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Dewsnup V. Timm And Nobelman V. American Savings Bank: The Strip Down Of Liens In Chapter 12 And Chapter 13 Bankruptcies

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NOTE

DEWSNUP V. TIMM AND *NOBELMAN V. AMERICAN SAVINGS BANK*: THE STRIP DOWN OF LIENS IN CHAPTER 12 AND CHAPTER 13 BANKRUPTCIES

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."¹

I. INTRODUCTION

On January 15, 1992, the United States Supreme Court decided *Dewsnup v. Timm*.² In a six-to-two decision,³ the Court held that a debtor in a Chapter 7 bankruptcy could not strip down a creditor's lien on real property to the value of the property securing the lien under section 506(d) of the Bankruptcy Reform Act of 1978⁴ (Bankruptcy Code).⁵ In its opinion the Court clearly stated an intent to limit its holding to the facts of the case.⁶ However, section 506 applies to all chapters of the Bankruptcy Code,⁷ and, accordingly, debtors also have attempted to strip down undersecured liens in reorganization plans under Chapter 12 and Chapter 13.⁸ As a result of its analysis and statutory interpretation methodology, *Dewsnup* has left unanswered the question of whether the strip down of undersecured liens

1. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 198 (Messner ed. 1982) quoted in *Union Planters Nat'l Bank v. Sainz-Dean* (*In re Sainz-Dean*), 143 B.R. 784, 785 n.3 (D. Colo. 1992).

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

3. *Dewsnup v. Timm*, 112 S. Ct. 773, 775. Justice Blackmun delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Stevens, O'Connor and Kennedy joined. *Id.* Justice Scalia filed a dissenting opinion, in which Justice Souter joined. *Id.* Justice Thomas took no part in the consideration or decision of the case. *Id.*

4. See 11 U.S.C. § 506(d) (1988) (providing for bankruptcy court's avoidance of disallowed secured liens); Bankruptcy Reform Act of 1978 (Bankruptcy Code), Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988 & Supp. II 1990)) (repealing and replacing National Bankruptcy Act of 1898).

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

6. *Id.*

7. 11 U.S.C. § 103(a) (1988 & Supp. II 1990). Section 103(a) provides: "Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title." *Id.*

8. See *infra* notes 185-98 and accompanying text (describing process of strip down of undersecured liens in Chapter 12 and Chapter 13 cases).

is still available in Chapter 12 and Chapter 13 bankruptcies⁹ and has raised new questions about how debtors, creditors, and lower courts should interpret the language of the Bankruptcy Code.¹⁰

The Supreme Court granted certiorari in December 1992 to the United States Court of Appeals for the Fifth Circuit in *Nobelman v. American Savings Bank (In re Nobelman)*¹¹ to address a split in the Circuits over the strip down of residential mortgages in a Chapter 13 case.¹² The Chapter 13 debtors in *Nobelman* had sought confirmation of a reorganization plan that included the strip down of the mortgage on their primary residence.¹³ The Fifth Circuit affirmed the lower courts' denial of confirmation of the plan based on the plain meaning of the statute and the implications of *Dewsnup*.¹⁴ *Nobelman* epitomizes many of questions that *Dewsnup*'s analysis and methodology raised or left unanswered.¹⁵ Thus, *Nobelman* represents an opportunity to address the problems of *Dewsnup*.

9. See Margaret Howard, *Dew-What?*, NORTON BANKR. L. ADVISER, Mar. 1992, at 1, 1-2 (suggesting some of uncertainties *Dewsnup* created in Chapter 12 and Chapter 13 bankruptcies).

10. *Dewsnup v. Timm*, 112 S. Ct. 773, 780-81 (1992) (Scalia, J., dissenting).

11. 968 F.2d 483 (5th Cir. 1992), cert. granted, 113 S. Ct. 654 (1992). Researchers should note that "Nobelman" is spelled as "Nobelman" in 113 S. Ct. 654 (1992) and in 129 B.R. 98 (D.N.D. Tex. 1991), but is spelled as "Nobleman" in 968 F.2d 483 (5th Cir. 1992). This Note will use "Nobelman" in all references.

12. See *infra* notes 201-15 and accompanying text (discussing split between courts of appeals over whether Chapter 13 debtor can strip down residential mortgage to value of collateral in reorganization plan).

13. *Nobelman v. American Sav. Bank*, 968 F.2d 483, 485 (5th Cir. 1992), cert. granted, 113 S. Ct. 654 (1992). In *Nobelman*, the United States Court of Appeals for the Fifth Circuit considered whether a debtor's attempt to bifurcate a mortgage claim on the debtor's principal residence using § 506 impermissibly modified the rights of the creditor as prohibited by § 1322(b)(2). *Id.* at 484. The debtors filed a Chapter 13 reorganization plan which proposed to bifurcate the undersecured mortgage on their residence into a secured claim and an unsecured claim and to treat the unsecured portion as a general unsecured claim. *Id.* at 485. The Fifth Circuit noted that four other courts of appeals had adopted the position advocated by the debtor, but that a significant number of bankruptcy courts had held bifurcation impermissible, as it would vitiate the purpose of § 1322(b)(2). *Id.* at 486-87. The court also noted that the Supreme Court's decision in *Dewsnup v. Timm*, 112 S. Ct. 773 (1992) preventing strip down of liens under § 506, lent support to the position that bifurcation is impermissible. *Nobelman*, 968 F.2d at 487. Citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989), as support, the Fifth Circuit looked at the plain meaning of the statute in question. *Nobelman*, 968 F.2d at 487-88. The court found that § 1322(b)(2) clearly prohibits the modification of the rights of holders of secured claims if the claim is secured by the debtor's principal residence. *Id.* at 488. Applying the tenet of statutory construction that if two statutes conflict, the specific statute should prevail over the general statute, the court held the language of § 1322(b)(2) preventing bifurcation of the mortgage controls. *Id.* The court found that the legislative history of the statute indicates that Congress intended that result. *Id.* Thus, the Fifth Circuit held that § 1322(b)(2) prevents the bifurcation of a mortgage on the primary residence of the debtor. *Id.* at 489.

14. *Id.* at 487-88.

15. See *infra* notes 145-75 and accompanying text (discussing and analyzing problems of *Dewsnup* holding).

This Note first explains the strip down of liens in Chapter 7 and the role of the bankruptcy discharge of debts in that process. A review of the reasoning of *Dewsnup*, including an analysis of the majority's interpretation of section 506 and of Justice Scalia's dissent, follows. This Note then reviews the recent history of statutory interpretation by the Court in order to determine *Dewsnup*'s use in interpretation of the Bankruptcy Code.

After identifying many questions that *Dewsnup* either raises or leaves unanswered, this Note turns its focus to the most significant question, how *Dewsnup* applies to Chapter 12 and Chapter 13 cases. Beginning with an explanation of the purposes of Chapter 12 and Chapter 13, this Note reviews the conflict over strip downs in Chapter 13 cases and the arguments of *Nobelman* and the conflicting courts of appeals over the application of *Dewsnup* to that issue. An analysis of other problems created by the application of *Dewsnup* to Chapter 13 cases yields the assessment that *Nobelman* epitomizes the problems *Dewsnup* has created for bankruptcy. Finally, this Note offers the conclusion that *Nobelman* provides the Supreme Court with an opportunity to address many of the questions *Dewsnup* has raised and then offers a methodology with which to address the issues the Supreme Court faces in *Nobelman*.

II. THE STRIP DOWN OF LIENS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

Strip down is an attempt by the debtor to reduce a lien on real property securing a debt by the amount of the lien that exceeds the fair market value of the collateral, leaving the debtor with a lower obligation on the debt.¹⁶ The first step in the strip down process is the bifurcation¹⁷ of the claim of the creditor that the debtor's property secures.¹⁸ Section 506(a)¹⁹ provides

16. See Theresa A. Calderone, Note, *Can a Debtor Void a Real Property Lien that Exceeds the Value of the Collateral?: An Interpretation of Section 506(d) of the Bankruptcy Code*, 45 WASH. & LEE L. REV. 1393, 1395 (1988) (criticizing debtor attempts to void real property liens to extent they exceed value of collateral).

17. See WEBSTER'S COLLEGE DICTIONARY 134 (1st ed. 1991) (defining "bifurcation" as noun form of bifurcate, which means to divide into two branches).

18. See Patricia Lindauer, Note, *Optimizing the "Fresh Start": Mortgage Cramdown Under Chapter 13 of the Bankruptcy Code*, 11 J.L. & COM. 257, 261 n.26 (1992) (characterizing strip down of residential mortgages as beyond fresh start that Congress intended for Chapter 13 bankruptcies).

19. 11 U.S.C. § 506(a) (1988). Section 506(a) reads in pertinent part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest 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.

for the bifurcation of the allowed claim of the undersecured creditor into two separate claims: a secured claim²⁰ equal to the value of the collateral, and an unsecured claim equal to the difference between the total undersecured claim and the value of the collateral.²¹ The bankruptcy court determines the value of the collateral as a part of the bifurcation process.²²

The second step of the strip down process is the avoidance of the unsecured lien by the bankruptcy court, leaving the creditor with only its secured lien against the debtor's property. In Chapter 7 cases the debtor seeks avoidance through the operation of section 506(d)²³ of the Bankruptcy Code, which voids any portion of a lien that represents an unsecured claim.²⁴ Therefore, section 506(d) voids the portion of the lien represented by the claim that section 506(a) classifies as unsecured, leaving only the portion of the lien represented by the claim that section 506(a) classifies as secured.²⁵ The bankruptcy court's grant to the debtor of a discharge of all prepetition debts under section 727²⁶ then relieves the debtor of any personal obligation for the debt represented by the unsecured claim.²⁷ The debtor may either pay off the stripped down lien or reaffirm it and retain the property with a smaller lien encumbering the property.²⁸

20. See 11 U.S.C. § 101 (1988 & Supp. II 1990) (providing definitions of terms used in Bankruptcy Code). "Claim" means a right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right of payment. *Id.* § 101(5). A "lien" means an interest in property to secure payment of a debt or performance of an obligation. *Id.* § 101(37). Thus, a secured claim is a right to payment of a debt that has a lien on property to ensure enforcement of that right. The amount of the secured claim equals the value of the lien encumbered property. 11 U.S.C. § 506(a) (1988).

21. See Margaret Howard, *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 AM. BANKR. L.J. 373, 375 (1991) (describing process by which debtor strips down undersecured lien under § 506(d)).

22. See *supra* note 19 (providing language of 11 U.S.C. § 506(a), which provides for determination of value of property securing creditor's claim).

23. 11 U.S.C. § 506(d) (1988). Section 506(d) reads in pertinent 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.*

24. See Howard, *supra* note 21, at 375-76 (describing operation of § 506(d) in voiding of unsecured portion of lien).

25. See *supra* notes 17-22 and accompanying text (describing operation of § 506(a) on undersecured liens).

26. 11 U.S.C. § 727(b) (1988). Section 727(b) reads:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before commencement of the case, whether or not a proof of claim based on a such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

Id.

27. *Id.*

28. See Howard, *supra* note 21, at 391 (noting that ability to retain property after strip down dependent on nonbankruptcy law).

For example, several creditors loaned T. LaMar and Aletha Dewsnap \$119,000, secured by a deed of trust on two parcels of farmland in Utah that the Dewsnums owned.²⁹ After a subsequent default on these loans in 1984 and the dismissal of two Chapter 11 reorganization petitions, the Dewsnums in 1987 filed a petition for liquidation under Chapter 7 of the Bankruptcy Code.³⁰ In an adversary proceeding, the bankruptcy court determined the value of the land subject to the deed of trust to be \$39,000.³¹ The Dewsnums then sought to have the bankruptcy court bifurcate the creditor's claims into a \$39,000 secured claim and an \$80,000 unsecured claim under § 506(a) and void the portion of the lien that the \$80,000 unsecured claim represented.³² This would strip down the lien encumbering the Dewsnap's property to \$39,000.³³ The Chapter 7 discharge would free the Dewsnums from any personal obligations for the unsecured claim.³⁴ The Dewsnums could then pay off the \$39,000 remaining debt that their land secured or reaffirm the remaining debt with the creditors and begin making payments on that obligation.³⁵

III. THE ROLE OF THE FRESH START OF DISCHARGE IN STRIP DOWN

The fresh start concept underlies and shapes virtually every aspect of the Bankruptcy Code.³⁶ The purpose of this concept in bankruptcy is to give "the honest but unfortunate debtor . . . a new opportunity."³⁷ The most important aspects of bankruptcy's fresh start are the conservation of adequate property for a debtor's return to normal life and the protection of the debtor from collection attempts by prepetition creditors.³⁸ The discharge of debt is central to the Bankruptcy Code's fresh start policy,³⁹ providing both asset conservation and debtor protection.⁴⁰

29. Dewsnap v. Timm, 112 S. Ct. 773, 775 (1992).

30. *Id.* at 776.

31. *Id.*

32. *Id.*

33. See *supra* notes 17-28 and accompanying text (describing strip down process in Chapter 7 case).

34. See *supra* notes 26-27, *infra* notes 36-49, and accompanying text (describing effect of discharge on personal obligations of debtor).

35. See *supra* notes 26-27, *infra* notes 36-49, and accompanying text (describing effect of discharge on personal obligations of debtor).

36. See Doug Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 723 (1980) (discussing different theories of policy underlying fresh start of bankruptcy).

37. See Charles J. Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 56-57 (1990) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) for proposition that one of central policies of bankruptcy is to give new opportunity to debtor).

38. H.R. REP. NO. 595, 95th Cong., 2d Sess. 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086.

39. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) (discussing protections and trade-offs of discharge of debts in bankruptcy law).

40. See Rendleman, *supra* note 36, at 750-54 (describing characteristics of fresh start in Bankruptcy Code).

The Bankruptcy Code increases the protection that was available to the consumer debtor under the National Bankruptcy Act of 1898.⁴¹ Section 727 provides for the grant of a discharge in Chapter 7 cases.⁴² Other sections of the Bankruptcy Code govern discharges in Chapter 12 and Chapter 13 cases.⁴³ The House Report accompanying the House of Representatives version of the Bankruptcy Code described section 727 as the "heart of the fresh start provisions of the bankruptcy law."⁴⁴ Under section 727, unless the debtor has committed certain prohibited acts,⁴⁵ the individual may obtain a discharge from most existing debts by the surrender of certain assets or a portion of future earnings.⁴⁶ This discharge releases the debtor from many prior financial obligations and protects him from adverse consequences that might result from his bankruptcy.⁴⁷

The bankruptcy discharge, therefore, fulfills the purpose of the strip down.⁴⁸ It relieves the debtor of any personal obligation for the portion of the debt that exceeds the judicially determined value of the real property securing the debt.⁴⁹ In *Dewsnup*, the Supreme Court addressed the contested question of whether the bankruptcy discharge removes a lien on real property to the same extent as it relieves a debtor's personal obligation.

IV. THE CONFLICT OVER STRIP DOWN

A great deal of controversy surrounded attempts by debtors to strip down undersecured liens in bankruptcy.⁵⁰ In two similar Chapter 7 cases, the United States Courts of Appeals for the Third Circuit and the Tenth Circuit issued conflicting decisions regarding the strip down of liens.⁵¹ In

41. H.R. REP. No. 595, 95th Cong., 2d Sess. 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086.

42. See 11 U.S.C. § 103(b) (1988) (providing that portion of Bankruptcy Code that includes § 727 applies only to Chapter 7 case).

43. See 11 U.S.C. § 1228 (1988) (providing for discharge of debt in Chapter 12 case); 11 U.S.C. § 1328 (1988 & Supp. II 1990) (providing for discharge of debt in Chapter 13 case).

44. H.R. REP. No. 595, 95th Cong., 1st Sess. 384 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6340.

45. See 11 U.S.C. § 727(a)(1)-(10) (specifying circumstances under which bankruptcy court will not grant discharge).

46. See Jackson, *supra* note 39, at 1393 (stating that bankruptcy's discharge of debt provides fresh start for debtor).

47. See *id.* (providing release from financial obligations and protection from adverse consequences of release as aspects of bankruptcy discharge's fresh start).

48. See *supra* note 16 and accompanying text (describing goal of strip down process).

49. See *supra* notes 36-48 and accompanying text (describing operation of bankruptcy discharge).

50. See Howard, *supra* note 21, at 374 n.2 (providing list of cases permitting strip down of undersecured liens and list of cases denying strip down to debtor).

51. Compare *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304, 1306-11 (3d Cir. 1989) (holding that Chapter 7 debtor could void portion of lien secured by real property which exceeded value of property) with *Dewsnup v. Timm (In re Dewsnup)*, 908 F.2d 588, 593 (10th Cir. 1990) (holding that Chapter 7 debtor could not void unsecured portion of lien and redeem property by paying fair market value of property), *aff'd*, *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992).

1989 the Third Circuit in *Gaglia v. First Federal Savings & Loan Ass'n*⁵² held that a debtor can strip down a lien under section 506.⁵³ The Third Circuit based its holding on both its reading of the plain meaning of section 506 and the fresh start policy of the Bankruptcy Code.⁵⁴ In 1990 the Tenth Circuit in *Dewsnup v. Timm (In re Dewsnup)*⁵⁵ held that a debtor could not strip down an undersecured lien.⁵⁶

52. 889 F.2d 1304 (3d Cir. 1989).

53. *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304, 1306-11 (3d Cir. 1989). In *Gaglia*, the United States Court of Appeals for the Third Circuit considered whether a Chapter 7 debtor could void the portion of secured liens that exceeded the value of the underlying property under § 506(a) and § 506(d) of the Bankruptcy Code. *Id.* at 1305. The debtors filed an adversary proceeding in the bankruptcy court, following their discharge from a Chapter 7 liquidation case, seeking to avoid a \$200,000 mortgage on their residence to the extent it exceeded the alleged value of \$34,000. *Id.* The bankruptcy court denied relief on the basis that § 506 applies only to property of the estate and not property released or abandoned by the estate. *Id.* The district court affirmed the bankruptcy court's denial of relief. *Id.* On appeal, the Third Circuit first considered whether § 506 applies only to property administered by the estate. *Id.* at 1306-07. The court found that the majority of bankruptcy and district courts that had considered this question had concluded that § 506 does apply to such property. *Id.* The creditors argued that § 506(a) does not apply when the debtor had no equity in the property, as was the case with the *Gaglias*. *Id.* at 1307. Rejecting this argument as unsupported by the plain meaning of the statute, the court of appeals held that § 506 allows the creditors to void the mortgage to the extent it is unsecured. *Id.* at 1308. The court further rejected creditor arguments that the debtors were not "parties in interest," that § 506 does not apply to property which the state did not administer, and that this use of § 506 would conflict with other sections of the Bankruptcy Code. *Id.* at 1309-10. Finally, the Third Circuit found that its holding was neither inequitable to the creditors nor would it discourage the use of the reorganization Chapters in favor of Chapter 7. *Id.* at 1311.

As an example, application of the Third Circuit's holding to the facts of *Dewsnup v. Timm*, 908 F.2d 588 (10th Cir. 1990), *aff'd*, 112 S. Ct. 773, 779 (1992), results in the *Dewsnups* having an \$80,000 personal obligation discharged and an \$80,000 lien voided. *Supra* notes 29-33 and accompanying text. Following their discharge from bankruptcy, a \$39,000 lien would remain on their property. *Supra* notes 30-31 and accompanying text. *But see infra* note 56 (providing example of opposite outcome by application of holding of *Dewsnup* to its facts).

54. *Id.* at 1306-11.

55. 908 F.2d 588 (10th Cir. 1990).

56. *Dewsnup v. Timm (In re Dewsnup)*, 908 F.2d 588, 593 (10th Cir. 1990), *aff'd*, 112 S. Ct. 773, 779 (1992). In *Dewsnup*, the United States Court of Appeals for the Tenth Circuit considered whether a Chapter 7 debtor may use § 506 of the Bankruptcy Code to void the unsecured portion of a lien on property abandoned by the bankruptcy estate. *Id.* at 589. The debtors sought to void liens on farmland in an adversary proceeding within a Chapter 7 bankruptcy case. *Id.* The bankruptcy court denied this relief, holding that the avoidance of the lien is not an intended use of § 506. *Id.* The district court affirmed that holding. *Id.* The Tenth Circuit first noted that although the majority of courts had adopted the position the debtors urged, a strong minority of courts had rejected the approach as inconsistent with the section's purpose. *Id.* The Tenth Circuit turned to an analysis of the statutory language, finding that § 506 applies only where the bankruptcy estate has an interest in the property. *Id.* at 590. The estate had abandoned the property at issue and therefore did not have the requisite interest in the property for the application of § 506. *Id.* at 590-91. The court of appeals held that if the property was abandoned by the estate, § 506 could not apply. *Id.* at 591. The court rejected the approach found in *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304 (3d Cir. 1989), on the basis of the plain language of the statute and the abandonment

In *Dewsnup* the debtor defaulted on a loan secured by a deed of trust on two parcels of farmland owned by the debtor.⁵⁷ Before a foreclosure sale could occur, the debtor filed a petition seeking liquidation under Chapter 7 of the Bankruptcy Code.⁵⁸ Because the debtor's \$119,000 debt exceeded the value of the collateral by approximately \$80,000, the debtor filed an adversary proceeding prior to liquidation seeking to void the unsecured portion of the creditor's lien.⁵⁹ Both the bankruptcy court and the district court rejected the debtor's assertions that strip down was an intended use of section 506.⁶⁰ The bankruptcy court based its decision on the assumption that the bankruptcy trustee had abandoned the subject property pursuant to section 554.⁶¹ On appeal the Tenth Circuit rejected the *Gaglia* court's approach and held that the plain language of section 506, together with the abandonment provision of the Bankruptcy Code, indicated that Congress did not intend for a Chapter 7 debtor to use section 506 to retain property abandoned by the estate.⁶² Upon petition by the debtors, the Supreme Court granted certiorari to the Tenth Circuit to resolve the conflict between the two courts of appeals.⁶³

V. DEBTOR AND CREDITOR ARGUMENTS IN *DEWSNUP* V. *TIMM*

In *Dewsnup* the debtor argued that the Court should read sections 506(a) and 506(d) together because they are complementary.⁶⁴ According to the debtor, section 506(a) bifurcates classes of allowed claims⁶⁵ into allowed

provision of the Bankruptcy Code. *Dewsnup*, 908 F.2d at 591-92; see *supra* note 53 and accompanying text (discussing *Gaglia*). The Tenth Circuit noted that the effect of its holding was consistent with the Bankruptcy Code's redemption provision, § 722, which allows redemption of only abandoned personal property. *Dewsnup*, 908 F.2d at 592.

As an example, application of the Tenth Circuit's holding to its facts results in the Dewsnups only having an \$80,000 personal obligation discharged. *Supra* notes 29-33 and accompanying text. Following their discharge from bankruptcy, the entire \$119,000 lien would remain on their property. *Supra* note 29 and accompanying text. *But see supra* note 53 (providing example of opposite outcome by application of holding of *Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304 (3d Cir. 1989)).

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

58. *Id.* at 776; see generally 11 U.S.C. §§ 701-766 (1988) (providing procedures for bankruptcy liquidation of debtor's estate).

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

60. *Dewsnup v. Timm (In re Dewsnup)*, 87 B.R. 676, 683 (Bankr. D. Utah 1988), *aff'd*, 908 F.2d 588, 593 (10th Cir. 1990), *aff'd*, 112 S. Ct. 773, 779 (1992). The United States District Court for the District of Utah affirmed the bankruptcy court's decision without issuance of an opinion. *Dewsnup v. Timm (In re Dewsnup)*, 112 S. Ct. 773, 776 (1992).

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

62. *Dewsnup v. Timm (In re Dewsnup)*, 908 F.2d 588, 592 (10th Cir. 1990), *aff'd*, 112 S. Ct. 773, 779 (1992).

63. *Dewsnup v. Timm*, 908 F.2d 588 (10th Cir. 1990), *cert. granted*, 111 S. Ct. 949 (1991):

64. *Dewsnup v. Timm*, 112 S. Ct. 773, 776-77 (1992).

65. 11 U.S.C. § 502(a) (1988 & Supp. II 1990). Section 502(a) reads in pertinent part: "A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, . . . objects." *Id.*

secured claims and allowed unsecured claims.⁶⁶ The portion of an allowed claim that equals the value of the real property is an allowed secured claim.⁶⁷ Section 506(d) protects a lien to the extent it secures this allowed secured claim.⁶⁸ Any portion of an allowed claim representing a lien on real property that exceeds the value of the property is an allowed unsecured claim, and the lien it represents is void under section 506(d).⁶⁹

Conversely, the creditors in *Dewsnup* primarily asserted that sections 506(a) and 506(d) are not rigidly tied together.⁷⁰ According to the creditors, section 506(a) fulfills the function of classifying claims at the time of the distribution of the estate to ensure fairness to unsecured creditors.⁷¹ The creditors argued that section 506(d) applies to the time of foreclosure and serves no distributional purpose if the estate abandons the property, as alleged.⁷² Alternatively, the creditors, joined by the United States as amicus curiae, asserted that the phrase "allowed secured claim" in section 506(d) is not an indivisible term of art, as defined by reference to section 506(a).⁷³ Instead, the creditors argued, the Court should read each term of this phrase independently of the other terms to refer to a claim that is first allowed and then secured.⁷⁴ Therefore, section 506(d) voids only claims that are not allowed and are secured.⁷⁵

VI. THE MAJORITY'S REASONING IN *DEWSNUP V. TIMM*

The majority, in weighing these two conflicting views, began its analysis by seeking to limit the impact of its holding, stating an intent to focus only on the facts before it and specifically declining to opine whether the phrase in question had different meanings elsewhere in the Bankruptcy Code.⁷⁶ Writing for the majority, Justice Blackmun found that the differing positions on the meaning of section 506 were evidence of ambiguity in that section's language and relationship to other provisions of the Bankruptcy Code.⁷⁷ Acknowledging some difficulty with the creditors' alternative argument, the *Dewsnup* Court nonetheless adopted it as the "better of several approaches."⁷⁸ The Court noted with disapproval that the adoption of the debtor's argument would result in the freezing of the creditor's interest at the then-current value of the collateral, denying the creditor the benefit of

66. *Dewsnup*, 112 S. Ct. at 777.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 778.

77. *Id.*

78. *Id.*

any appreciation in the value of the collateral prior to foreclosure and providing the debtor with a windfall.⁷⁹

The *Dewsnup* Court next noted that under the Bankruptcy Act of 1898, liens on real property passed through bankruptcy proceedings unaffected.⁸⁰ Finding ambiguity in section 506 and silence on the part of Congress regarding a change of pre-Code rules, the Court held that section 506(d) does not allow the stripping down of undersecured liens to the value of the collateral securing the lien.⁸¹ Given that Congress does not write "on a clean slate," the Court concluded that it must give pre-Code rules proper effect.⁸² The Court noted that two recent cases, *Johnson v. Home State Bank*⁸³ and *Farrey v. Sanderfoot*,⁸⁴ had each held that the Bankruptcy Code codified the rule of *Long v. Bullard*⁸⁵ that a creditor's right to foreclose on its mortgage survives bankruptcy.⁸⁶ Finding that the legislative history of the Bankruptcy Code provided no evidence of Congress's intent to modify this rule, the Court held that although the discharge of the Chapter 7 petition extinguishes the personal liability of the debtor, an in rem lien remains against the property securing the debt.⁸⁷ On this basis, the Court affirmed the Tenth Circuit's refusal to permit a Chapter 7 debtor to strip down a lien using section 506(d).⁸⁸ Thus, the Court's holding in *Dewsnup*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 777-78.

83. 111 S. Ct. 2150 (1991).

84. 111 S. Ct. 1825, 1831 (1991). In *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991), the Supreme Court considered the question of whether § 522(f) allows the debtor to avoid a lien on a homestead when the lien was granted under a divorce decree and when the lien secured no more than the value of the non-debtor spouse's former interest. *Id.* at 1827. The debtor sought to have voided a lien that a state court had placed on the debtor's property to secure an award to the debtor's former spouse at divorce. *Id.* To address this question, the Supreme Court looked to the language of § 522(f) of the Bankruptcy Code. *Id.* at 1829. The Court found the term lien "fixing" to have a temporal meaning. *Id.* Therefore, the Court held, unless the debtor had the property interest to which the lien attached at some point before the lien attached, he cannot avoid the fixing of the lien under § 522(f). *Id.* The Supreme Court then found that this interpretation was fully consistent with the intent of Congress for this provision. *Id.* at 1829-30. With such a finding, the *Farrey* Court held that the debtor could not avoid the lien on his property under § 522(f). *Id.* at 1831.

85. 117 U.S. 617 (1886). In *Long v. Bullard*, 117 U.S. 617 (1886), the Supreme Court considered the effect of the discharge in bankruptcy on the right of a creditor to enforce a lien upon real property in existence at the time of the commencement of the bankruptcy proceedings. *Id.* at 620. Following a suit by a creditor to enforce a lien, the debtors sought a decree declaring the lien on real property discharged in a prior bankruptcy. *Id.* at 619. The Court held that the bankruptcy laws preserved the lien and the claim of homestead did not relieve the property from the operation of the lien in existence prior to bankruptcy. *Id.* at 621.

86. *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992); see *Johnson*, 111 S. Ct. at 2154 (stating that Bankruptcy Code codified rule that liens pass through bankruptcy unaffected); *Farrey*, 111 S. Ct. at 1829 (same).

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

88. *Id.* at 779.

rests almost entirely upon its reading of the intent of Congress in its passage of section 506(d).⁸⁹ The legislative history of the Bankruptcy Code supports the Court's determination of Congress's intent.⁹⁰ Yet despite this consistency with legislative intent, *Dewsnup* is contrary to a plain reading of section 506(d) and the phrase "allowed secured claim."⁹¹ It is this inconsistency which most concerned Justice Scalia in his dissent.⁹²

VII. JUSTICE SCALIA'S DISSENT IN SUPPORT OF PLAIN MEANING

Justice Scalia, a strong proponent of plain meaning in statutory construction,⁹³ criticized the majority holding as replacing what Congress said with what the Court thinks Congress ought to have said.⁹⁴ Joined by Justice Souter,⁹⁵ Justice Scalia asserted that in so doing, the Court impaired well-established rules of statutory construction for future use.⁹⁶

Calling the *Dewsnup* holding the "methodological antithesis"⁹⁷ of *United States v. Ron Pair Enterprises, Inc.*,⁹⁸ a case in which the Court had relied exclusively on plain meaning,⁹⁹ Justice Scalia noted four primary objections

89. See *id.* (stating that if Congress intended to change pre-Code law it would comment in Code or legislative history).

90. See H.R. REP. No. 595, 95th Cong., 1st Sess. 357 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6313 (stating that "Subsection (d) permits liens to pass through the bankruptcy case unaffected"). But see S. REP. No. 989, 95th Cong., 2d Sess. 68 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5854 (stating that "Subsection (d) provides that to the extent a secured claim is not allowed, its lien is void").

91. See *infra* notes 93-110 and accompanying text (discussing Justice Scalia's criticisms of majority's reasoning).

92. See *Dewsnup v. Timm*, 112 S. Ct. 773, 779-88 (1992) (Scalia, J., dissenting) (questioning majority's use of legislative history despite plain meaning of statute).

93. Cf. Charles J. Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 879-81 (1991) (criticising bankruptcy jurisprudence of Supreme Court under Chief Justice Rehnquist).

94. *Dewsnup*, 112 S. Ct. at 780 (Scalia, J., dissenting).

95. *Id.* at 779 (Scalia, J., dissenting).

96. *Id.* at 780 (Scalia, J., dissenting).

97. *Id.* at 787 (Scalia, J., dissenting).

98. 489 U.S. 235 (1989).

99. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-49 (1989). In *Ron Pair*, the Supreme Court considered the question of whether § 506(b) of the Bankruptcy Code entitles a creditor to receive postpetition interest on a nonconsensual oversecured claim allowed in the bankruptcy proceeding. *Id.* at 237. The United States, as creditor, sought postpetition interest on a claim for unpaid withholding taxes, which had been perfected through a tax lien on property owned by the debtor. *Id.* The Government argued that § 506(b) allows recovery of postpetition interest on its claim, since the debtor's property had a value greater than the amount of the tax debt. *Id.* The *Ron Pair* Court started its analysis by stating that the task of determining the meaning of § 506 begins where all statutory interpretation questions must begin, with the language of the statute itself. *Id.* at 241. The Court found the language of the statute plain, and held where that is the case, reference to legislative history and pre-Code practice is unnecessary. *Id.* Finding that its interpretation was mandated by the grammatical structure of the statute, the Supreme Court held that the plain language of § 506 provided for postpetition interest in the case before it. *Id.* at 241-42. The Court rejected arguments of

to the majority's holding.¹⁰⁰ First, and most importantly, he argued that the majority opinion is at odds with the jurisprudence in other recent decisions.¹⁰¹ The Court rested its decision upon policy intuitions of a legislative character and on the principle that an ambiguous statute cannot change pre-Code law without the "imprimatur of legislative history" indicating an intent to do so.¹⁰² In doing so, the Court ignored the plain meaning of the statute, which, according to Justice Scalia, clearly expresses an intent to alter pre-Code practices.¹⁰³

Second, Justice Scalia criticized the Court for finding ambiguity in section 506 merely because of the presence of conflicting positions on its meaning.¹⁰⁴ He pointed out that the majority's mode of analysis in finding ambiguity means that every litigated statute is ambiguous.¹⁰⁵ Third, Justice Scalia characterized the Court's decision as founded in a pro creditor policy judgment, favoring the rights of the creditor over the debtor.¹⁰⁶ His concern centered on the fact that policy considerations were at work in the Court's statutory construction analysis.¹⁰⁷ Finally, Justice Scalia criticized the stilted "one-subsection-at-a-time" approach of the majority, which violates the rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.¹⁰⁸ Justice Scalia found that the majority's approach produces an interpretation that creates surplusage, redundancy, and absurdity in section 506(d).¹⁰⁹ The outcome of the Court's holding, Justice Scalia forecast, is unpredictability in the Bankruptcy Code.¹¹⁰ Whether Justice Scalia is correct or not will depend on whether *Dewsnup* is an aberration or the beginning of the Court's shift away from plain meaning in statutory construction.

VIII. AN ANALYSIS OF THE STATUTORY CONSTRUCTION IN *DEWSNUP*

The principles of statutory construction in *Dewsnup* represent a marked divergence from what had been the clear path of the Supreme Court's treatment of bankruptcy cases since 1989.¹¹¹ Indeed, *Dewsnup* creates some

the debtor that legislative intent and pre-Code practice indicated a different interpretation of the statute. *Id.* at 243-48. The Court found no legislative history or pre-Code practice to support the debtor's argument, holding that the plain meaning of the statute should be conclusive, except in the rare circumstances where the plain meaning is clearly and demonstrably at odds with the legislative intent. *Id.* at 248-49.

100. *Dewsnup v. Timm*, 112 S. Ct. 773, 779-88 (1992) (Scalia, J., dissenting).

101. *Id.* at 786-87 (Scalia, J., dissenting).

102. *Id.* at 781 (Scalia, J., dissenting).

103. *Id.* at 786-87 (Scalia, J., dissenting).

104. *Id.* (Scalia, J., dissenting).

105. *Id.* (Scalia, J., dissenting).

106. *Id.* at 787 (Scalia, J., dissenting).

107. *Id.* (Scalia, J., dissenting).

108. *Id.* at 780-81 (Scalia, J., dissenting).

109. *Id.* at 782-83 (Scalia, J., dissenting).

110. *Id.* at 787 (Scalia, J., dissenting).

111. See *Tabb & Lawless*, *supra* note 93, at 879-90 (discussing bankruptcy jurisprudence of Supreme Court after 1988).

hope for a shift away from the strict textualist or plain meaning approach that has characterized the Rehnquist Court¹¹² toward the broad considerations of the underlying purpose of the Bankruptcy Code that marked the early decisions following the Bankruptcy Reform Act of 1978.¹¹³

Prior to 1989 the Court generally considered the language of the statute to be only the starting point in the interpretation of the Bankruptcy Code.¹¹⁴ In *Kelly v. Robinson*,¹¹⁵ Justice Powell wrote that the Court's deference to federalism and the policy of following pre-Code law, unless otherwise indicated by the Bankruptcy Code, directed the Court to look beyond the language of the statute in interpreting the meaning of the statute.¹¹⁶ Quoting an earlier Supreme Court decision,¹¹⁷ Justice Powell noted that the Court had followed "with particular care" in bankruptcy cases the normal rule of statutory construction that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent clear.¹¹⁸ Indeed, during the first eight years following the passage of the Bankruptcy

112. See *id.* at 879-81 (describing Rehnquist Court's reliance on plain meaning in statutory interpretation).

113. See Charles J. Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PRR. L. REV. 477, 558-75 (1988) (describing Supreme Court's principles of decision in cases under Bankruptcy Reform Act of 1978 through Court's 1986 Term).

114. See Tabb & Lawless, *supra* note 93, at 828-29 (describing Supreme Court's use of policy in statutory interpretation of Bankruptcy Code in cases prior to 1988).

115. 479 U.S. 36 (1986).

116. *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986). In *Kelly*, the Supreme Court considered whether restitution obligations, imposed as conditions of probation in state criminal proceedings, were dischargeable under Chapter 7 of the Bankruptcy Code. *Id.* at 38. The debtor was ordered to repay wrongfully received welfare benefits as a condition of the suspension of a criminal sentence. *Id.* at 39. Following a voluntary Chapter 7 petition, the debtor filed an adversary proceeding in bankruptcy court seeking a declaration that her bankruptcy had discharged this obligation. *Id.* at 39-40. In deciding this issue, the Court first looked at the relevant statutes, § 101, governing the definition of "debt," and § 523, governing exceptions to discharge, in light of the history of bankruptcy courts' deference to criminal judgments and of the States' interest in the administration of their criminal justice system. *Id.* at 40-44. The *Kelly* Court found that under the Bankruptcy Act most courts had refused to allow the discharge in bankruptcy to affect a judgment of a state criminal court. *Id.* at 44-46. This was the backdrop under which the Bankruptcy Code was enacted. *Id.* at 46. The *Kelly* Court noted that it had previously held that the normal rule of statutory construction is that if Congress intended for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Id.* at 47. The Court also held that its interpretation of the Code must reflect federalism, as shown by the bankruptcy court's respect for the States' interest in administering their criminal justice system. *Id.* at 47-49. Turning to the language of § 523(a)(7), the Court found no significant difference between court-ordered restitution and a traditional criminal fine, which the Code exempted from discharge. *Id.* at 50-53. Given the strong interest of the States, the uniform construction of the former Act exempting criminal fines from discharge, and the absence of any significant evidence that Congress intended a change, the *Kelly* Court held that judicially-ordered restitution in a criminal case is not dischargeable under the Bankruptcy Code. *Id.* at 53.

117. *Id.* at 47 (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986), to state that normal rule of statutory construction is if Congress intended change in interpretation of judicially created concept, it makes intent specific).

118. *Kelly*, 479 U.S. at 47.

Code, the Court developed a jurisprudence that was limited in constitutional scope, proreorganization, deferential to state laws, and procreditor, using these values in conjunction with rules of statutory construction.¹¹⁹

By 1989 the composition of the Supreme Court changed significantly.¹²⁰ The Supreme Court's approach to statutory construction changed as a result. The Rehnquist Court announced its exclusive reliance on the text of the Bankruptcy Code¹²¹ in *United Savings Assn v. Timbers of Inwood Forest Associates*.¹²² The Court joined unanimously in an opinion by Justice Scalia that eschewed policy, pre-Code law, and legislative history¹²³ and held that an undersecured creditor is not entitled to interest on its collateral to assure adequate protection during the automatic stay of the bankruptcy petition.¹²⁴ In 1989 in *United States v. Ron Pair Enterprises, Inc.*,¹²⁵ a sharply divided

119. See Tabb, *supra* note 113, at 558-81 (discussing Supreme Court's application of principles of decision in cases involving Bankruptcy Code in eight years following Bankruptcy Reform Act of 1978).

120. Three Justices retired during the 1980s: Potter Stewart in 1981, Warren Burger in 1986, and Lewis Powell in 1987. See Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 893 n.3 (1991) (analyzing effect of change in composition of Supreme Court on religious freedom). President Reagan appointed Justice William Rehnquist as Chief Justice and Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy as Justices. *Id.* President Bush followed the conservative trend during his term by appointing David Souter to replace Justice William Brennan and Clarence Thomas to replace Justice Thurgood Marshall. *Id.*

121. See Tabb & Lawless, *supra* note 93, at 837 (discussing beginning of Supreme Court's reliance on plain meaning for statutory construction).

122. 484 U.S. 365 (1988).

123. See Tabb & Lawless, *supra* note 93, at 837 (describing Supreme Court's exclusive reliance on plain meaning in *Timbers*, 484 U.S. 365 (1988)).

124. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 382 (1988). In *Timbers*, the Supreme Court addressed the question of whether undersecured creditors are entitled to compensation under 11 U.S.C. § 362(d)(1) (1988) for the delay in foreclosure on its collateral caused by the automatic stay. *Id.* at 369. The creditor had sought the payment of interest during the automatic stay of § 362 on the amount estimated to be realized at foreclosure sale or relief from the stay for lack of adequate protection of its interest in the collateral. *Id.* at 368-69. The creditor asserted that the phrase "interest in property" in § 362(d)(1) includes a secured party's right to take immediate possession of collateral upon default and apply it to the payment of the debt. *Id.* at 370-71. Justice Scalia, writing for the Court, characterized statutory construction as a "holistic endeavor." *Id.* at 371. The Court then reviewed the meaning of the disputed phrase in light of other provisions in the Bankruptcy Code dealing with the rights of secured creditors. *Id.* at 371-76. The *Timbers* Court held that the language of those provisions indicates that the "interest in property" protected by § 362 does not include a secured party's right to foreclose. *Id.* at 376. Finally, the Court rejected the creditors argument that the Court's interpretation was inconsistent with other sections of the Bankruptcy Code and was unsupported by the legislative history of the Code. *Id.* at 377-81. Thus, the Court found that an undersecured creditor is not entitled to interest on its collateral during the automatic stay to assure adequate protection under § 362. *Id.* at 382; see also 11 U.S.C. § 362(a) (1988 & Supp. II 1990) (providing that filing of petition operates as stay against most collection actions against debtor or debtor's property with respect to pre-petition debt); 11 U.S.C. § 362(d) (1988 & Supp. II 1990) (providing for relief from automatic stay if lack of adequate protection of creditor's interest in debtor's property).

125. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).

Court¹²⁶ held, based on the placement of a comma in section 506(b), that an oversecured nonconsensual lienholder was entitled to postpetition interest.¹²⁷ The *Ron Pair* decision, which Justice Blackmun authored and which Justice O'Connor's dissent called a "capricious bit of punctuation,"¹²⁸ completely eviscerated the standing presumption of the Supreme Court that pre-Code law applies except when explicitly changed by Congress.¹²⁹

Finally, in 1990 the Supreme Court in *Pennsylvania Department of Public Welfare v. Davenport*¹³⁰ cast aside the considerations of federalism and pre-Code practice announced in *Kelly* and looked to the plain meaning of the statute to interpret the full-compliance discharge of Chapter 13 to include criminal restitution obligations.¹³¹ Since *Davenport*, the Court's blind allegiance to this textualist approach, forsaking other traditional considerations in statutory construction in favor of the Bankruptcy Code's plain meaning, has been the defining feature of bankruptcy decisions from the Rehnquist Court.¹³² If not dispositive, then plain meaning appears to have been at least presumptively controlling.¹³³ It has been the deciding factor in

126. See *id.* at 236 (providing Justices joining in majority). Chief Justice Rehnquist and Justices White, Scalia, and Kennedy joined Justice Blackmun in the majority. *Id.* Justices Brennan, Marshall and Stevens joined in Justice O'Connor's dissent. *Id.* at 249.

127. *Id.* at 241-42.

128. *Id.* at 249 (O'Connor, J., dissenting).

129. See Tabb & Lawless, *supra* note 93, at 844 (describing effect of *Ron Pair* Court's use of plain meaning on presumption that pre-Code law remains unchanged except when specifically indicated).

130. 495 U.S. 552 (1990).

131. *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 556-64 (1990). In *Davenport*, the Supreme Court addressed the issue of whether restitution obligations arising from criminal convictions are dischargeable debts under Chapter 13 of the Bankruptcy Code. *Id.* at 555. The debtors had filed an adversary action in their Chapter 13 case seeking a declaration that their restitution payments, imposed as a condition of their probation on welfare fraud convictions, were dischargeable debts. *Id.* at 556. The *Davenport* Court began its analysis by citing the fundamental canon of statutory construction that interpretation of the statute begins with the language of the statute itself. *Id.* at 557-58. The Court looked to § 101(4)(A) and found that Congress broadly defined the term "claim" as a "right to payment." *Id.* at 558-60. The Court found the plain meaning of the phrase "right to payment" is an enforceable obligation, regardless of the objectives of the State in imposing the obligation. *Id.* at 558-59. The Supreme Court concluded that restitution payments fall within the plain meaning of "right to payment," with neither the purpose or method of enforcement placing the payments outside that definition. *Id.* at 560. Rejecting arguments that other sections of the Bankruptcy Code supported a different conclusion, the *Davenport* Court held that such restitution payments are dischargeable under Chapter 13 proceedings. *Id.* at 564. The Court noted its decision was not a retreat from *Kelly v. Robinson*, 479 U.S. 36 (1986), which had held similar payments nondischargeable under Chapter 7, because the plain statutory language at issue in *Davenport* revealed Congress's intent not to exempt restitution payments from discharge under Chapter 13. *Davenport*, 495 U.S. at 563.

132. See Tabb & Lawless, *supra* note 93, at 879 (characterizing plain meaning as most striking feature of Rehnquist Court's bankruptcy decisions).

133. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 249 (discussing important role of plain meaning in Supreme Court's statutory interpretation cases).

eight of the ten Bankruptcy Code interpretation cases decided between *Kelly* and *Dewsnup*.¹³⁴

This focus on textualism has caused an erosion of bankruptcy jurisprudence and the demise of the presumption that Congress generally codified pre-Code law into the Bankruptcy Code unless a provision specifically altered pre-Code law.¹³⁵ Plain meaning also has undermined consistency of policy.¹³⁶ Despite Justice Scalia's pronouncement to the contrary,¹³⁷ the textual approach to statutory construction has caused uncertainty in the interpretation of the Bankruptcy Code.¹³⁸ Because the Court has decided each case based only on each Justice's individual interpretation of the language of the statute in question, the Rehnquist Court's bankruptcy cases have produced no underlying policy or principles that could guide lower courts in future statutory interpretation questions.¹³⁹ With each case standing alone and unconnected, uncertainty is the result.¹⁴⁰

Dewsnup represents a departure from this textualist drift and a return to many of the considerations that Justice Powell espoused in *Kelly*.¹⁴¹ First, the *Dewsnup* Court found ambiguity in the text simply on the basis of differing positions of the parties and looked to legislative history for evidence of the meaning of the statute.¹⁴² Second, the Court reasserted a pro creditor

134. See *Union Bank v. Wolas*, 112 S. Ct. 527, 531 (1991) (holding in unanimous decision that clarity in statutory language precludes use of congressional intent and policy considerations); *Toibb v. Radloff*, 111 S. Ct. 2197, 2199 (1991) (holding that clear statutory language is dispositive and therefore no need exists to look to legislative intent); *Johnson v. Home State Bank*, 111 S. Ct. 2150, 2153-55 (1991) (finding basis for holding in statutory language and using legislative history to corroborate interpretation); *Owen v. Owen*, 111 S. Ct. 1833, 1837 (1991) (basing holding on phrase "would have been entitled" in § 522(f)(1)); *Farrey v. Sanderfoot*, 111 S. Ct. 1825, 1828-30 (1991) (finding plain reading of word "fixing" in § 522(f)(1) dispositive in proper interpretation of statute); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-60 (1990) (basing holding on plain meaning of phrase "right to payment" in § 101); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989) (basing interpretation of § 506(b) on placement of comma); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 378-82 (1988) (using legislative history, pre-Code law and bankruptcy policy only to show consistency with plain reading of statutory language). *But see Begier v. IRS*, 496 U.S. 53, 58, 63-67 (1990) (using legislative history and basing decision on policy consideration of promoting reorganizations); *United States v. Energy Resources Co.*, 495 U.S. 545, 549-51 (1990) (basing decision on policy consideration of promoting reorganizations).

135. See *Tabb & Lawless*, *supra* note 93, at 879-81 (discussing impact of Supreme Court's reliance on plain meaning in statutory construction).

136. See *id.* at 882-83 (stating lack of consistent policy direction as one result of Supreme Court's reliance on plain meaning in statutory construction).

137. See *Dewsnup v. Timm*, 112 S. Ct. 773, 787-88 (1992) (Scalia, J., dissenting) (opining that majority decision will destroy predictability of Bankruptcy Code).

138. See *Tabb & Lawless*, *supra* note 93, at 880-81 (discussing lack of consistent bankruptcy jurisprudence as effect of Supreme Court's reliance on plain meaning in statutory construction).

139. *Id.*

140. *Id.*

141. See *supra* notes 114-19 and accompanying text (describing Supreme Court bases for interpretation of Bankruptcy Code prior to 1989).

142. *Dewsnup v. Timm*, 112 S. Ct. 773, 777 (1992).

position, noting that to accept the debtor's argument would cause a loss to the creditor and a windfall to the debtor if the collateral appreciated in value.¹⁴³ Most important, the Court returned to the policy of considering judicially-created pre-Code law unchanged unless otherwise indicated by the Bankruptcy Code.¹⁴⁴

Dewsnup appears to be a confusing aberration in the Supreme Court's bankruptcy jurisprudence. In each of the four cases since *Dewsnup* involving statutory interpretation of the Bankruptcy Code, plain meaning has played a dispositive role to the exclusion of legislative history and policy considerations.¹⁴⁵ Oddly, Justice Blackmun, author of the *Dewsnup* decision, wrote the majority opinion in the most recent of these cases.¹⁴⁶ Thus, *Dewsnup* provides little hope that the Court will develop a coherent methodology for the interpretation of the Bankruptcy Code.¹⁴⁷

IX. FURTHER QUESTIONS RAISED BY *DEWSNUP*

Dewsnup creates a number of problems that extend well beyond the declared reach of its holding. First, despite the Court's encouraging reliance on pre-Code law and legislative history in its decision, its analysis destroys predictability by impairing well-established rules of statutory interpretation.¹⁴⁸ For example, the Court has often invoked the normal rule of statutory construction that identical words used in different sections of the same statute are intended to have the same meaning.¹⁴⁹ The Court's use of

143. *Id.* at 778.

144. *Id.* at 778-79.

145. See *Patterson v. Shumate*, 112 S. Ct. 2242, 2246-47 (1992) (Blackmun, J.) (citing *Toibb* and *Ron Pair Enters.* to hold that clarity of statutory language at issue obviates need for inquiry into legislative history); *Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992) (Rehnquist, C.J.) (Stevens & Blackmun, JJ., dissenting) (citing *Toibb* and noting that appeals to legislative history are appropriate only to resolve statutory ambiguity); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (Thomas, J.) (Stevens, J., concurring and urging use of legislative history) (citing *Ron Pair Enters.* to hold that court should turn to one canon of statutory construction before all others: courts must presume that legislature says what it means and means what it says in statute); *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (Scalia, J.) (Stevens and Blackmun, JJ., dissenting) (finding no unequivocal expression of waiver of sovereign immunity in statute).

146. See *Patterson v. Shumate*, 112 S. Ct. 2242, 2246-47 (1992) (Blackmun, J.) (citing *Toibb* and *Ron Pair Enters.* to hold that clarity of statutory language at issue obviates need for inquiry into legislative history).

147. See *supra* notes 111-34 and accompanying text (discussing trends in interpretation of Bankruptcy Code by Supreme Court).

148. *Dewsnup v. Timm*, 112 S. Ct. 773, 780 (1992) (Scalia, J., dissenting).

149. See *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) (stating that basic canon of statutory construction is that identical terms within act bear same meaning); *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992) (stating that consistency of usage of term within statute is presumed); *Sullivan v. Strop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) to state normal rule of statutory construction that identical words used in different parts of same act are intended to have same meaning).

what Justice Scalia called "the one-subsection-at-a-time"¹⁵⁰ approach to statutory interpretation seems artificial and poorly suited for universal application to the Bankruptcy Code. However, the rule of construction found in section 102(8) of the Bankruptcy Code recognizes that terms may have different meanings in different areas of the Code.¹⁵¹ The Court's holding invites future argument that the language "allowed secured claim" has a different meaning in other areas of the Bankruptcy Code.¹⁵² One bankruptcy court has already interpreted *Dewsnup* as giving the term "secured claim" different meanings in the various provisions of the Bankruptcy Code.¹⁵³ This ambiguity will continue to exist until the Court provides further guidance.¹⁵⁴

Second, the *Dewsnup* Court's basis for finding ambiguity is either overly simplistic or hopelessly obscured. The Court found the statute to be ambiguous because the parties disagreed about the meaning of section 506(d) of the Bankruptcy Code.¹⁵⁵ Following this line of reasoning, each time adverse parties disagree about statutory language in the future, the Court will find ambiguity in the statute and seek to ascertain legislative intent.¹⁵⁶ This poorly crafted analysis provides little guidance for statutory interpretation and undercuts *Dewsnup*'s significance in the Supreme Court's bankruptcy jurisprudence.¹⁵⁷

Dewsnup may also create practical problems that interfere with the intended operation of the Bankruptcy Code. For example, the holding in *Dewsnup* may eliminate an undersecured lienholder's post-bifurcation, unsecured claim to any distribution from the proceeds of the estate.¹⁵⁸ If the undersecured creditor asserts a claim for the full amount of the debt and under *Dewsnup* has a lien that fully survives the discharge, then general bankruptcy principles prohibiting dual claims for the same debt should preclude the undersecured creditor from asserting a claim to distribution for the unsecured portion of the debt.¹⁵⁹ However, a second possibility

150. *Dewsnup*, 112 S. Ct. at 781 (1992) (Scalia, J., dissenting).

151. 11 U.S.C. § 102(8) (1988). Section 102(8) reads in pertinent part: "[A] definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section . . ." *Id.*

152. See Howard, *supra* note 9, at 2 (discussing potential problem of statutory term having different meanings in different parts of Bankruptcy Code). For example, will the Court's interpretation of "allowed secured claim" be the same for § 1325(a)(5) and § 1225(a)(5) as *Dewsnup* held it to be for § 506(d)? *Id.*

153. *In re Doss*, 143 B.R. 952, 954 (Bankr. E.D. Okla. 1992).

154. See *supra* notes 135-45 and accompanying text (discussing difficulties created by various methods of statutory interpretation).

155. *Dewsnup v. Timm*, 112 S. Ct. 773, 777 (1992).

156. See *id.* at 786 (Scalia, J., dissenting) (arguing in dissent that majority's mode of analysis makes every litigated statute ambiguous).

157. See *supra* notes 145-47 and accompanying text (arguing that *Dewsnup* is aberration in current Supreme Court bankruptcy jurisprudence).

158. See Howard *supra* note 9, at 2 (arguing that *Dewsnup* may disrupt proper payment of undersecured creditor's unsecured claim).

159. *Id.*

under *Dewsnup* is that the undersecured lienholder will have his cake and eat it too: asserting an unsecured claim to distribution and retaining a lien on the debtor's property after discharge. This second possibility raises serious questions about the proper oversight of a subsequent foreclosure.¹⁶⁰ For example, will the trustee continue to have powers over distribution of the proceeds of the sale of the collateral after discharge? If there are multiple lienholders, who will insure proper distribution of the sale proceeds? *Dewsnup* neither anticipates nor answers these questions.

The procreditor policy that played a role in the *Dewsnup* holding also creates a practical problem in the operation of the Bankruptcy Code. The *Dewsnup* Court reasoned that any postpetition appreciation of the property should accrue to the benefit of the undersecured creditor, and not to the benefit of unsecured creditors or the debtor.¹⁶¹ However, appreciation of the value of the property may be property acquired after the commencement of a bankruptcy case¹⁶² and, therefore, not property of the estate under section 541(a)(1).¹⁶³ If so, then the undersecured creditor is not entitled to any appreciation of the property after the filing of the petition in a Chapter 7 case.

Dewsnup's concern for the creditor's right to appreciation in the value of the property assumes that the creditor will receive more at a foreclosure sale than the judicially-determined value of the collateral.¹⁶⁴ However, this reasoning ignores the cost of subsequent foreclosure on the debtor's property, the opportunity costs of the creditor in bidding-in for the property, and the real risk to the creditor of postpetition depreciation of the property.¹⁶⁵ It also ignores the fact that the interest charged on loans already compensates creditors for potential losses by the setting of rates that reflect the risk of default.¹⁶⁶ In any event, many creditors may receive a greater portion of the undersecured debt owed to them after the strip down of their lien than they will in a foreclosure sale.¹⁶⁷

160. *Id.*

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

162. See Howard, *supra* note 21, at 412 (discussing counter-arguments to holding preventing strip down of liens under § 506(d)).

163. 11 U.S.C. § 541(a)(1) (1988). Section 541(a)(1) provides:

The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property *as of the commencement of the case*.

Id. (emphasis added).

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

165. See Howard, *supra* note 21, at 406-12 (comparing creditor's recovery under foreclosure with recovery under strip down).

166. See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) (discussing different policy justifications underlying bankruptcy law).

167. See Howard, *supra* note 21, at 406-12 (discussing differences in amount creditor receives from foreclosure and strip down).

The greatest impact of *Dewsnup* rests in the Court's holding that liens pass through bankruptcy unaffected.¹⁶⁸ Yet, in its search for legislative intent, the Court made no mention of the history of the section 727 discharge provision.¹⁶⁹ The legislative history clearly indicates that Congress designed the Bankruptcy Code to give debtors a fresh start that includes both adequate property for a debtor's return to normal life and the protection of the debtor from creditor collection attempts.¹⁷⁰ The Bankruptcy Code increased the protection provided to the consumer debtor under the National Bankruptcy Act of 1898.¹⁷¹ *Dewsnup* failed to give the Bankruptcy Code's fresh start due consideration.

The Supreme Court's decision in *Dewsnup* also raises important questions about reorganization cases under Chapter 12¹⁷² or Chapter 13.¹⁷³ First, it is not clear after *Dewsnup* whether undersecured creditors are subject to the strip down of the unsecured portion of their lien on the debtors property in a reorganization case. Second, does *Dewsnup* prevent confirmation of a Chapter 12 or Chapter 13 reorganization plan containing the strip down of a lien by the operation of sections 1225(a)(4)¹⁷⁴ or 1325(a)(4),¹⁷⁵ which require that an unsecured creditor receive as much under the reorganization plan as it would receive under a Chapter 7 liquidation plan? Finally, does the fresh start policy that Congress explicitly intended to be the foundation of Chapter 12 and Chapter 13 negate the effect of *Dewsnup* on these chapters? *Dewsnup* left these questions unanswered.

X. DEBTOR REORGANIZATION UNDER CHAPTERS 12 AND 13

Congress created Chapter 13 to give the consumer debtor adequate protection and to insure that the bankruptcy process would provide a fresh

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

169. *See id.* (providing Court's review of legislative history of Bankruptcy Code).

170. *See supra* notes 36-47 and accompanying text (describing role of discharge in fresh start policy).

171. *See infra* notes 176-80 and accompanying text (describing increased protection of consumer debtors).

172. *See* 11 U.S.C. §§ 1201-1231 (1988) (providing procedures for Chapter 12—"Adjustment of Debts of a Family Farmer with Regular Annual Income").

173. *See* 11 U.S.C. §§ 1301-1330 (1988 & Supp. II 1990) (providing procedures for Chapter 13—"Adjustment of Debts of an Individual with Regular Income").

174. 11 U.S.C. § 1225(a)(4) (1988). Section 1225(a)(4) reads in pertinent part:

[T]he court shall confirm a plan if . . . 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 was liquidated under chapter 7 of this title on such date;

....

Id.

175. 11 U.S.C. § 1325(a)(4) (1988). Section 1325(a)(4) reads in pertinent part:

[T]he court shall confirm a plan if . . . 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 was liquidated under chapter 7 of this title on such date;

....

Id.

start to the debtor after bankruptcy.¹⁷⁶ The purpose of Chapter 13 is to allow the creation of a plan that provides full repayment of claims in some cases and an equal percentage of claims in others.¹⁷⁷ This plan of reorganization allows the debtor to protect assets rather than liquidating them under Chapter 7.¹⁷⁸ The advantages of Chapter 13 over Chapter 7 include a right to remain in possession of all assets of the estate, a right to cure defaults on long term home mortgage debts, and a broader "super" discharge provision.¹⁷⁹ Only individuals with regular income and debt below statutory maximums may take advantage of a Chapter 13 fresh start.¹⁸⁰

Congress created Chapter 12 in the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986,¹⁸¹ closely modeling it after Chapter 13 and designing it to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land.¹⁸² Because of the similarity of these Chapters, the analysis of strip down of liens in a Chapter 13 plan after *Dewsnup* is the same as the analysis for a Chapter 12 case.¹⁸³

XI. CONFLICTS OVER THE STRIP DOWN OF LIENS IN CHAPTER 13 CASES

Prior to *Dewsnup* courts often approved a Chapter 13 debtor's use of section 506(a) and section 1322(b)(2)¹⁸⁴ to strip down an undersecured lien to the value of the underlying collateral, except in cases when the collateral was the debtor's primary residence.¹⁸⁵ The process is similar to that for a Chapter 7 debtor. The debtor first uses section 506(a) to bifurcate the

176. H.R. REP. No. 595, 95th Cong., 2d Sess. 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6078.

177. *Id.* at 6079.

178. *Id.*

179. See David S. Kennedy, *Chapter 13 Under the Bankruptcy Code*, 19 MEM. ST. U. L. REV. 137, 139 (1989) (discussing advantages of Chapter 13 discharge over Chapter 7 discharge).

180. 11 U.S.C. § 109(e) (1988). Section 109(e) states: "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 . . . may be a debtor under chapter 13 of this title." *Id.*

181. Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended at 11 U.S.C. §§ 1201-1231 (1988)).

182. H.R. REP. No. 764, 99th Cong., 2d Sess. 48 (1986), reprinted in 1986 U.S.C.C.A.N. 5227, 5249.

183. See *id.* (stating that Chapter 12 is closely modeled after Chapter 13).

184. 11 U.S.C. § 1322(b)(2) (1988). Section 1322(b)(2) reads in pertinent part:

[T]he plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; . . .

Id.

185. See *infra* notes 186-214 and accompanying text (describing current controversy over whether § 1322(b)(2) protects residential mortgages from strip down). Significant controversy exists over the statutory construction of § 1322(b)(2) as it relates to the primary residence of the debtor. *Id.*

undersecured lien into a secured claim equal to the value of the collateral and an unsecured claim for the portion of the lien in excess of the value of the collateral.¹⁸⁶ The debtor continues to make regular monthly payments on the secured portion of the debt according to his original loan agreement.¹⁸⁷

Under section 1322(b)(2)¹⁸⁸ the debtor then relegates the unsecured portion of the debt into a class that includes all other unsecured creditors.¹⁸⁹ This unsecured debt receives a pro rata share of the debtor's monthly payment, which the approved reorganization plan establishes as appropriate for the financial circumstances of the debtor.¹⁹⁰ After the three-to-five-year period of the plan,¹⁹¹ the court grants the debtor a discharge for all remaining unsecured debt.¹⁹²

For example, Leonard and Harriett Nobelman executed a note payable to American Savings Bank and secured by a deed of trust on their principal residence.¹⁹³ During a subsequent voluntary petition under Chapter 13, the Nobelmans filed a plan of reorganization valuing their residence at \$23,500.¹⁹⁴ In their plan the Nobelmans proposed to make payments to American at the mortgage contract rate only up to the value of their residence, using section 506(a) to bifurcate the mortgage and section 1322(b)(2) to modify it.¹⁹⁵ The balance of American's \$71,335 claim would be treated as an unsecured claim and paid equally with all other unsecured creditors.¹⁹⁶ However, the Nobelmans' plan called for the unsecured creditors to receive nothing.¹⁹⁷ Thus, at the end of the Nobelmans' plan they would receive a discharge of the unsecured claims, including American's, retain their residence, and owe American only the amount remaining on its secured claim.¹⁹⁸ It is here, at the discharge, that the statutory interpretation of *Dewsnup* and the fresh start policies of the reorganization chapters clash most

186. See *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 124-25 (3d Cir. 1990) (describing bifurcation of undersecured lien in Chapter 13 case).

187. See Lindauer, *supra* note 18, at 260-61 (describing strip down process in Chapter 13 case).

188. See *supra* note 184 (providing text of § 1322(b)(2)).

189. See Lindauer, *supra* note 18, at 260-61 (describing strip down process in Chapter 13 case).

190. *Id.*

191. 11 U.S.C. § 1322(c) (1988). Section 1322(c) provides: "The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." *Id.*

192. 11 U.S.C. § 1328 (1988 & Supp. II 1990).

193. *Nobelman v. American Sav. Bank (In re Nobelman)*, 968 F.2d 483, 484 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (1992).

194. *Id.* at 485.

195. *Id.*

196. *Id.*

197. *Id.*

198. See *id.* (describing strip down of mortgage in debtors' plan of reorganization).

loudly.¹⁹⁹ However, it is at bifurcation that the controversy addressed by *Nobelman* arises.²⁰⁰

A bankruptcy court compared the precise meaning of section 1322(b)(2), read in conjunction with section 506(a), to the "clarity of the Chicago River on St. Patrick's Day."²⁰¹ Significant splits exist among courts of appeals, district courts, and bankruptcy courts over the proper interpretation of these statutes when the undersecured lien is on the debtor's primary residence.²⁰² Courts that support bifurcation of an undersecured residential mortgage look to the compromise between the House and Senate bills²⁰³ that led to the passage of the specific language in section 1322(b)(2) as an indication of legislative intent to allow the strip down of residential mortgages to the extent they are unsecured.²⁰⁴ The House version allowed debtors to modify the rights of both secured and unsecured claim holders.²⁰⁵ The Senate version included protection against modification for all real estate mortgages.²⁰⁶ Courts that support bifurcation interpret the adopted language, even though not explicit in its meaning, to reflect a compromise between the two versions, allowing modification of all claims, including residential mortgages to the extent that they are not secured.²⁰⁷

Courts disapproving of the bifurcation of a lien on the principal residence of the debtor have relied on principles of statutory construction to hold that such a use of section 506 vitiates the purpose of section 1322(b)(2), removing the protection that the statute clearly provides.²⁰⁸ The

199. See *infra* notes 255-60 and accompanying text (discussing conflict between *Dewsnup* and fresh start of reorganization chapters).

200. See *infra* notes 201-16 and accompanying text (discussing conflict over strip down of residential mortgages in Chapter 13 cases).

201. *Goins v. Diamond Mortgage Corp.* (*In re Goins*), 119 B.R. 156, 158 (Bankr. N.D. Ill. 1990) (explaining that by custom river is dyed green on St. Patrick's Day).

202. See *Sapos v. Provident Inst. of Sav.*, 967 F.2d 918, 925-26 (3d Cir. 1992) (allowing strip down of residential mortgage); *Bellamy v. Federal Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176, 179 (2d Cir. 1992) (same); *Eastland Mortgage Co. v. Hart* (*In re Hart*), 923 F.2d 1410, 1413 (10th Cir. 1991) (same); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 128 (3d Cir. 1990) (same); *Houglund v. Lomas & Nettleton Co.* (*In re Houglund*), 886 F.2d 1182, 1183 (9th Cir. 1989) (same). *But see Nobelman v. American Sav. Bank* (*In re Nobelman*), 968 F.2d 483, 486-87 (5th Cir. 1992) (denying strip down of residential mortgage), *cert. granted*, 113 S. Ct. 654 (1992); *In re Ireland*, 137 B.R. 65, 70 (Bankr. M.D. Fla. 1992) (same); *In re Strober*, 136 B.R. 614, 617-19 (Bankr. E.D.N.Y. 1992) (same); *In re Sauber*, 115 B.R. 197, 199 (Bankr. D. Minn. 1990) (same).

203. *Wilson*, 895 F.2d at 128 (citing statements of Rep. Don Edwards in 1978 U.S.C.C.A.N. at 6436, 6481 and Sen. Dennis DeConcini in 1978 U.S.C.C.A.N. at 6505, 6550).

204. *Id.*

205. H.R. 8200, 95th Cong., 1st Sess. (1977), reprinted in *Collier App. 3* at III, 537, cited in *Wilson*, 895 F.2d at 127.

206. S. 2266, 95th Cong., 2d Sess. (1978), reprinted in *Collier App. 3* at VII, 573, cited in *Wilson*, 895 F.2d at 128.

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

208. See *Nobelman v. American Sav. Bank* (*In re Nobelman*), 968 F.2d 483, 486-87 (5th Cir. 1992) (holding that Congress designed statutory language to protect residential mortgage

United States Court of Appeals for the Fifth Circuit, in *Nobelman v. American Savings Bank (In re Nobelman)*,²⁰⁹ rejected the position of the courts of appeals allowing bifurcation.²¹⁰ In its decision, the Fifth Circuit first turned to the *Dewsnup* decision, citing the Supreme Court's statement that the Court was not deciding the meaning of the words "allowed secured claim" in other Bankruptcy Code sections.²¹¹ The *Nobelman* court also noted the *Dewsnup* Court's reliance in its holding on procreditor policy and the presumption that pre-Code law is unchanged unless specifically changed by Congress.²¹² Ironically, the *Nobelman* court then looked to the plain meaning of sections 506(a) and 1322(b)(2) and found apparent conflict between the statutes.²¹³ The Fifth Circuit held that the specific language of section 1322(b)(2) prevailed over the general language of section 506(a).²¹⁴ The Supreme Court has granted certiorari in the *Nobelman* case.²¹⁵ Unfortunately, given its questionable analysis and its place of isolation in the Rehnquist Court's bankruptcy jurisprudence, *Dewsnup* provides little guidance on the probable outcome of *Nobelman*.²¹⁶

XII. THE EFFECTS OF *DEWSNUP* ON CHAPTERS 12 AND 13

The most significant questions about the impact of *Dewsnup* arise when a Chapter 12 or Chapter 13 debtor attempts to strip down a lien as an element of the debtor's reorganization plan. The *Dewsnup* Court intended to avoid the application of its holding to other situations, involving different facts, Chapters, or sections of the Bankruptcy Code.²¹⁷ But it is because of the Court's analysis and holding that the application of *Dewsnup* to Chapter 12 and 13 cases has proven unavoidable.

A. Arguments Against the Application of *Dewsnup* to Chapters 12 and 13

Despite the Supreme Court's attempt to craft a narrow holding in *Dewsnup*, the lower courts are split over *Dewsnup*'s application in reorgan-

lenders), *cert. granted*, 113 S. Ct. 654 (1992); *In re Sauber*, 115 B.R. 197, 199 (Bankr. D. Minn. 1990) (same); *see also* 11 U.S.C. § 1322(b)(2) (1988 & Supp. II 1990) (providing that reorganization plan may modify rights of holders of secured claims other than claim only secured by debtor's principal residence).

209. 968 F.2d 483 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (1992).

210. *Nobelman v. American Sav. Bank (In re Nobelman)*, 968 F.2d 483, 486-89 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (1992).

211. *Id.* at 487.

212. *See id.* (finding policy and pre-Code presumption *Dewsnup* used as support for holding that strip down of residential mortgages prohibited by Code).

213. *Id.* at 488.

214. *Id.*

215. *Nobelman v. American Sav. Bank (In re Nobelman)*, 968 F.2d 483 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 654 (1992).

216. *See supra* notes 114-40 and accompanying text (discussing Supreme Court's statutory construction of Bankruptcy Code).

217. *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992) (stating "[W]e therefore focus upon the case before us and allow other facts to await their legal resolution on another day").

ization cases.²¹⁸ Both the Second and the Third Circuits have ruled that *Dewsnup* does not apply to Chapter 13 cases.²¹⁹ In *Bellamy v. Federal Home Loan Mortgage Corp.*,²²⁰ the Second Circuit case, the creditor argued that *Dewsnup* precluded the presupposition that "secured claim" in section 1322(b)(2) had the same meaning as "secured claim" in section 506(a).²²¹ However, the *Dewsnup* Court did not hold that "secured claim" could never be construed in other sections of the Bankruptcy Code as it was in section 506(a).²²² Further, some Code provisions specifically state that the term "secured claim" should not be construed as defined in section 506(a).²²³ Unless that caveat is present, the section 506(a) definition should apply.²²⁴

The language differences between sections 506(d) and 1322(b)(2) also suggest that *Dewsnup* does not govern the use of 1322(b)(2).²²⁵ Section

218. See *Sapos v. Provident Inst. of Sav.*, 967 F.2d 918, 924-25 (3d Cir. 1992) (finding *Dewsnup* limited to § 506(d) and thus inapplicable in Chapter 13 reorganization); *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 182-83 (2d Cir. 1992) (same); *In re Cardinale*, 142 B.R. 42, 43 (Bankr. D.R.I. 1992) (same); *In re Leverett*, 145 B.R. 709, 713 (Bankr. W.D. Okla. 1992) (finding that *Dewsnup* does not apply to Chapter 12 cases). *But see* *Nobelman*, 968 F.2d at 487 (holding that *Dewsnup* lends support to prohibition against bifurcation of residential mortgages); *In re Dyer*, 142 B.R. 364, 369 (Bankr. D. Ariz. 1992) (holding that bifurcation of residential mortgage is permissible but that *Dewsnup* prohibits avoidance of lien).

219. See *Sapos*, 967 F.2d at 924-25 (holding that *Dewsnup* does not apply in Chapter 13 cases); *Bellamy*, 962 F.2d at 182-83 (same).

220. 962 F.2d 176 (2d Cir. 1992).

221. *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176, 182 (2d Cir. 1992). In *Bellamy*, the United State Court of Appeals for the Second Circuit considered whether a reorganization plan can bifurcate a residential mortgage lender's claim into its secured and unsecured components and then treat the unsecured portion of the claim with other unsecured lenders. *Id.* at 178. The creditors sought approval of a plan of reorganization that relegated the mortgagee to the status of an unsecured creditor with respect to the portion of the debt in excess of the value of the collateral, discharged the unsecured debt with the other unsecured claims and reinstated the mortgage at its stripped down amount. *Id.* The court began by analyzing the interplay between two provisions of the Bankruptcy Code, §§ 1322(b)(2) and 506(a). *Id.* at 178-79. First, the *Bellamy* court found that bifurcation of the creditor's claim into secured and unsecured portions using § 506(a) does not modify the rights of the creditor, as is prohibited by § 1322(b)(2). *Id.* at 180. The court then held that § 1322(b)(2) only protects the rights of the holder of a residential mortgage from modification if the only security for that debt is the debtor's principal residence. *Id.* at 181. The court found this interpretation of the statute to be consistent with the purpose of Chapter 13 and the compromise language found in the legislative history. *Id.* at 182. Finally, the *Bellamy* court held that *Dewsnup v. Timm* does not apply to prevent the strip down of liens under § 1322(b)(2). *Id.* at 182-84. The court reasoned that the different language of § 506(d) and § 1322(b)(2), the different motivating factors of the *Dewsnup* decision, and the different legislative history and purpose make *Dewsnup's* analysis of § 506(d) inapposite to the interpretation of § 1322(b)(2). *Id.* Consequently, the *Bellamy* court held that a debtor can strip down a mortgage to the value of the collateral, even if the property is the debtor's primary residence, under § 1322(b)(2) of the Bankruptcy Code. *Id.* at 186.

222. *Id.* at 186.

223. See 11 U.S.C. § 1111(b)(2) (1988) (providing that claim is secured claim to extent allowed if holder of claim so elects under § 1111(b)(1)(a), notwithstanding § 506(a)).

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

225. *Id.* at 183.

506(d) refers only to secured claims; section 1322(b)(2) refers to both secured and unsecured claims.²²⁶ More importantly, the language of section 506(d) deals with the avoidance of liens that are not allowed; section 1322(b)(2), as well as section 506(a), deal with allowed claims that are either secured or unsecured.²²⁷ Finally, a major factor in the *Dewsnup* decision was the failure to find unequivocal legislative intent to change the pre-Code concept that liens pass through bankruptcy unaffected.²²⁸ The *Bellamy* court found that Chapter 13 of the Bankruptcy Code furthered the congressional scheme by expressly contemplating that a debtor's plan of reorganization may modify claims secured by real property.²²⁹

In *Sapos v. Provident Institution of Savings*,²³⁰ the Third Circuit adopted the *Bellamy* analysis to find that *Dewsnup* did not apply to Chapter 13 cases.²³¹ In addition, the Tenth Circuit approved a Chapter 12 debtor's strip

226. *Id.*

227. *Id.*

228. *Dewsnup v. Timm*, 112 S. Ct. 773, 778-79 (1992).

229. *Bellamy v. Federal Home Loan Mortgage Co.*, 962 F.2d 176, 184 (2d Cir. 1992) (citations omitted).

230. 967 F.2d 918 (3d Cir. 1992).

231. *Sapos v. Provident Inst. of Sav.*, 967 F.2d 918 (3d Cir. 1992). In *Sapos*, the United States Court of Appeals for the Third Circuit considered whether it should affirm the bankruptcy court's approval of a Chapter 13 debtor's plan of reorganization, which bifurcated the mortgagee's lien into a secured portion and an unsecured portion, thereby stripping down the lien to the value of the collateral. *Id.* at 920. The debtor defaulted on payments to the creditor and filed a Chapter 13 petition prior to the foreclosure sale. *Id.* at 922. The debtor's second amended plan proposed to continue payment of the portion of the debt that equaled the value of the collateral and to relegate the remaining balance on the mortgage to an unsecured status, which the plan would pay on a pro rata basis with other allowed unsecured creditors. *Id.* at 923. The bankruptcy court approved this plan over the objection of the mortgagee. *Id.* The Third Circuit began its analysis with the impact of *Dewsnup v. Timm* on Chapter 13 proceedings. *Sapos*, 967 F.2d at 924. The court voiced its agreement with *Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy)*, 962 F.2d 176 (2d Cir. 1992), to hold that the Supreme Court's interpretation of section 506 in *Dewsnup* does not apply in a Chapter 13 reorganization. *Sapos*, 967 F.2d at 924-25. Next, the court looked at the teachings of a prior Third Circuit case, *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123 (3d Cir. 1990), to hold that the antimodification provision of § 1322(b)(2) does not apply if the creditor takes a security interest in personalty in addition to realty and that § 1322(b)(2) only protects secured claims that remain after the application of § 506(a). *Sapos*, 967 F.2d at 925-26. The court also found that the creditor's rights were not modified under *Wilson*, which held that the use of § 506(a) to reduce a creditor's claim is not a modification of rights within the meaning of the term in § 1322(b)(2). *Id.* at 926. Turning to the specifics of the debtor's plan of reorganization, the Third Circuit found that the plan did not properly provide for adequate curing of arrearages in mortgage payments as required by § 1322(b)(5). *Id.* at 926-28. Consequently, the *Sapos* court refused to affirm the prior confirmation of the debtor's plan. *Id.* at 928.

See, e.g., *Union Planters Nat'l Bank v. Sainz-Dean (In re Sainz-Dean)*, 143 B.R. 784, 787 (D. Colo. 1992) (holding that *Dewsnup v. Timm* decision does not apply to Chapter 13 case); *Holmes v. Commonwealth Mortgage Co. (In re Holmes)*, 1992 Bankr. LEXIS 751, *2 (Bankr. E.D. Pa. 1992) (same); *In re Cardinale*, 142 B.R. 42, 43 (Bankr. D.R.I. 1992) (same); *In re Dinsmore*, 141 B.R. 499, 508 (Bankr. W.D. Mich. 1992) (same); *In re Govan*, 139 B.R. 1017, 1022 (Bankr. N.D. Ala. 1992) (same).

down of undersecured mortgages that the state held, noting that the court was not faced with the problems *Dewsnup* had created.²³² At least one bankruptcy court also has held that *Dewsnup* does not apply to Chapter 12 cases, noting that the extension of *Dewsnup* to a Chapter 12 case would defeat one of the primary purposes of the rehabilitative chapters by rendering section 506(a) meaningless and precluding the finality necessary to the success of the reorganization.²³³

B. Arguments Favoring Application of *Dewsnup* to Chapter 12 and 13

A bankruptcy court in a Chapter 13 case, *In re Dyer*,²³⁴ raised an important counter-argument to the Second and Third Circuits' decisions.²³⁵ The court noted that *Dewsnup* had relied on an earlier Supreme Court decision, *Johnson v. Home State Bank*.²³⁶ *Johnson* held that a Chapter 7

232. *Crook v. Oklahoma ex rel. Comm'rs of the Land Office*, 966 F.2d 539, 539 n.1 (10th Cir. 1992).

233. *In re Leverett*, 145 B.R. 709, 713 (Bankr. W.D. Okla. 1992).

234. 142 B.R. 364 (Bankr. D. Ariz. 1992).

235. *In re Dyer*, 142 B.R. 364, 366-67 (Bankr. D. Ariz. 1992). In *Dyer*, the United States Bankruptcy Court for the District of Arizona considered whether the Supreme Court decision in *Dewsnup v. Timm* overruled the Ninth Circuit decision in *In re Hougland*, 886 F.2d 1182 (9th Cir. 1989), thereby prohibiting the avoidance of a lien encumbering a Chapter 13 debtor's principal residence. *Dyer*, 142 B.R. at 366. The bankruptcy court began its analysis by noting that *Dewsnup* had relied upon an earlier Supreme Court decision, *Johnson v. Home State Bank*, 111 S. Ct. 2150 (1991). *Dyer*, 142 B.R. at 366. *Johnson* had held that even though a Chapter 7 proceeding discharged the personal liability of a debt, the in rem liability for the claim survives and can be paid in a Chapter 13 plan. *Id.* at 367. The *Dyer* court called *Dewsnup*, which interpreted § 506(d), "a logical extension of *Johnson*." *Id.* The court then noted that *In re Hougland* did not rely on § 506(d), but instead used § 1322(b)(2) to allow bifurcation of an undersecured claim in a Chapter 13 proceeding. *Id.* at 368-69. In light of the *Dewsnup* and *Hougland* decisions, the bankruptcy court found that it could follow *Hougland* and allow bifurcation of the creditor's undersecured claim, but must follow *Dewsnup* to prevent avoidance of the unsecured portion the lien. *Id.* at 369. The debtor can extinguish the in rem lien only by satisfaction of the entire indebtedness or through foreclosure proceedings. *Id.* at 372. The bankruptcy court then criticized the Second Circuit's holding in *Bellamy*, finding the analysis of the Court of Appeals inconsistent with the in rem analysis of *Johnson* and *Dewsnup* and unsupported by specific statutory provision. *Id.* at 373-74. The bankruptcy court concluded that the in rem lien on the debtor's principal residence survived the discharge at the termination of the Chapter 13 plan unless the plan paid the debt in full. *Id.*

236. *Johnson v. Home State Bank*, 111 S. Ct. 2150 (1991). In *Johnson*, the Supreme Court considered whether a debtor can include a mortgage lien in a Chapter 13 plan of reorganization after the personal obligation of the debtor secured by the mortgaged property has been discharged in a prior Chapter 7 proceeding. *Id.* at 2152. The debtor had filed a Chapter 7 petition to halt foreclosure of his farm property after defaulting on a mortgage the creditor held on the property. *Id.* Following discharge of the debtor's personal liability for the loan and a lifting of the automatic stay against the foreclosure, the creditor reinstated the foreclosure proceedings. *Id.* Before the creditor could complete the foreclosure, the debtor filed a Chapter 13 petition, listing the mortgage as a claim against his estate and proposing to make installment payments on the loan equal to the creditor's judgment against the property. *Id.* The Court first noted a distinction between the personal liability of a debtor, the in personam liability, and the creditor's interest in the property that secures the right to repayment,

discharge extinguishes only the personal liability of the debtor for a debt that a lien secured, leaving an in rem claim that survives the bankruptcy proceeding.²³⁷ The *Dyer* court called *Dewsnup* a "logical extension of *Johnson*."²³⁸ Under *Dewsnup*, the *Dyer* court reasoned, while bifurcation of the undersecured claim is allowed, the full amount of the lien on the property, the in rem claim, continues to encumber the collateral after the discharge of the debtor's personal liability.²³⁹ The *Dyer* court concluded that the *Dewsnup* holding that all liens continue to pass through bankruptcy unaffected precludes the strip down of liens in both Chapter 12 and Chapter 13 cases. The court explained that such preclusion exists even if section 1222(b)(2) or 1322(b)(2) allows bifurcation of the claim and the bankruptcy discharge extinguishes the debtor's personal liability.²⁴⁰

Nobelman also found *Dewsnup* applicable to Chapter 13 cases.²⁴¹ The Fifth Circuit interpreted the procreditor policy arguments in *Dewsnup* as support for its holding that section 1322(b)(2) prohibits bifurcation of residential mortgages.²⁴² The *Nobelman* court also adopted *Dewsnup*'s one-subsection-at-a-time approach to statutory interpretation as it read section 1322(b)(2) to protect residential mortgages.²⁴³ Therefore, strong arguments exist both supporting and opposing the application of *Dewsnup* to Chapter 12 and Chapter 13 cases.²⁴⁴

C. Legislative History's Role in the Solution

Because the plain meaning of the relevant statutes provides few answers, courts should use the policy and legislative intent for Chapter 12 and Chapter 13 in determining *Dewsnup*'s reach.²⁴⁵ However, the legislative

the in rem liability. *Id.* at 2153. The Court then held, following prior Supreme Court cases, that the creditor's right to foreclose on the mortgage survives the bankruptcy discharge. *Id.*

Turning to the issue before it, the Court addressed the statutory construction of the term "claim." *Id.* at 2154-56. The Court noted that it had previously held that Congress intended to adopt the broadest available definition of "claim," as the language of 11 U.S.C. § 101(5) (Supp. 1991) indicated. *Johnson*, 111 S. Ct. at 2154. Because the surviving in rem lien was a right to payment, it met the definition of claim the statute established. *Id.* The Court noted that this conclusion was consistent with other parts of the Bankruptcy Code and that the legislative background and history of the Code confirmed this statutory construction. *Id.* Thus, the *Johnson* Court held that a mortgage lien remains a claim for purposes of a Chapter 13 proceeding that follows a Chapter 7 discharge of the debtor's personal liability. *Id.* at 2152.

237. *Dyer*, 142 B.R. at 366 (citing *Johnson v. Home State Bank*, 111 S. Ct. 2150, 2153 (1991)).

238. *Id.* at 367.

239. *Id.* at 370.

240. *Id.* at 369-70.

241. *Nobelman v. American Sav. Bank (In re Nobelman)*, 968 F.2d 483, 487 (5th Cir. 1992), cert. granted, 113 S. Ct. 654 (1992).

242. *Id.*

243. *Id.* at 488.

244. See *supra* notes 218-43 and accompanying text (discussing arguments favoring and opposing application of *Dewsnup* to Chapter 12 and Chapter 13 cases).

245. See *infra* notes 246-60 and accompanying text (applying policy and legislative intent of Chapter 12 and Chapter 13 to question of *Dewsnup*'s application).

histories of Chapters 12 and Chapter 13 offer no clear answers about the intended treatment of liens under the reorganization chapters.²⁴⁶ The lack of a conference committee report for the Bankruptcy Code, which typically would provide information about the compromises reached, and the dominant roles of Senator Dennis DeConcini and Representative Don Edwards²⁴⁷ mean that the sparse floor statements of these two legislators are the primary sources for the legislative intent of the Bankruptcy Code.²⁴⁸ Yet the stated purposes of these two reorganization chapters are different from the purpose of Chapter 7.²⁴⁹ The legislative histories of both Chapter 12 and Chapter 13 show a clear intent to allow the debtor to keep his property after the bankruptcy.²⁵⁰ The application of *Dewsnup* thus appears to create results contrary to that intent. Further, the differing House and Senate versions of section 1322(b)(2)²⁵¹ indicate that Congress addressed the issue of lien avoidance and resolved the issue by allowing it in certain circumstances, as evidenced by the compromise language that became law.²⁵² Following the *Dewsnup* Court's own analysis,²⁵³ this legislative intent to change the pre-Code practice that liens pass through bankruptcy unaffected means that *Dewsnup* does not apply to Chapter 12 and 13 cases.²⁵⁴

Finally, it is unclear whether *Dewsnup* protects liens at all bankruptcy discharges or only at Chapter 7 discharges. The Chapter 12 and Chapter

246. *Goins v. Diamond Mortgage Corp. (In re Goins)*, 119 B.R. 156, 161 (Bankr. N.D. Ill. 1990).

247. *See Begier v. United States*, 496 U.S. 53, 64 n.5 (1990) (commenting on lack of significant legislative history of Bankruptcy Code).

248. *See id.* (providing text of floor statements by sponsoring legislators).

249. *See* H.R. REP. NO. 595, 95th Cong., 2d Sess. 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079 (stating purpose of Chapter 13); H.R. REP. NO. 764, 99th Cong., 2d Sess. 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5249 (stating purpose of Chapter 12); S. REP. NO. 595, 95th Cong., 2d Sess. 6-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5792-93 (stating purpose of Chapter 7).

250. *See* H.R. REP. NO. 595, 95th Cong., 2d Sess. 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079 (stating that benefit of Chapter 13 reorganization plan is that it allows debtor to protect assets, rather than liquidate them under Chapter 7); H.R. REP. NO. 764, 99th Cong., 2d Sess. 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5249 (stating that Congress designed Chapter 12 to give family farmers fighting chance to reorganize debts and keep land).

251. *See* H.R. 8200, 95th Cong., 1st Sess. (1977) (allowing modification of rights of holders of both secured and unsecured claims); S. 2266, 95th Cong., 2d Sess. (1978) (providing for modification of rights of holders of secured and unsecured claims other than claims wholly secured by mortgages on real property).

252. *See* 11 U.S.C. § 1322(b)(2) (1988) (providing that plan may modify rights of holders of secured claims except for claim secured by debtor's primary residence); *see also* 124 CONG. REC. H32,350, H32,409 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6481 (containing statement of Rep. Don Edwards that § 1322(b)(2) represents compromise between House and Senate bills).

253. *See Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992) (finding that change from pre-Code practice would require mention in legislative history).

254. *See supra* notes 249-50 and accompanying text (discussing legislative intent for Chapter 12 and Chapter 13).

13 discharge is a "super" discharge, which is much broader than the discharge that Chapter 7 provides.²⁵⁵ For example, the grounds for objecting to a discharge found in section 727(a)²⁵⁶ do not apply in Chapter 13 cases.²⁵⁷ More importantly, Chapter 13 discharges extinguish the nondischargeable obligations contained in section 523(a)²⁵⁸ that survive, with minor exceptions, Chapter 7 discharges.²⁵⁹ *Dewsnup's* protection of liens does not provide the kind of fresh start the drafters of Chapter 12 and Chapter 13 intended to make available to eligible debtors.²⁶⁰

D. Additional Problems with Dewsnup

Regardless of the treatment of liens, *Dewsnup* creates an additional problem for the strip down of a lien under section 1222(b)(2) or 1322(b)(2). For plan confirmation, section 1325(a)(4) requires that the present value of property distributed for each unsecured claim not be less than what the holder of the unsecured claim would have received if the debtor had liquidated under Chapter 7.²⁶¹ Chapter 12 has an identical requirement in section 1225(a)(4).²⁶² Now that *Dewsnup* prohibits the strip down of liens in Chapter 7, bankruptcy courts will have a difficult, if not impossible, task in determining the amount the unsecured creditor would have received in a Chapter 7 proceeding.²⁶³ *Dewsnup's* impact on reorganization cases may reflect its inapplicability outside of Chapter 7 cases, or it may mean that a Chapter 12 or 13 plan with a stripped down lien is not confirmable by the bankruptcy court.²⁶⁴

Dewsnup creates serious problems for Chapter 12 and 13 reorganization cases. It inhibits, or perhaps prevents, the functioning of Chapter 12 and

255. See Kennedy, *supra* note 179, at 158-59 (discussing operation of Chapter 13 super discharge); see also 11 U.S.C. § 727 (1988) (providing authority, scope and exceptions to discharge in Chapter 7 bankruptcy); *id.* § 1228 (providing authority, scope and exceptions to discharge in Chapter 12 bankruptcy); *id.* § 1328 (providing authority, scope and exceptions to discharge in Chapter 13 bankruptcy).

256. See 11 U.S.C. § 727(a) (1988) (providing certain grounds upon which court shall not grant debtor discharge).

257. See Kennedy, *supra* note 179, at 158 (discussing differences between Chapter 7 and Chapter 13 in grounds for objections to discharge).

258. 11 U.S.C. § 523(a) (1988 & Supp. II 1990).

259. See Kennedy, *supra* note 179, at 159 (discussing exceptions to super discharge of debts under Chapter 13).

260. See *supra* notes 176-83 and accompanying text (describing fresh start policies of Chapters 12 and Chapter 13).

261. 11 U.S.C. § 1325(a)(4) (1988); see *supra* note 175 (providing text of 11 U.S.C. § 1325(a)(4) (1988)).

262. 11 U.S.C. § 1225(a)(4) (1988); see *supra* note 174 (providing text of 11 U.S.C. § 1225(a)(4) (1988)).

263. See Howard, *supra* note 9, at 2 (discussing potential problems created by *Dewsnup* in operation of other parts of Bankruptcy Code).

264. See *id.* (discussing implications of serious problems if *Dewsnup* applies in Chapter 13 cases).

Chapter 13 in the manner intended by Congress.²⁶⁵ If the *Dyer* analysis is accurate,²⁶⁶ *Dewsnup* may result in fewer reorganization plans and more foreclosures or deeds in lieu of foreclosure. Family farmers and consumer debtors will not be able to protect their farms or homes. This result is contrary to the legislative intent that Chapter 12 and Chapter 13 protect the assets of consumer debtors and family farmers.²⁶⁷

Dewsnup may require bankruptcy courts to continue to participate in reorganization plans well beyond the time period envisioned by the legislative drafters. In protecting the in rem lien, *Dewsnup* will defeat the intent of clear statutory language by granting unsecured creditors access to future earnings beyond the time period envisioned by the drafters.²⁶⁸ Any improvements or maintenance that the debtor performs on the collateral will accrue to the creditor until the value of the collateral exceeds the lien amount. As a result, *Dewsnup* will also act as a disincentive to property owners to maintain and improve their holdings. Finally, it will allow lienholders to retain their leverage over their debtors, a condition the drafters of the Bankruptcy Code intended to prevent.²⁶⁹

XIII. CONCLUSION: THE OPPORTUNITY OF *NOBELMAN V. AMERICAN SAVINGS BANK*

Despite the Court's limiting pronouncement,²⁷⁰ the holding, analysis, and statutory construction principles of *Dewsnup* have created uncertainty in many other areas of the Bankruptcy Code. *Dewsnup* has left undefined when statutory language is clear and when it is ambiguous. The *Dewsnup* holding implied that a statute is ambiguous when the parties dispute its meaning.²⁷¹ The Court suggested that a statutory term or phrase has different meanings in different sections of the Bankruptcy Code,²⁷² but the Court failed to indicate how bankruptcy courts and practitioners could determine when different meanings would apply. *Dewsnup* held that liens pass through Chapter 7 bankruptcies unaffected,²⁷³ but left unanswered the obvious

265. H.R. REP. No. 595, 95th Cong., 2d Sess. 429 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6384-85 (stating congressional purpose of Chapter 13 reorganization plan); H.R. REP. No. 764, 99th Cong. 2d Sess. 48 (1986), reprinted in 1986 U.S.C.C.A.N. 5227, 5249 (stating congressional purpose of Chapter 12 reorganization plan).

266. See *supra* notes 234-40 and accompanying text (providing description of bankruptcy court's application of *Dewsnup* in Chapter 13 case).

267. See *supra* notes 176-83 and accompanying notes (describing fresh start policies of Chapter 12 and Chapter 13).

268. See 11 U.S.C. § 1322(c) (1988) (providing that court may not approve plan providing payments over period greater than five years); *id.* § 1222(c) (same).

269. H.R. REP. No. 595, 95th Cong., 2d Sess. 123-24 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6084-85.

270. See *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992) (describing Court's attempt to limit its holding to specific facts in case).

271. *Dewsnup v. Timm*, 112 S. Ct. 773, 777 (1992).

272. *Id.* at 778 n.3.

273. *Id.* at 778-79.

question of the treatment of liens under the reorganization chapters. The Court in *Dewsnup* turned to policy considerations and the presumption that pre-Code law is unchanged by the Bankruptcy Code unless intent is to the contrary,²⁷⁴ but then quickly returned to plain meaning as the Court's statutory construction hallmark in the next four bankruptcy cases.²⁷⁵

The Supreme Court's holding in *Dewsnup* that a Chapter 7 debtor cannot employ section 506(d) to strip down the value of an undersecured lien to the value of the collateral comports with the legislative intent and history of Chapter 7 and the Court's prior decisions dealing with the survival of liens in bankruptcy proceedings. However, this consistency comes at the dear price of troubling statutory analysis and serious questions about the decision's impact on other parts of the Bankruptcy Code. Further, the Court's holding is not consistent with the plain meaning of the statutory language. With *Nobelman* scheduled for oral arguments in the 1992 Term, the Supreme Court can correct these problems.

First, the Supreme Court should use the opportunity *Nobelman* provides to reduce its reliance on plain meaning as its primary tool of statutory construction and to revive the use of the tools found in *Kelly*.²⁷⁶ Plain meaning's greatest defect is that it provides no method with which courts can accurately interpret the Bankruptcy Code. Plain meaning begs the question, "Plain to whom?" The words and phrases of the Bankruptcy Code are like the words and phrases in every other statute; that is, they have multiple meanings.²⁷⁷ The correct meaning of statutory language is determined by evaluating the word or phrase within its context.²⁷⁸ That context includes not only the surrounding words or sections in the statute, but also the law existing at the time of the statute's passage, the legislature's purpose and intent in passage, and the legal and real world context in which the statute must operate.²⁷⁹ The Court's reliance on plain meaning has blinded it to the context of the Bankruptcy Code and, as a result, to the real world consequences of its interpretations.²⁸⁰

In place of the plain meaning doctrine, the Court should develop a bankruptcy jurisprudence sensitive to the context of statutory language.²⁸¹

274. *Id.*

275. See *supra* notes 145-47 and accompanying text (describing statutory construction in four bankruptcy cases after *Dewsnup*).

276. See *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986) (using deference to federalism and policy of following pre-Code law unless congressional intent to contrary); *supra* notes 111-19 and accompanying text (discussing statutory interpretation by Supreme Court prior to 1989).

277. See L.H. LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. PITT. L. REV. 733, 733 (1987) (discussing use of context in statutory interpretation).

278. See *id.* at 734-39 (discussing different contexts relevant to statutory interpretation).

279. See *id.* (listing different contexts relevant to statutory interpretation)d

280. See T. Alexander Aleinikoff & Theodore M. Shaw, *The Cost of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey, and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 689 (1992) (providing analysis of Supreme Court's use of plain meaning in statutory interpretation).

281. See Larue, *supra* note 277, at 734-39 (discussing importance of context in statutory interpretation).

The rebuttable presumption of *Kelly*, that the Bankruptcy Code merely codified judge-made pre-Code bankruptcy law, should be established as the starting point in statutory interpretation. Statutory language clearly different from pre-Code law would rebut this presumption.

If the *Kelly* presumption survives this analysis, the Court next should look to the legislative history of the Bankruptcy Code for evidence to rebut the presumption. Finding none, the Court should apply a pre-Code interpretation of the statute. If the Court finds evidence sufficient to rebut the presumption, it then should look to the purpose of the statute and the Bankruptcy Code and evaluate interpretation possibilities in light of the text of the statute and its operation in the real world. The correct interpretation will be the one that operates in the statutory and real world context to fulfill the purpose Congress intended.²⁸²

The Court should apply this statutory interpretation scheme in *Nobelman*. Under the Bankruptcy Act of 1898, liens on real property passed through bankruptcy unaffected.²⁸³ The legislative history of both Chapter 12 and Chapter 13 reflect a desire by Congress for family farmers to be able to keep their farms and for consumer debtors to be able to keep their houses.²⁸⁴ This congressional desire is supported by the "super" discharge afforded both Chapter 12 and Chapter 13 debtors.²⁸⁵ Finally, sections 1222(b)(2) and 1322(b)(2) specifically provide that the reorganization plan may "modify the rights of holders of secured claims."²⁸⁶ A lien is a right of its holder to proceed against the property for the payment of a debt obligation.²⁸⁷ Thus, both the legislative history and the specific language of the statute provide evidence of legislative intent to allow debtors to strip down liens in Chapter 12 and Chapter 13 plans. This rebuts the pre-Code presumption and renders *Dewsnup* inapplicable to Chapter 12 and Chapter 13 cases.

The Court should next examine the statute at issue in *Nobelman*—section 1322(b)(2)—in its context. The legislative history of this section indicates that its language was the result of a compromise between a House bill that provided no protection to residential mortgage holders and a Senate bill that provided total protection for this category of creditor.²⁸⁸ The fact

282. See *Kelly v. Robinson*, 479 U.S. 36, 43-53 (1986) (using deference to federalism and policy of following pre-Code law unless congressional intent to contrary); *Larue*, *supra* note 277, at 734-39 (discussing importance of context in statutory interpretation).

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

284. See *supra* notes 176-83 and accompanying text (discussing fresh start policy in Chapter 12 and Chapter 13).

285. See *supra* notes 179, 181-8 and accompanying text (discussing super discharge for Chapter 12 and noting similarity of Chapter 12 to Chapter 13).

286. 11 U.S.C. § 1322(b)(2) (1988); see *supra* note 184 (providing text of § 1322(b)(2)). *Id.* § 1222(b)(2). Section 1222(b)(2) reads: "[T]he plan may . . . modify the rights of holders of secured claims, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims . . ." *Id.*

287. See 11 U.S.C. § 101(37) (1988 & Supp. III 1991) (providing definition of lien).

288. See *supra* notes 205-06 and accompanying text (describing House and Senate versions of § 1322(b)(2)).

that the final bill restricted the modification of claims to those "other than a claim secured only by a security interest in real property that is the debtor's principle residence,"²⁸⁹ which is language not in the House version, is an indication of some purpose of protecting residential mortgage holders in section 1322(b)(2). Viewed in the context of sections 506(a)²⁹⁰ and 1222(b)(2),²⁹¹ the similar section in Chapter 12, in which a family farmer can strip down any undersecured lien in a Chapter 12 reorganization plan, the only logical purpose of the phrase at issue is to prevent the strip down of the mortgage on the debtor's primary residence. Alternative interpretations render the questioned phrase superfluous. Thus, under this statutory analysis, Chapter 13 debtor cannot strip down the mortgage on his primary residence under sections 506(a) and 1322(b)(2) of the Bankruptcy Code. *Nobelman* provides an opportunity for the Court to correct the harms of *Dewsnup* and to provide further guidance to bankruptcy courts and practitioners in the interpretation of the Bankruptcy Code.

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289. See 11 U.S.C. § 1322(b)(2) (1988) (providing that reorganization plan can modify rights of certain claimholders).

290. *Id.* § 506(a).

291. *Id.* § 1222(b)(2).