

LIEN STRIPPING IN CHAPTER 20 BANKRUPTCY: A PERMISSIBLE RELIEF TO DEBTORS

ABSTRACT

In the recent state of the housing crisis that continues to loom over homeowners in America, lien stripping has become a hot topic in the context of bankruptcies. This is especially so in the situation where a homeowner's financial situation is so grave that a debtor may pursue two separate bankruptcy cases within a short period of time. Lien stripping is a potential remedy in bankruptcy available to debtors through the process of avoiding a wholly unsecured lien. The combination of these events (seeking lien stripping relief in a second bankruptcy) creates the issue presented here that has caused a circuit court split in decisions.

In the situation of an underwater mortgage, where the amount of the debt exceeds the value of the security, the Supreme Court has prohibited debtors from reducing the amount of debt to the value of the property in what is called a "strip down." This leaves the appreciation in value of the property with the creditor. In its most recent lien stripping decision, the Supreme Court ruled that a debtor may not strip the entire dollar amount of debt on a lien when the value of the property is insufficient to secure any of the debt in a chapter 7 case. However, circuits continue to hold that this type of "strip off" is permissible in chapter 13 cases.

When a debtor seeks relief in a chapter 13 within four years of receiving a chapter 7 discharge, this is colloquially referred to as a "chapter 20" case. A chapter 20 debtor has more restrictions than a normal chapter 13 debtor, namely an ineligibility of a discharge. The topic for debate is whether lien stripping is restricted in chapter 20 cases. Circuits are split, though a resolution in favor of stripping appears to be approaching. An analysis of the Bankruptcy Code and the case law on this subject indicates that a chapter 20 debtor may pursue a strip of an unsecured lien in the same manner as any other chapter 13 debtor.

INTRODUCTION

Bankruptcy offers protections to debtors seeking relief from overwhelming amounts of debt. Residential mortgage debt is often an issue during bankruptcy. Some debtors are in a situation where they must pursue a second bankruptcy proceeding within four years of a prior bankruptcy.¹ When this happens, the debtor faces additional restrictions.² This Comment addresses the effect on a debtor's ability to seek specific relief on residential mortgages in this kind of double bankruptcy situation. One such relief available is "lien stripping," which essentially allows a debtor to remove the dollar amount of a mortgage that is unsupported by value in the residence. Specifically, the debtor first enters into a chapter 7 liquidation proceeding and receives a discharge and then, within four years, pursues a chapter 13 reorganization.³ Chapter 7 discharges the debtor of personal liability on the mortgage against the home.⁴ The mortgage creditor still has a remedy in the residence itself because the full value of the lien still exists against the property.⁵ Thus, a chapter 7 debtor may choose to file chapter 13 after a chapter 7 discharge as a means of finding relief, via lien stripping, from the looming danger of foreclosure on his or her residence.⁶

In recent times there are more and more home loans, both junior and senior, that are either partially or wholly unsecured by value in the residence, meaning the value of the residence ("Fair Market Value") is less than the amount of the secured debt.⁷ So, if a homeowner were to sell her residence, absent bankruptcy, the amount the homeowner would receive upon sale is not enough to pay off the mortgage(s) on the home. This can be a crippling reality, and so the Bankruptcy Code and corresponding case law develop the means for debtors to manage their mortgages in a manner that attempts to be fair to both debtors and creditors.⁸ What follows is a basic illustration of an important type of residential mortgage relief, lien stripping, and its relation to the issue of concern for this Comment.

¹ See, e.g., *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

² See 11 U.S.C. § 1328(f) (2012) (a chapter 13 debtor who has received a discharge within four years may not receive an additional discharge).

³ See *Johnson*, 501 U.S. 78.

⁴ See *id.* at 83.

⁵ See *id.*

⁶ E.g., *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013).

⁷ *In re Hoffman*, 433 B.R. 437, 441 (Bankr. M.D. Fla. 2010).

⁸ See 11 U.S.C. § 506 (2012); 11 U.S.C. § 1322(b)(2); *In re Davis*, 716 F.3d 331.

Debtors utilize lien stripping in situations where the creditor has a wholly unsecured lien.⁹ In bankruptcy, lien stripping generally begins with a valuation of the claim to determine if it is secured or unsecured.¹⁰ Then, the Code allows for the avoidance of (some) claims that are not secured, subject to restrictions applying to residential mortgages.¹¹ After the valuation, a creditor with an undersecured lien has a secured claim and an unsecured claim, and a creditor with a wholly unsecured lien has an unsecured claim.¹² This illustrates a similar position for the creditor as it would be without bankruptcy law: the creditor is protected for the dollar amount of the value of the property.¹³

While lien stripping allows the debtor to “strip off” a wholly unsecured debt, a similar, yet critically different, modification is a “strip down.” A strip down arises from a situation where the lien on the residence is greater than the value of the property (partially secured or undersecured).¹⁴ In such a situation, as previously discussed, the Code splits the lien into a secured claim and an unsecured claim.¹⁵ The strip down occurs when the debtor seeks to void the unsecured claim, essentially reducing the amount of the lien to the value of the secured claim.¹⁶ On the other hand, a “strip off” arises in a situation where the debtor has more than one lien on the residence and the value of the residence is insufficient to secure any amount of the junior lien.¹⁷ Thus, the debtor seeks to completely remove the junior lien(s) from the residence because it is not secured and instead are completely without value, absent personal liability, and, thus, unsecured.¹⁸

It is important to identify the major differences between bankruptcy cases to provide for an understanding of chapter 20 cases. Chapter 7 cases are liquidation bankruptcies¹⁹ whereas chapter 13 cases are individual

⁹ Lien stripping is unnecessary, and impossible, on mortgages that are fully secured because the value of the debtor’s residence is sufficient to protect the creditor’s interest in the mortgage. A claim is secured when it is supported by the value in the property. The unsecured claim is the claim that has no value in the underlying property. 11 U.S.C. § 506(a).

¹⁰ See 11 U.S.C. § 506(a).

¹¹ See 11 U.S.C. § 506(d); 11 U.S.C. § 1322(b)(2).

¹² See 11 U.S.C. § 506(a).

¹³ See *Gaglia v. First Fed. Sav. & Loan Assoc.*, 889 F.2d 1304, 1309 (3d Cir. 1989).

¹⁴ See *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, 754 F.3d 1323, 1326 (11th Cir. 2014).

¹⁵ See 11 U.S.C. § 506(a).

¹⁶ See 11 U.S.C. § 506(d); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 326 (1993).

¹⁷ See *In re Cain*, 513 B.R. 316, 319 (B.A.P. 6th Cir. 2014).

¹⁸ See *id.*

¹⁹ 6 COLLIER ON BANKRUPTCY ¶ 700.01 (Alan N. Resnick & Harry J. Sommer eds., 16th ed. 2011).

“reorganization” cases.²⁰ A chapter 20 case arises when a debtor files a chapter 13 within four years of receiving a discharge in a chapter 7 case.²¹ The Code specifically prohibits a chapter 20 debtor from receiving a second discharge within four years, pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).²² A chapter 13 case requires a creditor to retain *allowed secured claims* against the debtor until payment in full or discharge.²³ Because a chapter 13 debtor in a chapter 20 bankruptcy cannot receive a discharge, some courts have held that this provision prevents lien stripping, requiring the debtor to retain the lien until full payment.²⁴ As discussed later, the discharge eligibility of a debtor is irrelevant regarding lien stripping in chapter 20 cases because lien stripping involves unsecured claims, not secured claims.

Through the development of Supreme Court decisions—described below—strip downs in both chapter 7 and chapter 13 cases are prohibited against a debtor’s principal residence.²⁵ If the property’s value supports any portion of a lien, the entire lien is considered secured and protected from strip down.²⁶ However, strip offs give rise to a different debate. When a debtor has senior and junior mortgages on his or her principal residence, the issue becomes which mortgages are susceptible to lien stripping or modification by an otherwise permissible method in the Code. In its recent decision, *Bank of America, N.A. v. Caulkett*, the Supreme Court disallowed lien stripping of a wholly underwater junior lien in chapter 7 cases, extending the reasoning from the Court’s decision against strip downs in chapter 7 cases.²⁷ The Court has yet to rule on the permissibility of strip offs in chapter 13 or chapter 20 cases. However, a majority of circuits permit strip offs in chapter 13 cases.²⁸

²⁰ 8 COLLIER ON BANKRUPTCY ¶ 1300.01 (Alan N. Resnick & Harry J. Sommer eds., 16th ed. 2011).

²¹ *Branigan v. Davis (In re Davis)*, 716 F.3d 331, 332 n.1 (4th Cir. 2013) (noting “‘Chapter 20’ is a colloquial reference to a Chapter 13 bankruptcy filed within four years of a Chapter 7 bankruptcy that concluded with a discharge.”).

²² 11 U.S.C. § 1328(f) (2012); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 Pub. L. No. 8, 119 Stat. 23 (2005).

²³ See 11 U.S.C. § 1325(a)(5).

²⁴ See *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008).

²⁵ See *Dewsnup v. Timm*, 502 U.S. 410 (1992); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993).

²⁶ See *Dewsnup*, 502 U.S. 410; *Nobelman*, 508 U.S. 324.

²⁷ See 192 L. Ed. 2d 52 (2015) (applying the definition of secured claim in § 506(d) as previously defined in *Dewsnup*).

²⁸ See *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357, 1360 (11th Cir. 2000) (following the decisions in *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000); *Bartee v. Tara Colony Homeowners Ass’n (In re Bartee)*, 212 F.3d 277, 296 (5th Cir. 2000)); see also *In re Pond*, 252 F.3d 122 (2d Cir. 2001).

The current issue arises when a chapter 20 debtor seeks to strip off an entire junior residential mortgage that is unsupported by the property's value. While circuits are split on this issue,²⁹ a chapter 20 debtor should be able to find relief in a strip off in the same manner as any other chapter 13 debtor. This Comment will show that developed case law permits a chapter 13 debtor to utilize the relief of a strip off through a two-step process: (1) valuing the claim under § 506(a); and (2) utilizing the modification provision in § 1322(b)(2) to strip the lien.³⁰ Because a chapter 20 debtor is a chapter 13 debtor in the last leg of the chapter 20 case, she should be eligible to claim this same relief as a chapter 13 debtor. To support this contention, the Background section of this Comment discusses lien stripping in chapter 7 and in chapter 13 cases. Next, this Comment will present an analysis of lien stripping in chapter 20 cases, as well as the opposition to chapter 20 lien stripping, including ineligibility for a discharge in chapter 20 cases.

I. BACKGROUND

A. *Dewsnup*, *Caulkett*, and *Chapter 7 Lien Stripping*

In a chapter 7 bankruptcy all of a debtor's non-exempt assets are gathered and liquidated, so that the proceeds can be distributed to creditors,³¹ leading to a discharge of the debtor's personal liability on debts.³² *Dewsnup v. Timm* prohibits strip downs on residential liens in chapter 7 cases, and *Caulkett* prohibits strip offs in chapter 7 cases.³³

1. *Chapter 7 Bankruptcy Cases and Lien Stripping*

A chapter 7 case results in a discharge of *personal* liability.³⁴ This triggers problems for some debtors because a mortgage lien on a home consists of two

²⁹ Compare *Branigan v. Davis* (*In re Davis*), 716 F.3d 331, 332 (4th Cir. 2013) (finding lien stripping permissible in chapter 20 cases), with *In re Jarvis*, 390 B.R. at 601 (holding lien stripping impermissible in chapter 20 cases); *Boukatch v. MidFirst Bank* (*In re Boukatch*), 533 B.R. 292, 296–97 (B.A.P. 9th Cir. 2015) (describing the split in views).

³⁰ *In re Tanner*, 217 F.3d at 1360.

³¹ See 6 COLLIER ON BANKRUPTCY, *supra* note 19.

³² See *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991).

³³ See 502 U.S. 410 (1992) (prohibiting strip downs in chapter 7); 192 L. Ed. 2d 52 (2015) (prohibiting strip offs in chapter 7).

³⁴ 11 U.S.C. § 524(a)(1) (2012) (“voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor”); *Johnson*, 501 U.S. at 83.

parts: an in personam element and an in rem element.³⁵ The chapter 7 case discharges the debtor's in personam liability, and the in rem (claim against the property) survives discharge.³⁶ Because the in rem portion remains after a chapter 7 discharge, some debtors then pursue relief in a chapter 13 bankruptcy case, i.e. to strip or modify the lien.³⁷

Lien stripping removes a lien against a debtor's property.³⁸ In chapter 7, lien stripping occurs through a valuation and avoidance outlined in Code § 506.³⁹ Then, the unsecured claim is stripped under § 506(d) "[t]o the extent that a lien secures a claim against the debtor that is not an *allowed secured claim*, such lien is void"⁴⁰

2. *Dewsnup v. Timm*

Prior to the Supreme Court decision in *Dewsnup*, debtors could avoid liens in chapter 7 under § 506.⁴¹ The debt is secured to the extent of the value of the property under § 506(a) and void to the extent it is unsecured under § 506(d).⁴² At the time, the reasoning was that this process put the creditor in the same position it would have been in a sale of the property.⁴³

The holding in *Dewsnup* prevents a chapter 7 debtor from stripping down the value of a lien on real property to the value of the underlying collateral under § 506(d).⁴⁴ This situation arises from the bifurcation into allowed secured and unsecured claims under § 506(a).⁴⁵ The Court's decision is crucial

³⁵ *Johnson*, 501 U.S. at 82 (stating "[a] mortgage is an interest in real property that secures a creditor's right to repayment.").

³⁶ 11 U.S.C. § 524(a)(1); *Johnson*, 501 U.S. at 83.

³⁷ *Johnson*, 501 U.S. at 83 (stating "[a] mortgage is an interest in real property that secures a creditor's right to repayment.").

³⁸ As previously mentioned, both strip downs and strip offs are impermissible on residential mortgages in chapter 7 cases. See *Dewsnup*, 502 U.S. 410; *Caulkett*, 192 L. Ed. 2d 52.

³⁹ 11 U.S.C. § 506(a) ("An allowed claim . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim.") (emphasis added).

⁴⁰ 11 U.S.C. § 506(d).

⁴¹ See *Gaglia v. First Fed. Sav. & Loan Assoc.*, 889 F.2d 1304, 1308 (3d Cir. 1989). See also *In re Folendore*, 862 F.2d 1537 (11th Cir. 1989).

⁴² See *Gaglia*, 889 F.2d at 1306.

⁴³ See *id.* at 1311.

⁴⁴ See 502 U.S. 410 (1992).

⁴⁵ See *id.*; 11 U.S.C. § 502 ("A claim or interest, proof of which is filed under section 501 of this title [11 U.S.C. § 501], is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title [11 U.S.C. § 701], objects."); 11 U.S.C.

in its determination of the definition of allowed secured claim under § 506(d). In *Dewsnup*, the Court placed great emphasis on pre-Code history and Congressional intent, supporting the proposition that Congress intended for liens to pass through bankruptcy unaffected.⁴⁶

Section 506(d) voids a claim that is not an “allowed secured claim.”⁴⁷ The majority’s interpretation of an “allowed secured claim” under § 506(d) differs from that held previously in chapter 7 lien stripping cases.⁴⁸ Unlike prior cases, the Court in *Dewsnup* held that “allowed secured claim” in § 506(d) is not a term of art, but rather should be interpreted on a “term-by-term” basis.⁴⁹ As such, in the view of the Court, a claim is an “allowed secured claim” when it is both allowed and secured.⁵⁰ “Allowed” is defined under § 502, and “secured” refers to a “lien with recourse to the underlying collateral.”⁵¹ The Court viewed a “secured” claim under § 506(d) to include a claim that is secured by a lien, irrespective of the underlying value of the collateral as compared to the lien in the valuation under § 506(a).⁵²

The Court focused heavily on Congress’s intent, which the dissent argued was an inadequate reason to deviate from standard principles of statutory interpretation.⁵³ According to the majority, if a lien were to be stripped down after a § 506(a) valuation, the value of the debt would be “frozen,”⁵⁴ at this amount, resulting in a disadvantage to the creditor and an advantage to the debtor if the property appreciated in value before foreclosure.⁵⁵ This is the underlying purpose of a mortgagor–mortgagee relationship, which is for the

§ 506(d) (“To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless . . .”).

⁴⁶ See 502 U.S. at 418.

⁴⁷ See 11 U.S.C. § 506(d).

⁴⁸ See *Dewsnup*, 502 U.S. at 417.

⁴⁹ See *id.* at 415, 418 n.3 (“We express no opinion . . . as to whether the words ‘allowed secured claim’ have different meaning in other provisions of the Bankruptcy Code.”).

⁵⁰ *Id.* at 415.

⁵¹ See 11 U.S.C. § 502; *Dewsnup*, 502 U.S. at 415.

⁵² See *Dewsnup*, 502 U.S. at 415 (holding that § 506(d) “voids only liens corresponding to claims that have *not* been allowed and secured.”).

⁵³ See *id.* at 422 (Scalia, J., dissenting) (“The Court makes no attempt to establish a textual or structural basis for overriding the plain meaning of § 506(d), but rests its decision upon policy intuitions of a legislative character . . .”).

⁵⁴ See *id.* at 417 (“The practical effect of petitioner’s argument is to freeze the creditor’s secured interest at the judicially determined amount.”).

⁵⁵ See *id.* (finding that the pre-Code history providing for the appreciation in value of the collateral as a benefit reserved for the creditor and not the debtor).

creditor to recoup the value of the lien upon foreclosure.⁵⁶ In the majority's view, bankruptcy should not allow a single judicial valuation to alter this relationship.⁵⁷ This would decrease the creditor's interest in the value of the property at foreclosure simply because the lien was undersecured at one point.⁵⁸ This advantage (the value at foreclosure) belongs to the creditor, develops at the creation of the mortgage relationship, and is not a benefit reserved for the debtor.⁵⁹

The dissent takes the view that "allowed secured claim" is a term of art and is applied consistently throughout the Bankruptcy Code.⁶⁰ The dissent emphasizes two main issues: (1) the Court's disregard for traditional statutory interpretation, and (2) the Court's position that "allowed secured claim" has not been established as a term of art.⁶¹ Section 506(a) defines an "allowed claim" that is a "secured claim," and it is the dissent's view that this definition carries through into § 506(d).⁶² An allowed claim is secured to the extent of the underlying collateral.⁶³ The dissent's view is accurately reflected as "[w]hen § 506(d) refers to an 'allowed secured claim,' it can only be referring to that allowed 'secured claim'" described in § 506(a).⁶⁴ Ultimately, *Dewsnup* requires § 506 to work together with another Code section to effectuate a lien strip.⁶⁵

3. Bank of America, N.A. v. Caulkett

In the summer of 2015, the Supreme Court decided the issue of a strip off in a chapter 7 case.⁶⁶ Petitioners appealed the outlier Eleventh Circuit ruling that favored the debtors.⁶⁷ Holding for the Bank, the Court decided that, pursuant to the definition of "allowed secured claim" in § 506(d) as defined by

⁵⁶ See *id.* at 417–18.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.* at 421–22 (Scalia, J., dissenting) (citing §§ 506(b), 722, 1225(a)(5), 1325(a)(5) to interpret the term "allowed secured claim," and §§ 507(a)(7), 726(a)(2), 1225(a)(4), and 1325(a)(4) to interpret the term "allowed unsecured claim.").

⁶¹ See *id.* at 422–24 (Scalia, J., dissenting).

⁶² See *id.* at 421 (Scalia, J., dissenting).

⁶³ See 11 U.S.C. § 506(a) (2012).

⁶⁴ See *Dewsnup*, 502 U.S. at 421 (Scalia, J., dissenting) (referring to the statute's definition of an allowed claim that is a "secured claim" pursuant to § 506(a)).

⁶⁵ See 11 U.S.C. §§ 506(a), (d); 502 U.S. at 421 (Scalia, J., dissenting).

⁶⁶ See *Bank of Am., N.A. v. Caulkett*, 192 L. Ed. 2d 52 (2015).

⁶⁷ See Brief for Petitioner at 19, *Bank of Am., N.A. v. Caulkett and Bank of Am., N.A. v. Toledo-Cardona*, 83 U.S.L.W. 3365 (2014) (Nos. 13-1421 and 14-163).

Dewsnup, the debtors were unable to void a wholly underwater junior lien in a chapter 7 case.⁶⁸ Prior to this decision, the Eleventh Circuit was one of the only courts to permit a chapter 7 strip off.⁶⁹ The significance of *Caulkett* cannot be overstated, as it is the Supreme Court's first chance to revisit the analysis in *Dewsnup*, and likewise address *In re McNeal*, the Eleventh Circuit's controversial case.

In *Caulkett*, Bank of America argued that the wholly unsecured junior liens against the respondents' residences could not be stripped.⁷⁰ The Eleventh Circuit held that, pursuant to *McNeal*, the debtors were able to void their wholly unsecured junior liens on their principal residences under § 506(d).⁷¹ Bank of America appealed and argued that *McNeal* was "wrongly decided."⁷²

In its brief, Bank of America argued that the law and interpretation in *Dewsnup* governs.⁷³ Bank of America argued that although *Dewsnup* held that strip down is impermissible in chapter 7 cases, the reasoning similarly applies to strip off in chapter 7.⁷⁴ *Dewsnup* applies to situations where debtors are attempting to reduce the amount of the lien under § 506(d).⁷⁵ Thus, *Dewsnup* should apply equally to situations where debtors attempt to reduce the amount of the lien to the value of the collateral in a partially secured lien, or to situations where debtors attempt to reduce the amount of the lien to zero when the lien is wholly unsecured.⁷⁶ Bank of America argued that the main holding of *Dewsnup* was that § 506(d) only voids disallowed claims, protecting allowed claims that are secured by recourse in the property.⁷⁷ The valuation in § 506(a) does not define allowed secured claim under § 506(d).⁷⁸

On the other hand, *Caulkett* argued that the valuation in § 506(a) classifies a wholly unsecured lien as an unsecured claim and is not protected from voiding under § 506(d) as an "allowed secured claim."⁷⁹ *Caulkett* argued that this is not contrary to *Dewsnup*, which held only against strip downs, and that

⁶⁸ See *Caulkett*, 192 L. Ed. 2d at 55.

⁶⁹ See *McNeal v. GMAC Mortg., LLC (In re McNeal)*, 735 F.3d 1263 (11th Cir. 2012).

⁷⁰ See 192 L. Ed. 2d at 55–56.

⁷¹ See *id.* at 52.

⁷² See Brief for Petitioner, *supra* note 67.

⁷³ See *id.* at 21.

⁷⁴ See *id.*

⁷⁵ See *id.* at 25.

⁷⁶ See *id.*

⁷⁷ See *id.* at 21–22.

⁷⁸ See *id.*

⁷⁹ See *id.* at 11.

this reasoning is consistent with the Court's holding in *Nobelman v. American Savings Bank*.⁸⁰ *Nobelman* is not contrary because the Court held that a partially secured claim in a chapter 13 case was a secured claim protected from modification under § 1322(b)(2).⁸¹ Since *Nobelman*, many courts have held that a wholly unsecured lien in a chapter 13 case is an unsecured claim under a § 506(a) valuation and subject to modification under § 1322(b)(2).⁸² Caulkett argued that this distinction between *Nobelman* and *Dewsnup* demonstrates the key difference between a wholly unsecured lien and a partially secured lien, which is considered secured because there is some value in the property.⁸³

In *Caulkett*, the Court held for Bank of America simply by applying the *Dewsnup* Court's definition of "secured claim" in § 506(d) to the case at hand.⁸⁴ The Court found that the definition of "allowed secured claim" under § 506(d) had already been defined in *Dewsnup* and this definition controls on the issue of chapter 7 lien stripping in the same way it does in chapter 7 strip downs.⁸⁵ A claim that is allowed under § 502 and supported by a security interest in property is an "allowed secured claim" under § 506(d), and thus the value of the underlying property is irrelevant.⁸⁶ The Court found that the definition of "secured claim" defined in *Dewsnup* does not change if the lien is partially or wholly unsecured.⁸⁷ What matters is that the claim is supported by a security interest.⁸⁸ Under *Dewsnup*, the Court has essentially limited the voiding power of § 506(d) to claims that are not allowed.⁸⁹

In so deciding, the Court discounted the respondent's contention that *Nobelman* supports the distinction between a lien with some value and a lien

⁸⁰ See *id.* at 13.

⁸¹ See Brief for Respondent at 29, *Bank of Am., N.A. v. Caulkett and Bank of Am., N.A. v. Toledo-Cardona*, 83 U.S.L.W. 3365 (2014) (Nos. 13-1421 and 14-163).

⁸² See *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357, 1360 (11th Cir. 2000).

⁸³ See Brief for Respondent, *supra* note 81, at 30.

⁸⁴ See 192 L. Ed. 2d 52 (2015); 502 U.S. 410, 417 (1992).

⁸⁵ *Caulkett*, 192 L. Ed. 2d at 58.

⁸⁶ *Id.* at 57 ("Dewsnup defined the term 'secured claim' in § 506(d) to mean a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim.").

⁸⁷ *Id.* at 58 ("The definition it settled on . . . does not depend on whether a lien is partially or wholly underwater.").

⁸⁸ *Id.* at 57 ("Dewsnup defined the term 'secured claim' in § 506(d) to mean a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim.").

⁸⁹ *Id.* ("Under this definition, § 506(d)'s function is reduced to 'voiding a lien whenever a claim secured by the lien itself has not been allowed.'" (citing *Dewsnup*, 502 U.S. at 416)).

with no value.⁹⁰ The Court left the analysis in *Nobelman* completely untouched because *Nobelman* has nothing to do with § 506(d) and instead concerns a completely separate relationship between § 506(a) and § 1322(b)(2).⁹¹

Finally, the Court indicated concern regarding the potential arbitrary results that a one dollar difference in valuation can create in the lien stripping scenario.⁹² “If a court valued the collateral at one dollar more than the amount of a senior lien, the debtor could not strip down a junior lien under *Dewsnup*, but if it valued the property at one dollar less, the debtor could strip off the entire junior lien.”⁹³ While Congress has previously created similar arbitrary distinctions, the Court did not in the *Caulkett* decision.⁹⁴ Ultimately, the Court made a seemingly “easy” decision by applying a previously defined term to a case where that term, as defined by the Supreme Court itself, was at issue.⁹⁵

B. *Nobelman and Chapter 13 Lien Stripping*

Unlike a chapter 7 case, a chapter 13 case does not involve the liquidation of assets. Instead, a chapter 13 debtor may satisfy existing debts with future income as regulated by the court.⁹⁶ In *Nobelman*, the Court tackled the issue of a lien strip down in a chapter 13 case and subsequently outlined the process of lien stripping under chapter 13.⁹⁷

1. *Chapter 13 Bankruptcy Cases*

In a chapter 13 case, as opposed to a chapter 7 case, the debtor proposes a plan whereby she will pay the creditors over a period of time in the future.⁹⁸ Generally speaking, the debtor will pay creditors with money generated from income instead of from the debtor’s assets.⁹⁹ The purpose of chapter 13 is to

⁹⁰ *Caulkett*, 192 L. Ed. 2d at 58 (“Nor do we think *Nobelman* . . . supports the debtors’ proposed distinction.”).

⁹¹ *Id.* (“*Nobelman* offers no guidance on the question presented in these cases because the Court in *Dewsnup* already declined to apply the definition in § 506 (a) to the phrase ‘secured claim’ in § 506(d).”).

⁹² *Id.* at 58–59.

⁹³ *Id.*

⁹⁴ *Id.* at 59 (“Given the constantly shifting value of real property, this reading could lead to arbitrary results. To be sure, the Code engages in line-drawing elsewhere, and sometimes a dollar’s difference will have a significant impact on bankruptcy proceedings. . . . But these lines were set by Congress, not this Court.”).

⁹⁵ *Id.* at 52.

⁹⁶ 8 COLLIER ON BANKRUPTCY, *supra* note 20, at ¶ 1300.02.

⁹⁷ 508 U.S. 324 (1993).

⁹⁸ 8 COLLIER ON BANKRUPTCY, *supra* note 20.

⁹⁹ *Id.*

allow the debtor to keep assets while paying creditors.¹⁰⁰ Ultimately, a debtor's unsatisfied debts are discharged upon the completion of a confirmed plan.¹⁰¹

2. *Lien Stripping in Chapter 13 Cases*

The Code protects secured residential mortgages from modification (e.g., lien stripping) in chapter 13 bankruptcy. Section 1322(b)(2) states that a chapter 13 bankruptcy plan may:

modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, *or of holders of unsecured claims*, or leave unaffected the rights of holders of any class of claims¹⁰²

This provision prevents a chapter 13 debtor from pursuing a lien strip, or other modification, of a claim secured only by the debtor's residence. However, lien stripping in chapter 13 cases is a permissible modification if the claim is "unsecured."¹⁰³ A chapter 13 debtor determines secured and unsecured status through the valuation process in § 506(a).¹⁰⁴ Then, a chapter 13 debtor can use § 1322(b)(2) to strip an unsecured lien.¹⁰⁵ While the Supreme Court has held that strip down in a chapter 13 case is impermissible, the Court has not ruled on strip offs in chapter 13, and circuit courts have found strip offs in chapter 13 cases to be generally permissible.¹⁰⁶

3. *Nobelman v. American Savings Bank*

In *Nobelman*, the Court initially tackled and outlined the theory behind strip downs in chapter 13 cases.¹⁰⁷ *Nobelman* presents the issue of a strip down in a chapter 13 case involving an undersecured mortgage.¹⁰⁸ Ultimately, the Court held that the strip down of a mortgage on a principal residence to the value of the collateral based solely on a § 506(a) valuation is an impermissible modification under § 1322(b)(2).¹⁰⁹

¹⁰⁰ *Id.* at ¶ 1300.02.

¹⁰¹ *Id.* at ¶ 1300.01.

¹⁰² 11 U.S.C. § 1322(b)(2) (2012) (emphasis added).

¹⁰³ *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357, 1360 (11th Cir. 2000).

¹⁰⁴ *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 326 (1993).

¹⁰⁵ *In re Tanner*, 217 F.3d at 1360.

¹⁰⁶ *Nobelman*, 508 U.S. at 325–26; *see In re Tanner*, 217 F.3d at 1360.

¹⁰⁷ 508 U.S. at 328–29.

¹⁰⁸ *Id.* at 326 (identifying the outstanding amount of the note on the debtor's principal residence to equal \$71,335 while the value of the residence equal to \$23,500).

¹⁰⁹ 11 U.S.C. § 506(a) (2012); 11 U.S.C. § 1322(b)(2); *Nobelman*, 508 U.S. at 326.

First, the Court held that a valuation pursuant to § 506(a) of the Code determines “the status of the bank’s secured claim.”¹¹⁰ When the value of the collateral falls below the balance on the mortgage, the debt is valued and classified into secured and unsecured claims.¹¹¹ However, *Nobelman* importantly holds that an undersecured lien is not automatically an “unsecured” claim and without protection of the antimodification clause in § 1322(b)(2).¹¹²

Second, the modification and antimodification provisions of § 1322 are of particular importance to chapter 13 debtors in the process of lien stripping.¹¹³ Section 1322 provides a chapter 13 debtor’s requirements for proposing a readjustment plan.¹¹⁴ The modification provision found in § 1322(b)(2) allows a debtor to modify unsecured claims and secured claims that are not secured by the debtor’s principal residence.¹¹⁵ The “antimodification” provision prohibits adjusting a claim secured by the debtor’s principal residence.¹¹⁶

In *Nobelman*, the debtor’s mortgage was partially secured by the debtor’s principal residence, triggering the antimodification clause of § 1322(b)(2).¹¹⁷ The Court held that undersecured mortgages are considered “secured” for purposes of § 1322(b)(2) because the bank’s rights include both the secured and unsecured portions of the claim.¹¹⁸ While § 506(a) is a correct valuation method, a claim is considered “secured” to the extent that it is partially secured and falls within the antimodification provision of § 1322(b)(2).¹¹⁹ As a result, a debtor is prohibited from stripping down and permanently adjusting the amount of debt to the collateral’s value, as determined under § 506(a), because the bank’s rights remain secured in the underlying collateral despite its value.¹²⁰

¹¹⁰ *Nobelman*, 508 U.S. at 328.

¹¹¹ 11 U.S.C. § 506(a); *Nobelman*, 508 U.S. at 328.

¹¹² 508 U.S. at 329.

¹¹³ 11 U.S.C. § 1322(b)(2).

¹¹⁴ Veryl Victoria Miles, *The Bifurcation of Undersecured Residential Mortgages Under § 1322(b)(2) of the Bankruptcy Code: The Final Resolution*, 67 AM. BANKR. L.J. 207, 215–16 (1993).

¹¹⁵ 11 U.S.C. § 1322(b)(2).

¹¹⁶ Miles, *supra* note 114, at 230.

¹¹⁷ 508 U.S. at 326.

¹¹⁸ 11 U.S.C. § 1322(b)(2); *Nobelman*, 508 U.S. at 331.

¹¹⁹ 11 U.S.C. § 506(a); 11 U.S.C. § 1322(b)(2); *Nobelman*, 508 U.S. at 332.

¹²⁰ *Nobelman*, 508 U.S. at 326.

4. Strip Off in a Chapter 13 Case After *Nobelman*

Nobelman does not answer whether a lien strip of a completely unsecured junior mortgage, as measured by valuation of the residence, is permissible.¹²¹ Absent a Supreme Court decision, courts that have considered the matter have held that strip off of an unsecured junior mortgage, as measured by § 506(a) valuation, is permissible in chapter 13 cases.¹²² Even though *Nobelman* concerns a strip down rather than a strip off, its layout of the lien stripping process applies to strip offs.¹²³

Nobelman confirms that the first step in lien stripping is a § 506(a) valuation.¹²⁴ This valuation method does not modify a creditor's rights on its own; rather, it merely bifurcates a creditor's claims into separate portions for bankruptcy proceedings.¹²⁵ The § 506(a) valuation determines the debt's status as a secured and an unsecured claim. While *Nobelman* deals with a partially secured claim in a strip down, it does not address the strip off a wholly unsecured claim.¹²⁶

The second step in lien stripping in chapter 13 is a § 1322(b)(2) analysis.¹²⁷ Section 1322(b)(2) expressly provides for modifying unsecured claim holders' rights.¹²⁸ Thus, when a junior debt is completely unsecured, the Code permits the modification and strip off of the unsecured claim in chapter 13 cases under § 1322(b)(2).¹²⁹ The majority of circuits that have considered this issue have held that *Nobelman* does not prohibit this result.¹³⁰ While at first there was a

¹²¹ *Id.* at 325–26 (only holding on the issue of the strip down of an undersecured lien in a chapter 13 case).

¹²² *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357, 1359–60 (11th Cir. 2000) (following the decisions in *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000), and *Bartee Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 280 (5th Cir. 2000)); *see also In re Pond*, 252 F.3d 122, 127 (2d Cir. 2001); *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663, 665 (6th Cir. 2002); *In re Travers*, 541 B.R. 639, 642–43 (Bankr. E.D. Ky. 2015).

¹²³ *See Nobelman*, 508 U.S. 324.

¹²⁴ *Id.* at 328.

¹²⁵ *Id.* at 328–29.

¹²⁶ *Id.* at 325–26.

¹²⁷ *In re Lane*, 280 F.3d at 668; *see also Nobelman*, 508 U.S. 324.

¹²⁸ 11 U.S.C. § 1322(b)(2) (2012).

¹²⁹ 11 U.S.C. § 506(a); 11 U.S.C. § 1322(b)(2).

¹³⁰ *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357, 1359–60 (11th Cir. 2000) (citing *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000); *Bartee Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 280 (5th Cir. 2000)); *see also In re Pond*, 252 F.3d 122, 127 (2d Cir. 2001); *In re Lane*, 280 F.3d at 665; *In re Travers*, 541 B.R. 639, 642–43 (Bankr. E.D. Ky. 2015).

circuit split regarding lien stripping in chapter 13 cases, the majority of courts sustained the two-step process.¹³¹

C. Chapter 20 Lien Stripping

1. Permissibility of Chapter 20 Bankruptcy Cases

Even without regard to the issue of lien stripping, the permissibility of chapter 20 cases has been debated over time.¹³² Courts have differed on finding simultaneous chapter 7 and chapter 13 filings permissible.¹³³ Similarly, the permissibility of chapter 13 filing subsequent to a chapter 7 case has been disputed.¹³⁴ The concern with the structure of a chapter 20 case is the manner in which the debtor tries to achieve relief, especially in determining whether the chapter 13 plan was proposed in good faith.¹³⁵

One of the main differences between the subsequent filing of a chapter 13 case after a chapter 7 case, as opposed to a simultaneous case, is the timing.¹³⁶ This is one factor that courts use to determine the bigger picture: Was the chapter 20 bankruptcy pursued in good faith?¹³⁷ Courts have held that a chapter 13 case filed within four months of a chapter 7, while the chapter 7 is

¹³¹ *In re Lane*, 280 F.3d at 667.

¹³² James L. Buchwalter, *Issues Arising in Chapter 20 Bankruptcy Proceedings*, 89 A.L.R. FED. 2D 281.

¹³³ *See In re Strohscher*, 278 B.R. 432, 437 (Bankr. N.D. Ohio 2002) (holding that the Bankruptcy Code does not specifically bar the simultaneous filing of two cases, so the simultaneous filing of a chapter 7 and chapter 13 is not automatically impermissible). *But see In re Sidebottom*, 430 F.3d 893, 897 (7th Cir. 2005) (holding that there is a “per se rule prohibiting a debtor from having more than one bankruptcy case open at any time”); *In re Lord*, 295 B.R. 16, 18–19 (Bankr. E.D.N.Y. 2003) (holding that when a debtor attempts to abuse the bankruptcy system through a simultaneous chapter 13 filing with a chapter 7, the filing is impermissible); *In re Pingleton*, No. 03-71986, 2003 Bankr. LEXIS 943, at *2 (Bankr. C.D. Ill. Aug. 18, 2003) (“The majority rule is that a Chapter 13 petition filed by debtors while their Chapter 7 case is still open should be dismissed.”).

¹³⁴ Buchwalter, *supra* note 132.

¹³⁵ *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991) (finding that a bankruptcy court has authority to confirm a plan only when the plan is in good faith).

¹³⁶ *Compare In re Crone*, No. 12-11257, 2012 WL 6212856, at *2 (Bankr. N.D. Cal. Dec. 13, 2012) (holding that a chapter 13 case filed within four months of a chapter 7 was impermissible because this evidenced abuse of the Code), *with In re Tittle*, 346 B.R. 684, 692–93 (Bankr. E.D. Va. 2006) (holding that the lapse of two years between the chapter 7 and the chapter 13 cases, along with other factors, worked in the debtor’s favor and permitted the sequential filings).

¹³⁷ 11 U.S.C. § 1325(a)(3) (2012) (“[T]he court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law”); *Johnson*, 501 U.S. at 87 (finding that a bankruptcy court has authority to confirm a plan only when the plan is in good faith).

still pending, is indicative of bad faith.¹³⁸ On the other hand, courts have found a chapter 13 case filed roughly two years after a chapter 7 discharge to be a permissible use of the chapter 20 bankruptcy process.¹³⁹ Ultimately, chapter 13 cases preceded by a chapter 7 case will not be dismissed absent a finding that the debtor filed these sequential bankruptcy cases in bad faith.¹⁴⁰

Johnson v. Home State Bank is the Supreme Court's definitive ruling on the Code's permissibility of a chapter 20 case.¹⁴¹ The Court held that Congress expressly prohibited the sequential and serial filings of a variety of bankruptcy cases but did not prohibit the sequential filing of a chapter 7 and chapter 13 case; thus a chapter 20 case is not prohibited under the Code.¹⁴² That said, the Court noted the importance of filing in good faith under § 1325(a)(3).¹⁴³

Not only does *Johnson* hold that chapter 20 cases were permissible, but importantly it also holds that a lien in a chapter 13 bankruptcy is a claim that remains after a chapter 7 discharge.¹⁴⁴ This holding focused on two aspects of a mortgage: the in personam and the in rem portions.¹⁴⁵ Once the in personam claim has been discharged under chapter 7, § 101(5) maintains that a claim against the property exists for the amount of the debt.¹⁴⁶ This in rem property claim is the viable claim that remains after a chapter 7 discharge and is carried into the chapter 13 case to be reconciled through an approved plan, assuming the debtor filed in good faith.¹⁴⁷

¹³⁸ *In re Crone*, 2012 WL 6212856, at *2 (holding that a chapter 13 case filed within four months of a chapter 7 was impermissible because this evidenced abuse of the Code).

¹³⁹ *In re Tittle*, 346 B.R. at 691–92 (holding that the lapse of two years between the chapter 7 and the chapter 13 cases, along with other factors, worked in the debtor's favor and permitted the sequential filings).

¹⁴⁰ *Johnson*, 501 U.S. at 87 (holding that “Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief.”).

¹⁴¹ *Id.* at 81.

¹⁴² *Id.* at 87.

¹⁴³ *Id.*; see 11 U.S.C. § 1325(a)(3) (2012) (“Except as provided in subsection (b), the court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law . . .”).

¹⁴⁴ 501 U.S. at 80.

¹⁴⁵ *Id.* at 84.

¹⁴⁶ *Id.*; See 11 U.S.C. § 101(5) (“The term ‘claim’ means (A) right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) 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 reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.”).

¹⁴⁷ *Johnson*, 501 U.S. at 86 (“Insofar as the mortgage interest that passes through a Chapter 7 liquidation is enforceable only against the debtor's property, this interest has the same properties as a nonrecourse loan.”).

2. *Lien Stripping in Chapter 20 Cases*

The BAPCPA disallowed certain benefits of bankruptcy for chapter 20 filers.¹⁴⁸ Section 1328(f) prohibits a discharge in a chapter 13 case within four years of receiving a discharge in a chapter 7 case.¹⁴⁹ Section 1328(f) states:

(f) Notwithstanding subsections (a) and (b), the *court shall not grant a discharge* of all debts provided for in the plan or disallowed under section 502, *if the debtor has received a discharge—*
(1) *in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter [11 U.S.C. § 1301].*¹⁵⁰

A chapter 13 debtor's inability to take advantage of a discharge within four years of a chapter 7 discharge complicates a chapter 20 case where the debtor seeks to strip a lien.¹⁵¹ The issue arises because § 1325(a)(5) requires an "allowed secured claim" to be held until the earlier of payment or discharge.¹⁵² This Comment next describes and analyzes the circuit split over lien stripping in chapter 20 cases.

One approach uses the previously discussed chapter 13 lien stripping procedure.¹⁵³ Courts in these cases do not find the lack of discharge to be a deciding factor and essentially disregard the issue completely.¹⁵⁴ Section 1325(a)(5) applies to an "allowed secured claim."¹⁵⁵ Courts do not consider a junior mortgage unsecured by collateral as an "allowed secured claim" for purposes of the § 1325(a)(5) discharge requirement.¹⁵⁶ The majority of courts simply analyze the case in the same way that they pursue a chapter 13 lien strip off.¹⁵⁷

¹⁴⁸ 11 U.S.C. § 1328(f)(1).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, 754 F.3d 1323, 1326 (11th Cir. 2014) ("This case presents a single issue—whether a debtor can 'strip off' a wholly unsecured junior mortgage in a Chapter 20 case.").

¹⁵² 11 U.S.C. § 1325(a)(5).

¹⁵³ *In re Cain*, 513 B.R. 316, 322 (B.A.P. 6th Cir. 2014) (holding that "the wholly unsecured status of Amerifirst's claim, rather than the Debtor's eligibility for a discharge, is determinative.").

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (finding that the lower Bankruptcy Court erred in beginning its analysis with § 1325(a)(5) before first determining the status of the claim through a § 506(a) valuation).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ("Nothing in 11 U.S.C. § 1328(f)(1) prohibits a Chapter 20 debtor from taking advantage of the protections and benefits (other than discharge) of Chapter 13." (citing *Frazier v. Real Time Resolutions, Inc. (In re Frazier)*, 469 B.R. 889, 899 (E.D. Cal. 2012)).

However, a minority of courts are concerned by the fact that a discharge is impermissible in a chapter 20 case.¹⁵⁸ The issue arises from the language in § 1325(a)(5) that states that a lien is maintained until the earlier of discharge or payment.¹⁵⁹ Section 1325(a)(5) provides:

- (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—
 - (I) the holder of such claim retain the lien securing such claim until the earlier of—
 - (aa) the payment of the underlying debt determined under nonbankruptcy law; or
 - (bb) discharge under section 1328.¹⁶⁰

These courts take the view that § 1325(a)(5) requires either discharge or payment in full for an allowed secured claim, and thus a discharge is necessary for a permanent lien strip.¹⁶¹ This supports the pre-Code theory that liens pass through bankruptcy unaffected.¹⁶²

D. Chapter 13 and Chapter 20 Case Law Post-Caulkett

Since the *Caulkett* decision in June 2015, various courts have ruled on the issue of lien stripping in both chapter 13 and chapter 20 cases.¹⁶³ Even in light of the *Caulkett* decision, subsequent developments in case law do not appear to alter the pre-*Caulkett* method of lien stripping in either chapter 13 or chapter 20 cases.¹⁶⁴

¹⁵⁸ *In re Jarvis*, 390 B.R. 600, 604 (Bankr. C.D. Ill. 2008).

¹⁵⁹ 11 U.S.C. § 1325(a)(5) (2012).

¹⁶⁰ *Id.*

¹⁶¹ See *Boukatch v. MidFirst Bank (In re Boukatch)*, 533 B.R. 292, 296–97, 99 (B.A.P. 9th Cir. 2015).

¹⁶² See, e.g., *In re Gerardin*, 447 B.R. 342, 345 (Bankr. S.D. Fla. 2011) (“The Court [in *Dewsnup*] rejected an interpretation of § 506(d) that would depart from the well-established pre-Code rule that liens pass through bankruptcy unaffected.” (citing *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992))).

¹⁶³ See *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477 (9th Cir. 2015); *In re Boukatch*, 533 B.R. 292. See generally *Green Tree Servicing, LLC v. Wilson (In re Wilson)*, 532 B.R. 486 (S.D.N.Y. 2015); *In re Travers*, 541 B.R. 639 (Bankr. E.D. Ky. 2015); *Davis v. Springleaf Fin. Servs. (In re Davis)*, 547 B.R. 480 (Bankr. S.D. Ga. 2015); *Turman v. Pinnacle Bank (In re Turman)*, No. BK14-80062, 2015 Bankr. LEXIS 1923 (Bankr. D. Neb. June 12, 2015).

¹⁶⁴ See *In re Wilson*, 532 B.R. 486; *In re Travers*, 541 B.R. 639; *In re Davis*, 547 B.R. 480 (chapter 13 case finding *Caulkett* to apply only to chapter 7 cases); *In re Turman*, 2015 Bankr. LEXIS 1923; see also *In re Blendheim*, 803 F.3d 477 (chapter 20 case finding *Caulkett* restricted to chapter 7 and § 506(d)); *In re Boukatch*, 533 B.R. 292.

1. Chapter 13 Lien Stripping Decisions Since June 2015

Numerous bankruptcy courts have permitted chapter 13 lien strips following their circuits' pre-*Caulkett* law.¹⁶⁵ These cases all disregard *Caulkett*'s relevance by finding it only applicable to chapter 7 cases, generally discussing the case in footnotes.¹⁶⁶

There have been two bankruptcy court decisions in Georgia that highlight the potential issue that *Caulkett* poses on chapter 13 cases.¹⁶⁷ In September 2015, the court in *Davis v. Springleaf Financial Services* found that Eleventh Circuit precedent governed a chapter 13 lien strip case.¹⁶⁸ Because the Eleventh Circuit has held that strip offs in chapter 13 cases are permissible, the case at bar required the court to permit a strip off of a wholly underwater second mortgage on the debtor's home.¹⁶⁹ Even though *Caulkett* does not apply to chapter 13 cases, Judge Lamar W. Davis, Jr., opined that the decision could resurrect the "minority" view.¹⁷⁰ Under this view, *Nobelman* applies to both strip off and strip downs because of its interpretation of "secured claim."¹⁷¹ Judge Davis reasoned that the analysis in *Caulkett* applies equally to the idea behind strip offs post-*Nobelman*.¹⁷² Most importantly, *Nobelman* can and, in his view, should be interpreted to see if the debt is secured by the debtor's principal residence; if so, it should be protected from modification under § 1322(b)(2) regardless of the secured status determined by a § 506(a) valuation.¹⁷³ He favorably compared this reasoning to *Caulkett*'s rationale, which held that a secured claim is a claim that is secured by the property even if the value of the property does not exceed or equal the value of the claim.¹⁷⁴

The possible issue that courts will face in light of *Caulkett* hinges on the interpretation of the term "secured claim." Because *Caulkett* does not directly

¹⁶⁵ See *In re Wilson*, 532 B.R. 486; *In re Travers*, 541 B.R. 639.

¹⁶⁶ See, e.g., *Osborn v. Wells Fargo Fin. Bank (In re Osborn)*, No. BK12-80485, 2015 Bankr. LEXIS 3187, at *4 n.1 (Bankr. D. Neb. Sept. 21, 2015); *In re Ricci-Breen*, No. 14-22798 (RDD), 2015 Bankr. LEXIS 2909, at *1-2, *2 n.2 (Bankr. S.D.N.Y. Aug. 31, 2015).

¹⁶⁷ *Easterling v. S. State Bank (In re Easterling)*, No. 15-04011-LWD, 2015 Bankr. LEXIS 3363, at *1 n.1 (Bankr. S.D. Ga. Sept. 29, 2015); *In re Davis*, 547 B.R. at 482 n.4 ("Although arising in a Chapter 7 case which required interpretation of § 506(d) rather than § 1322(b)(2), the Supreme Court used similar reasoning to that of the minority view mentioned . . ." (citing *Bank of Am., N.A. v. Caulkett*, 192 L. Ed. 2d 52 (2015))).

¹⁶⁸ 547 B.R. at 482 (citing *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000)).

¹⁶⁹ *In re Davis*, 547 B.R. at 482; see also *In re Tanner*, 217 F.3d 1357.

¹⁷⁰ *In re Davis*, 547 B.R. at 482 n.4.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

overrule existing circuit case law that supports lien stripping in chapter 13 cases, most courts are bound by circuit precedent regarding the permissibility of chapter 13 lien stripping.

2. Chapter 20 Lien Stripping Decisions Since June 2015

The Ninth Circuit Court of Appeals and the Ninth Circuit Bankruptcy Appellate Panel (“BAP”) have both issued opinions on chapter 20 lien stripping cases since *Caulkett*.¹⁷⁵ These decisions do not focus directly on the impact of *Caulkett* but rather focus on the ineligibility of a discharge in chapter 20 bankruptcy.¹⁷⁶ The Ninth Circuit permits lien stripping in chapter 20 cases and disregards the view that a discharge is a necessary requirement to effectuate the lien strip.¹⁷⁷

First, the BAP held that a chapter 20 debtor may permanently strip off a completely valueless lien absent a discharge.¹⁷⁸ In so holding, the BAP found that *Caulkett* does not affect this outcome because *Caulkett* extends *Dewsnup*’s interpretation of the meaning of “secured claim” as it relates to § 506(d), not § 1322(b)(2), for chapter 13 cases.¹⁷⁹

Subsequently, in October 2015, the Ninth Circuit Court of Appeals confirmed that discharge is not a necessary element of an effective lien strip in chapter 20 cases.¹⁸⁰ Although this case involved the determination and effect of an allowed versus disallowed claim in terms of avoidance under § 506(d), the court distinguished *Caulkett* because of its focus on an allowed secured claim.¹⁸¹

These post-*Caulkett* cases indicate that most circuit courts’ case law regarding chapter 13 and chapter 20 is unaffected by the *Caulkett* decision. The Georgia bankruptcy courts do note the potential for change in light of *Caulkett*’s definition of “allowed secured claim.” This Comment will address this possibility.

¹⁷⁵ HSBC Bank USA, N.A. v. Blendheim (*In re Blendheim*), 803 F.3d 477 (9th Cir. 2015); Boukatch v. Midfirst Bank (*In re Boukatch*), 533 B.R. 292 (B.A.P. 9th Cir. 2015).

¹⁷⁶ *In re Blendheim*, 803 F.3d 477; *In re Boukatch*, 533 B.R. 292.

¹⁷⁷ *In re Blendheim*, 803 F.3d at 481, 494–95, 497; *In re Boukatch*, 533 B.R. 292, 293.

¹⁷⁸ *In re Boukatch*, 533 B.R. at 299–300.

¹⁷⁹ *Id.* at 297 n.7.

¹⁸⁰ *In re Blendheim*, 803 F.3d at 495.

¹⁸¹ *Id.* at 489.

II. ANALYSIS

A chapter 20 debtor should be treated like any other chapter 13 debtor with respect to lien stripping. Absent a discharge, lien stripping in chapter 20 cases is permissible via a § 506(a) valuation and a § 1322(b)(2) modification of unsecured claims. Discharge is irrelevant, and § 1325(a)(5) is not triggered because lien stripping in chapter 20 does not involve an “allowed secured claim.”

The dispute over the discharge requirement for chapter 20 lien stripping comes to a head during the determination of claim status. First, this Comment will present the “majority” view supporting chapter 20 lien stripping. Then, this Comment will argue that the competing “minority” view argues that a chapter 7 discharge, which prohibits a future chapter 13 discharge, prevents a chapter 20 debtor from utilizing the lien stripping benefits of a typical chapter 13 case.

A. *The “Majority” View on Lien Stripping*¹⁸²

The Fourth Circuit was the first federal circuit court of appeals to take on the apparent split of opinions in the lower courts regarding chapter 20 lien stripping.¹⁸³ After this case, the Eleventh Circuit in *Wells Fargo Bank, N.A. v. Scantling* also addressed the issue, holding in favor of lien stripping.¹⁸⁴ The BAP most recently addressed the issue and held in favor of lien stripping in chapter 20 cases post-*Caulkett*.¹⁸⁵

1. *Branigan v. Davis*

In re Davis was the first federal court of appeals case to tackle the issue of lien stripping in a chapter 20 bankruptcy.¹⁸⁶ After receiving a discharge in a chapter 7 case, the debtors had three liens remaining in rem against their principal residence when they filed a chapter 13 case.¹⁸⁷ The residence was valued at \$270,000, and its value did not cover the two junior liens, let alone

¹⁸² *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, 754 F.3d 1323 (11th Cir. 2014).

¹⁸³ *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013). See generally *Fisette v. Keller (In re Fisette)*, 455 B.R. 177 (B.A.P. 8th Cir. 2011), and *Bank of the Prairie v. Picht (In re Picht)*, 428 B.R. 885 (B.A.P. 10th Cir. 2010), for a discussion on this split in bankruptcy appellate cases.

¹⁸⁴ 754 F.3d at 1325.

¹⁸⁵ *Boukatch v. Midfirst Bank (In re Boukatch)*, 533 B.R. 292 (B.A.P. 9th Cir. 2015).

¹⁸⁶ 716 F.3d 331.

¹⁸⁷ *Id.* at 334.

the senior lien valued at \$275,373.59.¹⁸⁸ The debtors pursued chapter 13 relief to strip off the junior liens.¹⁸⁹ The chapter 13 petition was filed within the four-year period of prohibited discharges.¹⁹⁰

Ultimately, the Fourth Circuit permitted the strip off of the debtors' junior liens.¹⁹¹ The court decided that stripping off a wholly unsecured junior lien is permissible in chapter 20 cases because such activity is not prohibited under either the Code or the BAPCPA.¹⁹²

The Fourth Circuit began its analysis by looking at *Branigan v. Bateman*.¹⁹³ In *Bateman*, the court found that chapter 13 debtors may afford themselves of the benefits of a chapter 13 case, regardless of prior discharge.¹⁹⁴ This step was crucial because it allowed the court in *In re Davis* to essentially eliminate the issue of discharge for lien stripping in chapter 20 cases.¹⁹⁵ The court made the logical jump that the benefits of the last leg of a chapter 20 case (i.e., the chapter 13 case) do not hinge on discharge eligibility because the benefits of chapter 13 cases generally do not revolve around the debtor's eligibility for discharge.¹⁹⁶ Essentially, the court placed itself into a regular chapter 13 lien stripping analysis.¹⁹⁷

Then, the court determined that chapter 13 lien strip offs are permissible under the Code and case law.¹⁹⁸ The court then utilized the available chapter

¹⁸⁸ *Id.* at 335 (the second lien was valued at \$115,138.58 and the third lien was valued at \$117,603.31).

¹⁸⁹ *Id.* at 334.

¹⁹⁰ *Id.* at 334. This case also addressed the appeal of another debtor who filed chapter 13 within one week of receiving a discharge under chapter 7. *Id.*

¹⁹¹ *Id.*

¹⁹² Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 Pub. L. No. 8, 119 Stat. 23 (2005); *In re Davis*, 716 F.3d at 332, 339 (“[W]e find nothing in the Act to suggest that Congress intended to bar lien stripping of worthless liens in Chapter 20 proceedings.”).

¹⁹³ 515 F.3d 272 (4th Cir. 2008).

¹⁹⁴ *Id.* at 283 (“[I]t is the ability to reorganize one's financial life and pay off debts, not the ability to receive a discharge that is the debtor's 'holy grail.'”); see also *In re Davis*, 716 F.3d at 336.

¹⁹⁵ *In re Davis*, 716 F.3d at 338.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (“[I]f the Bankruptcy Code provides a mechanism for stripping off worthless liens absent a discharge, a debtor may avail himself of that relief.”).

¹⁹⁸ *Id.* at 335 (citing *First Mariner Bank v. Johnson* (*In re Johnson*), 407 F. App'x 713 (4th Cir. 2011); *Suntrust Bank v. Millard* (*In re Millard*), 404 F. App'x 804 (4th Cir. 2010); *Zimmer v. PSB Lending Corp.* (*In re Zimmer*), 313 F.3d 1220 (9th Cir. 2002); *Lane v. W. Interstate Bancorp* (*In re Lane*), 280 F.3d 663 (6th Cir. 2002); *Pond v. Farm Specialist Realty* (*In re Pond*), 252 F.3d 122 (2d Cir. 2001); *Tanner v. FirstPlus Fin.* (*In re Tanner*), 217 F.3d 1357 (11th Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n* (*In re Bartee*), 212 F.3d 277 (5th Cir. 2000); *McDonald v. Master Fin.* (*In re McDonald*), 205 F.3d 606 (3d Cir. 2000)).

13 lien stripping mechanics, using the combination of § 506 and § 1322.¹⁹⁹ First, a § 506(a) valuation of the home determines the unsecured status of the claim.²⁰⁰ Then, a modification under § 1322(b)(2) effectuates the strip off of the unsecured claim against the residence.²⁰¹ The unsecured claim is not protected by the antimodification provision in § 1322(b)(2) that only applies to secured claims.²⁰²

In making this determination, the court addressed the holding in *Nobelman*.²⁰³ The court's analysis of *Nobelman* was two-fold: On one hand, *Nobelman* establishes that valuation under § 506(a) is the first step that determines eligibility for lien modification; on the other hand, the court was able to distinguish this case from *Nobelman* because of the difference between partially secured and wholly unsecured debt.²⁰⁴ The court accepted *Nobelman* to stand for the impermissibility of a strip down of a lien on a principal residence when the lien is partially secured by the residence.²⁰⁵ Because partial security covers the entire lien, the *In re Davis* court held that *Nobelman* does not directly prohibit a chapter 13 debtor from stripping off a wholly unsecured junior lien; valueless liens are not secured claims.²⁰⁶ In the issue presented, the underlying collateral secured no part of the lien; thus the lien was not considered a "claim secured only by a security interest in real property that is the debtor's principal residence" under § 1322(b)(2), which would be afforded protection from modification.²⁰⁷ Instead, this claim was unsecured in its entirety and subject to modification.²⁰⁸ The court applied the same valuation to a wholly secured claim that *Nobelman* applies to a partially secured claim.

The Fourth Circuit held that the valuation process utilized in *Nobelman* stands.²⁰⁹ The court specifically addressed the opposing view that a § 506(a) valuation is unnecessary to determine secured status by stating that if "it were not necessary to first value the claim pursuant to section 506(a), the analysis in

¹⁹⁹ *Id.* at 338.

²⁰⁰ *Id.* at 335.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* (citing 508 U.S. 324 (1993)).

²⁰⁴ *Id.* at 340–41 (citing 508 U.S. 324).

²⁰⁵ *Id.* at 335 (citing 508 U.S. 324).

²⁰⁶ *Id.*

²⁰⁷ 11 U.S.C. § 1322(b)(2) (2012); *In re Davis*, 716 F.3d at 335.

²⁰⁸ 11 U.S.C. § 1322(b)(2); *In re Davis*, 716 F.3d at 335.

²⁰⁹ *In re Davis*, 716 F.3d at 335–36.

Nobelman would be superfluous.”²¹⁰ *Nobelman* does not directly apply to *In re Davis* because *Nobelman* involves a strip down versus a strip off; however, the *In re Davis* court found the valuation method to determine secured and unsecured claims is the same.²¹¹ Thus, valuing claims under § 506(a) is the necessary first step to determine the value of the secured and unsecured claims.²¹² The court determined that § 506(a) valuation precluded the junior liens in *In re Davis* from being “secured” claims because the value of the collateral was insufficient to cover even the senior mortgage.²¹³

Additionally, the court addressed the issue of whether permitting a strip off in a chapter 20 case essentially avoids the rule established in *Dewnsup*.²¹⁴ The court rejected the idea that permitting lien stripping in chapter 20 avoids *Dewnsup* because there is an “equally reasonable view that Congress intended to leave intact the normal chapter 13 lien-stripping regime.”²¹⁵ According to the *In re Davis* court, *Dewnsup* holds that § 506(a) valuation is insufficient to warrant a lien strip down under § 506(d); rather, § 506 must work in connection with another Code section to effectuate a strip down.²¹⁶ Applying this concept to strip off unsecured liens, the court held that a lien strip off in chapter 20 cases is permissible and not explicitly prohibited by the Code.²¹⁷

The court highlighted the difference between in personam and in rem liability as they apply to bankruptcy cases, which coincided with the disregard of discharge as a requirement in chapter 20 cases.²¹⁸ The court stated that this type of lien stripping does not put certain creditors at a disadvantage because there is no in personam liability that is being discharged in the chapter 20 case.²¹⁹ As previously discussed, after a chapter 7 discharge, what remains is an in rem liability, and thus, the right to future appreciation remains.²²⁰ The

²¹⁰ *Id.* at 338 (“Rather, the Court could have simply held that, because the lien was secured by a primary residence, it falls within the anti-modification provision of section 1322(b), regardless of the value of the collateral.” (citing 508 U.S. at 328)).

²¹¹ *Id.*

²¹² *Id.* at 335.

²¹³ *Id.* at 334–35.

²¹⁴ *Id.* at 337–38; *see also* 502 U.S. 410, 433 (1992) (holding that lien stripping in chapter 7 cases was not permissible through a tandem use of § 506(a) and § 506(d)).

²¹⁵ *In re Davis*, 716 F.3d at 338; *see also* 502 U.S. at 433 (holding that lien stripping in chapter 7 cases was not permissible through a tandem use of § 506(a) and § 506(d)).

²¹⁶ 716 F.3d at 337–38 (citing 502 U.S. 410).

²¹⁷ *Id.* at 335 (“[T]he analysis permitting lien-stripping in Chapter 20 cases is no different than that in any other Chapter 13 case.”).

²¹⁸ *Id.* at 337.

²¹⁹ *Id.*

²²⁰ *Id.*

court made the point that a lien strip in chapter 20 removes in rem liability of the debtor, not in personam.²²¹ Any personal liability that previously existed remains after a chapter 20 bankruptcy absent a discharge, given the underlying four year prohibition on discharge.²²²

The dissent in *In re Davis* agreed with the majority that a chapter 13 lien strip is permissible on an unsecured junior mortgage.²²³ However, the dissent had a major policy concern with the situation presented by chapter 20 lien stripping.²²⁴ While the dissent conceded that nothing in the amendments under the BAPCPA alters the ability of chapter 13 debtors to receive a lien strip, it argued that the implementation of § 1325(a)(5) and § 1328(f) prohibits chapter 20 lien stripping.²²⁵ This is the key difference in a lien strip and a strip down.

Essentially, the difference rests in the requirement for a discharge; however, this difference is ultimately rooted in the analysis of the phrase “allowed secured claim” in § 1325(a)(5).²²⁶ The dissent’s interpretation of *Nobelman* would have held that it did not alter the debt amount owed under § 506(a), nor did it alter the secured creditors non-bankruptcy rights.²²⁷ Instead, *Nobelman*’s use of § 506(a) as a valuation method was simply to give a status to the creditor’s claim for the purposes of the court system.²²⁸ The dissent believed that even the valueless lien is still secured by real property and the creditor is still secured, regardless of the valuation process employed by § 506(a).²²⁹

2. Wells Fargo Bank, N.A. v. Scantling

The Eleventh Circuit was the next court of appeals to decide the issue of lien stripping in chapter 20 cases in *In re Scantling*.²³⁰ For reasons similar to the *In re Davis* case, the Eleventh Circuit held that lien stripping in chapter 20 bankruptcy is permissible because there is nothing in the Code that prohibits

²²¹ *Id.* at 339.

²²² *Id.* at 338.

²²³ *Id.* at 339.

²²⁴ *Id.* at 339–40.

²²⁵ *Id.* at 339.

²²⁶ *Id.* at 340.

²²⁷ *Id.*

²²⁸ *Id.* at 341.

²²⁹ *Id.* at 340.

²³⁰ 754 F.3d 1323 (11th Cir. 2014).

it.²³¹ However, the analysis employed by the Eleventh Circuit differs slightly from that undertaken in *In re Davis* by the Fourth Circuit.²³²

The analysis relied on the impact of the BAPCPA of 2005.²³³ The Eleventh Circuit emphasized that lien stripping a completely unsecured lien was permissible in chapter 13 proceedings in the Eleventh Circuit before the enactment of the BAPCPA.²³⁴ *Tanner v. FirstPlus Fin. (In re Tanner)* outlined the chapter 13 lien stripping process as a § 506(a) valuation followed by a § 1322(b)(2) modification of an unsecured claim.²³⁵ Thus, after the enactment of the BAPCPA, which did not alter §§ 506 or 1322(b), the analysis of lien stripping in a chapter 20 case follows that of a chapter 13 case.²³⁶

The court also followed circuit precedent when looking at *Nobelman*'s impact on lien stripping.²³⁷ In *In re Tanner*, the Eleventh Circuit interpreted *Nobelman* to find that a claim is secured when there is some value in the collateral to secure a claim.²³⁸ To use the antimodification protection of § 1322(b)(2), the debt must be secured in the sense that “the collateral must have at least some value.”²³⁹ Absent “some value,” the claim is unsecured and subject to strip off pursuant to § 1322(b)(2).

Additionally, the court in *Scantling* addressed the issue of what an “allowed secured claim” is under § 1325(a)(5).²⁴⁰ Similar to *Dewsnup*, the creditor contended that an allowed secured claim remains an allowed secured claim for purposes of § 1325(a)(5), thus requiring either discharge or payment in full.²⁴¹ Because chapter 20 debtors may not receive a discharge, the bank argued that the lien must be paid.²⁴² However, the court held that a § 506(a) valuation determines the unsecured status of a claim; because a wholly

²³¹ *In re Scantling*, 754 F.3d at 1325 (stating that the BAPCPA did not amend §§ 506 or 1322(b), so “the analysis permitting strip offs in Chapter 20 cases is no different than that in any other Chapter 13 case”).

²³² *Id.*; 716 F.3d 331.

²³³ *In re Scantling*, 754 F.3d at 1326.

²³⁴ *Id.* (citing *Tanner v. FirstPlus Fin. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000)).

²³⁵ 217 F.3d 1357.

²³⁶ *In re Scantling*, 754 F.3d at 1329 (citing *In re Davis*, 716 F.3d at 338).

²³⁷ *Id.* at 1327 (citing 217 F.3d 1357).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 1328.

²⁴¹ *Id.*

²⁴² *Id.*

underwater lien is unsecured, § 1325(a)(5) is not triggered, and discharge is not required to effectuate the lien strip.²⁴³

The Eleventh Circuit was the first court to identify a true “majority” and “minority” opinion regarding lien strip off in chapter 20 cases.²⁴⁴ In highlighting the difference between the majority and minority positions, the Eleventh Circuit followed circuit precedent in *In re Tanner*, holding that §1325(a) is not triggered in a chapter 20 lien strip off.²⁴⁵ The court reasoned that chapter 13 lien strip offs are permissible, and thus, the process is the same in a chapter 20 case, which does not result in a discharge if within the prohibited four year period.²⁴⁶

3. Boukatch v. MidFirst Bank (In re Boukatch)

Soon after the *Caulkett* decision, the BAP held in *Boukatch v. MidFirst Bank (In re Boukatch)* that strip offs are permissible in chapter 20 cases.²⁴⁷ Previously, the Ninth Circuit had not issued an opinion on chapter 20 lien stripping at the appellate level,²⁴⁸ and the Ninth Circuit Court of Appeals subsequently confirmed that discharge is not a requirement for avoidance of a lien in a different chapter 20 case.²⁴⁹ Although the BAP merely noted *Caulkett*'s existence, the case remains important as the first post-*Caulkett* decision on chapter 20 cases. The Ninth Circuit was not bound by circuit precedent regarding chapter 20 lien stripping and, even in light of the *Caulkett* decision, the BAP came out on the side of permitting lien stripping in chapter 20 cases.²⁵⁰

In re Boukatch begins with an analysis of chapter 13 lien stripping in the Ninth Circuit.²⁵¹ Finding that the Ninth Circuit has interpreted *Nobelman* to permit chapter 13 strip offs, the BAP moved to the issue of a chapter 20 lien

²⁴³ *Id.* at 1330.

²⁴⁴ *Id.* at 1329.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1330 (stating that “the analysis permitting strip offs in Chapter 20 cases is no different than that in any other Chapter 13 case.”).

²⁴⁷ 533 B.R. 292, 295 (B.A.P. 9th Cir. 2015).

²⁴⁸ *Id.*

²⁴⁹ *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477, 494 (9th Cir. 2015) (application to a disallowed claim voided under § 506(d)).

²⁵⁰ *In re Boukatch*, 533 B.R. at 295.

²⁵¹ *Id.* (citing *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002)).

strip absent a discharge in the chapter 13 proceeding.²⁵² The BAP outlined the process beginning with the classification of the status of the claim under § 506(a), pursuant to *Nobelman*.²⁵³ It was undisputed that there was no value in the junior lien because a senior lien exceeded the value of the property.²⁵⁴ Thus, under a § 506(a) valuation the lien was “unsecured” and subject to modification under § 1322(b)(2).²⁵⁵ Similar to *Scantling*, the BAP emphasized that the unsecured status of the claim also precludes application of § 1325(a)(5) because that section only applies to “allowed secured claims.”²⁵⁶ Even though the court found that § 1325(a)(5) was inapplicable, it addressed the view that a lien strip is a “de facto” discharge.²⁵⁷ Disagreeing with this view, the BAP noted that the debtors did not seek a discharge (involving in personam liability); rather, the debtors sought to effectuate a lien strip (involving in rem liability).²⁵⁸ The difference between in personam and in rem liability was what the BAP found to distinguish a lien strip from a “de facto” discharge.²⁵⁹ Ultimately, the BAP held that nothing in the Bankruptcy Code prevents a chapter 20 lien strip and the strip off becomes effective upon completion of payments under the chapter 13 plan.²⁶⁰

B. The “Minority” View on Lien Stripping

The view holding that lien stripping in chapter 20 cases is impermissible finds that the discharge requirement in § 1325(a)(5) precludes strip off of a wholly unsecured lien because a chapter 20 debtor is ineligible for a discharge under § 1328(f). However, there are also cases that strictly view the discharge requirement as the reasoning behind the impermissibility of a lien strip off in a chapter 20 case, with specific disregard to § 1325(a)(5) because, like the majority view, the claim is unsecured.²⁶¹

In *In re Winitzky*, the Bankruptcy Court for the Central District of California addressed chapter 20 lien stripping in a situation where the debtors

²⁵² *Id.* at 295–96 (holding chapter 13 lien strip of a wholly unsecured lien against the debtor’s principal residence is permissible via the two-step process of bifurcation under § 506(a) and modification under § 1322(b)(2)).

²⁵³ *Id.* at 295.

²⁵⁴ *Id.* at 300.

²⁵⁵ *Id.* (citing *In re Zimmer*, 313 F.3d 1220).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 301.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *In re Jarvis*, 390 B.R. 600, 605 (Bankr. C.D. Ill. 2008).

sought to strip the wholly unsecured second lien in the chapter 13 plan.²⁶² Interestingly, the court did not take issue with the fact that the second lien is considered an “unsecured claim” under the bifurcation process in § 506(a). The court instead held that a lien could not be permanently stripped absent a discharge, reasoning that a lien strip could impermissibly alter the bank’s rights.²⁶³ The court noted that stripping a mortgagee of its property rights through a lien strip would lead to unfair results.²⁶⁴ Additionally, the court interpreted a chapter 13 lien strip, absent a discharge, to be a run around of the *Dewsnup* decision prohibiting lien stripping in chapter 7 cases.²⁶⁵

In *In re Jarvis*, a case in the Bankruptcy Court for the Central District of Illinois, a debtor filed a chapter 13 case within two years of receiving a chapter 7 discharge.²⁶⁶ The court focused exclusively on the ineligibility of a discharge in a chapter 20 case.²⁶⁷ The court made the distinction between pre-BAPCPA cases, which allowed for a chapter 13 discharge, and the case at bar, which sat in a situation where discharge was impermissible (because of § 1328(f)).²⁶⁸ In pre-BAPCPA cases, when debtors did not receive a discharge, the case was dismissed, and the lien, which was previously voided under § 506(d), was reinstated.²⁶⁹ Thus, the court in *In re Jarvis* found that discharge was a necessary element to permanent lien stripping for post-BAPCPA chapter 13 lien stripping cases.²⁷⁰ The court stated that “[a] no discharge Chapter 13 case may not, however, result in a permanent modification of a creditor’s rights where such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted.”²⁷¹

Because this analysis relies heavily on pre-BAPCPA case law and theory, the court in *In re Jarvis* used a similar, yet opposite, argument to the majority jurisdictions, finding that nothing in the BAPCPA intended to change this

²⁶² No. 1:08-bk-19337-MT, 2009 Bankr. LEXIS 2430, at *2 (Bankr. C.D. Cal. May 7, 2009).

²⁶³ *Id.* at *7–8.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at *9.

²⁶⁶ *In re Jarvis*, 390 B.R. at 601.

²⁶⁷ *Id.* at 605, 606–07.

²⁶⁸ *Id.* at 604.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 605 (“[I]n the absence of a discharge, the collateral securing the debt would still be encumbered by the balance due on the debt calculated at the contract rate.” (citing *In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007))).

²⁷¹ *In re Jarvis*, 390 B.R. at 605–06.

requirement for a discharge to effectuate lien stripping of a creditor's rights.²⁷² Thus, the theory and process have not changed.²⁷³

C. Impact of Caulkett on the Interpretation of "Allowed Secured Claim"

The underlying issue causing the circuit split is the requirement, or lack thereof, for a discharge to effectuate a strip off.²⁷⁴ However, the determination of a claim's secured status is ultimately the deciding factor.²⁷⁵ If a claim is considered an "allowed secured claim" under the Code, then it is subject to § 1325(a)(5), providing for the earlier of discharge or payment in full.²⁷⁶ Conversely, if the claim is valued, and its status is adjusted pursuant to § 506(a), then an unsecured lien takes an unsecured claim status and is susceptible to modification under § 1322(b)(2).²⁷⁷ How the courts determine a claim's status is the crucial step.²⁷⁸

The majority view interprets *Nobelman* to permit the valuation of a partially secured lien against the debtor's real property, bifurcating the claim into a secured claim and an unsecured claim.²⁷⁹ The valuation illustrates that junior liens are not considered "secured" by collateral when they are completely undersecured by the collateral's value. If a claim is not supported by value in the property, it is an unsecured claim and subject to modification under § 1322(b)(2).²⁸⁰

The minority view holds that a claim against property that survives a chapter 7 personal liability discharge is (1) a claim against the debtor's estate, (2) secured by the property to which the lien attaches, and (3) allowed because it is not specifically disallowed under § 502.²⁸¹ In this view, secured means

²⁷² *Id.* at 605.

²⁷³ *See id.*

²⁷⁴ Wells Fargo Bank, N.A. v. Scantling (*In re Scantling*), 754 F.3d 1323, 1329 (11th Cir. 2014).

²⁷⁵ *Id.* (the majority view follows that a claim that is unsecured under § 506(a) works with § 1322(b)(2) as an unsecured claim, whereas the minority view takes the position that "allowed secured claim" under § 1325(a)(5) is not defined through a § 506(a) bifurcation into secured and unsecured claims).

²⁷⁶ 11 U.S.C. § 1325(a)(5) (2012).

²⁷⁷ *In re Scantling*, 754 F.3d at 1329.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1327 ("[U]nderstand[ing] *Nobelman* to stand for the proposition that for a claim to be 'secured' and trigger the antimodification provisions of § 1322(b)(2), the collateral must have at least some value, as stated by the unambiguous language in § 506(a).").

²⁸⁰ *Id.*

²⁸¹ *In re Gerardin*, 447 B.R. 342, 346 (Bankr. S.D. Fla. 2011).

secured by the collateral, not secured via the § 506(a) valuation alone.²⁸² This essentially creates a checklist whereby if a claim is (1) allowed, and (2) secured (by virtue of being secured by the lien itself), then it is an “allowed secured claim.”²⁸³ As such, it is then subject to the implications of § 1325(a)(5), requiring full payment of a lien or discharge.²⁸⁴ Because a discharge is not allowed under § 1328(f) in a chapter 20 case, the lien should be held until paid in full.²⁸⁵

It is important to understand that the decision in *Caulkett* applies to chapter 7 bankruptcies, specifically § 506(d). The decision follows the majority of circuits that had previously prohibited lien stripping in chapter 7 cases, so the result is not necessarily shocking.²⁸⁶ As previously stated, the effect on chapter 13 lien stripping currently is minimal, as evidenced by the case law since the *Caulkett* decision.²⁸⁷ As mentioned by Judge Davis in the Georgia bankruptcy court, the minority view might “resurrect” in light of the *Caulkett* decision.²⁸⁸ This is not because *Caulkett* applies “allowed secured claim” to chapter 13 cases, but rather because the reasoning behind the *Caulkett* decision to extend the term “allowed secured claim” to wholly underwater liens is significant.

In *Caulkett*, the Court confirmed the *Dewsnup* definition of “allowed secured claim” as a claim that is secured by a lien and is allowed under the Code.²⁸⁹ This definition is conclusive regardless of the value of the lien in comparison to the collateral.²⁹⁰ What this suggests is that secured claim has one meaning under § 506(d) and a completely different meaning under

²⁸² *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) (stating that a § 506(a) valuation does not alter a creditor’s rights).

²⁸³ *In re Gerardin*, 447 B.R. at 346–47.

²⁸⁴ *Id.* at 348.

²⁸⁵ *Id.*

²⁸⁶ For the Eleventh Circuit, this decision has a large impact on chapter 7 debtors seeking a strip off; for the remainder of the circuits, this result is less dramatic. *See generally* *McNeal v. GMAC Mortg. LLC (In re McNeal)*, 735 F.3d 1263 (11th Cir. 2012).

²⁸⁷ In a number of chapter 13 cases, bankruptcy courts have found that *Caulkett* applies only to chapter 7 cases. *See In re Travers*, 541 B.R. 639 (Bankr. E.D. Ky. 2015); *Green Tree Servicing, LLC v. Wilson (In re Wilson)*, 532 B.R. 486 (S.D.N.Y. 2015); *Turman v. Pinnacle Bank (In re Turman)*, No. BK14-80062, 2015 Bankr. LEXIS 1923 (Bankr. D. Neb. June 12, 2015); *Davis v. Springleaf Fin. Servs. (In re Davis)*, 547 B.R. 480 (Bankr. S.D. Ga. 2015). Bankruptcy courts have also found in chapter 20 cases that *Caulkett* is restricted to chapter 7 cases and § 506(d). *See also* *Boukatch v. MidFirst Bank (In re Boukatch)*, 533 B.R. 292 (B.A.P. 9th Cir. 2015); *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477 (9th Cir. 2015).

²⁸⁸ *In re Davis*, 547 B.R. at 482 n.4; *Easterling v. S. State Bank (In re Easterling)*, No. 15-04011-LWD, 2015 Bankr. LEXIS 3363, at *1–2 n.1 (Bankr. S.D. Ga. Sept. 29, 2015).

²⁸⁹ 192 L. Ed. 2d 52, 57 (2015).

²⁹⁰ *Id.*

§ 1322(b)(2). Under § 506(d) a claim is a secured claim if it is secured by a lien and allowed. On the other hand, under § 1322(b)(2) a claim is a secured claim only if it retains “some value” in the collateral, assuming the collateral is the principal residence. The *Caulkett* Court justified this definition as an application of precedent from *Dewsnup*.²⁹¹ The Court did, however, leave *Nobelman* alone, thus giving rise to the post-*Caulkett* decisions that chapter 13 lien stripping cases are unaffected by *Caulkett*.²⁹²

If we apply the *Caulkett* reasoning to a chapter 13 lien strip scenario, the result is that the first step is to determine if the lien is secured by the principal residence. Regardless of the value of the lien, the determination is a simple “yes” or “no” answer. If yes, then the claim is secured and falls into the antimodification provision of § 1322(b)(2). If the answer is no, then this would be the only time that a claim would be “unsecured” for purposes of § 1322(b)(2). There would be no valuation necessary under § 506(a). However, this seems contrary to the *Nobelman* decision because in that case the Court explicitly laid out the framework for first valuing the claim under § 506(a) when analyzing a chapter 13 lien strip. The *Caulkett* Court left the decision of *Nobelman* alone and disregarded its applicability in the case because *Nobelman* involves the interaction of § 506(a) and § 1322(b)(2), unlike the chapter 7 situation at bar (involving § 506(d)). Like the cases since *Caulkett* have found, the term “secured claim” was only affected in the chapter 7 and § 506(d) application. The *Caulkett* reasoning may highlight the issue of constantly changing real estate values and how a small judicial valuation difference can have largely arbitrary results.²⁹³ However, the reasoning is insufficient to bring life to the view that completely underwater liens are not considered unsecured in the chapter 13 or chapter 20 context in relation to § 1322(b)(2) and § 1325(a)(5).

D. Policy Implications Regarding Lien Stripping

The housing crisis has haunted homeowners in recent years. With the fear of foreclosure looming, debtors began looking to the Code for solutions to

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 58–59.

solving the issue of the mortgages that were drowning them.²⁹⁴ The result is the circuit split discussed in this article.²⁹⁵

It is well known that one of the main purposes of bankruptcy is the debtor's "fresh start."²⁹⁶ The debtor's ability to strip off a lien that is financially unsecured would be very beneficial to a struggling debtor. The debtor must have at least one mortgage that is only undersecured, followed by one (or more) liens that are completely financially unsecured. Even in the *best* situation, the debtor cannot even sell the property and be relieved of the debts. Thus, the debtor seeks relief in the bankruptcy setting.

As discussed in the *Johnson* case, a chapter 7 discharge rids a debtor of personal liability, not in rem liability that may still remain against the property.²⁹⁷ The debtor will still live in fear of foreclosure on the property to settle the debts. The debt essentially becomes a nonrecourse debt after a chapter 7 discharge.²⁹⁸ This part of the problem highlights the importance of lien stripping in serial filings of a chapter 7 and chapter 13 (assuming good faith). Lien stripping is a process, permitted by the Code for chapter 13 and chapter 20, which would assist debtors during this housing crisis.

Creditors involved in the bankruptcy process deserve protection.²⁹⁹ However, Congress implemented the BAPCPA to cure abuses in the bankruptcy system and to add additional protections to creditors.³⁰⁰ Although lien stripping is not directly favorable to creditors, the Code specifically enacted the BAPCPA to protect creditors, and in doing so, the Code sections permitting lien stripping were not altered.³⁰¹ Finally, the antimodification clause in § 1322(b)(2) provides a significant protection to creditors with a first mortgage on a home because, despite its undersecured status, it will not be permitted to strip down such a lien to the creditor's disadvantage.³⁰²

²⁹⁴ Robin M. Long, *Help for Homeowners: Chapter 13 Lien Avoidance*, THE ADVOCATE, Jan. 2012, at 21.

²⁹⁵ *In re Cain*, 513 B.R. 316, 319 (B.A.P. 6th Cir. 2014).

²⁹⁶ John C. Anderson, *Highlights of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—Part 1—Consumer Cases*, 33 S.U. L. REV. 1, 2 (2005).

²⁹⁷ 501 U.S. 575 (1991).

²⁹⁸ *Id.*

²⁹⁹ *Branigan v. Davis (In re Davis)*, 716 F.3d 331, 332 (4th Cir. 2013).

³⁰⁰ *Id.*

³⁰¹ *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, 754 F.3d 1323, 1325 (11th Cir. 2014).

³⁰² 11 U.S.C. § 1322(b)(2) (2012).

CONCLUSION

The circuit split concerning strip off of financially unsecured liens in the chapter 20 context appears to be coming to an end in light of recent court of appeals decisions.³⁰³ The emerging “majority” view is that lien stripping is permissible in chapter 13 cases, and chapter 13 debtors are not required to achieve discharge to take advantage of bankruptcy’s benefits.³⁰⁴ Additionally, the statutory construction of §§ 506(a) and 1322(b)(2) is not a way of getting around the *Dewsnup* decision.³⁰⁵ The *Dewsnup* definition of allowed secured claim is restricted to § 506(d) and does not extend to the relationship between §§ 506(a) and 1322(b)(2). When the first mortgage exceeds the value of the collateral, it is valued under § 506(a) and bifurcated into secured and unsecured claims.³⁰⁶ Thus, strip offs of wholly unsecured liens fall outside the scope of § 1325(a)(5) and are not precluded from avoidance because a discharge is not permissible in a chapter 20 case as determined under § 1328(f).³⁰⁷

Through the BAPCPA, Congress merely tried to prevent abuse of the system by desperate debtors by making debtors in chapter 20 ineligible for discharge. Congress was not trying to remove a benefit to good faith debtors who need to seek relief in a chapter 13 plan after receiving chapter 7 discharge. What seems to be the dividing factor is the determination of what constitutes an allowed secured claim. This determination is crucial because an allowed secured claim cannot fall within the modification provisions of § 1322(b)(2); instead, courts must utilize § 1325 for any type of permissible modifications to allowed secured claims.³⁰⁸

The minority view, that a claim is an allowed secured claim simply by being attached to a piece of collateral, appears to gain traction as a result of the *Caulkett* decision. The Supreme Court has created a precarious situation whereby “secured claim” means one thing under one section of the Code and another thing under a different section of the Code. It is yet to be seen if this discrepancy will be remedied. For now, as the courts since the *Caulkett*

³⁰³ *In re Scantling*, 754 F.3d 1323; *In re Davis*, 716 F.3d 331; *Boukatch v. MidFirst Bank (In re Boukatch)*, 533 B.R. 292 (B.A.P. 9th Cir. 2015).

³⁰⁴ *In re Scantling*, 754 F.3d 1323.

³⁰⁵ 502 U.S. 410 (1992) (holding that lien stripping in chapter 7 cases was not permissible through a tandem use of § 506(a) and § 506(d)).

³⁰⁶ 11 U.S.C. § 506(a).

³⁰⁷ 11 U.S.C. § 1325(a)(5); 11 U.S.C. § 1328(f).

³⁰⁸ 11 U.S.C. § 1322(b)(2); 11 U.S.C. § 1325.

decision have shown, lien stripping is still a permissible relief to debtors in both chapter 13 and chapter 20 cases. It is well established that chapter 13 lien stripping is permissible through the two-step process utilizing § 506(a) valuation followed by a § 1322(b)(2) modification. Additionally, chapter 13 debtors do not have to receive discharge to be afforded the benefits of a chapter 13 case. Putting these two facts together, it seems to stand for the proposition, as the recent appellate cases find, that there is nothing in either the Code, or the recent amendments, that prohibits the result of a lien strip off of a wholly unsecured lien.

Finally, it is important to draw attention to the fact that Congress adopted the BAPCPA in 2005, which is after debtors had already tried chapter 20 lien stripping. If Congress was aware of this and did nothing to act on it, it appears Congress did not intend to prohibit lien stripping in the given situation. While it is true that Congress disallowed a discharge in a chapter 13 bankruptcy following a chapter 7 discharge, Congress did not limit in any other way a chapter 20 debtor's rights to other benefits of a chapter 13 case, including but not limited to a lien strip off of a completely worthless junior lien.

Although the issue appears to lean in the direction of permissible lien strip offs in chapter 20 cases, Supreme Court action is necessary. The *Caulkett* decision does not appear to currently cause issues, but like Judge Davis in the Bankruptcy Court for the Southern District of Georgia noted, many chapter 13 lien stripping cases might need reevaluation in light of the definition of "secured claim."

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