strip-down for *any* undersecured creditor with even $1 of value in the home, regardless of whether the lender provided funds to enable the initial purchase of the residence.[176] If the protection of enabling loans serves as the justification for allowing strip-off, no need exists to prevent strip-down of non-enabling liens on a home. Further, allowing a strip-off in Chapter 13 while preventing strip-off in Chapter 7 creates a situation in which the junior creditors receive *less* protection in Chapter 13 cases than in Chapter 7 cases.[177]

The history favoring of Chapter 13 filings over Chapter 7 likewise fails to support a different result in the Chapter 13 strip-off case as opposed to the *Nobelman* Chapter 13 strip-down case, since either a strip-off or a strip-down would encourage debtors to utilize the Chapter 13 over Chapter 7. Thus, neither the intent to protect mortgage lenders nor the intent to incentivize Chapter 13 filings justifies a different result in Chapter 13 strip-off cases than in the cases already decided by the Supreme Court.

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might lend on an unsecured basis will seek to have a lien on a residence simply to prevent modification of their rights. Lam v. Invs. Thrift (*In re* Lam), 211 B.R. 36, 41 (B.A.P. 9th Cir. 1997). While the *Lam* court used that rationale to permit strip-off in the Chapter 13 context, because a lender would not know whether the debtor might file under Chapter 7 or Chapter 13 and whether it might have any value in the property at the time of a future bankruptcy filing (thus having no knowledge of whether the debtor would strip-down or strip-off), allowing strip-off in Chapter 13 will not actually disincentivize the creditor from seeking an unnecessary lien on real property for the purpose of preventing modification of that interest, since it is still possible to enjoy that particular protection in other types of cases.

175. Further, the cases on which *Dewsnup* relied in determining that pre-Code practice prevented strip-down did not rely on protection of only enabling loans. *See supra* note 162.

176. *See* Nobelman v. Am. Sav. Bank, 508 U.S. 324, 331 (1993).

177. Schreiber & Cisar, *supra* note 51, at 29 (“It is difficult to understand how the mortgagee protection of § 1322(b)(2) is now actually less protective than a Chapter 7 case given the majority view of allowing strip-offs in Chapter 13.”).

C. Chapter 20 Cases

A Chapter 20 occurs when a debtor first receives a discharge in a Chapter 7 case, and then files for Chapter 13.[178] In such cases, the debtor—prohibited from strip-off in the Chapter 7 case due to *Caulkett*—may seek to use the later Chapter 13 case to strip off the wholly unsecured junior lien on the real property. That was the scenario in *Fisette v. Zeller (In re Fisette)*.[179] In *Fisette*, the debtor owed the senior mortgage holder $176,312, secured by property valued at $145,000.[180] As a result, the junior lienholders were wholly unsecured.[181] Debtor received a discharge of *in personam* liabilities via a Chapter 7 bankruptcy filing and, within a year, filed a Chapter 13 bankruptcy case seeking to strip off the liens of those junior lienholders.[182] The court noted that § 506(a) first bifurcates claims into the secured and unsecured portions, then allows § 1322(b) to step in and permit modification because the creditor did not hold a secured claim in the debtor's residence.[183] While noting that *Nobelman* denied strip-down for an undersecured creditor, the court declined to extend the *Nobelman* holding to protect strip-off of wholly unsecured creditors.[184] In so doing, it rejected the argument that because a creditor enjoys state-law rights in the property, it falls within that protections of § 1322(b) because "the *Nobelman* Court did not examine the rights protected by § 1322(b)(2) until *after* it established that the creditor held a secured claim."[185]

The *Fisette* court essentially followed the guidance of the majority of circuits on the Chapter 13 strip-off issue. But Chapter 20 cases add a wrinkle to the analysis, thanks to a provision enacted in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act

178. *In re* Davis, 716 F.3d 331, 332 n. 1 (4th Cir. 2013); *see also* Robin M. Long, *Help for Homeowners: Chapter 13 Lien Avoidance*, ADVOCATE (Idaho State Bar), Jan. 2012, at 20, 21.

179. 455 B.R. 177 (B.A.P. 8th Cir. 2011).

180. *Id.* at 179–80.

181. *Id.* at 180.

182. *Id.* at 179.

183. *Id.* at 181 (first quoting 11. U.S.C. § 506(a); and then quoting 11. U.S.C. § 1322).

184. *See id.* at 182.

185. *Id.* at 183 (first citing Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1226 (9th Cir. 2002); and then citing Tanner v. FirstPlus Fin., Inc. (*In re* Tanner), 217 F.3d 1357, 1360 (11th Cir. 2000)). The court went on to note that any rights that the junior lienholder held under state law "would presumably be only empty rights in the sense that they would not provide the lienholders with a remedy." *Id.* at 183 (citing Lam v. Invs. Thrift (*In re* Lam), 211 B.R. 36, 40 (B.A.P. 9th Cir. 1997)).

("BAPCPA")[186] that denies repeat filers discharge of debts in a subsequent Chapter 13.[187] Other cases decided at roughly the same time as *Fisette* held the same way, and noted that changes to Chapter 13 under BAPCPA did not impact the ability to strip-off in Chapter 13.[188]

Again in *Brannigan v. Davis (In re Davis)*,[189] the debtors likewise received a discharge in Chapter 7 and within four years of receiving the discharge filed a Chapter 13 case.[190] The debtors sought to strip-off wholly unsecured liens in the Chapter 13 plan that could not be stripped-off in the Chapter 7 case.[191] The Fourth Circuit first considered whether a Chapter 13 plan could strip-off wholly unsecured claims against real property generally before considering whether Chapter 20 cases modified that rule.[192] As to Chapter 13 cases generally, the court followed its own unpublished precedent and cases in other circuits that permitted strip-off in Chapter 13 cases.[193] In agreeing with the majority rule, the court employed a familiar two-part analysis. First, it noted that § 506(a) allows for bifurcation of

186. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

187. Eligibility for discharge in Chapter 13 cases is governed by § 1328. In a Chapter 20 case, which involves a Chapter 7 followed by a Chapter 13, the debtor is ineligible for a discharge in the later Chapter 13 case unless the Chapter 13 case was filed at least four years after the Chapter 7 discharge. 11 U.S.C. § 1328(f)(1); *Fisette*, 455 B.R. at 184. However, the *Fisette* Court noted disagreement as to whether a strip-off can occur for a debtor ineligible to discharge debts. *Id.* at 185.

188. Wells Fargo Bank, N.A. v. Scantling (*In re* Scantling), 754 F.3d 1323, 1326 (11th Cir. 2014); Brannigan v. Davis (*In re* Davis), 716 F.3d 331, 338 (4th Cir. 2013) ("[T]he analysis permitting lien-stripping in Chapter 20 cases is no different than that in any other Chapter 13 case.").

189. 716 F.3d 331.

190. *Id.* at 334.

191. *Id.* at 333–34. The debtors' bankruptcy discharge was granted in 2008, nearly a decade before the Supreme Court's decision in *Caulkett* prevented strip-off in Chapter 7 cases. Nevertheless, the debtors were advised that "lien-stripping was prohibited under Chapter 7" but proceeded under that chapter due to an inability to convert to Chapter 13. *Id.* at 333.

192. *Id.* at 334–35.

193. *Id.* at 335 (first citing Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220 (9th Cir. 2002); then citing Lane v. W. Interstate Bancorp (*In re* Lane), 280 F.3d 663 (6th Cir. 2002); then citing Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122 (2d Cir. 2001); then citing Tanner v. FirstPlus Fin. (*In re* Tanner), 271 F.3d 1357 (11th Cir. 2000); then citing Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277 (5th Cir. 2000; then citing McDonald v. Master Fin. (*In re* McDonald), 205 F.3d 606 (3d Cir. 2000); then citing First Mariner Bank v. Johnson (*In re* Johnson), 407 F. App'x 713 (4th Cir. 2011); and then citing Suntrust Bank v. Millard (*In re* Millard), 404 F. App'x 804 (4th Cir. 2010)).

claims into secured and unsecured portions.[194] For a wholly unsecured creditor, the entire claim lacks value from the collateral, even though under § 506(a) the creditor retains a security interest in real property.[195] The court then turned to § 1322(b)(2), which protects only holders of "secured claims"—a status that the wholly unsecured creditor lacks under § 506(a):

> Applying this framework, a completely valueless lien is classified as an unsecured claim under section 506(a). Only then does a bankruptcy court consider the rights of lien holders under section 1322, which affords protection to holders of secured claims against principal residences. Section 1322, however, expressly permits modification of the rights of unsecured creditors. The end result is that section 506(a), which classifies valueless liens as unsecured claims, operates with section 1322(b)(2) to permit a bankruptcy court, in a Chapter 13 case, to strip off a lien against a primary residence with no value.[196]

The court then considered whether the inability to obtain a discharge in a Chapter 20 case altered the conclusion that strip-off could occur in the Chapter 13 portion of the case.[197] The issue involved consideration of BAPCPA's limitations on discharge for repeat bankruptcy filers. In particular, § 1328(f)(1) prohibits a debtor from obtaining a discharge in a Chapter 13 case for four years after receipt of a discharge in Chapter 7.[198] Noting that courts differ in their analysis of that issue, the court declined to find any difference in ability to strip-off a wholly unsecured lien in a Chapter 20 case versus a Chapter 13.[199] Section 1325(a)(5)(B)(i) requires that secured creditors retain their lien until payment in full or discharge and reincorporates stripped liens upon termination of a Chapter 13.[200] The Trustee also argued that § 1325(a)(5)(B)(i) requires that creditors retain their lien and that any lien that would be stripped must then be reinstated at the conclusion of a Chapter 20.[201] The court rejected the Trustee's arguments by noting that § 1325's provisions only apply to secured claims

194. *See id.*
195. *Id.*
196. *Id.*
197. *See id.* at 336.
198. *Id.* (citing 11 U.S.C. § 1328(f)(1)).
199. *Id.* at 338.
200. *See id.* at 336.
201. *Id.*

when those liens have value.[202] In this case the liens at issue held no value, and thus the creditor's claim was wholly unsecured such that 1325(a)(5) did not apply to the court's analysis.[203]

In addition, the Trustee argued that allowing strip-off in Chapter 20 cases would allow debtors "an end run around" the prohibition of strip off in Chapter 7 cases and would be inconsistent with BAPCPA's goal of protecting creditors.[204] As to the BAPCPA argument, the court analyzed that the Supreme Court's cases prohibiting strip-down predated the BAPCPA amendments, yet the language of § 1325 prohibiting lien modification only for "secured claims" remained untouched.[205] Further, the court noted that BAPCPA's creditor protections could be effectuated by other means—namely, by considering whether the debtors engaged in bad faith by filing a Chapter 13 case solely for the purpose of stripping off wholly unsecured liens ineligible in the preceding Chapter 7 case.[206]

The dissent, like the majority, considered the Supreme Court's precedent in *Dewsnup* and *Nobelman* but rejected the idea that the *Dewsnup* interpretation of an "allowed secured claim" necessarily constrained the ability to use § 1322(b)(2)'s protections for wholly unsecured creditors who lack such a claim.[207] In particular, the dissent noted that "[s]ection 506(a) provides a method for the judicial valuation of an allowed secured claim, without altering the secured status of a creditor."[208] Because the wholly unsecured creditors have allowed claims secured by the residences at issue under state law, they hold "allowed secured claims" entitled to the protections of § 1325(a)(5)(B)(i).[209] While the provisions of this section do not apply to prevent the strip-off generally, because discharge cannot be granted at the end of Chapter 20 cases, the creditor's lien would need to be retained (or at a minimum reinstated at the end of the case) if the debtor failed to pay a creditor in full.[210] The Eleventh Circuit likewise addressed

202. *Id.* at 338.

203. *Id.*

204. *See id.* at 337–38.

205. *Id.* at 337.

206. *Id.* at 338. Earlier in the litigation, the bankruptcy court analyzed the good faith of the debtors and found that debtor's filed the Chapter 13 case in good faith. *Id.* at 334.

207. *See id.* at 341 (Keenan, J., dissenting).

208. *Id.* at 340.

209. *Id.* at 340–41 (citing 11 U.S.C. § 1325(a)(5)(B)(i)).

210. *Id.* at 340. The dissent also considered the legislative history of BAPCPA, indicating that Congress desired to protect creditors in Chapter 13 cases by ensuring that "a Chapter 13 plan provide that a secured creditor retain its statutory lien until the earlier of when the

the Chapter 20 issue in *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, reaching the same conclusion that BAPCPA did not impact the allowance of strip-off in the subsequent Chapter 13 case.[211] Other courts have considered § 1325's language mandating that a creditor retain a lien until payment in full and have determined that the lien—which survived the Chapter 7 bankruptcy discharge—could not be stripped in the subsequent Chapter 13 case.[212]

The Ninth Circuit likewise addressed the Chapter 20 issue in *HSB Bank USA v. Blendheim (In re Blendheim)*, albeit in a different context.[213] The court first noted that the issue of lien avoidance in Chapter 20's "divide[s] bankruptcy courts, bankruptcy appellate panels, district courts, and courts of appeals throughout the country."[214] The court then determined that a debtor could avoid a lien through the Chapter 20 process despite the inability to obtain a discharge in the subsequent Chapter 13 case.[215] *Blendheim* was, however, a factually unique case. The creditor, HSBC, filed a claim in the Chapter 13 case, but neglected to include the promissory note signed by the debtors, prompting the debtors to object to the claim.[216] Because HSBC never responded to the objection, the court disallowed its claim.[217] The debtors then argued that § 506(d) allowed stripping off of the first-priority lien on the residence as a "disallowed" secured claim.[218] The bankruptcy court agreed, affirmed by both the district and circuit courts.[219] In the Ninth Circuit's analysis, it relied in part on *Dewsnup*'s interpretation of § 506(d), which allowed for lien-stripping of disallowed claims.[220] It also

underlying debt is paid or the debtor receives a discharge." *Id.* at 341 (citing H.R. REP. NO. 109-31, pt. 1, at 71–72 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 103).

211. 754 F.3d 1323, 1325 (11th Cir. 2014).

212. *See* Jessica L. Johns, Comment, *Lien Stripping in Chapter 20 Bankruptcy: A Permissible Relief to Debtors*, 32 EMORY BANKR. DEVS. J. 471, 488 (2016) (citing *In re* Gerardin, 447 B.R. 342, 346 (Bankr. S.D. Fla. 2011)).

213. 803 F.3d 477, 488 (9th Cir. 2015) ("As the bankruptcy court below aptly summarized, this case presents 'unique issues stemming from the almost bizarre lack of diligence by [HSBC] early on in the case.'").

214. *Id.* at 481.

215. *See id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 482–83, 484, 489.

220. *Id.* at 489–90. Several other circuits dealing with similar cases pointed to § 506(d)'s provision that prohibited disallowance when the only basis was the failure of the secured creditor to file a proof of claim. Id. at 490 (citation omitted). Here, because HSBC filed a

considered the impact of other lien-avoidance cases such as the *Frazier v. Real Time Resolutions, Inc.* case, noting the split even within the Ninth Circuit on that issue.[221] At the time, five circuit courts had addressed the issue, either at the BAP or Circuit level, and all permitted lien-stripping in Chapter 20 cases.[222] The court followed suit, finding a clear distinction between discharge (which would not occur in a Chapter 20) and lien-stripping.[223]

The Chapter 20 cases demonstrate one of the difficulties inherent in the strip-off context. They rely on the same analysis as the Chapter 13 cases that permit strip-off but raise an additional concern—allowing a debtor to enjoy the benefits of both Chapter 7 and Chapter 13, rather than choosing between the chapters. The debtor obtains the greater—and faster—discharge of debt owed to the wholly unsecured creditor available through Chapter 7 while also enjoying the strip-off available in most circuits in Chapter 13, all at the expense of the wholly unsecured creditor and the benefit bargained for under state law.

VI. Conclusion

Commentators have widely criticized the *Dewsnup* reasoning.[224] As noted in the dissent and by several courts, that decision suggests that the interpretations of an allowed secured claim in § 506(a)'s bifurcation

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proof of claim and allowance was denied due to failure to respond to an objection to the claim, the court found those decisions inapt. *Id.* at 490–91.

221. *Id.* at 491–92 (citation omitted).

222. *Id.* at 492 (first citing Wells Fargo Bank, N.A., v. Scantling (*In re* Scantling), 754 F.3d 1323, 1329–30 (11th Cir. 2014); then citing Branigan v. Davis (*In re* Davis), 716 F.3d 331, 338 (4th Cir. 2013); then citing Boukatch v. MidFirst Bank (*In re* Boukatch), 533 B.R. 292, 300–01 (B.A.P. 9th Cir. 2015); then citing *In re* Cain, 513 B.R. 316, 322 (B.A.P. 6th Cir. 2014); and then citing Fisette v. Keller (*In re* Fisette), 455 B.R. 177, 185 (B.A.P. 8th Cir. 2011)).

223. *Id.* at 495–96 ("We take Congress at its word when it said in § 1328(f) that Chapter 20 debtors are ineligible for a *discharge*, and only a discharge. Had Congress wished to prevent Chapter 7 debtors from having a second bite at the bankruptcy apple, then it could have prohibited Chapter 7 debtors from filing for Chapter 13 bankruptcy entirely." (emphasis omitted)).

224. *See, e.g.*, Benjamin A. Ellison, *Is It Possible That* Dewsnup v. Timm *Might Finally Be Overturned?*, AM. BANKR. INST. J., June 2013, at 60, 60 ("[W]hen the majority *Dewsnup* opinion was issued, it was savaged by dissenting members of the Court, criticized by substantial academic literature and met with confusion by bankruptcy courts. A bankruptcy court has noted the *Dewsnup* opinion has been 'roundly criticized, and not always followed.'" (citations omitted)).

provision and § 506(d)'s lien avoidance provision differ.[225] Section 506(a) refers to an "allowed claim . . . secured by a lien on property" and provides that an allowed claim is secured only "to the extent of the value" available for that claim, permitting bifurcation of an undersecured claim into secured and unsecured portions. Section 506(d), by contrast, allows voiding of a lien "to the extent that a lien secures a claim . . . that is not an allowed secured claim."[226] Under the *Dewsnup* reasoning, § 506(d) prohibits bifurcation for the purpose of strip-down.[227] In theory, § 506(a) creates an allowed secured claim that § 506(d) then refers to for consideration. By all accounts, it appears that the sections focus on the same type of allowed secured claims and should apply the rules of each section to that specific subset of claims. Even the majority opinion in *Dewsnup* recognizes the odd dichotomy created by its decision.[228]

The *Dewsnup* Court determined that the Code prevents lien-stripping for allowed secured claims.[229] Both of these qualifiers are absolutes under *Dewsnup*'s interpretation of § 502(a), despite the use of the phrase "to the extent" located in each of § 506(a) and (d).[230] Either a creditor is secured, or it isn't. A claim is either allowed, or it isn't. Since the *Dewsnup* Court defined an allowed claim that also holds a state-law lien attached to it as an allowed secured claim, § 506(d)'s remaining role is to avoid liens only when the claim is either not secured at all or not allowed at all.[231] Because

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225. *See supra* notes 54–58 and accompanying text.

226. The "claim . . . secured by a lien on property" and "lien secures a claim" language mirror each other except that § 506(a) phrases itself in the past tense and § 506(d) looks forward. 11 U.S.C. §§ 506(a), (d).

227. *See supra* Part III.

228. *See* Dewsnup v. Timm, 502 U.S. 410, 417 (1992). While not noted in this opinion, the Court had previously indicated three years earlier in dicta that "[s]ubsection (a) of § 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured." United States v. Ron Pair Enters., 489 U.S. 235, 239 (1989).

229. *Dewsnup*, 502 U.S. at 417.

230. 11 U.S.C. § 506(a), (d).

231. The same phrase also *appears* in § 1325(a), which governs the rights of secured claimants in a Chapter 13 bankruptcy plan. Section 1325(a)(5) applies to "allowed secured claims" and provides that the "holder of *such* claim" retain the lien. 11 U.S.C. § 1325(a). (emphasis added). Under *Dewsnup*, once allowed and determined to have a lien, the holder of that lien should have the right to retain the lien until discharge or payment in full. Since *Dewsnup* determined that an undersecured creditor has an allowed claim, and *Caulkett* determined the same for a wholly-unsecured creditor, even a wholly-unsecured creditor qualifies as the holder of an allowed secured claim which retains its lien until payment in full or discharge. When applied in the Chapter 20 context, since a Chapter 20 debtor cannot

Caulkett then extended *Dewsnup* to wholly unsecured claims,[232] lien avoidance would only apply to allowed claims when there is no valid lien supporting that claim (either because the claim never qualified as secured under state law, or the trustee avoided the lien under Chapter 5's avoiding powers). If a creditor lacks an allowed claim, there is nothing for a lien to support. And if the creditor lacks a lien, nothing exists to attach to the claim.

Even if one agrees with the *Dewsnup* distinction between § 506(a) and § (d), and accepts that § 506(a) allows for bifurcation into secured and unsecured portions of a claim, while § 506(d) only applies to strip liens from creditors who have no lien or no allowed claim, the Court's later decision in *Caulkett* suggests that Chapter 13 cases should not differ. Section 1325(a)(5) requires that the holder of an "allowed secured claim" retain its lien until paid in full or until debtor receives its discharge. Since the *Dewsnup* and *Caulkett* Courts faced that same term in § 506(d) and determined that it includes any claim allowed under § 502 which holds a lien under state law,[233] a creditor with a lien—whether fully secured, undersecured, or wholly unsecured—qualifies and should retain its lien.[234]

While courts allowing strip off in the Chapter 13 context justify that result by the policies inherent in Chapter 13, that result also creates an odd-man-out situation. One type of lien-stripping is permitted in contrast to the Supreme Court's regular denial of lien-stripping in every other context. Fixing that problem could come from the Supreme Court by rendering a consistent decision in the Chapter 13 context that denies the ability to strip-off a wholly unsecured lien in Chapter 13. But it could also come from the Supreme Court's reconsideration of its earlier decisions to allow for lien-stripping in other contexts (such as allowing for strip-off in Chapter 7 on the basis that no lien exists after bifurcation). But the more potent remedy could come from Congress clarifying the interaction between § 506(a)'s bifurcation provision and § 506(d)'s lien avoidance provision, and their combined impact on § 1322(a)(2)'s anti-modification provision. While such clarification has been sought since the initial decisions in *Dewsnup* and

receive a discharge if close in time to receipt of a discharge in a prior Chapter 7, that allowed secured claim must instead be paid in full.

232. *See supra* Part III.

233. *See supra* Part V.

234. Section 1322(b)(2)'s language differs slightly, protecting holders of "secured claims" rather than "allowed secured claims" referred to in § 506(d)'s lien avoidance provision. 11 U.S.C. § 1322(b)(2).

Nobelman,[235] it has become even more important in the face of the Supreme Court's extension in *Caulkett* and the apparent contradiction between those decisions and the majority of circuit court cases on the one remaining issue of strip-off in the Chapter 13 context.

235. *See supra* note 224 and accompanying text.