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I. INTRODUCTION

The advertisements are on almost every radio and television station in the country. Whether it is Jim Palmer and the Money Store, Midwest Financial, First Finance, or any other credit corporation, the ads are difficult to miss. They go something like this: “Are you in a bit of a financial bind? Having a hard time making your monthly bill payments? If you’re a homeowner, we’ve got an easy solution for you: debt consolidation. Replace all your monthly bill payments with one low monthly payment.
We've saved people hundreds, even thousands of dollars a month. Call us today, we can help."

Now imagine if your credit card debt, doctor bills and utilities were piling up. Creditors and collection agents were constantly hounding you for payment. You started falling behind on your mortgage, placing you in jeopardy of losing your house. Bankruptcy loomed and you needed a way out. You heard one of these advertisements and made the call. Simple and painless, the credit company gave you a short-term loan allowing you to pay off your debts. Gone is all your outstanding debt, replaced by one monthly payment for the next five years. The bills stop coming. Even your creditors have stopped harassing you. One problem: six months later your bills are stacking up again and this time you have no way out. You can't even afford the monthly payment on another debt consolidation loan so you're forced to file for bankruptcy.

Terrie Mattson was one of the many people who found themselves in this position in recent years. In fact, in 1996 there were 1,042,110 bankruptcy filings. In 1997 that number rose to 1,316,999. And in well over ninety percent of all bankruptcy filings, the debtor is an individual, like Mattson, who seeks bankruptcy protection in order to obtain debt relief. Mattson wanted to keep her home, but needed a way out from under her debt. She chose to take a debt consolidation loan. A short time later, she was forced to file for bankruptcy. In bankruptcy circles this financial struggle is all too familiar, as is the outcome.

So why would a credit company make such a high risk loan knowing the odds are against the debtor being able to pull out of this financial tailspin? How can the company hope to get paid back if the debtor is forced to file for bankruptcy? Part of the answer is that these credit companies can charge exorbitant interest rates on these debt consolidation loans.

2. See Richard E. Coulson & Alvin C. Harrell, 1996 Consumer Bankruptcy Developments, 52 BUS. LAW., May 1997, at 1173 (stating that in 1996 there were 1,042,110 bankruptcy filings, of which 989,172 were nonbusiness filings); see also Jagdeep S. Bhandari & Lawrence A. Weiss, The Increasing Bankruptcy Filing Rate: An Historical Analysis, 67 AM. BANKR. L.J., Winter 1993, at 1 (stating that individual bankruptcy filings have risen from 18,500 in 1950 to 943,987 in 1991).
3. See Ed Flynn, Bankruptcy by the Numbers: Still Climbing, AM. BANKR. INST. J., Dec./Jan. 1998, at 1 (stating that this total equals one bankruptcy filing per 75 households in the United States, nearly one-half the birth rate).
5. See Mattson, 210 B.R. at 158.
6. See id.
7. See id.
8. See Bhandari & Weiss, supra note 2 (stating that total household debt has risen from $71.2 billion in 1950 to almost $4.1 trillion in 1991).
The real answer, however, is much more devious. Thanks to favorable judicial interpretations of 11 U.S.C. §§ 1322(b) (2) and (c)(2) of the Bankruptcy Code, credit companies can turn dischargeable unsecured debt (credit card debt, medical bills, utilities) into nondischargeable secured debt.\textsuperscript{10}

The impact of this seemingly magical transformation is dramatic. Traditionally, under the provisions of the bankruptcy code, a debtor is allowed to discharge some or all unsecured debt.\textsuperscript{11} However, if the same homeowning debtor accepts such a debt consolidation loan to pay off these debts, this new debt becomes secured, meaning the debtor cannot discharge it.\textsuperscript{12}

In many jurisdictions, all a credit company needs to do to complete this magical transformation is to make the loan a “junior mortgage” on the debtor’s residence.\textsuperscript{13} The loan does not need to be related to the home in any way.\textsuperscript{14} In fact, there doesn’t even need to be a corresponding value in the home to match the loan value.\textsuperscript{15} Just the magic words “junior mortgage” are all that is required.

By placing these words into the loan agreement, these credit companies have been allowed to manipulate the rules of bankruptcy by taking advantage of an exception aimed at protecting lenders that hold first mortgages. By turning unsecured debt into secured debt, these credit companies hold an unfair advantage over other unsecured creditors who are not given the same protection.\textsuperscript{16}

\textsuperscript{10} See In re Jones, 201 B.R. 371, 372 (Bankr. D.N.J. 1996) (demonstrating that creditors’ claim can be secured by collateral other than debtor’s principal residence).

\textsuperscript{14} For a full discussion of 11 U.S.C. §§ 1322(b)(2) & 1322(c)(2) see infra notes 86-119 and accompanying text.

\textsuperscript{12} See infra note 54 and accompanying text.

\textsuperscript{15} See In re Witt, 113 F.3d 508, 509 (4th Cir. 1997), aff’d 199 B.R. 890 (W.D. Va. 1996) (disallowing the bifurcation of a secured creditor’s claim into secured and unsecured portions, holding instead that 1322(c)(2) was intended to allow the modification of the stream of payments, not the claim itself); In re Neverla, 194 B.R. 547, 550 (Bankr. W.D.N.Y. 1996) (holding that Chapter 13 debtors could not modify the rights of a junior mortgagee even though the mortgagee’s lien was valueless. This construction of the Code section is the most “literal and functional”; the section should be applied irrespective of the value of the residence); see also In re Jones, 201 B.R. 371, 372 (Bankr. D.N.J. 1996); In re Barnes, 199 B.R. 256, 258 (Bankr. W.D.N.Y. 1996).

\textsuperscript{16} See Barnes, 199 B.R. at 257 (finding home valued at $29,900 was encumbered by three mortgages totaling $44,351.99).
This article urges Congress and the bankruptcy courts to remove this unwarranted shield and expose these debts for what they are: simple, unsecured or undersecured personal loans which have no relation to the debtor's home and no reason to be given secured debt status.

First, this article provides a brief overview of Chapters 7 and 13 of the Bankruptcy Code. Second, this article discusses bifurcation, cramdown, and stripoff of secured and unsecured debts in Chapters 7 and 13. Third, this article analyzes cases which have discussed these modification and cramdown provisions and have disagreed as to how, or whether, they should be applied. Fourth, this article analyzes In re Mattson, a Minnesota court's recent interpretation of 11 U.S.C. § 1322(c)(2). Fifth, this article looks at the cases which have interpreted sections 1322(b) and 1322(c)(2) correctly or partially correctly. Finally, this article proposes an amendment to section 1322(b)(2) that would remedy this problem.

II. GENERAL OVERVIEW OF THE BANKRUPTCY CODE

The bankruptcy code's primary objectives are to distribute a debtor’s assets equitably and, in appropriate instances, discharge obligations. These objectives, often referred to as a “fresh start” for the debtor, have three primary components: a discharge of obligation, the protection of exempt assets, and a prohibition of discrimination against those who resort to bankruptcy.

There are a variety of formats an individual can use to gain bankruptcy relief under the current Bankruptcy Code. The following is a brief overview of the relevant bankruptcy chapters. This overview is only intended to put the issue discussed in this article into context. A complete analysis of each chapter is beyond the scope of this article.

depos can be treated differently. What became of the Visa debt is secured and cannot be discharged. The Mastercard debt is unsecured and can be discharged. All because of favorable interpretation of a bankruptcy code provision, the loan company is treated as a superior claimholder to Mastercard.

17. See infra notes 54-59 and accompanying text.
21. Other components that provide additional protection for the debtor exist. 11 U.S.C. §§ 366, 1322 (b)(2), (5) (1988). For example, the Bankruptcy Code includes the right to provide for the regulation of utility service and cure defaults and modify security agreements during bankruptcy. See id.
22. See id. § 727(a).
A. Chapter 7

The most common form of bankruptcy relief is governed by Chapter 7. This chapter contains the classical liquidation form of bankruptcy by which an individual, husband and wife, or other authorized entity place all nonexempt assets in the hands of a trustee who then liquidates these assets and uses the proceeds to pay the debtors' creditors. In 1996, there were 779,741 nonbusiness Chapter 7 bankruptcy filings, making it by far the most popular choice for debtors.

The filing of a Chapter 7 bankruptcy creates an automatic stay on nearly all actions to collect or enforce pre-petition claims against the debtor. This provides the debtor with some breathing room to deal with the financial crisis. After the petition is filed, the United States Trustee's Office schedules a meeting of the creditors. The notice for this meeting contains information about the bankruptcy case of the debtor, including: (1) the date and jurisdiction where the bankruptcy was filed; (2) the deadline, if any, to file proofs of claims; (3) the deadline to file certain types of nondischargability claims; (4) the name and address of the debtor's bank-
ruptcy trustee; and (5) the deadline for filing objections to any exemptions claimed by the debtor.

At the meeting, the trustee assesses the debtor's estate to determine whether there are any assets to administer. If not, the case will be treated as a "no asset" case and will be administratively closed. If assets exist, the trustee will determine how best to utilize each to satisfy the debtors' creditors. Typically, however, all liens, security interests, and mortgages on property owned by the debtor will survive or "ride through" this procedure.

From this point, unless the debt underlying the lien, security interest, or mortgage is nondischargeable or is reaffirmed, personal liability on the debt will be discharged. Similarly, unless such debts are nondischargeable or reaffirmed, all properly listed unsecured debts of the debtor will be discharged under sections 523(a)(3) and 727 of the Bankruptcy

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34. In 1992, the United States Supreme Court in Taylor v. Freeland & Kronz, 503 U.S. 638, 642 (1992), held that if an exemption is claimed by a debtor and not timely objected to by the trustee, creditor, or other party in interest, then the claimed exemption will be allowed as valid even if there is no factual or legal basis for the claim of exemption. For cases discussing the Freeland decision see generally In re Hyman, 967 F.2d 1316, 1319-20 (9th Cir. 1992) (construing ambiguities in a debtor's list of exemptions against the debtor because the time to object is so short); In re Smith, 143 B.R. 912, 914 (Bankr. D. Neb. 1992) (discussing the use of sanctions against debtors who incorrectly claim exemptions which are not supported by facts or law).

35. See FED. R. BANKR. P. 4005(b).


37. See generally Judd v. Wolfe, 78 F.2d 110, 114-15 (3rd Cir. 1996) (discussing the effect of having no assets to liquidate).


   (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
   (3) neither listed nor scheduled under section 521 of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—
   (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
   (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such para-
Bankruptcy Code.

When a Chapter 7 case is closed, whatever assets are not sold or used for the benefit of the bankruptcy estate are deemed "abandoned" to the debtor by the trustee. At that time, actions may be taken against the property by creditors, to the extent their claims survive the discharge, without fear of violating either the automatic stay or the discharge injunction.

B. Chapter 13

Chapter 13 is a bankruptcy proceeding which allows an individual with a regular income and a limited amount of indebtedness to file a bankruptcy plan that readjusts most secured and unsecured debts. It is viewed as the responsible bankruptcy since the debtor commits to making payments to debtors whereas similar debt under Chapter 7 is usually discharged without payment. A Chapter 13 debtor takes his monthly income, subtracts from it a reasonable amount for living expenses, with the remainder divided among the creditors.

Under Chapter 13, the plan is automatically approved if it meets the statutory criteria. This means that Chapter 13 creditors cannot defeat a plan by voting, nor can they propose their own plan.

Chapter 13 plans also provide a discharge which is far broader than that available under Chapter 7. Under Chapter 13, all debts are discharged except for certain long-term debts, taxes, certain educational loans and related obligations, debts for death or injury caused while operating a motor vehicle while intoxicated, criminal restitution awards, and graphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

Id.
45. See 11 U.S.C. § 109(e) (1994) (stating that an individual with "regular income" must, on the date of filing, have less than $250,000 in noncontingent, liquidated, unsecured debts and less than $75,000 in noncontingent, liquidated, secured debts).
debts related to spousal assistance and child support. The major drawback to a Chapter 13 plan is that a debtor must commit all disposable income to the plan payments in order for the plan to be confirmed.

III. CRAMDOWN AND BIFURCATION PROCESS UNDER CHAPTERS 7 AND 13

A. The Bifurcation, Cramdown, and Lien Stripping Process

To understand how bifurcation, cramdown and lien stripping work, it is important to understand the meaning of secured, unsecured, and undersecured debt. Generally speaking, a debt is secured if it is supported by corresponding value in the collateral. An example of a typical secured debt is an auto loan. A debt is unsecured if there is no corresponding value in the collateral or if there is no collateral at all. An example of a typical unsecured debt is a credit card bill. A debt is considered undersecured if there is some corresponding value in the collateral, but not enough to support the entire amount of the debt. Bifurcation, cramdown, and lien stripping become an issue when a debt is undersecured.

The bifurcation and cramdown process is quite simple: the debtor simply bifurcates, or splits, the undersecured creditors' claims into secured and unsecured components.

Section 506(a) authorizes claim bifurcation. It provides:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest... is a secured claim to the extent 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.

Under section 506(a), a court will determine the amount of the secured claim by assessing the value of the collateral. The amount of the unsecured claim is the balance remaining after deducting the amount of the secured claim from the original claim. Under section 506(d), the debtor can then cram the claim down to its secured portion. Such a

55. See id.
56. See 11 U.S.C. § 506(d) (1994) (stating that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is
cramdown or lien strip is offensive to undersecured creditors because the creditors do not receive the full benefit of the original agreement with the debtor.\footnote{See Michael S. Polk, The Chapter 13 Cramdown: New Nightmare for the Lender, 19 REAL EST. L.J. 279, 282 (1991).}

An example best illustrates this process: X wishes to buy a car for $10,000. X gets a five year loan from Bank A to cover the cost of the car. Bank A therefore holds a $10,000 security interest in X’s car. After three years, the car has a fair market value of $6,000 but X still owes the bank $8,000 under the terms of the loan. Thus, there is a negative equity of $2,000 since only $6,000 of Bank A’s loan is supported by a corresponding value in the car. Unfortunately, X suffers financial difficulties and is forced to file for bankruptcy.

After a valuation under section 506(a), a court will find that Bank A holds a secured claim in the amount of $6,000 and an unsecured claim in the amount of $2,000. Under section 506(d), X’s plan can provide for full payment of the secured portion of Bank A’s claim of $6,000, but less than the full amount of the unsecured portion of Bank A’s claim, which is $2,000.

B. Chapter 7 and Dewsnup v. Timm

Prior to the Supreme Court’s 1992 decision in \textit{Dewsnup v. Timm},\footnote{502 U.S. 410 (1992).} there was considerable debate as to whether bifurcation and cramdown were allowed in Chapter 7. Many courts held that section 506(a) of the Bankruptcy Code allowed undersecured claims to be divided into secured and unsecured portions, with section 506(d) allowing the unsecured portion to be voided.\footnote{See Gaglia v. First Fed. Sav. & Loan Ass’n, 889 F.2d 1304, 1306-11 (3d Cir. 1989) (discussing that the majority of courts have allowed a chapter 7 debtor to void that portion of his or her debt that is unsecured); \textit{In re Folendore}, 862 F.2d 1537, 1539 (11th Cir. 1989) (stating that lien stripping under 11 U.S.C. § 506(d) is the majority view).} These courts reasoned that without a corresponding value in the property, the claim is not an allowed secured claim.\footnote{See Folendore, 862 F.2d 1537, 1539 (11th Cir. 1989) (stating that lien stripping under 11 U.S.C. § 506(d) is the majority view).} Under section 506(d), a lien is void “[t]o the extent that [it] secures a claim against the debtor that is not an allowed secured claim.”\footnote{11 U.S.C. § 506(d) (1994).}

The Supreme Court in \textit{Dewsnup}, however, did not agree with this interpretation of section 506.\footnote{See Dewsnup, 502 U.S. at 417.} In \textit{Dewsnup}, the debtor filed an adversary proceeding arguing that the $120,000 debt she owed exceeded the fair market value of the land securing the debt and, therefore, the Bankruptcy Court should reduce the lien to the land’s fair market value pursuant to
The debtor reasoned that Timm's claim was an "allowed secured claim" only to the extent of the judicially determined value of the collateral. In a 6-2 opinion written by Justice Harry A. Blackmun, the Supreme Court held that such a lien strip was prohibited. To reach this result, the Court adopted the lender's interpretation of the statute, holding that the phrase, "allowed secured claim," used in section 506(d), was "not... an indivisible term of art defined by reference to [section] 506(a)... Rather the words should be read term-by-term to refer to any claim that is, first, allowed, and second, secured." Because the claim in Dewsnup had been allowed and the underlying debt was at least partly secured, the Court felt the claim was both allowed and secured so as to prohibit its modification.

The Court thereby refused to give section 506(d) its full effect because doing so, the Court argued, would have been a departure from the pre-Code practice that allowed liens to survive bankruptcy unaffected. The Court did not believe Congress had intended such a result since it failed to mention the change in the section's legislative history.

This decision produced a very curious result. The Court's holding gave the term "secured claim" a different meaning under section 506(a) than under section 506(d). It is difficult to imagine Congress giving the same term different meanings within the same code section. Despite this odd result, and despite the fact the Court limited its holding to the facts of the case, its decision has been viewed as a complete bar to cramdown in Chapter 7. Therefore, the focus of the debate has shifted to Chapter 13.

C. Chapter 13 and Section 1322(c)(2)

Congress created Chapter 13 to allow individuals to adjust their assets and repay their debts over an extended period under court supervision.

63. See id. at 413.
64. See id.
65. See id. at 417.
66. Id. at 415.
67. See id. at 417.
68. See id. at 417-19.
69. See id. at 420.
70. See id. at 417.
71. See id. at 417 n.3 ("[W]e express no opinion as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code.").
73. See 11 U.S.C. § 1325(a) (1994). Under chapter 13 the debtor submits a proposed payment plan that must meet the criteria of § 1325(a) in order for a court to confirm it. See id. Section 1325(a) provides:
A successful Chapter 13 plan necessarily requires that debtors adjust their creditors' claims. Allowing debtors to reduce creditors' claims facilitates an effective readjustment and is consistent with the Bankruptcy Code's strong policy in favor of providing debtors a "fresh start." Accordingly, under section 1325(a)(5)(B), debtors may modify their creditors' claims without the creditors' consent. This section is commonly referred to as Chapter 13's "cramdown" provision.

1. The Cramdown Process: Bifurcation of Undersecured Creditors' Claims in Chapter 13

The presence of the cramdown provision demonstrates Congress's desire to enable Chapter 13 debtors to reorganize effectively without losing their property. Section 506(a), applies to Chapter 13 cases pursuant to section 103(a), and as discussed in the preceding section, authorizes claim bifurcation.

Under section 506(a), a court will determine the amount of the secured claim by assessing the value of the collateral. The amount of the unsecured claim is the balance remaining after deducting the amount of the secured claim from the original claim. Thus, an undersecured creditor is left with two claims against the Chapter 13 debtor's estate after a valuation under section 506(a) and the debtor's exercise of his or her cramdown power under section 1325(a)(5)(B).

The classification of secured and unsecured claims is extremely important because unsecured debts receive considerably less favorable treatment than secured debts do since most Chapter 13 plans propose to pay holders of unsecured claims much less than the amount they are

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

(5) with respect to each allowed secured claim provided for by 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.

Id.

75. See id.
77. See Polk, supra note 57, at 281.
79. See COLLIER, supra note 54, ¶ 506.04.
80. See id.
81. See id.
owed. Nevertheless, a court will confirm such a plan. Furthermore, upon successful completion of the plan, the debtor can discharge the remaining unsecured portion of the debt, meaning the property is no longer subject to the lien.

It is quite clear that claim bifurcation, cramdown, and discharge greatly assist the debtor's ability to obtain a fresh start after financial reorganization under Chapter 13. It is also evident that cramdown has an adverse impact on undersecured creditors. The effect is particularly harsh in the residential real estate setting where the stakes can be very high. Upset by this treatment, residential real estate lenders sought special protection under the Bankruptcy Code.

2. Special Protection for the Homestead Mortgagee

The Bankruptcy Code contains an express limitation on the debtor's exercise of the cramdown provision by precluding its use against creditors with claims secured only by the debtor's principal residence. Section 1322(b)(2) allows a debtor to modify secured claims "other than a claim secured only by a security interest in real property that is the debtor's principal residence."

By prohibiting Chapter 13 debtors from using their cramdown power against homestead mortgagees, the "antimodification" clause reduces the homestead lender's risk of loss, and was intended to stabilize the residential real estate market. Congress believed that homestead mortgagees would extend loans on more favorable terms if they were given special

82. See Polk, supra note 57, at 282 (stating that "completed chapter 13 plans generally provide for between 10-50 percent payment on unsecured claims" and that in the author's experience a "20 percent unsecured payoff figure was most prevalent"); David A. Wisniewski, Note, Residential Mortgages Under Chapter 13 of the Bankruptcy Code: The Increasing Case Against Cramdown After Dewsnup v. Timm, 46 VAND. L. REV. 1031, 1033 (1993) (stating that an unsecured creditor's recovery "may be nothing at all, and is often as little as five or ten cents on the dollar").
84. See 5 COLLIER, supra note 54, ¶ 1328.01.
85. See infra Part IIA.2.
88. See In re Seidel, 752 F.2d 1382, 1385 (9th Cir. 1985) (stating that the purpose of § 1322(b)(2) is "to provide stability in the residential long-term home financing industry and market"); see also Julia Patterson Forrester, Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing, 69 TUL. L. REV. 373, 405 (1994) (commenting that Congress believed that "permitting modification of home mortgage loans in Chapter 13 would have a negative impact on the availability of home mortgage credit").
If financing was more accessible, Congress believed a consumer would be more inclined to buy a home. Thus, Congress included the antimodification clause in section 1322(b)(2) to promote the residential real estate market and assist consumers in their efforts to buy a home.

Whether this antimodification clause has helped stabilize the residential real estate market is unclear. What is clear is that the clause makes it more difficult for debtors to retain their residence during a Chapter 13 reorganization because it precludes debtors from using their cramdown power. Despite the prohibition in section 1322(b)(2), four circuit courts of appeal have held that section 1322(b)(2) does not bar cramdown of an undersecured mortgage. These courts have instead reasoned that section 1322(b)(2) merely requires that the debtor continue paying his or her monthly payments. However, the Supreme Court rejected this line of cases in Nobelman v. American Savings Bank.


In Nobelman, the debtor’s condominium was subject to a $71,000 purchase money mortgage. However, the condominium was valued at only $23,500. The debtors proposed to treat $23,500 as a secured claim while treating the remainder as an unsecured claim. The secured claim was to be paid off in full, with the unsecured claim receiving no payment.

In an opinion by Justice Clarence Thomas, the Supreme Court rejected the proposed cramdown. While Justice Thomas admitted that section 506(a) limited the value of the mortgagee’s secured claim to

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89. See Grubbs v. Houston First Am. Sav. Ass’n, 730 F.2d 236, 246 (5th Cir. 1984); Forrester, supra note 88, at 406.
90. See Forrester, supra note 88, at 405.
91. See Capitol Credit Plan of Tenn., Inc. v. Shaffer, 116 B.R. 60, 61 (Bankr. W.D. Va. 1988) (“This industry deserves such protection because of the valuable social service it provides: fulfilling the American dream of owning your own home”). But the extent of this special protection afforded homestead mortgagees was not solidified until the Supreme Court decided Nobelman v. American Savings Bank, 508 U.S. 324 (1993).
93. See Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123, 127 (3d Cir. 1990); In re Houghland, 886 F.2d 1182, 1185 (9th Cir. 1989); In re Hart, 923 F.2d 1410, 1413-16 (10th Cir. 1991); In re Bellamy, 962 F.2d 176, 182-83 (2d Cir. 1992).
95. See id. at 326.
96. See id.
97. See id.
98. See id.
99. See id. at 325-26.
$23,500, he did not believe this was the question presented by the case. Instead, he chose to shift the focus from the creditor's "claim" to the creditor's "rights." Justice Thomas held that the bank's "rights," which could not be modified,

are reflected in the relevant mortgage instruments... They include the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioner's residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure. These are the rights that were 'bargained for', and are rights protected from modification by sec. 1322(b)(2).

The holding in Nobelman clearly bars cramdown of senior mortgages that fall within the scope of section 1322(b)(2)'s "no modification" clause. However, the holding left open the question of whether cramdown is allowed in cases of junior mortgages and mortgages which do not fall within the scope of section 1322(b)(2).

Section 1322(b)(2) and Nobelman have been criticized for granting too much protection to homestead mortgagees. Accordingly, Congress adopted section 1322(c)(2) to limit the effect of the antimodification clause.

B. The Scope of section 1322(c)(2)

The addition of section 1322(c)(2) expands the debtor's power to modify creditors' claims in chapter 13 cases by limiting section 1322(b)(2)'s antimodification clause. Section 1322(c)(2) provides:

Notwithstanding subsection (b)(2) and applicable nonbankruptcy law... In a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

Under general rules of statutory construction, the plain language of

100. See id. at 328.
101. See id. at 328-32.
102. Id. at 329-30 (citations omitted).
105. See 5 COLLIER, supra note 54, ¶ 1322.14B.
the provision is controlling.\textsuperscript{107} The plain language of section 1322(c)(2), specifically “[n]otwithstanding subsection (b)(2),\textsuperscript{108} indicates that it was enacted as an exception to subsection (b)(2).\textsuperscript{109} Furthermore, subsection (b)(2), as amended, is “[s]ubject to subsection . . . (c)” of section 1322.\textsuperscript{110} Thus, the debtor may modify the rights of a homestead mortgagee in the way described, notwithstanding the protection of section 1322(b)(2)’s antimodification clause.\textsuperscript{111}

Section 1322(c)(2) does not remove all of section 1322(b)(2)’s protections. Rather, it only affects homestead mortgagees in short-term mortgages, mortgages with balloon payments, and long-term mortgages that are nearing expiration.\textsuperscript{112} By allowing modifications of such mortgages, more debtors are able to save their homes because they can unilaterally restructure a mortgage agreement, lessening the chance of default.

\textsuperscript{107} See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)(stating that when statutory language is plain the “sole function of the courts is to enforce it according to its terms”) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).


\textsuperscript{109} See In re Young, 199 B.R. 643, 647 (Bankr. E.D. Tenn. 1996).


\textsuperscript{111} See Young, 199 B.R. at 646-47 (holding that debtors could modify rights of mortgagees whose last regularly scheduled mortgage payment became due during the life of the plan); In re Sanders, 202 B.R. 986, 987 (Bankr. D. Neb. 1996) (holding that junior mortgagee was wholly unsecured such that its rights could be modified); In re Libby, 200 B.R. 562, 568 (Bankr. D.N.J. 1996) (holding that third mortgagee’s claim could be modified since it was wholly unsecured); In re Barnes, 199 B.R. 256, 257 (Bankr. W.D.N.Y. 1996) (holding that debtor could not strip liens of wholly unsecured mortgagees under Nobelman); In re Purdue, 187 B.R. 188, 190 (S.D. Ohio 1995) (holding that debtors could modify rights of junior mortgagee where value of residence was less than the principal mortgagee’s claim); In re Thomas, 177 B.R. 750, 752-53 (Bankr. S.D. Ga. 1995) (stating that when the holder of claim against Chapter 13 debtor’s principal residence where senior claimholder’s lien was larger than equity in debtor’s home the claim must be secured in some way by the residence to be entitled to protection against modification); In re Lee, 177 B.R. 715, 716 (Bankr. N.D. Ala. 1995) (holding that claims of third and fourth mortgagees could properly be treated as unsecured where value of Chapter 13 debtor’s homestead was less than balance owed on first and second mortgages); In re Mitchell, 177 B.R. 900, 902 (Bankr. E.D. Mo. 1994) (holding that Chapter 13 plan could modify rights of junior mortgage holder whose claim was rendered totally unsecured by three senior liens that exceeded fair market value of debtor’s principal residence); In re Williams, 161 B.R. 27, 28-29 (Bankr. E.D. Ky. 1993) (holding that a wholly unsecured second mortgagee was not the “holder of a secured claim” and therefore that its rights could be modified); In re Horne, 160 B.R. 709, 720 (Bankr. D. Conn. 1993) (holding that a plan could modify the rights of a junior mortgagee whose claim was wholly unsecured); In re Plouffe, 157 B.R. 198, 200 (Bankr. D. Conn. 1993) (holding that a wholly unsecured second mortgagee is not entitled to the protection of § 1322(b)(2), meaning the plan could modify the second mortgagee’s rights).

\textsuperscript{112} See 5 COLLIER, supra note 54, ¶ 1322.14B, at 1322-49.
under the agreement and, thus, reducing the possibility that they will lose their homes due to foreclosure.\textsuperscript{115}

For example, debtors whose mortgage agreements fall within the scope of section 1322(c)(2) may restructure principal payments, reducing the amount due each month.\textsuperscript{114} In addition, debtors in a short-term mortgage contract—an agreement that usually imposes high interest rates—could propose to pay a lesser interest rate over the duration of the plan.\textsuperscript{115} There is little doubt that these modifications are permissible.\textsuperscript{116} For a court to hold otherwise would be to render section 1322(c)(2) superfluous.\textsuperscript{117}

\textbf{IV. FROM IN RE WITT TO IN RE YOUNG: A DRASTIC SPLIT OF AUTHORITY}

\textbf{A. In re Witt: A Clearly Flawed Decision}

\textit{In re Witt}, a recent Fourth Circuit Court of Appeals decision, held that section 1322(c)(2) does not, despite its language, allow bifurcation of a home mortgage.\textsuperscript{118} In \textit{Witt}, the debtors filed for relief under Chapter 13 on April 13, 1995.\textsuperscript{119} Part of the Witt's debt was a mortgage from United Companies Lending Corporation (United).\textsuperscript{120} This mortgage had an outstanding balance of $22,561.02, was to mature on October 1, 1999, and was secured by a first deed of trust on the Witt's personal residence.\textsuperscript{121} Prior to filing for bankruptcy, the Witts had the residence appraised and claimed a fair market value of $13,100.\textsuperscript{122}

Pursuant to their interpretation of section 1322(c)(2), the Witt's bifurcated the obligation to United into two claims, one secured and one unsecured.\textsuperscript{123} In the plan, the Witt's proposed to pay the secured claim ($13,100) in full over the five years of the plan.\textsuperscript{124} The remaining balance

\begin{itemize}
\item \textsuperscript{113} See Forrester, \textit{supra} note 88, at 451.
\item \textsuperscript{114} See id. (stating that "[t]his provision presumably will permit a Chapter 13 plan to provide for the modification of a short term home equity loan to lower its interest rate or to extend its term to the end of the term of the plan").
\item \textsuperscript{115} See id.
\item \textsuperscript{116} See 5 \textit{COLLIER, supra note 54, ¶ 1322.14B, at 1322-49; see also supra note 114.}
\item \textsuperscript{118} See \textit{Witt}, 113 F.3d at 513-14.
\item \textsuperscript{119} See \textit{id.} at 509.
\item \textsuperscript{120} See \textit{id.}
\item \textsuperscript{121} See \textit{id.}
\item \textsuperscript{122} See \textit{id.}
\item \textsuperscript{123} See \textit{id.}
\item \textsuperscript{124} See \textit{id.}
\end{itemize}
($9,461.02) was to be treated as unsecured and, along with all other unsecured debt, was to receive only 30 percent of the full amount.  

United objected to the Witt’s proposed plan, claiming such a modification was a violation of section 1322(b)(2) which prohibits the modification of claims that are “secured only by a security interest in real property that is the debtor’s principal residence.” The bankruptcy court rejected United’s argument, approving the Witts’ plan, but was overruled by the district court. The Fourth Circuit Court of Appeals then affirmed the district court’s holding.

The Fourth Circuit, as support for rejecting the Witt’s proposed bifurcation, focused its attention on a sentence in section 1322(c)(2). The court stated that the issue of whether the Witt’s proposed bifurcation was permissible depended on the meaning of the phrase, “the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.” The court asked whether the words, “as modified,” should apply to “claim” or to “payment.”

The Witts argued that the phrase “as modified” clearly applies to the word “claim,” and therefore that the claim could be modified. United, on the other hand, argued that the phrase only allows modification of “payment[s],” not the “claim” itself. United’s argument would only allow the Witts to modify “the amount or scheduling of the individual payments on the claim; the amount of the underlying claim itself could not be modified.”

The Witt court first looked for the answer to this question in the text of the statute but found none. Next, the court stated that, according to the rules of grammar, specifically the “rule of last antecedent,” a phrase should be read to modify its immediate antecedent. Under this rule, the phrase, “as modified,” must apply to its immediate antecedent, “claim.” However, despite the obviousness of this result, the Witt court determined that such a conclusion was “not compelled,” and that, as a matter of common sense, the phrase “as modified” could just as easily modify “payment.” The court thereby ignored the “rule of last antecedent” it

125. See id. at 509-10.
126. See id. at 510.
128. See Witt, 113 F.3d at 510.
129. See id. at 514.
130. See id. at 510.
131. Id. at 511.
132. Id.
133. See id.
134. Id.
135. Id.
136. See id.
137. Id.
138. Id.
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had just embraced.

The Witt court went further by stating that the Witt’s interpretation of the phrase would render the word “payment” superfluous.\(^\text{139}\) Citing a Supreme Court decision, the Witt court concluded that “courts should disfavor interpretations of statutes that render language superfluous.”\(^\text{140}\) Therefore, the phrase was held to modify “payment.”\(^\text{141}\)

The Witt court buttressed its conclusion by looking at the legislative history, or lack thereof. Specifically, the court held that section 1322(c)(2) could not be read to overrule the Supreme Court’s holding in Nobelman, since it did not expressly state such an intention.\(^\text{142}\) However, the court reached each of these conclusions by using false premises. First, there is no ambiguity in the language of section 1322(c)(2). In fact, the court seems to create an ambiguity by reading the language illogically and by disobeying the rules of grammar. The section clearly states that a plan may modify the claim.\(^\text{143}\) Therefore, absent an ambiguity, the sole function of the court is to enforce the plain meaning of the statute, which is conclusive except in those rare cases “in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”\(^\text{144}\)

The second false premise came in the way the court looked at the legislative history. While legislative history can be invaluable,\(^\text{145}\) “silence in the legislative history cannot be controlling.”\(^\text{146}\) In the case of section 1322(c)(2), there simply is no relevant legislative history. The legislative history that exists is at best ambiguous and is not supportive of the conclusion that cramdown and bifurcation are not permitted under section 1322(c)(2).\(^\text{147}\) When the legislative history is silent or unclear, “judicial inquiry is complete ... and the sole function of the court is to enforce [the plain language of the statute] according to its terms.”\(^\text{148}\) The court in Witt chose instead to create legislative history where there was none. The court chose to fill in the missing legislative history in an attempt to sup-

\(^{139}\) Id.
\(^{140}\) Id. at 512 (citing Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253 (1992)).
\(^{141}\) Witt, 113 F.3d at 512.
\(^{142}\) Id. at 513 (4th Cir. 1997).
\(^{147}\) See In re Young, 199 B.R. 643, 652 (Bankr. E.D. Tenn. 1996); see also In re Jones, 188 B.R. 281, 282-83 (Bankr. D. Or. 1995).
\(^{148}\) Young, 199 B.R. at 652; see also In re Hussman, 133 B.R. 490, 492 (Bankr. D. Minn. 1991) (stating that “to determine the meaning of any statute, the primary focus must be on the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose”).
While the *Witt* decision is flawed as a whole, it only represents one extreme. Several courts, most prominently *In re Young*, have refuted the logic behind the holding in *Witt*, opting instead to allow bifurcation of such claims. 149

### B. In re Young: A Step in the Right Direction

In *Young*, the debtors filed for chapter 13 bankruptcy on February 8, 1996. 150 Part of the debt owed by the debtors was comprised of both a first and second mortgage on their principal residence. 151 The first mortgage was held by Home Federal Bank in the amount of $42,000. 152 The second mortgage was held by Appalachian Real Estate ("Appalachian") in the amount of $13,000 and was to mature prior to the end of the debtor's proposed plan, therefore bringing it under the scope of section 1322(c)(2). 153

The total of these two mortgages was $55,000. However, the current market value of the homestead was only $50,000. 154 Therefore, since the first mortgage accounted for $42,000 of this value, only $8,000 of the $13,000 second mortgage was secured by a corresponding value in the home.

In their Chapter 13 plan, the debtors proposed to pay the remainder of the first mortgage in full. 155 The debtors also proposed to bifurcate the second mortgage into secured and unsecured portions, paying the $8,000 secured portion in full and treating the $5,000 unsecured portion the same as all other unsecured debts. 156

Appalachian objected to the proposed plan, arguing that the modification or bifurcation of its claim violated section 1322(b)(2). 157 The *Young* court began its discussion in the same place the *Witt* court did, by looking at the language of the statute itself. 158 Contrary to the holding in *Witt*, the court in *Young* held that

149. See supra Part II.A.2.
150. See *Young*, 199 B.R. at 645.
151. *Id.*
152. *Id.*
153. *Id.* at 645-46.
154. *Id.* at 645.
155. *Id.* The plan actually called for the debtors to pay the secured portion in full at a rate of $60 per month for 60 months. *Id.*
156. *Id.* at 645-46. The plan called for the debtors to pay Appalachian $175 per month plus 9% interest. *Id.* at 645. The plan also proposed that “[p]erpetuation allowed unsecured claims will receive the greater of 20% or funds available, with the debtors making monthly payments into the plan of $820 for sixty months.” *Id.* at 646.
157. *Id.* at 646.
158. *Id.*
[a] plain reading of this provision indicates that a plan may modify pursuant to [section] 1325(a) (5) a claim secured solely by the debtor's principal residence . . . if the last regularly scheduled payment under the claim falls due before final payment under the plan is due, notwithstanding 11 U.S.C. [section] 1322(b)(2) or any contrary applicable nonbankruptcy law.

The Young court also pointed out that the Supreme Court had already held, in an analysis of section 1322(b)(5), that similar "notwithstanding (b)(2)" language created an exception to the prohibition on modifications of home mortgages. The court concluded that there is "no statutory basis for concluding that one 'notwithstanding' provision constitutes an exception to [section] 1322(b)(2), yet another does not." The court further pointed out that "it is logical to conclude that subsection (c)(2) provides an exception to the general prohibition on home mortgage modifications for those mortgages where the last payment happens to fall due during the life of the plan."

Appalachian then argued that, while section 1322(c)(2) allows for modification of its mortgage, such a modification under section 1325(a)(5)

consists only of adjustments in the term of the mortgage, the amount of periodic payments or whatever changes may be necessary to cure a home mortgage default and that it does not include the ability to bifurcate an undersecured claim into its secured and unsecured components pursuant to [section] 506(a) of the Bankruptcy Code.

The Young court flatly rejected Appalachian's narrow reading of section 1325(a), stating that the "very essence of a [section] 1325(a)(5) modification is the write down or 'cramdown' of a secured claim to the value of the collateral securing the debt."

The Young court also rejected the argument that Congress' failure to
expressly state that section 1322(c)(2) overrules the Supreme Court's decision in Nobelman prevents such a modification. The court concluded that the literal application of section 1322(c)(2) necessarily forces it to overrule Nobelman. In Nobelman, the Court held that

[T]o give effect to [section] 506(a)'s valuation and bifurcation of secured claims through a Chapter 13 plan in the manner petitioners propose would require a modification of the rights of the holder of the security interest. Section 1322(b)(2) prohibits such a modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence.

To this the Young court correctly pointed out that the opposite was also true: "absent [section] 1322(b)(2)'s protection, 'cramdown' of an undersecured home mortgage under [section] 1325(a)(5)(B) would be permitted. Furthermore, nothing in the [Nobelman] opinion suggests that bifurcation, 'cramdown' or lien stripping in general in a chapter 13 case is inappropriate." Since section 1322(c)(2) expressly states that it is an exception to section 1322(b)(2), any protection provided by section 1322(b)(2) does not apply in cases such as Young.

The Young court also felt compelled to discuss the importance of lien stripping in the context of Chapter 13 cases by stating that:

[to bar lien stripping] would in essence, gut the sum and substance of the reorganization and rehabilitation of debt concept under the Bankruptcy Code. In such cases, the Debtor would propose a plan for repayment of creditors to the extent of the value of the property securing the creditor's claim, but would still owe the unsecured portion of the claim, post-confirmation, in order to obtain a release of the lien on said property. This would require all plans filed under the chapters 11, 12 and 13 to pay all creditors one hundred percent of their claims in order for the debtor to emerge with a "fresh start." Clearly, this has never been the purpose [of the Bankruptcy Code]...

The Young decision has been viewed as the "definitive opinion" in the area of bifurcation and cramdown. Unfortunately, most courts have
refused to extend this holding to its logical conclusion by declaring the entire debt unsecured or voidable if there is no corresponding value in the home. Only a handful of courts have held that wholly unsecured junior mortgage liens can be stripped completely away and treated as an unsecured debt. 172

V. IN RE MATTSON: HOW A MINNESOTA COURT GAVE SOME SECURITY TO A WHOLLY UNSECURED LOAN

In re Mattson presented the perfect opportunity for a court to apply the reasoning in Young to cases involving wholly unsecured home mortgages. 173 In June of 1994, Terrie Mattson bought a home for $49,000. 174 To pay for the home, Mattson obtained a loan from Norwest Mortgage, Inc., for $47,405, secured by a first priority mortgage on the home. Mattson also borrowed $1,500 from a special loan program, paying the...
balance of the sale price in cash. Mattson repaid the $1,500 loan prior to filing for bankruptcy, but a balance of $45,000 remained on the first mortgage.

In the fall of 1995, Mattson received an unsolicited letter from Commercial Credit Consumer Services, Inc. (Commercial Credit) offering her a debt consolidation loan. On November 2, 1995, Mattson contacted Commercial Credit and went to its office in Burnsville. While Mattson was filling out a loan application for $5,000 to refinance credit card debt, an agent for Commercial Credit offered to instead loan her $10,000 secured by a second mortgage on her home. Commercial Credit never asked about the value of Mattson's home or any current encumbrances.

Mattson decided to take the offer and signed a promissory note in the amount of $10,202.06, granting Commercial Credit a second mortgage on her home to secure repayment. The loan was to be repaid over five years with the last payment due November 7, 2000. Mattson had made each payment to Commercial Credit until about a month before she filed her chapter 13 case on February 27, 1997. At that time, after having determined that the home was worth less than the remaining balance on Norwest's first mortgage, Mattson filed a plan in which she proposed to treat Commercial Credit as an unsecured creditor.

Mattson split her argument into two parts. First, she took the same approach the debtors in Young took by stating that section 1322(c) (2) allowed for the bifurcation of Commercial Credit's debt into secured and unsecured portions. Commercial Credit argued that section 1322(b) (2) should be read to prohibit bifurcation. As support for its position, Commercial Credit cited In re Witt. The court quickly rejected Commercial Credit's argument and repudiated the holding in Witt, opting instead to "wholeheartedly endorse" the "definitive opinion" set forth in Young, thereby allowing Mattson to bifurcate Commercial Credit's claim and cram it down.

The court concluded by stating that,
the effect of [section 1322(c)(2)] is really not extraordinary. It provides only that such mortgages are treated like bankruptcy treats virtually all other secured creditors, save only the special provisions provided for the more traditional home purchase lender.

In essence, the court recognized that these debt consolidation loans, which, as in Mattson, have absolutely no relation to the home mortgage industry and are rarely based on any corresponding value in the home, do not deserve the protection afforded to home mortgage lenders. But this conclusion by the court makes the second part of the holding all the more confusing.

As an alternative argument, Mattson contended that since Commercial Credit's second mortgage represented no corresponding value in the home, it should be viewed as wholly unsecured and therefore outside the protections of section 1322(b)(2). The rationale behind this argument is plain: section 1322(b)(2) was not enacted to protect junior mortgages. Rather, it was enacted to encourage the flow of capital into the home lending market.

The court in Mattson recognized this distinction, stating that [section 1322(c)] addresses mortgages that have nothing to do with the home mortgage market. The section will typically apply to second mortgages such as this one, which are based very little on the value of the home and more on the leverage provided by having a mortgage on a debtor's homestead.... While I concede that occasionally this provision could catch a [true] home mortgage, it will be so rare as to have no effect on the home mortgage market. Thus, it is not at all unlikely that Congress saw a distinction between the type of mortgage that exists here and the type of mortgage that it sought to protect in [section] 1322(b)(2).

Despite these statements, the court rejected Mattson's argument, stating that "[a] creditor with a mortgage is secured by the underlying property even if, for bankruptcy purposes, it has no allowed secured claim
and therefore is entitled to the protection afforded home mortgages provided by 11 U.S.C. [section] 1322(b)."\(^{195}\)

Therefore, regardless of whether there is or ever was any corresponding value in the home to support the mortgage, and despite the fact that the loan had nothing to do with the home mortgage lending industry, the debt somehow still deserved secured status. In actuality, the court failed to even formally address the argument, stating instead that it had "already rejected the debtor's argument [in its holding in *In re Hussman*\(^{196}\)] and will not revisit it here."\(^{197}\) By flatly rejecting the argument, the court failed to look at the changes in the bankruptcy code since *Hussman* was decided in 1991. For instance, section 1322(c)(2) was enacted in 1994, after *Hussman* and *Nobelman* had been decided.

In *Hussman*, the debtor's home was encumbered by a first mortgage of $85,988.\(^{198}\) The home was also encumbered by a second mortgage of $6,303.\(^{199}\) However, the home was valued at only $84,000, meaning the first mortgage was only partly secured and the second mortgage was wholly unsecured.\(^{200}\) The question was "whether the debtor's [could] use section 506(a) to modify the rights of holders of a claim secured only by a security interest in real property that is the debtor's homestead without violating section 1322(b)(2)."\(^{201}\)

The court recognized that a split of authority existed on the issue, but dismissed those courts which "held that [section] 506(a) applies to Chapter 13, therefore, [section] 1322(b)(2) protects only the secured portion of the claim."\(^{202}\) In ignoring these cases, the court held that,

[determination of the secured claim under [section] 506(a) is irrelevant to [section] 1322(b)(2) . . . . Debtors need only look to the holder of the claim to determine if they may modify that claim. Only the rights of holders of claims secured by an interest other than the debtors' principal residence and holders of unsecured claims may be modi-

\(^{195}\) Id. at 159.


\(^{197}\) *Mattson*, 210 B.R. at 160, (citing *Hussman*, 133 B.R. at 490); *Nobelman*, 508 U.S. at 328 (stating that even if a claim is undersecured under section 506(a), the creditor is still a "holder of [a] secured claim," and as such is entitled to the protection of section 1322(b)(2)).

\(^{198}\) *Hussman*, 133 B.R. at 490.

\(^{199}\) See id. at 491.

\(^{200}\) See id.

\(^{201}\) Id.

The court felt that the presence of section 1322(b)(2) illustrated Congress' intent to unequivocally protect home mortgage lenders. However, the court in *Mattson*, by relying on *Hussman*, failed to recognize that the enactment of section 1322(c)(2) signified a change, or at least a clarification, of that Congressional intent. While section 1322(b)(2) may have reflected Congress' intent to prevent modification of home mortgages in 1991, the approval in section 1322(c)(2) of such modifications clearly signifies that Congress has changed its mind. Congress made it clear that junior mortgages should not receive the same protection as first mortgages. The *Mattson* court failed to address this change when it rejected Mattson's argument.

## VI. *In re Geyer*: How One Court Got It Right

The issue in *In re Geyer* was identical to the one in *Mattson*. In *Geyer*, the debtors filed a petition under Chapter 13 on December 29, 1995. The debtor's principal residence was subject to a first priority deed of trust in the amount of $127,349, but had a fair market value of only $119,000. Commercial Credit Corporation held a second priority deed of trust, none of which was secured by a corresponding value in the debtor's residence. The debtors, pursuant to section 506(a) and 506(d), sought to treat the creditor's second mortgage as a wholly unsecured debt.

In granting the debtor's request, the court made several important statements. First, the court held that "an allowed claim is a secured claim to the extent of the creditor's interest in the estate's interest in the collateral. [Section 506(a)] separates an undersecured creditor's claim into two parts—he has a secured claim to the extent of the value of his collateral; he has an unsecured claim for the balance of his claim." The court then stated that since the value of the first mortgage accounted for all the value in the residence, the creditor's second mortgage could have no corresponding value. Therefore, under section 506(a), the creditor did not have an allowed secured claim. The court then concluded by stating, under section 506(d), "a lien is void if the under-
ing claim is not ‘an allowed secured claim.’" The Commercial Credit Corporation's lien was therefore declared void.

Commercial Credit Corporation presented two arguments in an attempt to prevent this holding. First, it argued that the Supreme Court's decision in *Dewsnup* prevents the lien from being voided. In *Dewsnup*, the court held that a chapter 7 debtor could not void a lien under section 506(d) if the lien was undersecured. However, the court in *Geyer* stated that *Dewsnup* was not controlling because it dealt with a lien which was merely undersecured under section 506(a). The *Geyer* case on the other hand dealt with a lien which was wholly unsecured.

Commercial Credit Corporation next argued that the Supreme Court's decision in *Nobelman v. American Savings Bank* makes it the holder of a secured claim which could not be modified. The court rejected this argument as well, stating that *Nobelman* was a case about undersecured, rather than wholly unsecured debt. The court concluded by stating that,

> [i]n order to be afforded the protection of section 1322(b)(2) the creditor must be a holder of a claim which is at least partially secured . . . . Unless there is some equity to which the creditor's lien attaches, there is no allowed secured claim and no entitlement to the protections against modification in section 1322(b)(2). A chapter 13 debtor may 'strip-off' a lien on his or her primary residence under the plan or under section 506(d) when the lienholder's interest is totally unsecured.

What *In re Geyer* and its progeny do is split these mortgage liens, under section 506(a), into three classifications: (1) secured claims; (2) partially secured and partially unsecured claims; and (3) wholly unsecured claims. If the claim is secured, it is protected from modification by section

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214. *Id.* (quoting 11 U.S.C. § 506(d) (1994)).
215. See *id.* at 730.
218. See *id.*
219. See *id.*
220. See *id.*
222. See *id.* at 729.
223. See *id.* at 728; see also *In re Hornes*, 160 B.R. 709, 715 (Bankr. D. Conn. 1993) (stating that “[t]he code does not generally classify creditors based on the existence of a piece of paper purporting to give a creditor rights in specified collateral, but rather on whether a creditor actually holds a claim supported by valuable estate property.”); *In re Plouffe*, 157 B.R. 198, 200 (Bankr. D. Conn. 1993) (holding “[t]here is neither a logical or rational basis for a creditor holding a completely unsecured claim to be protected from claim modification in a bankruptcy case simply because the creditor obtained a lien on the homestead prepetition.”).
1322(b) (2). If the claim is partially secured and partially unsecured and the last payment is due during the life of the plan, bifurcation and cramdown are allowed under section 1322(c)(2). If the claim is wholly unsecured, it is not protected by section 1322(b)(2) and is therefore voidable under section 506(d).

Such a classification not only obeys the language of the Bankruptcy Code, it also upholds the spirit and intent behind the legislation. The home mortgage lending market is protected, but loans which are thinly disguised personal loans taking advantage of section 1322(b)(2)'s protective umbrella are exposed for what they are. Such a classification also removes the unfair advantage these unsecured debts have over other unsecured debts. Under the Geyer decision, all unsecured debts are treated equally.

The only appellate court to decide the issue agreed with the decision in Geyer. In In re Lam, the Ninth Circuit bankruptcy appellate panel held that protecting holders of secured claims is consistent with the congressional intent of encouraging home lending by residential mortgagors. However, "there are no such concerns when dealing with the second mortgage market." The umbrella of protection afforded first mortgages should therefore not be extended to cover second, or junior, mortgages. Unfortunately, too few cases have followed this line of reasoning. Therefore, something more needs to be done.

VII. THE SOLUTION: AMEND SECTION 1322(B)(2)

In August of 1997, the National Bankruptcy Review Commission outlined a proposed amendment to the Bankruptcy Code. Under the proposal, a Chapter 13 plan could not modify obligations on first mortgages and refinanced first mortgages, except to the extent currently permitted by the Bankruptcy Code. The NBRC also proposed that "[s]ection 1322(b)(2) should be amended to provide that the rights of a holder of a

226. See supra notes 73-77 and accompanying text.
227. See In re Lam, 211 B.R. 36, 41 (B.A.P. 9th Cir. 1997) (holding the extension of section 1322(b)'s protections to wholly unsecured lien holders is contrary to the provisions of the bankruptcy code).
228. See id. at 36.
229. See id. at 41.
230. Id.
232. See id.
claim secured only by a junior security interest in real property that is the debtor's principal residence may not be modified to reduce the secured claim to less than the appraised value of the property at the time the security interest was made.

However, while this proposal begins to address the issues created by junior mortgages and the secured status some courts automatically bestow on them, it does not go far enough. Quite simply, it adopts the holding of In re Young and its progeny by allowing two classifications: (1) secured claims; and (2) partially secured and partially unsecured claims. The only thing it adds to Young is the idea that the value of the property should be assessed at the time the junior mortgage loan is made. This would help protect the lender from a decline in property value and therefore would be a positive change. However, the proposal still does not deal with wholly unsecured claims. Nor does it deal with the unfair advantage these claimholders have over other unsecured creditors.

In 1993, Congress considered several versions of what would become section 1322(c)(2). Under Senate bill 540, undersecured junior liens would have been protected only if, and to the extent that, these liens had been backed by real collateral value at the time the loan was made. Under this bill, junior liens would have been strippable if they had been undersecured from the date the loan was made. This bill was not included in the 1994 amendments to the Bankruptcy Code, but the reasons for its exclusion are ambiguous. "It could mean that Congress believed junior liens were included in and completely protected by the no modification clause. On the other hand, it could mean that Congress believed junior liens not only were not so protected, but should not be, and for that reason the proposal was dropped."

In order to balance the goals of protecting home mortgage lenders, while at the same time providing debtors with a fresh start and maintaining fairness between similarly situated creditors, Congress must provide a clear mandate. To that end, Congress should amend section 1322(b)(2) to read as follows:

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

(2) modify the rights of

(i) holders of secured claims, other than a claim that is a first mortgage or refinanced first mortgage secured by a security interest in real property that is the debtor's principal residence;

233. Id. at 17-18.
234. See id. at 17.
237. Id.
(ii) holders of unsecured claims, even when the claim is partially secured by a security interest in real property that is the debtor's principal residence; or

(iii) leave unaffected the rights of holders of any class of claims.

(iv) junior mortgage liens on the debtor's principal residence which are wholly unsecured at the time they are made do not fall within the scope of this section and are therefore voidable pursuant to section 506(d).

This amendment would finally end the confusion currently prevalent in many jurisdictions by recognizing three classifications of claims. If the mortgage loan was fully secured at the time it was made, under section 1322(b)(2) it cannot be modified. If the mortgage loan was partially secured and partially unsecured at the time it was made, section 1322(c)(2) would only allow the modification of the unsecured portion. If the mortgage loan was wholly unsecured at the time it was made, the lien would be voidable pursuant to section 506(d).

VIII. CONCLUSION

Amending section 1322(b)(2) as detailed above would solve the problem presented in cases such as Mattson. It would balance the public policy interests with economic reality and fairness. Not only would it protect the mortgage lending industry by preventing the modification of fully secured first mortgages or refinanced first mortgages, but it would also treat these debt consolidations or junior mortgages for what they truly are: simple personal loans with no relation to the debtor's home and no reason to be given secured debt status. Debtors would finally be given the true "fresh start" the Bankruptcy Code mandates.

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