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INTRODUCTION

Chapter 13 of the Bankruptcy Code (the "Code") provides for the "[a]djustment of [d]ebts of an [i]ndividual with a [r]egular [i]ncome." The primary purpose of chapter 13 is to enable an individual to restructure his debts in a payment plan lasting be-


4 See 11 U.S.C. § 109(e) (1988). Chapter 13 is available only to individual debtors, including self-employed individuals engaged in business. See id. § 1304(a). According to § 109(e), "[o]nly 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. § 109(e). "[I]ndividual with regular income" is defined in § 101(29) as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." Id. § 101(29).

Under the Bankruptcy Act of 1898, only "wage earners," i.e., individuals whose principal income consisted of wages, salary, or commissions, qualified for chapter 13 relief. Bankruptcy Act of 1898, supra note 1, § 608(8); see also S. Rep. No. 989, supra note 1, at 5799 (discussing defects in prior chapter XIII provisions). However, the Code expanded the scope of chapter 13 relief to include self-employed individuals and those whose primary income is
between three and five years. As part of the plan, the debtor may modify the terms of most secured claims; however, the creditor

The debtor may “propose and have approved a reasonable plan for debt repayment based on that individual’s exact circumstances.” Id. Upon filing a bankruptcy petition, all of the debtor’s legal and equitable interests in property are included in the bankruptcy estate, 11 U.S.C. § 541(a)(1) (1988), and an automatic stay is imposed to prevent creditors from commencing or continuing any action against the debtor or the estate for the recovery of a claim. Id. § 362. The automatic stay is a fundamental protection which not only shields the debtor, but also prevents individual creditors from depleting estate assets to the detriment of other creditors. Weintraub & Resnick, supra note 3, at 1-31. Once the case is filed, the bankruptcy court obtains exclusive jurisdiction over the estate’s assets and can equitably distribute them among the creditors pursuant to the restructuring plan. Id. See generally David S. Kennedy, Chapter 13 Under the Bankruptcy Code, 19 Mem. St. U. L. Rev. 137, 146-49 (1989) (discussing automatic stays).

The debtor’s plan must provide for payment on unsecured claims in an amount “not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on [the effective date of the plan].” 11 U.S.C. § 1325(a)(4) (1988). Furthermore, the holder of an unsecured claim may object to the plan, thus requiring the court to deny it, unless the plan “provides that all of the debtor’s projected disposable income to be received [over the life of the plan] will be applied to make payments under the plan.” Id. § 1325(b)(1)(B). “Disposable income” is income “not reasonably necessary . . . for the maintenance or support of the debtor or [his dependents]; and . . . the payment of expenditures necessary for the continuation, preservation, and operation of [the debtor’s] business.” Id. § 1325(b)(2)(A), (2)(B).

With few exceptions, upon successfully completing the plan, the chapter 13 debtor re-
retains its lien and is entitled to the full value, with interest, of the collateral securing the claim.8

An exception to the debtor’s modification rights was created for home mortgage lenders in section 1322(b)(2), which provides that a plan under chapter 13 may not modify the “rights of holders of . . . a claim secured only by . . . the debtor’s principal residence.”9 In interpreting this section, however, three circuit courts of appeals recently held that bifurcating a home mortgage loan in accordance with section 506(a) into a secured claim, equal to the fair market value of the property securing the loan, and an unsecured claim, equal to the amount by which the loan balance exceeds that property’s value, is not a modification of the mortgagee’s rights.10 Furthermore, these courts concluded that following bifurcation, the protection of section 1322(b)(2) applies only to the

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8 See 11 U.S.C. § 1325(a)(5) (1988). The plan will be confirmed if:

(5) With respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder

9 Id. (emphasis added). Section 1325(a) is one of the Code’s “cram-down” provisions. See In re Catlin, 81 B.R. 522, 525 (Bankr. D. Minn. 1987). It requires that secured creditors receive the present value of the claim determined by proposed stream of future payments. Id.

To equate the allowed secured claim with the present value of deferred future payments, the plan may “propose interest payments over and above the face amount of the allowed secured claim at whatever interest rate is equivalent to the discount rate selected by the court or agreed upon by the parties.” 5 Collier, supra note 3, ¶ 1325.06[4][b][iii][B]; see also GMAC v. Miller (In re Miller), 13 B.R. 110, 118 (Bankr. S.D. Ind. 1981). The variety of interest rates employed by the courts “almost equals the number of decisions confronting this issue.” Bowman & Thompson, supra note 7, at 581 (listing, inter alia, legal rate, judgment rate, contract rate, IRS rate, prime rate, market rate, and arbitrary rates).

10 See Eastland Mortgage Co. v. Hart (In re Hart), 923 F.2d 1410, 1415 (10th Cir. 1991); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123, 124 (3rd Cir. 1990); Hougland v. Lomas & Nettleton Co. (In re Hougland), 886 F.2d 1182, 1185 (9th Cir. 1989).

Section 506(a) states that

[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

secured portion of the lender's claim.\textsuperscript{11} Although a growing number of courts share this view of section 1322(b)(2),\textsuperscript{12} a staunch minority\textsuperscript{13} argues that bifurcation of a home mortgage renders the protection of section 1322(b)(2) meaningless.\textsuperscript{14}

This Note will examine the application of sections 506(a) and 1322(b)(2) to home mortgage debt in chapter 13 proceedings. Part I will discuss the opinions of the Third, Ninth, and Tenth Circuits, which allow modification of the unsecured portion of a mortgage. Part II will analyze the plain meaning of, and highlight the ambiguity within, section 1322(b)(2). Part III will review the legislative history surrounding the enactment of the anti-modification clause. Finally, Part IV will consider the implications of the opposing interpretations of section 1322(b)(2) and conclude that to allow undersecured mortgages to be "stripped down" to the fair market value of the property frustrates Congress's clear intent to protect the home mortgage industry.

\section{The Three Circuits}

In the 1989 decision of \textit{Hougland v. Lomas & Nettleton Co. (In re Hougland)},\textsuperscript{15} the Ninth Circuit shocked the lending community by holding that a chapter 13 debtor could strip away the undersecured portion of his home mortgage without violating section

\begin{itemize}
  \item \textsuperscript{11} See Hart, 923 F.2d at 1415 ("undersecured mortgage is \ldots two claims, and only the secured claim is protected"); Wilson, 885 F.2d at 124 ("unsecured portion \ldots may be modified"); Hougland, 886 F.2d at 1185 ("secured portion has special protection," while "unsecured portion does not"); see also infra notes 15-31 and accompanying text (examining circuit court decisions).
  \item \textsuperscript{14} See \textit{In re Mitchell}, 125 B.R. 5, 6 (Bankr. D.N.H. 1991) (noting split of authority and enumerating courts holding minority view); Hart, 923 F.2d at 1417 (Brorby, J., dissenting) (same).
  \item \textsuperscript{15} 886 F.2d 1182 (9th Cir. 1989).
\end{itemize}
The Hougland court, observing that the debtor's mortgage loan balance exceeded the value of the debtor's home by several thousand dollars at the time the bankruptcy petition was filed, held that since section 506(a) was applicable to chapter 13 proceedings, the debt should be bifurcated into secured and unsecured portions. Furthermore, the court found that section 1322(b)(2) applied only to the secured portion of the mortgage and consequently held that the unsecured portion could be modified under the plan. The Hougland court examined the following language of section 1322(b): "the plan may . . . modify the rights of holders of secured claims, other than a claim secured only by . . . the debtor's principal residence," and concluded that because of its position in the sentence, the "other than" clause should be read as referring only to the "secured claims" language. The court reasoned that Congress failed to restrict the word "claim" in the "other than" clause solely for the purpose of maintaining the "natural rhythm and flow" of the sentence. Notwithstanding its acknowledgment of Congress's intent to benefit home mortgage lenders, the Ninth Circuit concluded that only the secured portion of a lender's claim is protected from modification by section 1322.

\[16\] Id. at 1185; see also Lenders Cringe As Judges Chop Mortgage Value, WALL ST. J., Sept. 26, 1990, at B1 (circuit court ruling contrary to lender expectations).

\[17\] Hougland, 886 F.2d at 1182-83. In 1983, as part of an Oregon State program to assist U.S. veterans, the Houglands obtained a loan from Lomas & Nettleton Co., secured only by a deed of trust on their home. Id. at 1182. After missing several payments, the debtors filed for chapter 13 protection. Id. The bankruptcy court denied confirmation of the debtor's plan, but the district court reversed. Id.

\[18\] Id. at 1183-84. Section 103(a) states that chapters 1, 3, and 5 contain general provisions that apply to cases in chapters 7, 11, 12, and 13. Id. Thus, the court concluded that the definitions of secured and unsecured claims established by § 506(a) applied to the use of those terms in § 1322(b)(2). Id. This aspect of the court's reasoning is not disputed because the Senate report accompanying the approved bill specifically stated that "[t]hroughout the bill, references to secured claims are only to the claim determined to be secured under § 506(a), and, not to the full amount of the creditor's claim." S. REP. No. 989, supra note 1, at 5854.


\[20\] Id. at 1184.

\[21\] Id. "Congress need not create such an awkward and wooden sentence structure. We also find the suggestion of amicus that the word 'such' should have preceded the word 'claim' to be equally unfelicitious, and little more than a bow to legal jargon." Id. But see infra note 41 and accompanying text (discussing Congress's frequent use of "such").

\[22\] See Hougland, 886 F.2d at 1185 ("those who have set out to harvest the legislative history have only been able to reap the conclusion that Congress intended to benefit residential real estate lenders").
The following year in *Wilson v. Commonwealth Mortgage Corp.*, the Third Circuit expressly agreed with the Ninth Circuit's determination that section 1322, by its plain meaning, protects only the secured portion of an undersecured claim. Dismissing the lender's argument that this interpretation conflicts with congressional intent, the court stated that "although it is clear that the anti-modification provision of the Act was inserted on behalf of the home mortgage industry, the fact that the provision itself was a compromise suggests that the residential mortgage providers did not emerge with all the protection they may have sought."

Most recently, in *Eastland Mortgage Co. v. Hart* (In re...
Hart), the Tenth Circuit continued this trend towards allowing the bifurcation of undersecured home mortgages. After recognizing the Hougland and Wilson decisions, the Eastland court acknowledged the split of opinion on the bifurcation issue among the lower courts in several other circuits. However, the court dismissed the arguments of the anti-bifurcation courts, and held that section 1322(b)(2) does not preclude a debtor from stripping down home mortgage claims to the fair market value of the property.

II. Statutory Construction

All three of the circuit courts ruling on the bifurcation issue declared that section 1322(b)(2) unambiguously applies only to the

28 923 F.2d 1410 (10th Cir. 1991). The facts in Hart are almost identical to those in Wilson, including the securing of the mortgage with "collateral other than the debtor's principal residence." *Id.* at 1413. The Tenth Circuit did not rely solely upon this fact, however; it decided the bifurcation issue because the district court "could have addressed the issue had it concluded that it was dispositive." *Id.* at 1413-14.

29 *See id.* at 1414.

30 *Id.* The court referred to district and bankruptcy court decisions in the Fourth, Sixth, and Seventh Circuits, which allowed bifurcation. *Id.* However, the court also cited cases from the Fifth, Eighth, and Eleventh Circuits, which prohibited bifurcation. *See id.* at 1414-15 (citing *In re* Chavez, 117 B.R. 733, 736-37 (Bankr. S.D. Fla. 1990); *In re* Sauber, 115 B.R. 197, 199 (Bankr. D. Minn. 1990); *In re* Schum, 112 B.R. 169, 162 n.3 (Bankr. N.D. Tex. 1990); *In re* Kaczmarczyk, 107 B.R. 200, 202-03 (Bankr. D. Neb. 1989); *In re* Russell, 93 B.R. 703, 705 (D.N.D. 1988); *In re* Catlin, 81 B.R. 522, 524 (Bankr. D. Minn. 1987)). The Hart court noted that the lower courts within the Tenth Circuit were in dispute over the proper application of § 1322. *See id.* at 1415 n.3.

The Hart court set forth the rationales on which the anti-bifurcation courts based their holdings:

(1) the legislative history mandates protection of the home mortgage lender, and bifurcation impermissibly dilutes that protection; (2) as a matter of statutory construction, the requirements of a specific section . . . control those of a general section . . .; (3) as a matter of statutory construction, the courts should look to the definition of "claim" . . ., rather than the definition of "secured claim". . .; and (4) analysis of the legislative history should look back to Chapter XIII of the now-repealed Bankruptcy Act . . . for guidance in the definition of secured claims.

*Id.* at 1414. However, without addressing any of the above arguments, the court stated it was "not persuaded" by these rationales and concluded that the plain meaning supported "threshold bifurcation." *Id.* at 1415. *But see id.* at 1417 (Brorby, J., dissenting) ("I believe [the anti-bifurcation] cases correctly analyze the problem and reach the better solution.").

31 *Id.* at 1415. The majority of courts, including those allowing bifurcation, recognize that reducing the size of mortgage payments is a prohibited modification. See *infra* note 128 and accompanying text. However, the Hart court implies that a debtor may reduce the monthly payments on the bifurcated mortgage by stating that "the Hart's plan provided for the secured claim to be paid in full without adjustment in the interest rate or repayment schedule . . . . [T]his plan . . . is not a modification of the creditor's rights under the mortgage." Hart, 923 F.2d at 1415.
secured portion of an undersecured mortgage.\textsuperscript{32} It is submitted, however, that Congress’s use of the terms “claim” and “modify” in section 1322(b)(2) should be interpreted as precluding the modification of any portion of a home mortgage claim.\textsuperscript{33} Additionally, because section 506(a) on its face appears inapplicable to home mortgage claims,\textsuperscript{34} it is suggested that in a chapter 13 proceeding, the claims of home mortgagees may not be bifurcated at all.

A. “Claim”

The Supreme Court has repeatedly held that “Congress intended . . . to adopt the broadest available definition of ‘claim’”\textsuperscript{35} when it defined the term in the Code as a “right to payment, whether or not such right is . . . secured[ ] or unsecured.”\textsuperscript{36} Thus, it is significant that the anti-modification provision in section 1322(b)(2), specifically stating that a plan may “modify the rights of holders of secured claims, other than a claim secured only by . . . the debtor’s principal residence,”\textsuperscript{37} fails to restrict the scope of the word “claim” in the “other than” clause.\textsuperscript{38}

The Hougland court, reasoning that the “other than” clause obviously referred to the “secured claims” language which preceded it in the sentence,\textsuperscript{39} suggested that it was not necessary to “sen[d] the word ‘claim’ into the ‘other than’ clause flanked on

\textsuperscript{32} See Hart, 923 F.2d at 1415; Wilson, 895 F.2d at 127-28; Hougland, 886 F.2d at 1184.
\textsuperscript{33} See infra notes 35-62 and accompanying text.
\textsuperscript{34} See infra notes 63-72 and accompanying text.
\textsuperscript{35} See Johnson v. Home State Bank, 111 S. Ct. 2150, 2154 (1991) (citing Pennsylvania Dep’t of Pub. Welfare v. Davenport, 495 U.S. 552 (1990)). In the Johnson case, the Supreme Court held that a mortgage lien on real estate for which the debtor’s personal liability was previously discharged in a chapter 7 liquidation was a “claim” and therefore includable in a chapter 13 plan. Id.
\textsuperscript{36} 11 U.S.C. § 101(5)(A) (1988) (emphasis added). A “claim” is also defined as a “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is . . . secured or unsecured.” Id. § 101(5)(B). The Code is clear that the automatic stay imposed upon the filing of a bankruptcy petition works to prevent the secured creditor from taking any subsequent action to enforce its claim. Id. § 362(a); see also S. REP. No. 989, supra note 1, at 5787, 5840-41 (“It gives the debtor a breathing spell from his creditors”). However, the stay may be lifted as to specific property or creditors, for cause. See supra note 5 (discussing automatic stay).
\textsuperscript{38} See id.; see also In re Hynson, 66 B.R. 246, 253 (Bankr. D.N.J. 1986) (“The language of 11 U.S.C. § 1322(b)(2) does not specifically limit its protection to a secured claim secured only by a security interest in such real property.”). Contra Hougland, 886 F.2d at 1184 (“Congress need not create such an awkward and wooden sentence structure.”).
\textsuperscript{39} Hougland, 886 F.2d at 1184.
each side by the word 'secured.'" However, throughout the Code, where Congress has intended to limit the scope of "claim," it has done so with specific restrictive words. It is therefore asserted that the word "claim" in the "other than" clause is indicative of Congress's intent to protect the entire home mortgage from modification, without regard to the value of the property.

The placement of the anti-modification clause following the "secured claims" language in section 1322(b)(2) was explained further by a Wisconsin bankruptcy court in In re Etchin. The Etchin court agreed with Hougland that "because the anti-modification clause begins with the qualifying phrase 'other than,'" it must be applied to the "secured claims" clause immediately preceding it. "Home mortgages are, after all, a subclass within the more general classification of holders of secured claims." However, the Etchin court asserted that the "secured claims" clause is only "one of the referents of the anti-modification clause," and criticized the Hougland court for "neglect[ing] to consider as referents the larger universe of claims which are defined in 11 U.S.C. § 101."

The Etchin court went further, asserting that the anti-modifi-
cation clause was set apart with commas from the general language of section 1322(b)(2) to “maintain the independence of the anti-modification language from the ‘secured claims’ language preceding it.” As the court observed, without the commas, section 1322(b)(2) would allow debtors to “modify the rights of holders of secured claims other than a claim.” In setting the clause apart, it is suggested that Congress sought to ensure that the broadest possible definition of “claim” would be used to determine the protection for home mortgagees.

B. “Modify”

The minority courts’ most vehement argument against the majority’s plain meaning interpretation of section 1322(b)(2) centers on the meaning of the word “modify.” The minority contends that “the statute means what it says” and that to “reduce the dollar amount of claims secured by an interest in . . . the debtor’s principal residence . . . would be a modification specifically prohibited by . . . section 1322(b)(2).” However, because Congress failed to define “modify” in the Code, these courts have been forced to look elsewhere to determine what Congress intended by its use of the term.

In In re Schum, a Texas bankruptcy court relied on a dictionary to determine that “[t]he ordinary meaning of the term modify is: ‘to change somewhat the form or qualities of; alter somewhat; . . . to reduce in degree; moderate; qualify; . . . to

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46 Etchin, 128 B.R. at 668.
47 Id. (emphasis added).
48 Id.; see also In re Hyson, 66 B.R. 246, 253 (Bankr. D.N.J. 1986) (“emphasis . . . should be on the existence of a claim”); In re Simpkins, 16 B.R. 956, 963 (Bankr. E.D. Tenn. 1982) (“emphasis should be on ‘claim’”).
49 See, e.g., In re Brown, 91 B.R. 19, 22 (Bankr. E.D. Va. 1988) (“any modification of such a claim is simply impermissible”); In re Catlin, 81 B.R. 522, 524 (Bankr. D. Minn. 1987) (“Application of § 506(a) . . . would modify the rights of the holder . . . beyond the permissible impairment provided in § 1322(b)(2) and (b)(6).”).
50 In re Boullion, 123 B.R. 549, 551 (Bankr. W.D. Tex. 1990). “To read the statute other than literally, as many courts have done, is to permit inroads into a protection afforded a class of creditors by Congress.” Id. (citing In re Schum, 112 B.R. 159 (Bankr. N.D. Tex. 1990); In re Sauber, 115 B.R. 197 (Bankr. D. Minn. 1990)).
52 See infra notes 73-107 and accompanying text (discussing legislative history of § 1322).
53 112 B.R. 159 (Bankr. N.D. Tex. 1990). “By failing to define the term ‘modify,’ Congress has enacted a rather ambiguous provision in § 1322(b)(2).” Id. at 161.
change; to become changed." A number of courts have recognized that what section 1322(b)(2) prohibits is the modification of the "rights of holders" of home mortgage claims. Observing that a mortgagee's rights include the right to full repayment of the loan, the right to benefit from the appreciation of the property during bankruptcy, and the right to receive payments of "the size, frequency and number" provided in the contract, these courts have

54 Id. (citing THE AMERICAN COLLEGE DICTIONARY (Random House 1970)) (emphasis added). Other courts have also attempted to understand the ordinary meaning by resorting to dictionaries. Although finding that § 1322(b)(2) permits bifurcation, the bankruptcy court in Demoff, 109 B.R. at 917, referred to Black's Law Dictionary: "Modify. To alter, to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease." BLACK'S LAW DICTIONARY 905 (3d ed. 1979) (emphasis added).


56 See, e.g., In re Brown, 91 B.R. 19, 22 (Bankr. E.D. Va. 1988) (even if claim were undersecured, creditor would "still receive payment in full because the contract cannot be modified").

57 See Etchin, 128 B.R. at 667. The Etchin court recognized that § 1322(b)(2) preserves "all of the 'rights of holders of secured claims' . . . [including] the right to credit bid with the unsecured portion of the debt at a foreclosure sale or otherwise to avail themselves of benefits from appreciation in the value of the property." Id. (footnote omitted).

The Supreme Court has recently determined that pursuant to § 506(d), a debtor cannot avoid the lien on the unsecured portion of a mortgage on his principal residence, even if the property was abandoned by the trustee in the debtor's chapter 7 case. Dewsnup v. Timm, 112 S. Ct. 773, 778 (1992). The Court reasoned that

[t]he practical effect of [the debtor's] argument is to freeze the creditor's secured interest at the judicially determined valuation. By this approach, the creditor would lose the benefit of any increase in the value of the property by the time of foreclosure sale. The increase would accrue to the benefit of the debtor, a result some of the parties describe as a "windfall." We think, however, that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and mortgagee . . . . Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the [undersecured] creditor, not to the benefit of other unsecured creditors whose claims . . . had nothing to do with the mortgagor-mortgagee bargain. Dewsnup, 112 S. Ct. at 778 (emphasis added). It is suggested that this reasoning applies with even greater weight in the chapter 13 scenario, where the home lender has been afforded explicit protection not available in chapter 7. Compare 11 U.S.C. § 1322(b)(2) (1988) with id. § 722. In a lengthy and thorough dissent, Justice Scalia analyzed § 506(a) and (d) in relation to the entire Code, and suggested that "[t]he feared 'windfall' to the debtor may be prevented by 11 U.S.C. § 551, which preserves liens avoided under § 506(d) and other provisions of the Code 'for the benefit of the estate.'" Dewsnup, 112 S. Ct. at 781 n.1 (Scalia, J., dissenting). However, § 551 only benefits the creditor in a "trustee-managed foreclosure sale," and thus is no help to the chapter 13 home mortgagee. Id.

58 See Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236 (5th Cir. 1984) (permitted modifications include changing size and timing of installment payments).
concluded that reducing the amount due under the security agreement “necessarily entails a modification of the mortgage holder's rights.”

One bankruptcy court has stated that “[i]n order to afford section 1322(b)(2) any relevant meaning, we must find that the claim referred to in this section applies to the entire claim . . . .” It is submitted, however, that even ignoring the practical justification for precluding bifurcation of an undersecured mortgage, it remains clear from the language of the Code that, regardless of the value of the property, the debtor's plan is prohibited from altering the terms of the mortgage contract. Unfortunately, by ignoring the common import of the word “modify” in their interpretation of the anti-modification provision, the majority courts have “carrie[d] the syntax of the Bankruptcy Code to an absurd conclusion which is at odds with . . . the clear legislative intent of . . . 11 U.S.C. 1322(b)(2).”

C. Specific Provisions Control Those of General Application

While section 506(a) applies to cases under chapters 7, 11, 12, and 13, section 1322(b)(2) applies solely to chapter 13 cases. As a matter of statutory construction, Code sections that pertain to a specific chapter are generally deemed to supersede conflicting sections of general application. Consequently, the minority courts,
arguing that a conflict exists between section 506(a)’s generally applied bifurcation provision and section 1322(b)(2)’s specific anti-modification clause, assert that the conflict must be resolved by enforcing only section 1322(b)(2). However, one could argue that sections 1322 and 506 do not conflict, but that section 506 is inapplicable to claims protected by section 1322(b)(2)’s anti-modification clause.

By enacting section 506, Congress recognized that, in many instances, debts are treated differently, depending on whether they are secured or unsecured. Generally, section 506(a) applies when it is necessary to distinguish secured and unsecured claims to determine the rights of the parties affected by the bankruptcy.

In certain instances, however, the section is inapplicable because the secured or unsecured status of a claim will not alter the claimant’s rights. For example, it appears that section 506(a), by

(b) are superseded by specific provisions).

See, e.g., Mitchell, 125 B.R. at 6 (statutes in conflict “to a limited extent . . . because § 506 attempts to invade the protection of § 1322(b)(2) under the very narrow circumstances outlined therein”); Nobelman v. American Sav. Bank (In re Nobelman), 129 B.R. 98, 102 (N.D. Tex. 1991) (same).

See, e.g., Mitchell, 125 B.R. at 6 (specific provision governs); In re Hynson, 66 B.R. 246, 249 (Bankr. D.N.J. 1986) (same); In re Simpkins, 16 B.R. 956, 965 (Bankr. E.D. Tenn. 1982) (section 506(d) does not affect payment rights under § 1322(b)(2)). In In re Sauber, 115 B.R. 197, 199 (Bankr. D. Minn. 1990), the court noted that “Hougland takes an overly technocratic approach . . . relating section 506(a) to § 1322(b)(2) . . . . [T]he proper setting of the statutes in the context of the overall scheme of the Code, is as clearly missed as the proverbial forest might be missed in examining the trees.”

See, e.g., 11 U.S.C. § 726(a) (1988) (regarding distribution of property of estate); id. § 1111(b) (election of non-recourse debt).

Generally, chapter 13 claims may be classified as secured or unsecured pursuant to § 506(a) and then treated differently under the plan. See, e.g., id. § 1322(b)(1) (may “designate a class or classes of unsecured claims”); id. § 1322(b)(2) (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”). Section 1325 provides for the true difference in treatment under chapter 13 of secured and unsecured claims. See supra notes 7-9 and accompanying text (describing treatment of claims in chapter 13). Section 1325(a)(5) mandates that secured claims receive full payment with interest unless the creditor receives the collateral or agrees otherwise. See 11 U.S.C. § 1325(a)(5) (1988). However, § 1325(b)(1)(B) only requires that unsecured claims receive any surplus of the debtor’s disposable income over the amount necessary for secured claims. Id. § 1325(b)(1)(B). See generally 5 COLLIER, supra note 3, ¶ 1325.08[1]-[4] (more expansive discussion on treatment of unsecured claims).


See, e.g., id. § 1322(a)(2) (priority claims pursuant to § 507 entitled to “full payment, in deferred cash payments” in chapter 13 debtor’s plan). Furthermore, pursuant to chapter 11’s fair and equitable test, the holder of an undersecured claim may elect to treat the claim as fully secured and thereby take advantage of any appreciation in the value of the prop-
its terms, simply does not apply to home mortgage claims. The last sentence of section 506(a) provides that the value of property securing a creditor's claim "shall be determined . . . in conjunction with any hearing on . . . [the] disposition or use [of the property] or on a plan affecting . . . [the] creditor's interest." Because section 1322(b)(2) precludes a chapter 13 debtor's plan from "affecting" the rights of a home mortgagee, it is suggested that section 506(a) is inapplicable to home mortgage claims. Thus, although section 506(a) does not conflict with section 1322(b)(2), the claim of a home mortgagee in a chapter 13 proceeding still should not be subject to bifurcation.

The arguments posed by the courts opposed to bifurcation demonstrate that the majority's plain meaning interpretation of section 1322(b)(2) is by no means exclusive. Thus, the apparent ambiguity of section 1322(b)(2) requires an examination of the legislative history to determine the intent of Congress in enacting the section.

III. LEGISLATIVE HISTORY

Although the legislative history of the Bankruptcy Code does not provide an easy answer to the bifurcation issue, it does establish a clear congressional intent to protect "homemortgagor [sic] lenders, [who] perform[] a valuable social service through their loans."
A. Pre-Code Legislation

The Bankruptcy Act of 1898 (the "Act") extensively recognized secured creditors, but it did not clearly define their rights in relation to the debtor or the estate. Unfortunately, the courts' attempts at filling the gaps resulted in conflicting decisions and uncertain application of the law. In 1972, recognizing the many inequities of the Act and its amendments, Congress created the Commission on the Bankruptcy Laws of the United States to propose a new comprehensive bankruptcy law.

In 1973, the Bankruptcy Commission issued a report that thoroughly examined the "inadequacies in Chapter XIII, including [the] treatment of secured claims." To prevent consumer creditors from coercing the payment of excessive claims by threatening to repossess a debtor's personal belongings, the report recommended limiting secured claims on personal property to the value of the creditor's security interest.

In addition, noting that chapter XIII of the Act prohibited the debtor's plan from dealing at all with claims secured by real property, the Commission recommended that the new Code provide

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76 Bankruptcy Act of 1898, supra note 1.
77 See Bowman & Thompson, supra note 7, at 569.
78 See generally COMMISSION REPORT, supra note 3, at 157-67 (consumer bankruptcy problems and recommendations).
80 See S. Rep. No. 989, supra note 1, at 5787-89; see also COMMISSION REPORT, supra note 3, at 2 ("[p]roblems which caused the commission to be created").
for the limited treatment of such claims. Section 6-201(4) of the report stated that a plan "may include provisions for the curing of defaults within a reasonable time and the maintenance of payments while the case is pending on claims secured by a lien on the debtor's residence." The Commission explained that allowing the reinstatement of a home mortgage pursuant to a chapter 13 plan would enable a debtor to "preserve his equity in his home." However, the proposed bill "[did] not authorize reduction of the size or varying of the time of installment payments."

The House version of chapter 13 contained most of the Commission's recommendations and expanded the Commission's proposal regarding the debtor's ability to modify claims. The House bill provided that a chapter 13 plan may "modify the rights of holders of secured claims or of holders of unsecured claims." Thus, it exposed debts secured by real estate or personal property to "modification by the reduction of the secured creditor's lien to only the value of the collateral." Furthermore, the House bill distinguished between the debtor's right to modify claims and his

claim was defined as "all claims of whatever character against the debtor or his property ... whether secured or unsecured ... [but shall not include claims secured by estates in real property or chattels real." Id. (emphasis added). To give some protection to the debtor's home, courts often enjoined creditors from enforcing such liens and allowed the debtor to cure and reinstate pursuant to the courts equitable powers. See Hallenbeck v. Penn Mut. Life Ins. Co., 323 F.2d 566, 568 (4th Cir. 1963); In re Garrett, 203 F. Supp. 459, 460 (N.D. Ala. 1962); COMMISSION REPORT, supra note 3, at 165.

See COMMISSION REPORT, supra note 3, pt. 2, at 204-05.

Id. at 204.

Id. at 206.

Id. Thus, the Commission's recommendations permitted the debtor to deal with his home mortgage by cure and maintenance, but they did not permit the reduction of such claims to the value of the property. See Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 244 (5th Cir. 1984).

H.R. 8200, 95th Cong., 1st Sess. 530-45 (1977) [hereinafter H.R. 8200]. Although the Commission submitted a proposed bill in the 93rd Congress, no action was taken during that session. See S. Rsp. No. 989, supra note 1, at 5787. In the 94th Congress, the Commission's bill was re-introduced along with an alternative bill prepared by the National Conference of Bankruptcy Judges. Id. at 5788.

After extensive hearings on the parallel bills, the House passed H.R. 8200 on February 1, 1978. Id.

See Grubbs, 730 F.2d at 242. But see S. Rsp. No. 989, supra note 1, at 5787 (although House bill passed rather than Senate bill, its language contained much of the Senate bill's text).

H.R. 8200, supra note 87, at 537.

Id.

Grubbs, 730 F.2d at 243 (citations omitted).
right to reinstate the "original agreed payment schedule," thus implying that a plan could either reduce the principal of a loan to the value of the property securing it or provide for the cure of a loan default and the continuing payment of regular installments.

The Senate bill, although ultimately rejected in favor of a modified House version, effected a substantial change in the House proposal. During the Senate hearings, representatives of secured creditors testified that, although chapter 13's cure provisions were tolerable, allowing debtors to alter the size and timing of installments and permitting the reduction of a secured claim to the value of the collateral would cause lenders to restrict the flow of credit to the home mortgage market. Recognizing the impor-
tance of freely available capital for the purchase of homes to individual consumers and the national economy, the Senate amended its proposed bill to preclude modification of loans “wholly secured by real estate.”

B. The Bankruptcy Reform Act

The final version of the Code was a compromise of the House and Senate bills, reached through “a series of agreed-upon floor amendments in both houses.” The Senate ultimately agreed to limit the scope of protection of section 1322(b)(2) to claims “secured only by . . . the debtor’s principal residence.” While there are no on-the-record remarks regarding the change of language from “wholly” to “only,” it seems clear that Congress intended to prevent the word “wholly” from being read as protecting only fully secured claims against modification.

However, while the version of section 1322 that was ultimately enacted prohibits the debtor from modifying the rights of a home mortgagee, it does provide him with the power to cure. Congress enacted chapter 12 of the Code for the special protection of family farmers, see Andrea J. Winkler & Jean K. FitzSimons, Legislative History of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act, app. I, at 1813-14 (15th ed. 1989), and in doing so granted them greater protection than the chapter 13 debtor. Compare 11 U.S.C. § 1222 (1988) with id. § 1322. There is no exception to modification for home mortgage lenders in § 1222(b)(2) (chapter 12’s version of § 1322(b)(2)), and §

98 S. 2266, supra note 95, § 1322(b)(2); see Grubbs, 730 F.2d at 245.
101 See Hart, 923 F.2d at 1412 (citing In re Neal, 10 B.R. 535, 539 (Bankr. S.D. Ohio 1981)). The Neal court doubted whether the change was intentional since “‘wholly’ secured fits more neatly into the overall statutory scheme.” Neal, 10 B.R. at 539. Although this position would be persuasive if Congress intended only to protect the secured portion of home mortgages, it is suggested that the change indicates Congress’s intent to protect the entire claim.
102 11 U.S.C. § 1322(b)(5) (1988); see also In re Taddeo, 685 F.2d 24, 28 (2d Cir. 1982) (“Indeed, earlier Senate bills along with House bills and the present statute listed the power to cure and the power to modify in different paragraphs, indicating that the power to cure is different from the power to modify.”).

It is suggested that if a debtor’s plan reduces the secured claim to the value of the collateral and modifies the contract pursuant to § 1322(b)(2), the debtor must repay the entire secured claim within the period of the plan pursuant to § 1322(c). See 11 U.S.C. § 1322(b)(2), (e). However, the courts permitting strip down implicitly permit the debtor to repay the reduced claim according to the modified amortization schedule, extending beyond the plan’s term. See infra notes 128-29 and accompanying text. It is submitted that, when read in light of § 1222(b)(2) and (c), such an interpretation is clearly erroneous. See 11 U.S.C. § 1222(b)(2), (c) (1988).
thus expressed its intent that although a debtor may not change the terms of his loan agreement, he could nevertheless save his home by curing his loan default and reinstating his original payment schedule.

All courts that have considered section 1322(b)(2) agree "that Congress intended to accord home mortgagees preferred treatment under the law." However, as the minority courts construing section 1322 have stated, "apply[ing] the cram down provisions of . . . 11 U.S.C. § 506 to [home mortgagees is] . . . at odds with the clear intent of Congress to protect a lender's security when a lender is secured only by a security interest in a Chapter 13 debtor's home."

IV. NECESSARY IMPLICATIONS

Chapter 13 gives debtors with a regular income a "fresh start" by allowing them time to restructure their debts. A

1222(b)(9) permits payment of a modified claim "over a period exceeding [five years]"). Thus, it is submitted that if Congress intended to permit chapter 13 debtors to reduce their home mortgages and pay the reduced secured claim over a period exceeding the length of the plan, Congress would have included in chapter 13 language comparable to that found in § 1222(b)(9).


See supra notes 82-85 and accompanying text (cure provisions intended to permit debtor to save equity in home).

See 11 U.S.C. § 1322(b)(5) (1988). In discussing the impairment of secured claims under chapter 11, the Senate report stated the following:

The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

S. REP. No. 989, supra note 1, at 5906. Here, Congress explicitly stated that the cure of a claim, under chapter 11, necessitates payment in full. Id. It is suggested that the treatment of a home mortgage lender under chapter 13 that results in less than full payment is clearly contrary to Congress's intent to protect the home mortgage industry.

Nobelman v. American Sav. Bank (In re Nobelman), 129 B.R. 98, 103 (N.D. Tex. 1991); see also Wilson, 885 F.2d at 128 ("anti-modification provision . . . inserted on behalf of home mortgage industry"); Hougland, 886 F.2d at 1185 ("Congress intended to benefit residential real estate lenders"); In re Hildebran, 54 B.R. 585, 586 (Bankr. D. Or. 1985) ("legislative intent . . . was to provide stability in the long term residential housing market").


H.R. REP. No. 595, supra note 3, at 6079.

See supra notes 5-7 and accompanying text.
chapter 13 repayment plan, while enabling the debtor to retain possession of his property, also benefits the secured creditor, who is likely to recover more under the plan than he would through a forced sale. Under a repayment plan, the debtor must either pay secured creditors the fair market value of the collateral securing their claims or cure any default and resume regular payments in accordance with the parties' original agreement. However, recognizing the importance of home mortgage lenders to society, Congress enacted section 1322(b)(2) to provide them with protection not available to other secured creditors, and thus balanced the "fresh start" policy against the need for the availability of home mortgage loans.

For years following the enactment of the Code, the majority of courts considering section 1322(b)(2) held that home mortgage lenders possessed an absolute right to full repayment. However, the recent circuit court cases have relied on a plain meaning interpretation to allow the strip down of undersecured mortgages and have failed to recognize that such a construction "produce[s] result[s] demonstrably at odds with the intention of ... [section 1322(b)(2)'] drafters." To determine whether bifurcation frustrates Congress's intent to favor home mortgage lenders, it is necessary to examine the treatment of claims secured by property other than the debtor's

110 See S. Rep. No. 989, supra note 1, at 6079.
111 See id. ("The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.").
112 See 11 U.S.C. §§ 506(a), 1325(a)(5)(B)(ii) (1988); see also supra note 7 and accompanying text. In the alternative, the debtor may surrender the collateral to the holder thereof and thereby avoid treatment of the claim under the plan. 11 U.S.C. § 1325(a)(5)(C) (1988).
113 Id. § 1322(b)(5) (1988). The debtor may also cure and maintain payments on unsecured claims. Id.; see also infra notes 119-25 and accompanying text (discussing treatment of holders of non-residential mortgages).
114 See 11 U.S.C. § 1322(b)(2) (1988); see also Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 246 (5th Cir. 1984) (home lenders need special protection from modification); In re Simpkins, 16 B.R. 956, 963 (Bankr. E.D. Tenn. 1982) ("Congress wanted to protect the lender secured only by a security interest in the ... debtor's home.").
115 See supra notes 108-14 and accompanying text.
116 See, e.g., Grubbs, 730 F.2d at 242-46 (cure does not amount to modification).
117 See, e.g., Houglan, 886 F.2d at 1183. "There are times when the quest for meaning should begin and end 'with the language of the statute itself.'" Id. (quoting United States v. Ron Pair Enters., 409 U.S. 235, 240 (1999)).
118 Ron Pair Enters., 489 U.S. at 242 ("intention of the drafters, rather than the strict language, controls").
principal residence. As previously indicated, a creditor with a security interest in personal property has a secured claim equal to the fair market value of the collateral. Pursuant to section 1322, the debtor may modify the rights of such a creditor, or the debtor may cure his default and maintain regular payments on the claim. If modification is elected, the creditor must receive full payment on the secured portion of the claim, including interest. The permitted modifications only include reducing the lien to the value of the collateral, altering the payment schedule, and adjusting the interest rate to reflect the revised payment plan's effect on present value.

Alternatively, if a debtor elects to cure his default, he must within a reasonable time provide for the payment of past due installments, plus late charges and fees, and he must continue to make regular payments on the debt as they become due. Furthermore, a debtor who elects to cure must satisfy the creditor's entire claim pursuant to the terms of the contract, without regard to the value of the collateral.

Although few of the courts permitting bifurcation of home mortgages have explained how the reduced secured claim should be treated, their reasoning implies that a mortgage secured

119 See In re Hayes, 111 B.R. 924, 926 (Bankr. D. Or. 1990) (considering debtor's options regarding property other than principle residence).
120 See 11 U.S.C. § 506(a) (1988); supra note 7 (discussing § 506(a)).
122 See 11 U.S.C. § 1325(a)(5) (1988); Hayes, 111 B.R. at 926; supra note 8 and accompanying text. Furthermore, the debtor's plan must provide for total payment within three to five years. 11 U.S.C. § 1322(c) (1988).
123 See Hayes, 111 B.R. at 926. If the value of the collateral exceeds the principal balance of the claim, the creditor is also entitled to interest, costs, fees, etc., as provided in the contract, to be paid under the plan as part of the secured claim. See 11 U.S.C. § 506(b) (1988).
125 See Hayes, 111 B.R. at 926. “[T]he debtor has two alternatives for treatment of a claim secured other than by a security interest in the principal residence. He or she may either leave the contract intact (maintain and cure) or alter the terms and pay the present value of the secured claim (cram-down).” Id.; see also Clark v. Federal Land Bank of St. Paul (In re Clark), 738 F.2d 869, 871-72 (7th Cir. 1984) (“‘cure’ . . . is to remedy or rectify . . . [the default and] restore matters to the status quo ante”); 5 COLLIER, supra note 3, ¶ 1322.09[4] (“creditor receives the interest charges and costs to which it is entitled under the contract and applicable nonbankruptcy law”).
126 See Hayes, 111 B.R. at 925 (“Hougland does not suggest how to structure plan payments to reconcile the 'special protection' of § 1322(b)(2) with the fact that only a portion of the outstanding balance may be repaid under a plan”); see also Wilson, 895 F.2d at 128-29
solely by the debtor’s principal residence is to be treated the same as any other undersecured claim.\textsuperscript{127} Attempting to give some meaning to the protective clause, most of the courts allowing strip down have concluded that section 1322(b)(2) only prevents debtors from altering the interest rate or reducing the payments on their debts.\textsuperscript{128} Thus, amortization of the reduced principal is accelerated and the debt satisfied earlier than originally intended. Since the debtor must maintain the full payment provided in the note, bifurcation does nothing to reduce present debt service or assist in giving the debtor a fresh start. Instead the debtor realizes a future windfall.\textsuperscript{129}

With its claim bifurcated, the home mortgage lender will often receive payment only on the secured portion of its claim. Thus, the home mortgagee’s rights are almost identical to those of any other secured creditor.\textsuperscript{130} The only difference is that a home mortgage lender will receive the interest rate and payments provided in the mortgage contract,\textsuperscript{131} while other secured creditors may have their interest rates altered and their payments reduced.\textsuperscript{132} However, where the debtor elects to cure his default and maintain payments, the holders of home mortgages are treated identically to other secured creditors under the majority’s interpretation of section 1322(b)(2).\textsuperscript{133}

It is suggested that Congress balanced the benefit of allowing a debtor in bankruptcy to adjust the mortgage on his principal resi-

\textsuperscript{127} See supra note 31. This interpretation is contrary to the majority opinion of the courts, including those allowing bifurcation. \textit{Id.}

\textsuperscript{128} See \textit{Schum}, 112 B.R. at 162. In \textit{Schum}, the court rejected bifurcation, reasoning that it “would have the effect of treating real property secured by only a lien on the debtor’s principal residence in the same manner as any other property secured by a lien.” \textit{Id.}

\textsuperscript{129} See \textit{Hayes}, 111 B.R. at 926-27 (plan may not alter monthly payments to reflect reduced secured debt); \textit{In re Shaver}, 58 B.R. 166, 167 (Bankr. S.D. Ohio 1985) (reduction of payments and interest rate impermissible modification); \textit{In re Wilkinson}, 33 B.R. 933, 935 (Bankr. S.D.N.Y. 1983) (same); see also Jeffrey W. Morris, \textit{The Undersecured Home Mortgage Lender in Chapter 13}, \textit{Faulkner & Gray’s Bankruptcy L. Rev.}, Summer 1990, at 54-55.

\textsuperscript{130} See Morris, supra note 128, at 54-55.

\textsuperscript{131} See supra notes 119-23 (discussing treatment of claims secured other than by security interest in principal residence).

\textsuperscript{132} See supra note 128 and accompanying text.

\textsuperscript{133} See supra notes 119-23 and accompanying text.

\textsuperscript{134} See 11 U.S.C. § 1322(b)(5) (1988); see also supra note 123 and accompanying text.
dence against its desire to protect home mortgage lenders by allowing the debtor to cure and reinstate his original contract. By permitting home mortgages to be stripped down, the courts grant a windfall to individual debtors at the expense of potential home buyers who will be forced out of the market by a restricted flow of credit.\textsuperscript{134}

Thus, it is submitted that permitting the bifurcation and strip down of mortgages secured only by the debtor’s principal residence renders section 1322(b)(2) essentially meaningless, thereby vitiating Congress’s clear intent to protect residential mortgage lenders, who “perform[ ] a valuable social service through their loans.”\textsuperscript{135}

\textsuperscript{134} See S. Rep. No. 989, supra note 1, at 5792. “The [Senate] committee feels that the policy of the bankruptcy law is to provide a fresh start, \textit{but not instant affluence...}” Id. (emphasis added); see also Nobelman v. American Sav. Bank (\textit{In re Nobelman}), 129 B.R. 98, 104 (N.D. Tex. 1991) (“bifurcation... would result in a windfall to debtors who would then repay only the value of their residence, and reap the benefit of their discharged unsecured claim if property values rise’”) (quoting First Interstate Bank of Okla., N.A. v. Woodall (\textit{In re Woodall}), 123 B.R. 95, 97-98 (W.D. Okl. 1990), rev’d, 931 F.2d 62 (10th Cir. 1991)).

The \textit{Hougland} court reasoned that lenders should protect themselves by requiring a greater spread between the loan amount and the value of the real estate collateral. \textit{Hougland}, 886 F.2d at 1184; see also \textit{In re Frost}, 96 B.R. 804, 807 (Bankr. S.D. Ohio 1989) (“Absent intentional depreciation by a debtor or very abnormal economic times, most holders of first mortgages should be fully secured”), aff’d, 123 B.R. 254 (S.D. Ohio 1990); cf. \textit{Caster v. United States (In re Caster)}, 77 B.R. 8, 13 (Bankr. E.D. Pa. 1987) (“most mortgages... are fully secured due to... appreciation of housing values”) (emphasis omitted). However, it is suggested that again, this analysis contradicts Congress’s intent. See \textit{In re Sauber}, 115 B.R. 197, 199 (Bankr. D. Minn. 1990). Presumably, in granting special protection to home mortgagees, Congress intended to stimulate the economy by increasing the number of potential home purchasers, thereby increasing new home sales and producing more jobs. Broad use of bifurcation, especially during recessionary periods, will likely cause most mortgage lenders to require larger down payments and increase interest rates, thereby placing “a higher price tag on home ownership.” See \textit{Groups Ask Exemption from Cramdowns, Nat’l Mortgage News}, June 10, 1991, at 22 (quoting Mortgage Bankers Association’s John Davey, Senior Vice President of Draper & Karmer, Inc.). Consequently, it is suggested that potential first-time and upgrade buyers with sufficient incomes to support 90-95% financing will be forced out of the market by lenders requiring 20-30% down to adequately protect their loans from bifurcation. See \textit{Senate Committee Weighs Impact of Home Mortgage Cramdowns by Ch. 13 Debtors}, Banking Rep. (BNA), at 1082 (June 10, 1991). Additionally, widespread bifurcation is likely to have a severe impact on the secondary mortgage market and government guarantee agencies. See \textit{Groups Ask Exemption from Cramdowns, supra}, at 22 (quoting Frank Keating, General Counsel of the Department of Housing and Urban Development); see also \textit{Cramdowns in Bankruptcy Raise Questions of Public Policy, Secondary Market Impact}, Banking Rep. (BNA), at 588 (Mar. 28, 1991) (discussing effects on secondary market).

\textsuperscript{135} See Grubbs v. Houston First Am. Sav. Ass’n, 730 F.2d 236, 246 (5th Cir. 1984).
CONCLUSION

The courts presently allowing the strip down of residential mortgages in chapter 13 dismiss the critics who assert that such treatment of home mortgagees is precluded by section 1322(b)(2) of the Code. However, these courts treat home mortgage lenders and other secured creditors almost identically, thereby frustrating Congress's intent to protect residential mortgages and increase the availability of credit for the purchase of homes. In enacting chapter 13, Congress sought to assist debtors by, inter alia, permitting the cure of home mortgage defaults and allowing debtors to reinstate the original terms of their loan contracts. It is submitted that Congress did not intend to allow debtors to reap a windfall by stripping their home mortgages down to the value of their property, but indeed sought to prohibit such action by adopting section 1322(b)(2).

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POSTSCRIPT: THE NEXT CIRCUIT

On the eve of publication of this Note, the Second Circuit, in Bellamy v. Federal Home Loan Mortgage Corp., followed "the three circuits" by holding that section 1322(b)(2) permits strip down of home mortgages. However, unlike the other circuits, the Bellamy court did not rely solely on the plain meaning of the Code.

The Second Circuit based its holding primarily on the revised Code's preference for treating claims as secured or unsecured, rather than treating creditors as secured or unsecured. In light of this "fundamental change" in bankruptcy law, the court stated "the 'rights' which may not be modified under §1322(b)(2) must be defined in terms of the claim, not with reference to the status of the claimant." Therefore, the court reasoned, the "other than..."
clause must be read as precluding a modification of only the secured portion of the home mortgage claim (as defined by section 506(a)).\footnote{Id. at *11.} The court also applied this reasoning to dispose of the creditor's argument that the Supreme Court's recent decision in \textit{Dewsnup v. Timm}\footnote{\textit{Dewsnup v. Timm}, 112 S. Ct. 773 (1992); see also note 57 (discussing limited application of \textit{Dewsnup} to \textsection{1322(b)(2)).} precludes the use of section 506(a) to bifurcate secured claims.\footnote{\textit{Bellamy}, 1992 U.S. App. LEXIS 7768 at *19-24. The Second Circuit noted that the \textit{Dewsnup} holding was limited to lien avoidance under 11 U.S.C. \textsection{506(d), not the treatment of claims under 11 U.S.C. \textsection{1322(b)(2). Id.}} The Second Circuit acknowledged that section 1322(b)(2) was obviously intended to benefit home mortgage lenders;\footnote{See id. at *17; see also note 106 and accompanying text.} however, it is submitted that its analysis of the legislative history is clearly flawed.

While recognizing that the Senate's proposal prohibiting modification of 'claims wholly secured by real estate mortgages' was intended to "retain Chapter XIII's exception for mortgagees,"\footnote{See \textit{id.} at *17; supra notes 99-101 and accompanying text (final version of \textsection{1322(b)(2) represented a compromise between House and Senate proposals.).} the court failed to recognize that the congressional compromise\footnote{\textit{See id. at *17; supra notes 99-101 and accompanying text (final version of \textsection{1322(b)(2) represented a compromise between House and Senate proposals.).}} merely limited what was an exception for all real estate mortgages to only home mortgages.\footnote{\textit{See 11 U.S.C. \textsection{1322(b)(2); see also Grubbs v. Houston First Am. Sav. Ass'n., 730 F.2d 236, 246 (5th Cir. 1984); supra note 100 and accompanying text.}} The Second Circuit did not explain why the compromise should be interpreted as granting less protection for home mortgages. Neither the slight change in language\footnote{\textit{Compare S.2266, supra note 95 ("modify the rights of holders of secured and unsecured claims, except claims wholly secured by real estate mortgages.") with 11 U.S.C. \textsection{1322(b)(2) ("modify the rights of holders of secured claims, other than a claim secured only by . . . the debtor's principal residence, or of holders of unsecured claims . . . .").}} nor the subsequent legislative history of section 1322(b)(2),\footnote{\textit{See supra notes 99-105 and accompanying text; \textit{Bellamy}, 1992 U.S. App. LEXIS 7768 at *16-17.}} indicate that Congress intended to limit the existing exemption from treatment for mortgages secured by the debtor's principal residence.\footnote{\textit{See \textit{Bellamy}, 1992 U.S. App. LEXIS 7768 at *15; supra notes 82-86 and accompanying text.}}

The \textit{Bellamy} court quickly disposed of the litany of arguments raised by appellant and amici. While declaring that "the terms of payment must, at a minimum, remain unchanged or the prohibi-
tion on modification is meaningless,” the court failed to recognize that principal and length of repayment are two of the four repayment terms. The court attempted to dismiss the arguments that strip down does nothing to promote the debtor’s fresh start and instead provides a future windfall by reasoning that the future windfall is itself “a measurable contribution to the Code’s ‘fresh start’ policy.”

Ironically, the Second Circuit concluded its dismissal of the many arguments that strip down is exactly what Congress intended to prevent, by stating that “the balance to be struck between promoting home ownership and protecting residential mortgage lenders is one for the legislature, not the court, to make.”

Unless overruled by the Supreme Court, the four Circuit Court decisions are likely to result in restricted availability of credit for home purchasing, contrary to Congress’s intent in enacting section 1322(b)(2).

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152 See Bellamy, 1992 U.S. App. LEXIS 7768 at *27.
153 See id.
154 See supra notes 129, 134 and accompanying text.
155 Bellamy, 1992 U.S. App. LEXIS 7768 at *34.
156 Id. at *35.