BANKRUPTCY—CHAPTER 13 'STRIP DOWN'—SECTION 1322(B)(2) PROHIBITS A DEBTOR FROM BIFURCATING A HOMESTEAD MORTGAGEE'S CLAIM INTO SECURED AND UNSECURED PORTIONS SO AS TO REDUCE THE AMOUNT OF AN UNDERSECURED MORTGAGE TO THE FAIR MARKET VALUE OF THE COLLATERAL—*Nobelman v. American Savings Bank*, 113 S. Ct. 2106 (1993).

Chapter 13 of the United States Bankruptcy Code[1]—Adjustment of Debts of an Individual With Regular Income—enables qualified individuals to pay their debts over an extended period of time while under the supervision and protection of a bankruptcy court.[2] Designed specifically to afford a measure of protection to

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[1] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as 11 U.S.C. §§ 101-1330 (1988 & Supp. IV 1993)) *as amended by* Bankruptcy Amendments And Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); Bankruptcy Judges, United States Trustees, And Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (1988); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (1990).

[2] H.R. REP. NO. 595, 95th Cong., 2d Sess. 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079; S. REP. No. 989, 95th Cong., 2d Sess. 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5799; *see* 11 U.S.C. §§ 1301-1330 (1988 & Supp. IV 1993). *See generally* 5 COLLIER ON BANKRUPTCY ¶ 1300.02 (Lawrence P. King ed., 15th ed. 1993) [hereinafter COLLIER] (describing Chapter 13's purpose and providing a textual discussion of the Code sections applicable to Chapter 13 cases).

Chapter 13's protection is available only to individuals with regular income who submit a portion of their future earnings to a court-appointed trustee. 11 U.S.C. § 1322(a)(1) (1988). Pursuant to a court-approved plan, distribution to creditors is then spaced over a time period of three to five years. *See In re* Roach, 824 F.2d 1370, 1372 (3d Cir. 1987) (citations omitted) (explaining that the court-appointed trustee supervises the distribution of funds derived from post-petition earnings in payment of the debtor's pre-petition obligations, as adjusted by and provided for in the plan of reorganization).

Drafted with consumer debtors in mind, Chapter 13 is designed to correct some of the shortfalls of former Chapter XIII of the Bankruptcy Act of 1948. COLLIER, *supra*, ¶ 1300.01, at 1300-14. Numbered among former Chapter XIII's deficiencies were: (1) the Chapter applied only to individual wage earners with regular income and not to self-employed individuals; (2) there was no set duration for the plan of reorganization which resulted in most plans requiring full payment of the entire debt over a long period of time; and (3) there was no provision for dealing with secured creditors, including debtors with a claim on the debtor's residence. *Id.* ¶ 1300.01, at 1300-12, 1300-13.

The 1978 Bankruptcy Reform Act's Chapter 13 eliminated these deficiencies, and more significantly, now permits modification of secured claims. H.R. REP. NO. 595, *supra*, at 124, *reprinted in* 1978 U.S.C.C.A.N. at 6058. Specifically, Chapter 13 allows a debtor to reduce the amount of a secured claim to the market value of the collateral and to treat the remainder of the debt as unsecured. *See* 11 U.S.C. §§ 506(a), 1322(b)(2) (1988). In effect, Chapter 13 recognizes the difference between true value and the collateral's value to the debtor. Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 239 n.3 (5th Cir. 1984) (en banc). Although certain items

wage earners, Chapter 13 is a favored sanctuary for debtors seeking to keep their homes when confronted with distressing and often unexpected financial hardship.[3] Faced with foreclosure, qualified debtors[4] regularly turn to Chapter 13 to delay creditors and to re-

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may not have a high resale value, such items may nevertheless be valuable to the consumer because of sentimental or other practical considerations, i.e., high replacement costs. *Id.* By allowing the reduction of a secured claim to the actual market value of the collateral securing the underlying lien, Chapter 13 eliminates some of the secured party's leverage. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess. (1973), *reprinted in* 2 App. COLLIER ON BANKRUPTCY 1, 169 (Lawrence P. King ed., 15th ed. 1993) [hereinafter COMMISSION REPORT].

[3] *See* Regina L. Nassen, Note, *Bankruptcy Code § 1322(B)(2)'s No-Modification Clause: Who Does It Protect?*, 33 ARIZ. L. REV. 979, 979 (1991) (proclaiming that it is "a matter of common knowledge" that most Chapter 13 cases are filed to preserve the family home); Ken Kahan, Comment, *Home Foreclosures Under Chapter 13 Of The Bankruptcy Reform Act*, 30 UCLA L. REV. 637, 637 n.2 (1982) (citing California statistics indicating that up to 62% of individuals facing foreclosure file for bankruptcy); *see also In re* Sauber, 115 B.R. 197, 199 (Bankr. D. Minn. 1990) ("The vast majority of Chapter 13 cases are filed by homeowners, and most plans [of reorganization] treat mortgage defaults."); *In re* Bruce, 40 B.R. 884, 888 (Bankr. W.D. Va. 1984) ("[I]n most cases, the preservation of the residence from foreclosure is the primary reason for the filing of a Chapter 13 case."); *In re* Thacker, 6 B.R. 861, 865 (Bankr. W.D. Va. 1980) ("[T]he bottom line of most Chapter 13 cases is to preserve and avoid foreclosure of the family house."). This phenomenon is not unexpected; the downturn in the general economy, coupled with a decreasing value of real estate during the 1980's and early 90's, have led to a record number of individuals filing for bankruptcy protection. *See* TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS, BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 3-5 (1989).

Homeowners prefer Chapter 13 over both Chapter 11, "Reorganization," and Chapter 7, "Liquidation," because of the intended favorable treatment afforded by Congress and incorporated into Chapter 13's various provisions. *See* Collier, *supra* note 2, ¶ 1300.02, at 1300-18-19 (indicating that Chapter 13 maximizes the relief available to debtors); H.R. REP. NO. 595, *supra* note 2, at 117, *reprinted in* 1978 U.S.C.C.A.N. at 6077 (noting that consumers do not prefer straight liquidation). Chief among Chapter 13's more favorable provisions are: § 1306(b), which allows a debtor to remain in possession of both exempt and non-exempt property (*compare* Chapter 7, which mandates the turning over of non-exempt property to the trustee); § 1322(b)(5), which permits a debtor to cure home mortgage defaults even after acceleration; and § 1301, which provides for a codebtor automatic stay. 11 U.S.C. §§ 1301, 1306(b), 1322(b)(5) (1988); *see also* David S. Kennedy, *Chapter 13 Under the Bankruptcy Code*, 19 MEM. ST. U. L. REV. 137, 138-42 (1989) (providing a full exposition of the advantages of Chapter 13 over Chapter 7 and Chapter 11).

[4] Code § 109(e) sets forth the qualifications a debtor must possess to file a Chapter 13 petition. 11 U.S.C. § 109(e) (1988). Section 109(e) provides:

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except for a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liq-

organize their financial affairs.[5] Chapter 13 provides these necessary protections by allowing homeowners to cure mortgage defaults,[6] to prevent execution on foreclosure judgments,[7] and even to cure defaults after foreclosure sales have already been conducted.[8]

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uidated, secured debts of less than $350,000 may be a debtor under Chapter 13 of this title.

Id.

[5] *See Sauber*, 115 B.R. at 199 (emphasizing that homeowners file most Chapter 13 cases). The mere filing of a Chapter 13 petition stays all proceedings against a debtor, including "any act to obtain possession of property of the estate" and "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(3)-(4) (1988). Thus, a debtor can prevent the continuation of a foreclosure proceeding by filing a petition and invoking the jurisdiction of the bankruptcy court. *See id.* The stay remains in effect until the case is closed, dismissed, or at the "time a discharge is granted or denied." 11 U.S.C. § 362(c)(2) (1988). The stay enjoins not only the enforcement of a mortgagee's rights and remedies, but is also broad enough to prevent the issuance of a notice of default and acceleration. COLLIER REAL ESTATE TRANSACTIONS AND THE BANKRUPTCY CODE ¶ 2.01[1], at 2-3 (Lawrence P. King ed., 1992) [hereinafter REAL ESTATE TRANSACTIONS].

[6] *See* 11 U.S.C. § 1322(b)(5) (1988) ("provid[ing] for the curing of any default within a reasonable time and maintenance of payments while the case is pending"). A default is an event, often defined in the security documents, that triggers certain consequences such as the right to accelerate the entire indebtedness or the commencement of foreclosure proceedings. *In re* Taddeo, 685 F.2d 24, 26 (2d Cir. 1982). Common events of default in a home mortgage include non-payment of principal or interest charges, non-payment of property taxes or insurance premiums, non-compliance with laws or governmental regulations, and even the filing of bankruptcy. REAL ESTATE TRANSACTIONS, *supra* note 5, ¶¶ 2.01[1]-[2], at 2-5, 2-6, 2-7. A mortgagor may eliminate the consequences of default by "taking care of the triggering event and returning to pre-default conditions." *Taddeo*, 685 F.2d at 26-27; *see, e.g., In re* Glenn, 760 F.2d 1428, 1442 (6th Cir. 1985) (holding that a Chapter 13 debtor possesses a right to cure a default up until the property has been sold at foreclosure), *cert. denied*, Miller v. First Fed. of Mich., 474 U.S. 849 (1985); *In re* Clark, 738 F.2d 869, 874 (7th Cir. 1984) (allowing a debtor to cure a mortgage default even after the mortgagee had obtained a judgment in foreclosure); *Grubbs*, 730 F.2d at 247 (proclaiming that curing a mortgage default is authorized by § 1322(b)(3) and is not a prohibited modification of a secured creditor's rights); *see also* Brian G. Smooke, *Chapter 13: Treatment Of Home Mortgages*, 3 BANKR. DEV. L.J. 433 (1986) (providing an overview of decisions interpreting and applying § 1322(b)(5)'s cure provision).

[7] *See, e.g.*, United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 369 (1988) (stating that the Bankruptcy Code prevents a creditor from taking any action to foreclose on collateral); *In re* Acevedo, 26 B.R. 994, 997 & n.5 (Bankr. E.D.N.Y. 1982) (accepting the Second Circuit's rationale in *In re Taddeo* and urging that a default could be cured even after a final judgment has been obtained); United Companies Fin. Corp. v. Brantley, 6 B.R. 178, 189 (Bankr. N.D. Fla. 1980) (prohibiting the execution on a foreclosure judgment and allowing a debtor to cure arrearages).

[8] Ruth M. Gulas, Note, In Re Glenn: *The Court Establishes A Point In The Chapter 13 Bankruptcy Process When The Homeowner's Right To Cure His Defaulted Mortgage Is Terminated*, 17 U. TOL. L. REV. 653, 674-75 (1986). For cases allowing a mortgagor to cure defaults after a foreclosure sale has been conducted, see *In re* Smith, 43 B.R. 313, 318-19 (Bankr. N.D. Ill. 1984) (asserting that a debtor has a right to cure a default after

Moreover, until recently, a majority of the circuit courts that have considered the issue, the Second, Third, Ninth, and Tenth Circuits, permitted a homeowner to bifurcate a mortgagee's lien on the debtor's primary residence into secured and unsecured claims.[9] Through bifurcation, a debtor could then void the portion of the lien attached to the unsecured claim.[10] Once a debtor

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the foreclosure sale has been conducted even though his petition in bankruptcy was not filed until after the sale); *In re* Chambers, 27 B.R. 687, 689-90 (Bankr. S.D. Fla. 1983) (holding that deceleration and reinstitution of a mortgage are available even after the foreclosure sale, as long as the state redemption period has not expired by the time the debtor has filed his petition in bankruptcy). *But see Glenn*, 760 F.2d at 1435 (choosing the foreclosure sale date as the cut-off point for debtors' rights to cure defaults under Chapter 13); *In re* Pearson, 10 B.R. 189, 193 (Bankr. E.D.N.Y. 1981) (remarking that once a foreclosure sale has taken place a "debtor cannot recover his home" by filing for relief under Chapter 13).

[9] Margaret Howard, *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 AM. BANKR. L.J. 373, 395 (1991) (stating that while the majority of courts declare bifurcation permissible, there is a split in the reported decisions); *see, e.g., In re* Bellamy, 962 F.2d 176, 179 (2d Cir. 1992) ("Our view, consistent with the other circuits that have addressed this issue, is that § 1322(b)(2) prohibits modification of a residential mortgage lender's rights only insofar as the mortgagee holds a secured claim."); *In re* Hart, 923 F.2d 1410, 1411 (10th Cir. 1991) ("We hold that the bifurcation was a recognition of the legal status of the creditor's interest in the debtors' property and not a modification of the mortgage."); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123, 127 (3d Cir. 1990) ("[W]e hold today that section 1322(b)(2) does not preclude the modification of any 'unsecured' portion of an undersecured claim."); *In re* Hougland, 886 F.2d 1182, 1185 (9th Cir. 1989) ("The secured portion [of a residential mortgage lender's claim] has special protection . . . . The unsecured portion does not."). These decisions were generally recognized as the majority approach. Howard, *supra*, at 395 & n.95.

A "secured claim" is supported or backed by collateral. BLACK'S LAW DICTIONARY 1354 (6th ed. 1990). An "unsecured claim," on the other hand, is not supported by pledged collateral. *Id.* at 1539. In case of default, a secured creditor is assured of payment by foreclosing on the pledged collateral. *See In re* Taddeo, 685 F.2d 24, 25 (2d Cir. 1982).

In *United States v. Ron Pair Enter., Inc.*, the Court explained that pursuant to § 506(a), a claim is secured only up to the amount of the collateral securing such claim, and the remainder is classified as an unsecured claim. United States v. Ron Pair Enter., Inc., 489 U.S. 235, 239 (1989). In essence, the bifurcation of a lender's mortgage lien into secured and unsecured claims allows a debtor to reduce the amount of the mortgage lien to the current market value of the collateral. *See id.* at 239 n.3; *see also In re* Barnes, 146 B.R. 854, 855 (Bankr. W.D. Okla. 1992) (explaining the theory and practical effect of the bifurcation procedure). Because Chapter 13 reorganization plans typically provide for a return of $.10, or less, on the dollar, a lender stands to lose a substantial amount of money. *See* Nassen, *supra* note 3, at 982 (citing *In re* Frost, 96 B.R. 804, 805 (Bankr. S.D. Ohio 1989); *In re* Hill, 96 B.R. 809, 810 (Bankr. S.D. Ohio 1989) (providing for 5% and 13% returns, respectively, to unsecured creditors)).

[10] *See* 11 U.S.C. § 506(d) (1988). Section 506(d) states, in relevant part: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . ." *Id.*; *see also In re* Etchin, 128 B.R. 662, 665 (Bankr. W.D. Wis. 1991) (expressing the generally accepted view that § 506(d) voids an unsecured

made the required pro rata payments, if any, to unsecured creditors pursuant to the Chapter 13 Plan of Reorganization, the unsecured portion of the claim would be discharged.[11] Thus, under the majority bifurcation approach, an undersecured home mortgage lender with a claim on a Chapter 13 debtor's principal residence could have the unsecured portion of the claim discharged and suffer a substantial loss.[12]

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claim); Howard, *supra* note 9, at 375-88 (discussing §§ 506(a) and 506(d) in detail and describing the effect of lien voidance from a policy perspective).

[11] *See* 11 U.S.C. § 1328(a) (Supp. IV 1993); *Etchin*, 128 B.R. at 665. To be confirmed, the plan of reorganization must first meet the following six requirements:

> (1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;
> (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
> (3) the plan has been proposed in good faith and not by any means forbidden by law;
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
> (5) with respect to each allowed secured claim provided for by the plan—
> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
> (C) the debtor surrenders the property securing such claim to such holder; and
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.

11 U.S.C. § 1325(a) (1988).

These requirements are less onerous and therefore not as strict as the requirements for confirmation of a Chapter 11 plan. Kennedy, *supra* note 3, at 153-54. Furthermore, the contents of the plan are for the most part permissive and must simply provide for the submission of funds and future earnings to a court-appointed trustee for distribution to creditors. COLLIER, *supra* note 2, ¶ 1322.02, at 1322-24. *Compare* 11 U.S.C. § 1322(a)(1)-(3) (1988) (listing mandatory requirements of a Chapter 13 plan) *with* 11 U.S.C. § 1322(b)(1)-(10) (1988) (cataloguing permissive provisions of the reorganization plan). A discharge, therefore, is easily obtained once a debtor complies with the plan's mandatory provisions. 11 U.S.C. 1328(a) (Supp. IV 1993); *see also* Kennedy, *supra* note 3, at 158-59 (recognizing that a Chapter 13 discharge is often called a "super" or "full compliance" discharge and is broader than a Chapter 7 discharge).

[12] *See* Alexander L. Cataldo et al., *Residential Mortgage Bifurcation Under Chapter 13 Of The Bankruptcy Code*, 96 COM. L.J. 225, 245-47 (1991) (explaining that if the mortgaged property were to appreciate in value, the lender would suffer a "double whammy" because not only would the principal amount of the loan be reduced, but the lender would also be prevented from recouping any of the post-bankruptcy appre-

Other jurisdictions, however, including the Fifth Circuit and bankruptcy courts in the First, Sixth, Seventh, Eighth, and Eleventh Circuits, did not adhere to the majority bifurcation approach.[13] Relying on a plain reading of § 1322(b)(2), these courts prevented a debtor from using § 506(a) to divide a mortgagee's lien into secured and unsecured claims.[14] Therefore, under the minority interpretation, a debtor was prohibited from modifying the rights of homestead mortgage lenders.[15]

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ciation); *see, e.g., Bellamy*, 962 F.2d at 178 (debtors discharged their unsecured debt including the lender's entire unsecured claim of $23,840.85); *Hart*, 923 F.2d at 1411 (unsecured portion of the lender's claim was $25,000.00); *Etchin*, 128 B.R. at 664 (unsecured portion of three separate lenders' claims aggregated $58,800.00); *Wilson*, 895 F.2d at 124 (unsecured portion of the lender's claim was $16,176.75); *Hougland*, 886 F.2d at 1182 (unsecured portion of the lender's claim was $4,850.78); *In re* Russell, 93 B.R. 703, 704 (Bankr. D.N.D. 1988) (unsecured portion of lender's claim was $36,237.01). For an early criticism of these decisions, see Patricia Lindauer, Note, *Optimizing The "Fresh Start": Mortgage Cramdown Under Chapter 13 Of The Bankruptcy Code*, 11 J. L. & COM. 257, 259 (1992) (opining that the decisions allowing bifurcation "take the 'fresh start' policy of the Bankruptcy Code to an unintended extreme").

[13] *See* Tracy J. Cowan, Note, *Modification of an Undersecured Home Mortgage in a Chapter 13 Proceeding*, 56 MO. L. REV. 841, 842 (1991); *see, e.g., In re* Nobleman, 968 F.2d 483, 489 (5th Cir. 1992) ("[B]ifurcation of an undersecured home mortgage runs afoul of the specific protection afforded under section 1322(b)(2) . . . ."); *In re* Mitchell, 125 B.R. 5, 8 (Bankr. D.N.H. 1991) ("[D]ebtors . . . are not allowed to bifurcate the security interest of a first mortgagee on residential real property into secured and unsecured portions as defined under section 506(a) for purposes of proposing a plan."); *Etchin*, 128 B.R. at 665 ("[B]ifurcation and partial avoidance of an undersecured home mortgage by a Chapter 13 debtor runs afoul of the specific protection afforded to creditors whose claims are secured only by a debtor's principal residence under § 1322(b)(2)."); *In re* Boullion, 123 B.R. 549, 551 (Bankr. W.D. Tex. 1990) ("Application of 11 U.S.C. § 506 to reduce the dollar amount of claims secured by an interest in real property that is the debtor's principal residence under Chapter 13 would be a 'modification' specifically prohibited by 11 U.S.C. § 1322(b)(2)."); *In re* Chavez, 117 B.R. 733, 737 (Bankr. S.D. Fla. 1990) ("[T]his Court holds that bifurcation of [the lender's] claim would result in the impermissible modification of [the lender's] mortgage rights in violation of § 1322(b)(2) of the Bankruptcy Code."); *In re* Kaczmarczyk, 107 B.R. 200, 203 (Bankr. D. Neb. 1989) ("Section 1322(b)(2) prohibits modification of the rights of the holder of an undersecured mortgage claim on the debtor's principal residence."); *In re* Bradshaw, 56 B.R. 742, 744 (Bankr. S.D. Ohio 1985) ("On its face, the plain language of section 1322(b)(2) clearly prohibits . . . any modification of the terms of a loan secured only by a security interest in the debtor's principal residence.").

[14] *Nobleman*, 968 F.2d at 487, 488 (indicating that the clear meaning of § 1322(b)(2) prohibits bifurcation); *Mitchell*, 125 B.R. at 7 (opining that § 1322(b)(2) is neither complicated nor ambiguous); *Etchin*, 128 B.R. at 664 (concluding that § 1322(b)(2)'s language clearly prohibits "lien stripping"); *Chavez*, 117 B.R. at 735 (declaring that § 1322(b)(2)'s words clearly express the statute's prohibition against modification); *Bradshaw*, 56 B.R. at 744 (emphasizing that on its face § 1322(b)(2) does not permit modification).

[15] *See* Cowan, *supra* note 13, at 848 & n.59. See *supra* note 13 and cases cited therein for a list of courts applying the minority interpretation. The court, in *In re Schum*, defined "modify" as "to change somewhat the form or qualities of; alter some-

Recently, in *Nobelman v. American Savings Bank*,[16] the Supreme Court of the United States addressed whether a Chapter 13 debtor may bifurcate a mortgagee's claim on the debtor's primary residence into secured and unsecured portions.[17] In an unanimous decision, the Court concluded that a debtor may not valuate and bifurcate a mortgage claim pursuant to § 506 in an effort to reduce the amount of mortgage security to the residence's fair market value.[18]

On June 21, 1984, American Savings Bank (American) loaned Leonard and Harriet Nobelman $68,250 to purchase a condominium unit that was to be their primary residence.[19] The Nobelmans, in turn, executed a promissory note in the face amount of the loan and a deed of trust as security for the loan.[20] After defaulting on

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what; . . . to reduce in degree; moderate; qualify; . . . to change; to become changed." *In re* Schum, 112 B.R. 159, 161 (Bankr. N.D. Tex. 1990) (quotation omitted).

16 113 S. Ct. 2106 (1993). For an analysis of the bankruptcy court's initial decision and the decision's progeny, see T.G. MaCauley, Note, Nobleman v. American Savings Bank: *Section 1322(B)(2) of the Bankruptcy Code Bars Bifurcation of an Undersecured Mortgage Secured Solely by the Debtor's Principal Residence*, 67 TUL. L. REV. 1271 (1993).

17 *Nobelman*, 113 S. Ct. at 2108.

18 *Id.* at 2111. Justice Thomas delivered the opinion of the Court and emphasized that § 1322(b)(2) prohibited such a modification of the "rights" of home mortgage lenders. *Id.* at 2108, 2111. Justice Stevens, in a one paragraph concurring opinion, observed that the result was mandated by the clear legislative history of Chapter 13 and therefore joined in the Court's opinion and judgment. *Id.* at 2112 (Stevens, J., concurring).

The Court acknowledged that § 506(a) is applicable, as a statute of general applicability, to Chapter 13. *Id.* at 2109 n.3; *see* 11 U.S.C. § 103(a) (1988) (providing that "chapters 1, 3, and 5 of [the Code] apply in a case under chapter 7, 11, 12, or 13"). The Court, however, commented that because the debtors' application of § 506(a) would conflict with the provisions of § 1322(b)(2), the latter must prevail. *Nobelman*, 113 S. Ct. at 2111; *see also In re* Hynson, 66 B.R. 246, 249 (Bankr. D.N.J. 1986) (accepting the "tenet of statutory construction" that where there is a conflict between two statutes of the same enactment, a statute of general applicability does not prevail over another provision that deals specifically with the matter in question).

19 *In re* Nobelman, 129 B.R. 98, 98, 99 (N.D. Tex. 1991), *aff'd*, *In re* Nobleman, 968 F.2d 483 (5th Cir. 1992), *aff'd*, Nobelman v. American Sav. Bank, 113 S. Ct. 2106 (1993).

20 *Nobelman*, 113 S. Ct. at 2108. A deed of trust is a mortgage instrument by which the borrower conveys title of the mortgage security to a third person to hold in trust as security for payment of the debt. *See* GEORGE E. OSBORNE ET AL., REAL ESTATE FINANCE LAW § 1.6 (1979) (describing a deed of trust as a "mortgage variant" granting the trustee a power of sale). Should a borrower default on the note, the trustee, who could also be the lender, may sell the mortgage security without bringing a judicial foreclosure action. *Id.* As such, a foreclosure sale pursuant to a deed of trust is preferred over a judicial foreclosure because it is a more efficient and less time consuming procedure. *See* MICHAEL T. MADISON & JEFFRY R. DWYER, THE LAW OF REAL ESTATE FINANCING ¶ 3.08[1] (1981) (defining a deed of trust and pointing out that its primary function is to avoid the delay and cost of judicial foreclosure). In *Nobelman*, the deed of trust also included an undivided .67% security interest in the condominium com-

the loan, the Nobelmans filed a voluntary petition in bankruptcy.[21] During the pendency of the bankruptcy case, American filed a proof of claim in the amount of $71,335.[22] Subsequently, the Nobelmans, in their modified plan of reorganization, valued the condominium at $23,500 and filed a motion pursuant to § 506(a) for a judicial determination of the market value of their home.[23] At the confirmation hearing, the market value of the residence was uncontested, and accordingly, the Nobelmans proposed to cure arrearages and to reinstate their original mortgage contract in the amount of $23,500.[24] Under the plan, the remainder of the bank's

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plex's common areas including escrow funds, rents, and any proceeds from hazard insurance. *Nobelman*, 129 B.R. at 99.

[21] *Nobelman*, 113 S. Ct. at 2108. The Noblemans defaulted on their loan by failing to make the required mortgage payments. *Id.* The Nobelmans then filed for relief under Chapter 13 of the Code. *Id.*; *see* 11 U.S.C. § 301 (1988 & Supp. IV 1992) ("The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter."). The Nobelmans' filing effectively stayed any action by the lender to enforce its rights as provided for in the loan documents or under state law. 11 U.S.C. § 362(a)(1)-(5) (1988). See *supra* note 5 and accompanying text for a discussion of the Code's automatic stay provision.

[22] *Nobelman*, 113 S. Ct. at 2108. Initially, the amount of the proof of claim was $71,265.04, but the bank later amended this claim. *Nobelman*, 129 B.R. at 99. In its proof of claim, American acknowledged that it was secured only to the extent of the value of its mortgage security and that it was unsecured for any resulting deficiency. *Id.*

A proof of claim is defined as "a written statement setting forth a creditor's claim." FED. R. BANKR. P. 3001(a) (Supp. IV 1993). A proof of claim provides a means by which creditors and other security interest holders present their claims to the bankruptcy court. *See* 11 U.S.C. § 501(a) (1988) ("A creditor . . . may file a proof of claim. An equity security holder may file a proof of interest."). Generally, a creditor files a proof of claim setting forth the amount owed on its note to include, among other things, the principal balance, any fees incurred, and accrued interest. *See id.* §§ 501, 502 (1988).

[23] *Nobelman*, 129 B.R. at 99; *see also* 11 U.S.C. § 1323(a) (1988) (allowing a debtor to modify a plan of reorganization "at any time before confirmation"). Section 506(a) provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Id. § 506(a) (1988).

[24] *Nobelman*, 113 S. Ct. at 2108. To confirm a Plan of Reorganization, the court must hold a confirmation hearing at which time any party in interest may object to the debtor's plan. *See* 11 U.S.C. § 1324 (1988). The court must notify interested par-

claim, namely $41,257.66, was classified as an unsecured claim payable "*pari passu.*"[25]

Objecting to the proposed treatment of its claim, American argued that its rights as a home mortgage lender were being impermissibly altered in violation of § 1322(b)(2).[26] The United States District Court for the Northern District of Texas, Dallas Division, agreed and refused to confirm the Nobelmans' plan of reorganization.[27] In its decision, the district court reviewed the holdings of

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ties of the hearing and afford them an opportunity to object to the confirmation of the plan. *Id.*; FED. R. BANKR. P. 3020(b) (Supp. IV 1993). In *Nobelman*, although the lender, a party in interest, objected to the plan, it did not object to the debtor's valuation of the residence. *Nobelman*, 113 S. Ct. at 2108-09.

[25] *Nobelman*, 129 B.R. at 99. *Pari passu* refers to the equal treatment of generally unsecured claims in a bankruptcy proceeding—unsecured claims are paid in equal proportion to each other. BLACK'S LAW DICTIONARY 1115 (6th ed. 1990). In this case, because the Nobelmans' plan did not provide for any payment to unsecured creditors, the bank stood to lose $41,257.66 if the plan was confirmed. *See Nobelman*, 129 B.R. at 99.

[26] *Nobelman*, 113 S. Ct. at 2109. *See infra* notes 89 and 92 (listing the lender's rights in a Chapter 13 proceeding). The Standing Chapter 13 Trustee also objected to the plan for the same reasons. *Nobelman*, 113 S. Ct. at 2109. Both objections were based on a plain reading of § 1322(b), which states:

> Subject to subsections (a) and (c) of this section, the [Chapter 13] plan may—
>
> . . .
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; . . . .

11 U.S.C. § 1322(b)(2) (1988).

A standing trustee is appointed under § 586 of title 28. *See* 28 U.S.C. § 586(b) (1988). Once appointed, a standing trustee has the power to:

> (1) perform the duties specified in sections 704(2), 704(4), 704(5), 704(6), 704(7) and 704(9) of this title;
>
> (2) appear and be heard at any hearing that concerns—
>
> (A) the value of property subject to a lien;
>
> (B) confirmation of a plan; or
>
> (C) modification of the plan after confirmation;
>
> (3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act; and [sic]
>
> (4) advise, other than on legal matters, and assist the debtor in performance under the plan; and
>
> (5) ensure that the debtor commences making timely payments under section 1326 of this title.

11 U.S.C. § 1302(b) (1988).

[27] *Nobelman*, 129 B.R. at 99, 104. A denial of confirmation may result in the dismissal of the case or its conversion into a Chapter 7 case. *See* 11 U.S.C. § 1307(c)(5) (1988). If a case is dismissed, then the creditor retains its security interest and can continue to enforce its rights under state law. *See id.* § 349(b) (1988). On the other hand, if the case is converted to Chapter 7, the debtor would be forced to liquidate

the Third, Ninth, and Tenth Circuits that permitted the bifurcation of a home mortgage lender's claim on the debtor's principal residence.[28] Finding these decisions to be based on strained and unconvincing analyses, the district court held that the plain language and legislative history of § 1322(b)(2) prevented the modification of a home mortgage lender's rights.[29]

Agreeing with the district court's plain language and congressional intent arguments, the United States Court of Appeals for the Fifth Circuit affirmed.[30] The court deemed the legislative history of § 1322(b)(2) dispositive of Congress's intent regarding the bifurcation issue.[31] To allow bifurcation, the court of appeals de-

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his estate, and the trustee would likely abandon the mortgage security if the debtor did not have any equity in the residence. *See id.* § 554(a) (1988).

[28] *Nobelman*, 129 B.R. at 100-01 (citations omitted). The district court specifically focused on the Ninth Circuit decision, *In re Hougland*, and explained that "the *Hougland* court simply assumed that because section 506(a) may be applied to Chapter 13 proceedings pursuant to section 103(a), every undersecured claim in a Chapter 13 proceeding is automatically transformed into a secured and unsecured claim. This assumption is the foundation upon which the entire *Hougland* decision rests, and it is flawed . . . ." *Id.* at 100, 101. Likewise, the court criticized the Third Circuit's decision in *Wilson v. Commonwealth Mortgage Corp.* because the Third Circuit had relied upon the Ninth Circuit's reasoning when it held that § 506's general provisions controlled § 1322(b)(2)'s specific provisions. *Id.* at 100, 101-02. Finally, the district court took issue with the Tenth Circuit's conclusion that § 1322(b)(2) "'kicks in' only to prevent any further modification of [a] secured claim." *Id.* at 102 (quoting *In re* Hart, 923 F.2d 1410, 1417 (10th Cir. 1991) (Brorby, J., dissenting)). This would render § 1322(b)(2), the district court observed, essentially meaningless. *Id.* (quoting *Hart*, 923 F.2d at 1417 (Brorby, J., dissenting)).

[29] *Nobelman*, 129 B.R. at 104. The court also dismissed the Nobelmans' contention that the deed of trust secured more than the primary residence. *Id.* In addition to securing the Noblemans' condominium, the deed of trust provided for an undivided .67% interest in the common areas of the condominium complex. *Id.* Because the deed of trust covered the .67% interest in the condominium's common areas, the Noblemans argued that § 1322(b)(2) could not apply; by its very terms, § 1322(b)(2) applies solely to "claim[s] secured *only* by a security interest in real property." *Id.* (citation omitted); 11 U.S.C. § 1322(b)(2) (1988) (emphasis added). Nonetheless, the court rejected the Noblemans' argument because a .67% interest in a condominium's common areas is not a sufficient interest to warrant the non-applicability of § 1322(b)(2). *Nobleman*, 129 B.R. at 104.

[30] *In re* Nobleman, 968 F.2d 483, 484, 487, 488 (5th Cir. 1992), *aff'd*, *Nobleman v. American Sav. Bank*, 113 S. Ct. 2106 (1993). Both courts examined the legislative history of § 1322(b)(2) and determined that Congress intended to afford special protection to home mortgage lenders. *Nobleman*, 968 F.2d at 488-89; *Nobelman*, 129 B.R. at 103-04. Each court then summarily dismissed other circuit courts' analyses of the issue and contrary holdings, declaring them inconsistent with the legislative intent and clear meaning of the statute. *Nobleman*, 968 F.2d at 486-88; *Nobelman*, 129 B.R. at 100-04.

[31] *Nobleman*, 968 F.2d at 488-89. The Fifth Circuit, in *Grubbs*, had previously examined the legislative history of § 1322 in detail and therefore was fully cognizant of Congress's intent. Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 243-46 (5th Cir. 1984). As originally proposed, the *Grubbs* court explained, the House version of

cided, would vitiate the specific protections granted to home mortgage lenders with claims secured only by a debtor's primary residence.[32] The Fifth Circuit also found further support in a recent United States Supreme Court decision, *Dewsnup v. Timm*,[33] which prohibited a Chapter 7 debtor from using § 506(a) to strip down a lien secured by the debtor's real property.[34]

The United States Supreme Court granted certiorari[35] to determine whether, in a Chapter 13 case, § 1322(b)(2) permits the bifurcation of a home mortgage lender's claim secured by the debtor's principal residence.[36] The Court found bifurcation impermissible and held that a debtor could not use the valuation and bifurcation provisions of § 506(a) to modify a home mortgage lender's rights.[37] Such modification, the Court declared, is prohib-

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§ 1322(b)(2), set forth in H.R. 8200, provided that the debtor's plan may modify the rights of holders of secured claims or of holders of unsecured claims. *Id.* at 243. The court noted that, in this respect, the House version was more encompassing than the Bankruptcy Commission's recommendation calling for the inclusion of a provision allowing for the modification of secured and unsecured claims on a debtor's personal property. *Id.* (citing COMMISSION REPORT, *supra* note 2, at 204-05). The Senate version of § 1322(b)(2), as set forth in S.B.2266, allowed a debtor's plan to "modify the rights of holders of secured claims (*other than claims wholly secured by mortgages on real property*) or of holders of unsecured claims." *Id.* at 245, n.14. The court buttressed its analysis by explaining that during the course of deliberations, the Senate retreated from its insistence that no claim secured by a mortgage on a debtor's real property could be modified and settled for the current version of § 1322(b)(2) which bars modification of "a claim 'secured only by a security interest in real property *that is the debtor's principal residence.*'" *Id.* at 246.

32 *Nobleman*, 968 F.2d at 489.

33 112 S. Ct. 773 (1992). *But see* Lindauer, *supra* note 12, at 1275 (stating that the *Dewsnup* holding was limited to the facts of that particular case).

34 *Nobleman*, 968 F.2d at 487 (citing *Dewsnup*, 112 S. Ct. at 778). In *Dewsnup*, the Supreme Court held that a Chapter 7 debtor could not 'strip down' a lien on real property to the fair market value of the property pursuant to § 506(d). *Dewsnup*, 112 S. Ct. at 778. Because the claim at issue was an allowed claim pursuant to § 502, the court reasoned that § 506(d) does not apply and that the "lien stays with the real property until the foreclosure [because] that is what was bargained for by the mortgagor and the mortgagee." *Id.* at 777, 778.

35 Nobelman v. American Sav. Bank, 113 S. Ct. 654 (1992).

36 Nobelman v. American Sav. Bank, 113 S. Ct. 2106, 2108 (1993).

37 *Id.* at 2111. Justice Stevens concurred in the opinion and judgment of the Court and authored a one paragraph concurrence emphasizing the legislative history favoring home mortgage lenders. *Id.* at 2111-12 (Stevens, J., concurring). The *Nobelman* Court's decision was widely acclaimed by the lending community. *See High Court: Thumbs Down on 'Stripdowns'*, 15 NAT'L L.J. June 14, 1993, at 5, 9 (describing the lending community's strong interest in the *Nobleman* case). In addition, scholars had frequently criticized the earlier decisions holding that bifurcation was permissible. *See* Erik Klingenberg, Esq., *Chapter 13: Circuits Split on Strip Down of Home Mortgages*, 21 REAL PROP. L. SEC. NEWSLETTER (N.Y. St. B. Ass'n, New York, N.Y.) Jan., 1993, at 7, 7-9 (criticizing the pro-bifurcation decisions, especially the Second Circuit's decision in *In re Bellamy*); Lindauer, *supra* note 12, at 281 (arguing that bifurcation pro-

ited by § 1322(b)(2).[38]

Notwithstanding Congress's specific intent to carve out an exception for home mortgage lenders, a majority of circuit courts, prior to *Nobelman*, authorized bifurcation in an effort to promote the Bankruptcy Code's "fresh start" policy.[39] For example, in *In re Hougland*,[40] the Ninth Circuit Court of Appeals first addressed the issue of bifurcation in a Chapter 13 case.[41] The *Hougland* court, relying on tenets of statutory interpretation, ruled that

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vides a debtor with a windfall by taking "the fresh start policy to the extreme"). *But cf.*, Peter H. Carroll, III, *Cramdown of Residential Mortgages in Chapter 13 Cases*, 20 COLO. LAW. 881, 882 (May 1991) (claiming that bifurcation of an undersecured home mortgage claim is fair to other secured creditors); Cowan, *supra* note 13, at 854-55 (commenting that bifurcation encourages debtors to file for Chapter 13 instead of Chapter 7 and is consistent with the Bankruptcy Code's fresh start policy).

[38] *Nobelman*, 113 S. Ct. at 2111.

[39] Howard, *supra* note 9, at 395; *see In re* Bellamy, 962 F.2d 176, 186 (2d Cir. 1992) ("We believe [discharging the unsecured portion of the debt after bifurcation is] a measurable contribution to the Code's 'fresh start' policy."); *In re* Hart, 923 F.2d 1410, 1411 (10th Cir. 1991) (holding "that the bifurcation was a recognition of the legal status of the creditor's interest in the debtors' property and not a modification of the mortgage"); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123, 127 (3d Cir. 1990) (holding "that section 1322(b)(2) does not preclude the modification of any 'unsecured' portion of an undersecured claim"); *In re* Hougland, 886 F.2d 1182, 1185 (9th Cir. 1989) ("The secured portion [of a residential mortgage lender's claim] has special protection . . . . The unsecured portion does not."); *see also In re* McNair, 115 B.R. 520, 523 (Bankr. E.D. Va. 1990) (giving consideration to the Bankruptcy Code's "fresh start" policy before deciding whether bifurcation was permissible) (citation omitted); *In re* Harris, 94 B.R. 832, 836 (D.N.J. 1989) (proclaiming that bifurcation promotes the "fresh start" policy by not saddling the debtor with unsecured debt); *In re* Simmons, 78 B.R. 300, 304 (Bankr. D. Kan. 1987) (reaching its decision mindful of the Bankruptcy Code's "fresh start" policy) (citations omitted).

One of the Code's internal goals is to return an insolvent debtor to a useful economic role by granting the debtor a "fresh start." *See* COLLIER, *supra* note 2, ¶ 1300.01, at 1300-9; H.R. REP. NO. 595, *supra* note 2, at 118, *reprinted in* 1978 U.S.C.C.A.N. at 6078; *see also* Williams v. United States Fidelity & Guar. Co., 236 U.S. 539, 554-55 (1915) (noting that the goal of the bankruptcy process is to permit an honest debtor a fresh start) (citations omitted).

[40] 886 F.2d 1182 (9th Cir. 1989); *see* Howard, *supra* note 9, at 395 (citing *Hougland* as the leading case allowing bifurcation under § 1322(b)(2)); Cowan, *supra* note 13, at 842 (concluding that "the *Hougland* Court's result is fair, logical, and should be adopted by all courts"). *But see* Lindauer, *supra* note 12, at 271-77 (criticizing the *Hougland* court's analysis). *See generally* Nassen, *supra* note 3, at 992-93 (describing the Ninth Circuit's analytical approach to the bifurcation issue).

[41] *See* Klingenberg, *supra* note 37, at 7 (indicating that the Ninth Circuit was the first circuit court to address the bifurcation issue). The debtors obtained a mortgage from the lender under a veteran's home mortgage assistance program that permitted negative amortization of the loan. *Hougland*, 886 F.2d at 1182. As a result, at the time of the filing of the petition in bankruptcy, the balance of the loan was greater than the value of the property. *Id.* at 1182-83. The debtors sought to bifurcate the mortgage loan into secured and unsecured portions presumably so they could subsequently discharge the unsecured portion of the mortgagee's claim. *See id.* at 1183.

§ 1322(b)(2) permitted bifurcation.[42] Maintaining that the plain meaning of the statute mandated such a result, the court dismissed any suggestion that §§ 506(a) and 1322(b)(2) were in conflict.[43] Additionally, the *Hougland* court noted that real estate lenders would not be adversely affected by the court's interpretation of the statute because most lenders would ensure that a sufficient equity cushion existed, thereby preventing any portion of their claim from being unsecured.[44]

In *Wilson v. Commonwealth Mortgage Corp.*,[45] a factually analogous case, the Third Circuit followed suit and reached the same result as the *Hougland* court.[46] Relying on § 1322(b)(2)'s plain meaning, the *Wilson* court embraced the Ninth Circuit's statutory

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[42] *Id.* at 1184. Specifically, the *Hougland* court insisted that "[w]hen normal principles of statutory construction are applied, the analysis of this statutory scheme is relatively simple." *Id.* at 1183 (footnote omitted). First, the court stated that the terms "secured claim" and "unsecured claim" have the same meanings in § 1322(b)(2) as they do in § 506(a). *Id.* Therefore, the court concluded, a claim can have a secured and unsecured portion. *Id.* at 1183-84. The court then examined § 1322(b)(2)'s "other than" clause and determined that because "[t]hat clause follows the secured claim portion of the sentence and precedes the unsecured claim portion," it must refer only to the secured portion of a claim and not to any unsecured portion. *Id.* *See infra* note 73 and accompanying text (discussing later criticism of the *Hougland* decision).

The Ninth Circuit's analysis was rejected in *In re Sauber*. *In re* Sauber, 115 B.R. 197, 199 (Bankr. D. Minn. 1990). The *Sauber* court stated:

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

Id.

[43] *Hougland*, 886 F.2d at 1184. The court did not even consider the legislative history because "the statute is internally consistent." *Id.* at 1185.

[44] *Id.* at 1184. The *Hougland* court's observation has, of course, not withstood the test of time as the general downturn in the United States economy, coupled with falling real estate values, have caused many mortgages to become undersecured. *See* Nassen, *supra* note 3, at 1005 (observing that during the 1980's the total amount of real estate loans increased "from $268 billion to $750 billion," of which $130 billion were in default) (footnotes omitted); *see also* Lindauer, *supra* note 12, at 266 n.62 (identifying the various scenarios which could cause a mortgage to become undersecured) (citation omitted). For a more detailed examination of the court's decision in *Hougland*, see Cowan, *supra* note 13.

[45] 895 F.2d 123 (3d Cir. 1990). *See generally* Nassen, *supra* note 3, at 993 (discussing the *Wilson* court's holding); Lindauer, *supra* note 12, at 271-77 (criticizing the Third Circuit's utilization of § 1322(b)(2)'s legislative history to permit cramdown).

[46] *Wilson*, 895 F.2d at 127. The amount of the loan balance in *Wilson* was $38,176.75 and the stipulated value of the property was only $22,000. *Id.* at 124. The debtors sought to limit the amount of the mortgage lender's claim to the value of the residence and to treat the remainder as unsecured. *Id.*

interpretation and dismissed the statute's legislative history as inconclusive.[47] The court summarily rejected the mortgagee's contention that the provisions of § 1322(b)(2), a statute of specific applicability, controlled the general provisions of § 506(a).[48] Consequently, the Third Circuit concluded that the bifurcation of a home mortgage lender's claim under § 506(a) is not prohibited by § 1322(b)(2).[49]

The United States Court of Appeals for the Tenth Circuit also adopted the majority bifurcation approach in *In re Hart*.[50] While conceding that the legislative intent of § 1322(b)(2) was to afford greater protection to home mortgage lenders, the *Hart* court determined that a plain interpretation of the statute permitted bifurca-

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47 *Id.* at 127. The court noted that "[i]n determining the meaning of any statute, the words of the statute are 'the primary, and ordinarily the most reliable, source of interpreting' its meaning." *Id.* (quoting Watt v. Alaska, 451 U.S. 259, 266 n.9 (1981) (citation omitted)). In response to the mortgage lender's argument that the legislative history of the statue compelled a different result, the court asserted, "[u]nfortunately, our review of the history of the provision does not provide us with much insight into the critical question here." *Id.*

48 *Id.* at 128. Particularly, the Third Circuit stated that such an interpretation would "require that we ignore section 506(a) in Chapter 13 proceedings, which is inconsistent with our earlier precedent that holds that section is fully applicable to Chapter 13." *Id.* (citation omitted).

49 *Id.* In addition to ruling that bifurcation is permissible, the *Wilson* court also declared that the mortgagee's claim was secured by the debtor's personal property as well as the debtor's principal residence. *Id.* Thus, the court did not even have to reach the bifurcation issue because a claim that is secured by other than the debtor's principal residence does not fall within the purview of § 1322(b)(2). *See* Lindauer, *supra* note 12, at 264 n.48. The court's alternate holding was based on § 1322(b)(2)'s specific language which only protects claims "secured only by a security interest in real property that is the debtor's principal residence." *Wilson*, 895 F.2d at 128 (quoting 11 U.S.C. § 1322(b)(2) (1988)). Referencing the lender's mortgage, the court observed that the lender had a security interest in the Wilsons' personal property, including appliances, furniture, and other personalty. *Id.* As such, the court held that § 1322(b)(2)'s anti-modification provision did not apply. *Id.* at 129.

50 923 F.2d 1410, 1411, 1415 (10th Cir. 1990). The Harts' loan balance was $55,000, but the property's market value was only $30,000. *Id.* The Harts filed a Plan of Reorganization bifurcating the mortgage lender's claim into secured and unsecured portions. *Id.* The lender objected to the bifurcation of its claim, but the Tenth Circuit held that bifurcation was permitted. *Id.* at 1411, 1415. Prior to the *Hart* decision, bankruptcy courts in the Tenth Circuit were divided on the bifurcation issue. *Compare In re* Brouse, 110 B.R. 539, 543-44 (Bankr. D. Colo. 1990) (allowing a debtor to use § 506(d) to bifurcate a mortgagee's claim) *and In re* Ross, 107 B.R. 759, 762-63 (Bankr. W.D. Okla. 1989) (permitting the modification of a mortgage lender's rights with respect to the unsecured portion of the claim) *and In re* Simmons, 78 B.R. 300, 303 (Bankr. D. Kan. 1987) (agreeing that § 1322(b)(2) does not protect an undersecured home mortgage) *with In re* Woodall, 123 B.R. 95, 98 (Bankr. W.D. Okla. 1990) (asserting that for public policy reasons "§ 506(a) may not be used to bifurcate a claim under § 1322(b)(2)") *and In re* Christiansen, 121 B.R. 63, 64 (Bankr. D. Colo. 1990) (adopting a plain reading and common-sense approach to § 1322(b)(2)).

tion.[51] Accepting the notion that bifurcation could be deemed a modification of the mortgage, the court nonetheless ruled that bifurcation is not an impermissible modification of a secured claim pursuant to § 1322(b)(2).[52]

More recently, in *In re Bellamy*,[53] the Second Circuit echoed the majority view that bifurcation of a lender's mortgage claim on a Chapter 13 debtor's primary residence is permissible.[54] Despite recognizing that the "rights" referred to in § 1322(b)(2) are broader than the term "claims," the *Bellamy* court concluded that § 1322(b)(2)'s "other than" clause referred solely to secured claims and not to the entire bundle of rights available to home mortgage lenders.[55] The Second Circuit also examined § 1332(b)(2)'s legislative history and pronounced that it did not support the lender's

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51 *Hart*, 923 F.2d at 1415. The Tenth Circuit "'[began] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Id.* (quotations omitted).

52 *Id.* The *Hart* court argued that bifurcation is not impermissible because it does not affect the secured portion of the claim. *Id.* According to one author, "[t]his analysis is flawed at its root, as § 1322(b)(2) protects the *rights* of residential mortgage lenders from modification, not merely the claim." Lindauer, *supra* note 12, at 265 n.57. The author noted that the protection afforded by § 1322(b)(2) is to the mortgagee's rights, not claims. *See* 11 U.S.C. § 1322(b)(2) (1988); *In re* Etchin, 128 B.R. 662, 666 (Bankr. W.D. Wis. 1991) (explaining that "it is the 'rights of the holders' and not the 'claims' alone which cannot be modified").

53 962 F.2d 176 (2d Cir. 1992). One commentator declared that the *Bellamy* court erred by ignoring the lender's "litany of rights" and deciding that only the lender's right to monthly payments and interest were protected under § 1322(b)(2). Klingenberg, *supra* note 37, at 8.

54 *Bellamy*, 962 F.2d at 179. The debtors, Jimmie and Cynthia Bellamy, bifurcated the lender's mortgage claim on their primary residence into secured and unsecured portions. *Id.* at 178. The outstanding amount of the promissory note secured by a mortgage on the Bellamy's home was $151,340.85 and a valuation of the residence reflected a $127,500 market value, leaving an unsecured claim in the amount of $23,840.85. *Id.* In their plan of reorganization, the Bellamys used § 506(d) to void the unsecured portion of the mortgage lien and reinstated the mortgage at its original contract rate on the allowed secured claim pursuant to § 1322(b)(5). *Id.* As a result, the unsecured portion of the lender's claim was treated like other generally unsecured claims and discharged pursuant to § 1322(b)(1). *Id.*

55 *Id.* at 180. The lender argued that a claim as defined by § 101(5)(A) is any "right to payment, *whether or not such right is . . . secured, or unsecured.*" *Id.* (quoting 11 U.S.C. § 101(5)(A) (Supp. IV 1993)). Therefore, because the "other than" clause of § 1322(b)(2) protects a claim secured by the debtor's principal residence, the lender asserted that it follows that both the secured and unsecured portions of that claim are protected. *Id.* The court rejected the lender's argument and relied on the rule of the last antecedent, ruling that § 1322(b)(2)'s "other than" clause applied only to the secured portion of the claim because the clause immediately preceded language in the statute describing claims secured by a security interests in real property that is the debtor's residence. *Id.* (citations omitted); *see also In re* Hougland, 886 F.2d 1182, 1184 (9th Cir. 1989) (stating that a clause modifies the portion of the sentence directly preceding it).

contention that Congress intended to prohibit bifurcation.[56]

Unlike the Third, Ninth, and Tenth Circuits, however, the *Bellamy* court addressed the bifurcation issue in light of the Supreme Court's decision in *Dewsnup*, which prohibited a Chapter 7 debtor from voiding the unsecured portion of a creditor's lien secured by the debtor's real property.[57] The *Bellamy* court read *Dewsnup*'s import narrowly and decided that the *Dewsnup* holding applied only to Chapter 7 cases.[58] Like its counterparts in the Third, Ninth, and Tenth Circuits, the Second Circuit declared that § 1322(b)(2) did not prohibit bifurcation of a mortgage claim secured by a debtor's principal residence pursuant to § 506(a).[59]

Despite the majority of courts' plain reading of § 1322(b)(2) as favoring debtors' bifurcation efforts, the Fifth Circuit and several bankruptcy courts refused to allow a debtor to reap the financial benefits of such a windfall.[60] Rather, these courts postulated that a home mortgage lender's claim secured by a lien on the debtor's principal residence may not be divided into secured and unsecured portions.[61] The minority championed its position by underscoring some of the following arguments: (1) Congress intended to afford home mortgage lenders greater protection as evidenced by § 1322(b)(2)'s legislative history;[62] (2) the specific

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56 *See id.* at 181-82. In support of its contention, the Second Circuit relied on the fact that the Bankruptcy Laws Commission's Report did not specifically define modification of a secured claim to include bifurcation. *Id.* at 182 (citation omitted).

57 *Bellamy*, 962 F.2d at 182 (citing Dewsnup v. Timm, 112 S. Ct. 773, 778 (1992)). See *supra* notes 33-34 for a discussion of *Dewsnup*.

58 *Bellamy*, 962 F.2d at 184. The court also suggested that the *Dewsnup* analysis would not command a different result due to the different uses of the term "secured claim" in §§ 506(d) and 1322(b)(2). *Id.* The *Bellamy* court summarized that "*Dewsnup*'s analysis of § 506(d) is thus inapposite in interpreting § 1322(b)(2)." *Id.* at 183.

59 *Id.* at 179. The Second Circuit added that a solution to the problem of falling real estate prices, if any exists, should come from Congress. *Id.* at 187. Specifically, the court stated: "Were falling real estate prices to result in a significant enough number of residential mortgages not being paid so as to reduce the funds available for such mortgages, the remedy, if any, would be in Congress's hands." *Id.*

60 *See In re* Woodall, 123 B.R. 95, 97-98 (Bankr. W.D. Okla. 1990) ("[B]ifurcation of § 1322(b)(2) claims would result in a windfall to debtors who would then repay only the value of their residence, and reap the benefit of their discharged 'unsecured' claim if property values rise."). See *supra* note 13 and cases cited therein for a survey of the minority approach.

61 *See In re* Nobleman, 968 F.2d 483, 489 (5th Cir. 1992), *aff'd*, Nobelman v. American Sav. Bank, 113 S. Ct. 2106 (1993); *In re* Mitchell, 125 B.R. 5, 8 (Bankr. D.N.H. 1991); *In re* Etchin, 128 B.R. 662, 665 (Bankr. W.D. Wis. 1991); *In re* Boullion, 123 B.R. 549, 551 (Bankr. W.D. Tex 1990); *In re* Chavez, 117 B.R. 733, 737 (Bankr. S.D. Fla. 1990); *In re* Kaczmarczyk, 107 B.R. 200, 203 (Bankr. D. Neb. 1989); *In re* Bradshaw, 56 B.R. 742, 744 (Bankr. S.D. Ohio 1985).

62 *See, e.g., Boullion*, 123 B.R. at 551 (agreeing with the Fifth Circuit's interpretation of § 1322(b)(2)'s legislative history, set forth in *Grubbs v. Houston First Am. Sav. Ass'n*,

provisions of § 1322(b)(2) control the application of § 506(a), a statute of general applicability;[63] (3) the definition of "claim" in § 101(5)(A), which is applicable to § 1322(b)(2), includes both secured and unsecured claims, and therefore neither may be modified;[64] and (4) because pre-Code practice allowed a secured claim to pass through bankruptcy unaffected, absent clear language to the contrary, post-Code practice should remain the same.[65]

For example, in *In re Schum*,[66] the United States Bankruptcy Court for the Northern District of Texas opined that § 1322(b)(2)'s legislative history illustrated Congress's desire to bestow greater protection upon home mortgage lenders.[67] Focusing

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and stating that Congress intended to create a protected class of creditors); *In re* Schum, 112 B.R. 159, 162 & n.4 (Bankr. N.D. Tex. 1990) (quoting Chapter 12's legislative history to support the proposition that modification is not allowed in Chapter 13); *In re* Hemsing, 75 B.R. 689, 690 (Bankr. D. Mont. 1987) (recognizing that § 1322(b)(2)'s legislative history compels the protection of home mortgage lenders).

63 *See, e.g.*, *Chavez*, 117 B.R. at 734 (enunciating that § 1322(b)(2) controls the application of § 506(a) & (d)); *In re* Russell, 93 B.R. 703, 705 (Bankr. D.N.D. 1988) (stating that a statute's specific provisions prevail over a statute of general applicability) (citations omitted); *In re* Catlin, 81 B.R. 522, 524 (Bankr. D. Minn. 1987) (emphasizing that § 1322 supersedes the inconsistent provisions of § 506); *In re* Hynson, 66 B.R. 246, 249 (Bankr. D.N.J. 1986) (finding that a statute of general applicability does not prevail over a specific provision of the same enactment) (citations omitted).

64 *See In re* Sauber, 115 B.R. 197, 199 (Bankr. D. Minn. 1990) (refusing to focus on § 506(a)'s definition of secured and unsecured claims); *see also Etchin*, 128 B.R. at 668 (using the broad definition of the word "claim," as stated in § 101(5)(A), to reach its conclusion that bifurcation is prohibited). Section 101(5)(A) states that a claim is "[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1988).

65 *See In re* Hart, 923 F.2d 1410, 1414 (10th Cir. 1991) (summarizing the four rationales employed by bankruptcy courts in the Fifth, Eighth, and Eleventh Circuits) (citations and footnote omitted); *see, e.g.*, *Kaczmarczyk*, 107 B.R. at 203 (maintaining the continuity of treatment of secured claims under § 1322(b)(2) from Chapter XIII of the Bankruptcy Act to Chapter 13 of the Code); *Mitchell*, 125 B.R. at 8 (explaining that "the prior Bankruptcy Act did not allow Chapter 13 debtors to modify secured claims").

66 112 B.R. 159 (Bankr. N.D. Tex. 1990). David Allen Schum borrowed approximately $207,960 from MBank Preston, Dallas, Texas. *Id.* at 160. The loan was secured by a deed of trust on his primary residence. *Id.* The initial thirty year note was subsequently renewed on October 11, 1987, and upon default the bank demanded payment for the outstanding balance of the note. *Id.* The debtor filed for bankruptcy and sought to reduce the amount of the outstanding indebtedness—$207,960—to the fair market value of the residence pursuant to § 506(a). *Id.* The bank argued that § 1322(b)(2) prohibited the bifurcation of its claim. *Id.*

67 *Id.* at 161-62 & n.3. The *Schum* court reported that the Congressional discussion of Chapter 12 specifically supported the proposition that home mortgage lenders were granted greater protection. *Id.* at 162 n.4. In Chapter 12's legislative history, the court explicated, Congress specifically indicated that while the contents of a Chapter 12 plan of reorganization came from both Chapter 11 and Chapter 13, § 1322(b)(2)

on the meaning of the word "modify" in § 1322(b)(2), the bankruptcy court insisted that a debtor would certainly be modifying a home mortgage lender's claim if bifurcation was permitted.[68] Moreover, the *Schum* court explained that § 1322(b)(2)'s specific provisions trumped the general provisions of § 506(a).[69] The court stated that these arguments singularly, and taken as a whole, supported the court's holding that § 1322(b)(2) prohibits modification of a home mortgage lender's claim on a debtor's principal residence.[70]

In keeping with the minority view, the Bankruptcy Court for the Western District of Wisconsin, in *In re Etchin*,[71] similarly articulated that "lien stripping" was impermissible.[72] The *Etchin* court maintained that the word "claim" in § 1322(b)(2), as defined in § 101(5)(A), included both secured and unsecured claims.[73] Having found that § 1322(b)(2) protected more than secured claims,

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was omitted from Chapter 12 to allow farmers to modify secured home mortgage claims. *Id.* (quotation omitted).

68 *Id.* at 161-62. *See supra* note 15 (providing the *Schum* court's definition of "modify").

69 *Id.* at 160-61 (citing *In re* Russell, 93 B.R. 703, 705 (Bankr. D.N.D. 1988) (citations omitted); *In re* Hynson, 66 B.R. 246, 249-50 (Bankr. D.N.J. 1986) (citations omitted)).

70 *Id.* at 162. As a result, the court concluded that "lien stripping" was prohibited by the clear language of section 1322(b)(2). *Id.*; *see* Lindauer, *supra* note 12, at 261 n.26 ("'Strip down' means that the creditor must stand and be stripped bare of its unsecured lien. . . . [This term] has come to be used in any situation where § 506 operates on an undersecured creditor.").

71 128 B.R. 662 (Bankr. W.D. Wis. 1991). Star Acquisition Corporation (Star) foreclosed on a real estate mortgage given by Joseph and Juanita Etchin as security for a debt. *Id.* at 664. By filing separate bankruptcy petitions, the Etchins stayed the foreclosure sale. *Id.* Their individual cases were subsequently consolidated for administrative purposes on November 20, 1990. *Id.* The debtors then brought an adversary proceeding for a judicial determination of Star's secured claim and avoidance of the unsecured portion of the mortgagee's claim *Id.* Star sought dismissal of the adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6) and Bankruptcy Rule 7012, claiming that § 1322(b)(2) prohibits the "strip down" of their claim secured by the debtor's principal residence. *Id.* at 665.

72 *Id.* at 664.

73 *Id.* at 668. The bankruptcy court further criticized the *Hougland* court's reasoning, stating:

> The mistake in . . . *Hougland* . . . is that it limits the pool of other possible referents of the anti-modification clause to either "the unsecured language or to the whole sentence" and then dismisses them. The court neglects to consider as referents the larger universe of claims which are defined in 11 U.S.C. § 101. Section 101(5)(A) provides that a "claim" includes both secured and unsecured claims. This definition of "claim" is applicable to § 1322(b)(2).

Id. (citations omitted). *See supra* notes 64 (providing the text of § 101(5)(A)) and 26 (setting forth the relevant parts of § 1322).

the bankruptcy court held that a debtor could not strip down a lien on a primary residence.[74] Strip down, the *Etchin* court explained, required modification of a homestead mortgage lender's "claim," a practice that would directly violate § 1322(b)(2).[75]

Adopting the minority rationale, in *In re Kaczmarczyk*,[76] the Bankruptcy Court for the District of Nebraska agreed that § 1322(b)(2) prohibited bifurcation.[77] Analyzing the bifurcation issue from Chapter 13's historical perspective, the *Kaczmarczyk* court pointed to pre-Code practice wherein a debtor could not modify secured claims.[78] Absent a specific provision in Chapter 13 dictating otherwise, the bankruptcy court commented, this rule must be honored today.[79]

Seizing the occasion to resolve the split among the circuits, the United States Supreme Court definitively addressed the bifurcation issue in *Nobelman v. American Savings Bank*.[80] The *Nobelman* Court questioned whether a homestead lender's rights are impermissibly modified when a debtor divides the amount of a claim secured by a home mortgage on his principal residence into secured and unsecured portions.[81]

Delivering the opinion for a unanimous Court, Justice Thomas first rejected the debtors' contention that even though § 1322(b)(2) prohibited the modification of a home mortgage lender's rights, their plan of reorganization did not modify the mortgagee's rights.[82] Specifically, Justice Thomas dismissed the

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74 *Etchin*, 128 B.R. at 669.

75 *Id.* See *supra* note 70 for an explanation of the term "strip down." For a brief analysis of the *Etchin* court's reasoning, see MaCauley, *supra* note 16, at 1276.

76 107 B.R. 200 (Bankr. D. Neb. 1989). Michael and Myrna Kaczmarczyk's residence was valued at $30,000 and was security for two mortgages, the first in the amount of $28,000 and the second in the amount of $11,000. *Id.* at 200, 201. In their plan of reorganization, the debtors left the first mortgage intact as it was fully secured and treated the second mortgage as secured in the amount of $2,000 and unsecured in the amount of $9,000. *Id.* The second mortgagee objected to the treatment of its claim and urged that the court reject the debtors' plan because it violated § 1322(b)(2)'s restriction on modification of a home mortgage lender's rights. *Id.*

77 *Id.* at 202.

78 *Id.* at 202-03 (citations omitted). Chapter 13 under the Bankruptcy Act of 1898 precluded a debtor "from dealing with claims secured by real property." *See* Lindauer, *supra* note 12, at 267 (footnote omitted).

79 *Id.* at 203. The court stated that "as Congress did not explicitly change the treatment of claims secured by a mortgage on a debtor's residence, I conclude that a continuity of treatment of such claims was intended." *Id.*

80 113 S. Ct. 2106, 2108, 2109 (1993).

81 *Id.* at 2108.

82 *Id.* at 2108, 2109-11. Justice Thomas wrote that it "appears to be impossible" to reduce the principal amount of the loan to the fair market value of the residence without modifying the lender's rights. *Id.* at 2111.

Nobelmans' explanation that the language of § 1322(b)(2) excepts from modification only the secured portion of the mortgage claim.[83] Although the *Nobelman* Court recognized that other circuits had applied the "rule of the last antecedent" when interpreting § 1322(b)(2), Justice Thomas adopted a broader definition of "claim" which encompassed both secured and unsecured claims.[84] To embrace the debtor's interpretation of § 1322(b)(2), the Justice asserted, would in essence render the statute's protection meaningless.[85]

The Court further strengthened its holding by stressing that § 1322(b)(2) protects a homestead lender's "rights," not "claims" or "claims secured only by" the debtor's primary residence.[86] Justice Thomas conceded, however, that the amount of a secured claim is properly defined under § 506(a) and that the debtors were correct in seeking such a valuation.[87] Nonetheless, the Justice intimated that such a determination of the secured portion of the claim did not limit or define the mortgagee's rights.[88]

Particularly, Justice Thomas observed that because Texas law governed American's rights,[89] § 1322(b)(2) protected the bank's

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83 *Id.* at 2109. The debtors argued that because the language of § 1322(b)(2) provides that a plan may "'modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtors' principal residence*,'" then it follows that the 'other than' clause refers only to the clause immediately preceding it; thus it only applies to the secured portion of the claim. *Id.* (quotation omitted). The debtors further stated that pursuant to § 506(a), a claim is only secured up to the value of the collateral and unsecured for the remainder. *Id.* Consequently, the debtors asserted that in agreeing to pay the full amount of the secured claim at the original contract rate, their plan of reorganization was not modifying the secured lender's rights. *Id.*

84 *Id.* at 2111 (citing *In re* Bellamy, 962 F.2d 176, 180 (2d Cir. 1992) (citations omitted); *In re* Hougland, 886 F.2d 1182, 1184 (9th Cir. 1989)). The court acknowledged that although such an interpretation was grammatically correct, it was not compelled. *Id.* *See supra* note 55 (discussing the "rule of the last antecedent").

85 *Nobelman*, 113 S. Ct. at 2111.

86 *Id.* at 2109-10. Furthermore, the Court rejected the debtors' narrow reading of the "other than" exception and determined that Congress's use of the words "claim secured . . . by" instead of the term "secured claim" reflected the view that the broader definition of claim was applicable to § 1322(b)(2). *Id.* at 2110.

87 *Id.* See *supra* note 23 for the text of § 506(a).

88 *Nobleman*, 113 S. Ct. at 2110. Justice Thomas articulated that the term "rights" is not defined in the Bankruptcy Code. *Id.* Therefore, the Court had to look to state law to determine the mortgagee's property rights because "[p]roperty interests are created and defined by state law." *Id.* (quoting Butner v. United States, 440 U.S. 48, 55 (1979)).

89 *Id.* at 2110. The mortgagee's rights recognizable under Texas law, the Court explained, include: the right to repayment of the principal plus interest, the right to keep a lien securing the collateral until the loan is paid in full, the right to accelerate the loan or to foreclose on the mortgage collateral upon default, and the right to a

state law property rights.[90] The Court pointed out that the lender's contractual rights included both the secured and unsecured portions of the claim.[91] Accordingly, the Court surmised, the debtors could not change the terms of the unsecured portion of the claim without simultaneously modifying the secured portion.[92] Thus, the Court held that such a modification is prohibited under § 1322(b)(2) because the modification alters a home mortgage lender's rights.[93]

In a one paragraph concurring opinion, Justice Stevens remarked that it appeared "somewhat strange" that a bankrupt debtor is not afforded greater protection in safeguarding his primary residence.[94] The Justice observed, however, that such an anomalous result is commanded by § 1322(b)(2)'s legislative history.[95] Noting with approval Justice Thomas's literal interpretation

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deficiency judgment should the proceeds of a foreclosure sale be insufficient to satisfy the amount of the judgment. *Id.* (citation omitted).

90 *Id.* The Court remarked that the state law rights may nonetheless be subject to modification by other provisions of the Bankruptcy Code. *Id.* In particular, the *Nobelman* Court explicated, § 362(a)'s automatic stay provision limits the enforcement of a lender's right to foreclose, and § 1322(b)(5)'s cure provision allows a debtor to cure a mortgage default notwithstanding § 1322(b)(2)'s anti-modification provision. *Id.* (citations omitted).

91 *Id.* at 2111. Both the secured and unsecured claims, the Court stated, were contained in a single promissory note in the amount of $68,250 and secured by the deed of trust. *Id.* at 2108, 2111. See *supra* note 20 and accompanying text for a definition of a deed of trust and a discussion of the Nobelmans' loan from American.

92 *Nobelman*, 113 S. Ct. at 2111. The Court explained:

> The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component. Thus, to preserve the interest rate and the amount of each monthly payment specified in the note after having reduced the principal to $23,500, the plan would also have to reduce the term of the note dramatically. That would be a significant modification of a contractual right.

Id. The Court further commented that the lenders had an adjustable rate mortgage requiring a recalculation of the principal and interest owed on the note each time the interest rate changed. *Id.* Because the loan documents did not indicate whether the amortization should be based on the outstanding principal or on the "unamortized value of the collateral," the *Nobelman* Court decided that to reduce the amount of the loan to the fair market value of the collateral, pursuant to § 506(a), would require a modification of the lender's rights under the note. *Id.* This modification, the Court explained, would occur because such a reduction would in effect require an amortization on less than the full amount of the note. *Id.*

93 *Id.*

94 *Id.* at 2111-12 (Stevens, J., concurring).

95 *Id.* at 2112 (Stevens, J., concurring) (citation omitted). Specifically, the Justice stated that Congress "intended to encourage the flow of capital into the home lending market." *Id.* (citation omitted).

of § 1322(b)(2), Justice Stevens stated that such an approach was allegiant to Congress's intent.[96]

From the early days of debtor imprisonment,[97] American bankruptcy law has continually evolved from a system favoring creditors who were first to reach a debtor's assets to a more orderly scheme providing for a ratable distribution of assets and granting the debtor a fresh start.[98] Debtor fresh start, however, is only one of bankruptcy's policy objectives; another is the promotion of an "open-credit economy."[99] In *Nobelman*, the majority and concurring opinions correctly recognized that the Bankruptcy Code's fresh start policy cannot supersede a statute's plain meaning, nor can it override Congress's specific goal of ensuring a "flow of capital into the home lending market" by providing home mortgage lenders with special protection.[100]

The Second, Third, Ninth, and Tenth Circuits each generally purported to ground their pro-bifurcation decisions on a plain reading of § 1322(b)(2).[101] Their statutory construction approach, however, failed to account for the specific limitations placed on a debtor's right to modify a mortgage claim secured by the debtor's primary residence.[102] Furthermore, it is doubtful that the courts' decisions can be based on a plain reading of § 1322(b)(2). The statute is clear and no amount of legal sophistry can change its plain meaning—there can be no modification of the rights of a holder of a claim secured by the debtor's principal residence.[103]

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96 *Id.*

97 According to one author:

> Debtor imprisonment continued to be a prevalent practice in the United States until after 1830. . . . While debtor imprisonment lasted . . . there were periods of time during which substantially more debtors occupied prisons than convicted criminals. In Pennsylvania, New York, Massachusetts and Maryland, there were three to five times as many persons imprisoned for debt as for crime.

Susan Jensen-Conklin, *Nondischargeable Debts In Chapter 13: "Fresh Start" Or "Haven For Criminals"?*, 7 BANKR. DEV. J. 517, 520-21 (1990) (quotation omitted).

98 *See* COLLIER, *supra* note 2, ¶ 1300.01, at 1300-9 n.11 (citing Wilson v. City Bank, 84 U.S. 473, 480-81 (1873)). The *Wilson* court explained that the primary objective of the bankruptcy process "is to secure a just distribution of the bankrupt's property among his creditors" and the secondary objective "is the release of the bankrupt from the obligation to pay the debts of those creditors." *Wilson*, 84 U.S. at 480-81.

99 COMMISSION REPORT, *supra* note 2, at 68.

100 *Nobelman*, 113 S. Ct. at 2112 (Stevens, J., concurring).

101 *See In re* Bellamy, 962 F.2d 176, 179 (2d Cir. 1992); *In re* Hart, 923 F.2d 1410, 1415 (10th Cir. 1991); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123, 127 (3d Cir. 1990); *In re* Hougland, 886 F.2d 1182, 1183 (9th Cir. 1989). See *supra* notes 40-59 and accompanying text for a discussion of *Bellamy*, *Hart*, *Wilson*, and *Hougland*.

102 *See* 11 U.S.C. § 1322(b)(2) (1988).

103 *See id.*

"Claim," as defined by § 101(A)(5), includes both unsecured as well as secured claims.[104] Moreover, a lender's contractual rights, as defined by state law, include both the secured and unsecured portions of a claim.[105] Any lingering doubt as to the statute's meaning is dissipated when one examines its legislative history.[106] Specifically, the Senate's version of the bill and the series of compromises that took place in adopting § 1322(b)(2) demonstrate conclusively that Congress intended to afford greater protection to home mortgage lenders.[107]

The *Nobelman* Court refrained from tailoring a statute's meaning simply to reach a pragmatic result, namely giving a debtor a fresh start.[108] The Court's interpretation is not only the more reasonable approach, but also ensures adherence to Congressional intent. Furthermore, the Court's approach promotes stability in the home mortgage market by guaranteeing that both lenders and borrowers receive the benefit of their bargain.[109] The United States Supreme Court's reasoned approach in *Nobelman* is both fair and practical because it assures that affordable mortgage rates and adequate funds will continue to be available to home buyers.

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104 *See* 11 U.S.C. § 101(5)(A) (Supp. IV 1993). See *supra* note 64 for the text of § 101(5)(A).

105 *See supra* note 89 (listing the mortgagee's rights recognizable under Texas law).

106 *See* H.R. REP. No. 595, *supra* note 2, at 429, *reprinted in* 1978 U.S.C.C.A.N. at 6384; COMMISSION REPORT, *supra* note 2, at 204; S. REP. No. 989, 95th Cong., 2d Sess. 141, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5927.

107 *See* Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 242-346 (5th Cir. 1984) (chronicling the legislative history of Chapter 13 of the Code).

108 One commentator suggested that bifurcation and strip down would not further the Code's fresh start policy because there is no change in the debtor's present financial condition at the time of the strip down as mortgage payments remain the same on the secured portion of the claim. Lindauer, *supra* note 12, at 281. The only effect of the strip down is to eliminate future payments, that would become due long after the debtor's plan has run its course. *Id.* Such a result "looks more like a favorable deal on the price of a home and less like a 'fresh start.'" *Id.*

109 *See, e.g.*, Dewsnup v. Timm, 112 S. Ct. 773, 778 (1992) (stating that a creditor's lien stays with the real property until foreclosure and cannot be stripped down because those are the rights "bargained for by the mortgagor and the mortgagee"). Perhaps an even more compelling argument against mortgage bifurcation and strip down is that the debtor receives a windfall if the value of the property rises. For example, suppose a debtor has a mortgage in the amount of $200,000 on his primary residence but the market value is only $150,000. The plan of reorganization could bifurcate the claim and strip down the amount of the lien to $150,000. Later, should the property appreciate in value to its original mortgage amount of $200,000, the debtor would obtain a windfall of $50,000. Such a result is unfair to the lender who loses the benefit of his bargain.