



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 30 | Number 2

Article 10

1-1-1997

From Dewsnap to Nobleman to the Bankruptcy Reform Act of 1994: Did Congress Intend to Change Pre-Amendment Law When It Enacted 1322(c)(2)

Timothy B. McCaffrey Jr.

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Timothy B. McCaffrey Jr., *From Dewsnap to Nobleman to the Bankruptcy Reform Act of 1994: Did Congress Intend to Change Pre-Amendment Law When It Enacted 1322(c)(2)*, 30 Loy. L.A. L. Rev. 841 (1997).

Available at: <https://digitalcommons.lmu.edu/llr/vol30/iss2/10>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

FROM *DEWSNUP* TO *NOBELMAN* TO THE BANKRUPTCY REFORM ACT OF 1994: DID CONGRESS INTEND TO CHANGE “PRE- AMENDMENT” LAW WHEN IT ENACTED § 1322(C)(2)?

I. INTRODUCTION

As part of the Bankruptcy Reform Act of 1994 (BRA of 1994)¹ Congress added 11 U.S.C. § 1322(c)(2),² which expands the debtor's power to modify homestead mortgagees' claims once specifically protected by the Code.³ But the extent to which the debtor can modify homestead mortgagees' claims under this new section is unclear.

A bankruptcy court and several commentators believe § 1322(c)(2) enables debtors to treat certain undersecured mortgagees—those who are entitled to full payment before or during chapter 13 reorganization—as they would any other undersecured creditors. They read § 1322(c)(2) as permitting debtors to bifurcate, cramdown, and potentially strip the liens of undersecured homestead mortgagees.⁴ This assessment of § 1322(c)(2) is incorrect, however, in light of principles derived from two United States Supreme Court cases,⁵ which restrict the effect of § 1322(c)(2) and preclude an interpretation that allows debtors to bifurcate and cramdown an undersecured homestead mortgagee's claim.

1. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 301, 108 Stat. 4106, 4131 (1994) (codified at 11 U.S.C. § 1322(c)(1)-(2) (1994)).

2. All references to Code sections are references to title 11 of the *United States Code*.

3. 11 U.S.C. § 1322(b)(2) (1994).

4. See *In re Young*, 199 B.R. 643 (Bankr. E.D. Tenn. 1996); see, e.g., 5 COLLIER ON BANKRUPTCY ¶ 1322.14B (Lawrence P. King ed., 15th ed. 1996) [hereinafter COLLIER]; 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 (1994).

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

In 1992 the Supreme Court stated that it will not interpret Code provisions to alter preexisting bankruptcy practice unless Congress indicated it intends such an effect in the provision's legislative history.⁶ In 1993 the Court held that debtors could not bifurcate and cramdown undersecured homestead mortgagees' claims in a chapter 13 proceeding.⁷ Then in 1994 Congress enacted § 1322(c)(2), which appears to allow chapter 13 debtors to bifurcate and cramdown undersecured homestead mortgagees' claims. However, because this practice was prohibited prior to the BRA of 1994, § 1322(c)(2) should not be interpreted to allow debtors to bifurcate and cramdown undersecured homestead mortgagees' claims unless Congress indicated in the legislative history that it intended such an effect. And Congress did not!

This Comment interprets § 1322(c)(2) in light of case precedent and congressional intent. Part II provides background information regarding chapter 13's policy objectives and discusses claim bifurcation and cramdown in the context of a chapter 13 proceeding. Part II also discusses § 1322(c)(2)'s apparent effect under general rules of statutory construction. Part III discusses *Nobelman v. American Savings Bank*⁸ and *Dewsnup v. Timm*⁹ in order to present the framework for the analysis of § 1322(c)(2). Part IV analyzes § 1322(c)(2) in light of *Nobelman* and *Dewsnup* and concludes that § 1322(c)(2) does not allow debtors to bifurcate and cramdown undersecured homestead mortgagees' claims.

II. CHAPTER 13 AND THE APPARENT BREADTH OF § 1322(C)(2)

A. Chapter 13's Policy Objectives and Congress's Attempt to Promote the Residential Real Estate Market

Congress created chapter 13 to allow individuals to adjust their assets and repay their debts over an extended period under court supervision.¹⁰ A successful chapter 13 plan necessarily requires that debtors adjust their creditors' claims.¹¹ Allowing debt-

6. See *Dewsnup*, 502 U.S. at 419-20.

7. See *Nobelman*, 508 U.S. at 332.

8. 508 U.S. 324 (1993).

9. 502 U.S. 410 (1992).

10. See H.R. REP. NO. 95-595, at 118 (1977).

11. 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 11 U.S.C. § 1325(a) (1994). Section 1325(a) provides:

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

ors to reduce creditors' claims facilitates an effective readjustment and is consistent with the Code's strong policy in favor of providing debtors a "fresh start."¹² Accordingly, § 1325(a)(5)(B) enables debtors to modify their creditors' claims without their consent.¹³ This section is commonly referred to as chapter 13's "cramdown" provision, as it allows debtors to restructure their debts over the objection of affected creditors.¹⁴

1. The cramdown process: bifurcation of undersecured creditors' claims

The presence of the cramdown provision demonstrates Congress's desire to enable chapter 13 debtors to reorganize effectively without losing their property. Debtors exercise the cramdown provision by bifurcating, or splitting, undersecured creditors' claims into secured and unsecured components.¹⁵ Cramdown is offensive to undersecured creditors because they do not receive the full benefit of the original agreement with the debtor.¹⁶

Section 506(a), applicable to chapter 13 cases pursuant to § 103(a),¹⁷ 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.¹⁸

....
 (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.

12. See Richard I. Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-for-Lawyers Bill*, 1979 UTAH L. REV. 1, 24.

13. See 11 U.S.C. § 1325(a)(5)(B).

14. See Michael S. Polk, *The Chapter 13 Cramdown: New Nightmare for the Lender*, 19 REAL EST. L.J. 279 (1991).

15. See *id.* at 281.

16. See *id.*

17. 11 U.S.C. § 103(a).

18. *Id.* § 506(a).

Under § 506(a) a court will determine the amount of the secured claim by assessing the value of the collateral.¹⁹ The amount of the unsecured claim is the balance remaining after deducting the amount of the secured claim from the original claim.²⁰ Thus, an undersecured creditor is left with two claims against the debtor's estate after a valuation under § 506(a) and the debtor's exercise of his or her cramdown power under § 1325(a)(5)(B).²¹

A simple hypothetical best demonstrates this process:

C holds a security interest in D's car. D owes \$15,000 to C at the time D files a chapter 13 petition. The car's fair market value is \$10,000. Thus, there is a negative equity of \$5,000. After a valuation under § 506(a), a court will find that C holds a secured claim in the amount of \$10,000 and an unsecured claim in the amount of \$5,000. Under § 1325(a)(5)(B), D's plan can provide for full payment of the secured portion of C's claim of \$10,000, but *less than* the full amount of the unsecured portion of C's claim, which is \$5,000.

Most chapter 13 plans propose to pay holders of unsecured claims much less than the amount that they are owed.²² Nevertheless, a court will confirm such a plan.²³ Furthermore, upon successful completion of the plan, the debtor can discharge the remaining unsecured portion of debt.²⁴

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 a lender's insurance recovery is often denied.²⁵ It is the ef-

19. See 3 COLLIER, *supra* note 4, ¶ 506.04.

20. See *id.*

21. See *id.*

22. See Polk, *supra* note 14, 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").

23. See 11 U.S.C. § 1325(a)(5)(B).

24. See 5 COLLIER, *supra* note 4, ¶ 1328.01.

25. See Polk, *supra* note 14, at 296; Jane Kaufman Winn, *Lien Stripping After Nobelman*, 27 LOY. L.A. L. REV. 541, 589 (1994) ("From the point of view of a lender . . . the difference between foreclosure under state law and lien stripping under bankruptcy law is very significant because [insurers] have refused to compensate

fect of the chapter 13 cramdown that caused residential real estate lenders to seek special protection under the Code.²⁶

2. Special protection for the homestead mortgagee

The 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.²⁷ 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."²⁸ By prohibiting chapter 13 debtors from using their cramdown power against homestead mortgagees,²⁹ the "antimodification" clause reduces the homestead lender's risk of loss, and was intended to stabilize the residential real estate market.³⁰ Congress believed that homestead mortgagees would extend loans on more favorable terms if they were given special protection under the Code.³¹ If financing was more accessible, Congress believed a consumer would be more inclined to buy a home.³² Thus, Congress included the antimodification clause in § 1322(b)(2) to promote the residential real estate market and assist consumers in their efforts to achieve the American dream.³³

Whether the antimodification clause has helped stabilize the residential real estate market is unclear. It is clear, however, that

insured lenders following Chapter 13 cramdowns.") (footnote omitted).

26. See discussion *infra* Part II.A.2.

27. See 11 U.S.C. § 1322(b)(2).

28. *Id.*

29. See *Nobelman v. American Sav. Bank*, 508 U.S. 324, 332 (1993).

30. See *In re Seidel*, 752 F.2d 1382, 1385 (9th Cir. 1985) (stating that § 1322(b)(2) is intended to protect home mortgage lenders rather than homeowners); *United Cos. Fin. Corp. v. Brantley*, 6 B.R. 178, 189 (Bankr. N.D. Fla. 1980) (stating that the purpose of § 1322(b)(2) is "to provide stability in the residential long-term home financing industry and market"); see also Forrester, *supra* note 4, at 404-05 (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").

31. See *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 246 (5th Cir. 1984); Forrester, *supra* note 4, at 406.

32. See Forrester, *supra* note 4, at 405.

33. 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).

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.³⁴ As a result, the anti-modification clause has been criticized for granting too much protection to homestead mortgagees.³⁵ Accordingly, Congress adopted § 1322(c)(2) to limit the effect of the antimodification clause.³⁶

B. The Scope of § 1322(c)(2) Under General Rules of Statutory Construction

The addition of § 1322(c)(2) expands the debtor's power to modify creditors' claims in chapter 13 cases by limiting § 1322(b)(2)'s antimodification clause.³⁷ Section 1322(c)(2) provides:

Notwithstanding subsection (b)(2) and applicable non-bankruptcy law—

....

[I]n 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.³⁸

Under general rules of statutory construction the plain language of the provision is controlling.³⁹ The plain language of § 1322(c)(2), specifically "[n]otwithstanding subsection (b)(2)," ⁴⁰ indicates that it was enacted as an exception to subsection (b)(2).⁴¹ Furthermore, subsection (b)(2), as amended, is "[s]ubject to sub-

34. See *Nobelman*, 508 U.S. at 332.

35. See Winn, *supra* note 25, at 583, 616-17.

36. See Lori B. Riga, Note, *The Best Laid Plans of Corporations and Consumers: The Third Circuit, §§ 1123 and 1322(b)(2) of the Bankruptcy Code, and New Jersey's Merger Doctrine*, 19 SETON HALL LEGIS. J. 231, 269 n.220 (1994).

37. See 5 COLLIER, *supra* note 4, ¶ 1322.14B.

38. 11 U.S.C. § 1322(c)(2) (1994).

39. 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)).

40. 11 U.S.C. § 1322(c)(2).

41. See *In re Young*, 199 B.R. 643, 647 (Bankr. E.D. Tenn. 1996).

section[] . . . (c)” of § 1322.⁴² Thus, the debtor may modify the rights of a homestead mortgagee previously protected by § 1322(b)(2)’s antimodification clause.

Section 1322(c)(2) will affect homestead mortgagees in short-term mortgages, mortgages with balloon payments, and long-term mortgages that are nearing expiration.⁴³ This section converts once impermissible proposed modifications into potential home savers because it allows debtors to unilaterally restructure a mortgage agreement, lessening the chance of default under the agreement and thus, reducing the possibility that they will lose their homes due to foreclosure.⁴⁴

For example, debtors whose mortgage agreements fall within § 1322(c)(2) may restructure principal payments, reducing the amount due each month.⁴⁵ 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.⁴⁶

There is little doubt that these modifications are permissible.⁴⁷ For a court to hold otherwise would be to render § 1322(c)(2) superfluous. But what is unclear, and what is the focus of this Comment, is just how far § 1322(c)(2) allows the debtor to go. Specifically, does § 1322(c)(2), by incorporating § 1325(a)(5), allow chapter 13 debtors to bifurcate homestead mortgagees’ claims and exercise chapter 13’s cramdown?⁴⁸ In essence, does § 1322(c)(2) bestow upon the debtor a power the Supreme Court explicitly pro-

42. See 11 U.S.C. § 1322(b)(2).

43. See 5 COLLIER, *supra* note 4, ¶ 1322.14B.

44. See Forrester, *supra* note 4, at 451.

45. 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”).

46. See *id.*

47. See 5 COLLIER, *supra* note 4, ¶ 1322.14B.

48. See *infra* Part IV. A related question, but one not addressed in this Comment, is if bifurcation and cramdown are permissible, upon successful completion of the chapter 13 plan, can debtors retain their residence and strip undersecured homestead mortgagees’ claims to the amount of the secured claim? The Court’s holding in *Dewsnup* has created a furor over whether lien stripping is permissible at all in the reorganization chapters. See, e.g., *In re Bowen*, 174 B.R. 840, 853 (Bankr. S.D. Ga. 1994) (discussing the split in case law on the issue of lien stripping in the reorganization chapters 11, 12, and 13 after the *Dewsnup* decision). But it appears courts will permit lien stripping in the reorganization chapters. See *id.* Thus, if § 1322(c)(2) is interpreted to permit bifurcation and cramdown, debtors will be able to void the unsecured portion of a homestead mortgagee’s lien. See 11 U.S.C. § 506(d).

scribed in *Nobelman*?⁴⁹

Although several commentators and one court—the only court to pass on the question—believe § 1322(c)(2) allows debtors to exercise their right of cramdown on an undersecured homestead mortgagee's claim,⁵⁰ their analyses are unpersuasive because they ignore the rule of statutory construction used by the Supreme Court in *Dewsnup v. Timm*. The rule is that a Code provision should not be read to alter preexisting practice unless Congress indicates in the provision's legislative history that it intended it to do so.⁵¹ Because the Court established that bifurcation and cramdown of an undersecured homestead mortgagee's claim was impermissible in the context of chapter 13 before the BRA of 1994, § 1322(c)(2) should not be read to alter that preexisting practice unless the legislative history indicates Congress so intended. And it does not!

III. NOBELMAN V. AMERICAN SAVINGS BANK AND DEWSNUP V. TIMM

Under *Dewsnup v. Timm* an amended or additional Code provision that purports to alter preexisting practice does so only to the extent Congress indicated its intention for such a change in the provision's legislative history.⁵² Accordingly, because the Court's holding in *Nobelman v. American Savings Bank* established a practice prior to the enactment of § 1322(c)(2), and Congress did not indicate in § 1322(c)(2)'s legislative history that it intended to alter the *Nobelman* rule, § 1322(c)(2) should not be interpreted to allow debtors to bifurcate and cramdown undersecured mortgagees' claims.⁵³

49. 508 U.S. 324 (1993) (holding that a chapter 13 debtor could not bifurcate and cramdown an undersecured claim that was secured only by a security interest in the debtor's principal residence).

50. See *In re Young*, 199 B.R. 643 (Bankr. E.D. Tenn. 1996); see, e.g., 5 COLLIER, *supra* note 4, ¶ 1322.14B (stating that "[t]he exception [referring to § 1322(c)(2)] from the modification prohibition also overrules for such mortgages the Supreme Court's decision in *Nobelman v. American Savings Bank*"); Forrester, *supra* note 4, at 451 (stating that § 1322(c)(2) will permit lien stripping of a short-term undersecured loan).

51. See *infra* Part III.C.4.

52. See *infra* Part III.C.4.

53. See *infra* Part IV.A-B.

A. Nobelman v. American Savings Bank

In *Nobelman* the Court resolved a split among the circuits regarding the proper interpretation of § 1322(b)(2)'s antimodification clause.⁵⁴ Prior to the *Nobelman* decision, some circuits held that § 1322(b)(2)'s antimodification clause did not prohibit claim bifurcation and cramdown of undersecured homestead mortgagees' claims.⁵⁵ These courts read § 1322(b)(2) as only prohibiting modification of the secured portion, as determined by § 506(a),⁵⁶ of undersecured homestead mortgagees' claims.⁵⁷ Critics of this analysis argued that this interpretation was contrary to the spirit of the antimodification clause,⁵⁸ which was included in the Code to provide special protection for residential real estate lenders.⁵⁹ They argued that this reading of § 1322(b)(2) treated undersecured homestead mortgagees the same, if not worse than, other undersecured creditors.⁶⁰

Other circuit courts viewed bifurcation and cramdown as an impermissible modification of a homestead mortgagee's rights under § 1322(b)(2)'s antimodification clause.⁶¹ The Supreme Court in *Nobelman* affirmed this analysis, solidifying the extent to which § 1322(b)(2)'s antimodification clause protects homestead lenders.⁶²

54. See *Nobelman v. American Sav. Bank*, 508 U.S. 324, 327 n.2 (1993).

55. See, e.g., *In re Bellamy*, 962 F.2d 176 (2d Cir. 1992); *In re Hart*, 923 F.2d 1410 (10th Cir. 1991), *overruled by In re Wicks*, 5 F.3d 1372 (10th Cir. 1993); *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123 (3d Cir. 1990); *In re Hougland*, 886 F.2d 1182 (9th Cir. 1989).

56. See *supra* notes 19-21 and accompanying text.

57. See cases cited *supra* note 55.

58. See Winn, *supra* note 25, at 550 (discussing the arguments made by respondent and amici during the *Nobelman* litigation).

59. See *supra* Part II.A.2.

60. See Winn, *supra* note 25, at 589 (discussing the lack of insurance coverage for homestead lenders subject to cramdown). But it should be noted that the courts that allowed debtors to exercise their right of cramdown required that the creditor receive the regular payment amount under the original agreement throughout the life of the plan. See *In re Demoff*, 109 B.R. 902, 920 (Bankr. N.D. Ind. 1989) ("The size and timing of the installment payments will not be altered and thus the scheduled amount of the monthly contract payment will remain the same, as will the interest rate."). Thus, the cramdown of an undersecured mortgage changed the payment schedule by reducing the amount of principal owed, not the amount of the periodic payment due. See *id.*

61. See, e.g., *In re Nobleman* [sic], 968 F.2d 483 (5th Cir. 1992), *aff'd sub nom. Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993).

62. See *Nobelman*, 508 U.S. at 332. It is interesting to note that the Court approved of a valuation under § 506(a) of American Savings Bank's claim. See *id.* at

In resolving these contrasting interpretations, Justice Thomas, writing for a unanimous Court, concluded that for the purposes of § 1322(b)(2) “a claim secured only by a [homestead lien]’ [is] referring to the *lienholder’s entire claim*, including both the secured and the unsecured components of the claim.”⁶³ The Court arrived at this conclusion by focusing on the rights of the mortgagee, American Savings Bank, not its claim.⁶⁴ The Court did so because it believed the mortgagee’s rights, not the amount of the secured component of its undersecured claim, were the focus of the anti-modification clause.⁶⁵

It is not clear, however, that the focus of the antimodification clause is on rights.⁶⁶ Nevertheless, the Court’s holding was true to Congress’s intent to provide special protection to residential real estate lenders.

Justice Stevens wrote a brief concurrence on this point.⁶⁷ He began by acknowledging that § 1322(b)(2) made it more difficult for debtors to retain their residences than other secured property.⁶⁸ But he also wrote that “the legislative history indicat[es] that favorable treatment of residential mortgagees was intended to encourage the flow of capital into the home lending market.”⁶⁹ Justice Stevens concluded that the majority’s opinion was consistent with Congress’s intent to provide special protection to homestead mortgagees.⁷⁰

B. Nobelman: *The Aftermath*

The reaction to *Nobelman* has been mixed.⁷¹ Some lower court decisions continue to demonstrate a desire to limit the effect

328. But even though the bank was undersecured, the Nobelmans could not exercise their right of cramdown because the bank held a secured claim. *See id.* at 329. Bankruptcy courts interpret this aspect of the opinion to exclude lienholders who are entirely unsecured from the protection of § 1322(b)(2). *See In re Kidd*, 161 B.R. 769 (Bankr. E.D.N.C. 1993).

63. *Nobelman*, 508 U.S. at 331 (emphasis added).

64. *See id.* at 328.

65. *See id.*

66. *See Winn, supra* note 25, at 552 (“It is far from clear as a matter of statutory interpretation that the focus of § 1322(b)(2) is really on ‘rights’ rather than ‘secured claims.’”).

67. *See Nobelman*, 508 U.S. at 332 (Stevens, J., concurring).

68. *See id.* (Stevens, J., concurring).

69. *Id.* (Stevens, J., concurring) (citing *Grubbs v. Houston First Am. Sav. Ass’n*, 730 F.2d 236, 245-46 (5th Cir. 1984)).

70. *See id.* (Stevens, J., concurring).

71. *See Winn, supra* note 25, at 616-17.

of § 1322(b)(2)'s antimodification clause.⁷² But these decisions can be reconciled with the policy behind the antimodification clause.

Recall that Congress provided special protection to homestead mortgagees to promote the residential real estate market.⁷³ In so doing, however, Congress explicitly required that the homestead mortgagee be "secured *only* by a security interest in . . . the debtor's principal residence."⁷⁴ Thus, although lower courts have limited the antimodification clause in essentially two ways, they have done so within the language and spirit of the provision.

The first limitation on the antimodification clause is that a homestead mortgagee secured by additional collateral might not benefit from § 1322(b)(2)'s antimodification clause.⁷⁵ Second, courts will not afford homestead mortgagees the protection of § 1322(b)(2)'s antimodification clause if the homestead mortgagee's claim is determined, after a § 506(a) valuation, to be completely unsecured.⁷⁶

Although these holdings may appear contrary to the Supreme Court's procreeitor stance in *Nobelman*, they are not. The *Nobelman* decision was the product of the Court's desire to remain true to Congress's intent to afford special protection to homestead mortgagees,⁷⁷ those who take a security interest only in the property they have helped the borrower obtain.⁷⁸ While the *Nobelman* decision ensured that special protection would be afforded homestead lenders, the ruling was susceptible to abuse by predatory lenders.⁷⁹ The lower court decisions simply limit this potential for abuse and ensure that § 1322(b)(2)'s antimodification clause protects its intended beneficiaries.

72. See, e.g., *In re Kidd*, 161 B.R. 769, 771 (Bankr. E.D.N.C. 1993) (holding that the antimodification clause does not protect a completely unsecured mortgagee).

73. See *supra* Part II.A.2.

74. 11 U.S.C. § 1322(b)(2) (1994) (emphasis added).

75. See, e.g., *In re Hirsch*, 166 B.R. 248, 254 (Bankr. E.D. Pa. 1994) (stating that the antimodification clause would not protect a mortgagee secured by the debtor's residence and a "wealth of personalty"). The *Hirsch* court believed that in the wake of *Nobelman*, the extent of additional security would be critical to the determination of whether the antimodification clause protected the mortgagee. See *id.* Accordingly, the court rejected the debtor's argument that the antimodification clause should not apply because the extent of additional security held by the mortgagee was not enough to take the mortgagee outside the antimodification clause. See *id.* at 253-54.

76. See, e.g., *Kidd*, 161 B.R. at 771.

77. See *supra* Part II.A.3.

78. See 11 U.S.C. § 1322(b)(2).

79. See Forrester, *supra* note 4, at 387-92, 451.

While it is clear that § 1322(c)(2) manifests Congress's intent to further limit the antimodification clause,⁸⁰ the extent to which § 1322(c)(2) limits this special treatment is reduced because of the Court's analysis in *Dewsnup v. Timm*.⁸¹

C. *Dewsnup v. Timm*

Under the interpretive method used in *Dewsnup*, a Code section should not be interpreted to change preexisting bankruptcy law absent legislative history indicating that Congress intended such a result.⁸² In light of the Court's analysis in *Dewsnup*, the *Nobelman* decision, which proscribed bifurcation and cramdown of undersecured homestead mortgagees' claims,⁸³ affects the interpretation of § 1322(c)(2).

1. The Court's opinion

In *Dewsnup* the Court interpreted § 506(d) in the context of a chapter 7 proceeding.⁸⁴ Although § 506(d) appears to allow debtors to strip the unsecured component of an undersecured claim, the Court held that it did not have this effect in the context of a chapter 7 proceeding.⁸⁵ In essence, despite the unambiguous language of § 506(d), the Court declined to give it full effect because doing so would have been a departure from the pre-Code practice that allowed liens to survive bankruptcy unaffected.⁸⁶ The Court could not believe Congress intended such a result without at least

80. Another Code amendment reflecting Congress's intent to limit the protection afforded homestead lenders is § 1322(c)(1). 11 U.S.C. § 1322(c)(1). Section 1322(c)(1) guarantees debtors a period of redemption, thus facilitating their efforts to retain their principal residences. *See id.* The legislative history indicates that § 1322(c)(1) was enacted to overrule *In re Roach*, 824 F.2d 1370 (3d Cir. 1987). Under *Roach* debtors could not cure a default after a foreclosure judgment under §§ 1322(b)(3) or 1322(b)(5). *See id.*

81. 502 U.S. 410 (1992).

82. *See id.* at 414-20; *see also* Brian K. Van Engen, Comment, *Nobelman v. American Savings Bank: The Supreme Court's Answer Raises More Questions*, 20 J. CORP. L. 363, 367 (1995) ("*Dewsnup* represented a change in the Court's method of statutory interpretation [T]he Court interpreted the statutory sections in question by relying on legislative history.").

83. *See Nobelman v. American Sav. Bank*, 508 U.S. 324, 332 (1993).

84. *See Dewsnup*, 502 U.S. at 412-13.

85. *See id.* at 417. Section 506(d) provides: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" 11 U.S.C. § 506(d).

86. *See Dewsnup*, 502 U.S. at 417-19.

some mention of the change in the section's legislative history.⁸⁷

The Court's rationale, however, led to a very curious result. The Court's holding gave the term "secured claim" a different meaning under § 506(a) than under § 506(d).⁸⁸ Although it limited its holding to the facts of the case,⁸⁹ the Court's decision, and its analysis, spawned great debate.⁹⁰

2. The majority's analysis in *Dewsnup*

At first glance it appears that the Court examined § 506(d)'s legislative history because it found the provision ambiguous within the context of the Code. The Court stated that "the contrasting positions of the respective parties . . . demonstrates that § 506 of the Bankruptcy Code and its relationship to other provisions of that Code do embrace some ambiguities."⁹¹ Further, upon reaching its conclusion, the Court stated that "given the *ambiguity in the text*, we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected."⁹² From this language it is reasonable to infer that the Court found § 506(d) ambiguous in the context of the Code.

Some commentators suggest the contextual ambiguity existed because of a conflict between § 506(d) and § 722 of the Code.⁹³ The theory is as follows: Section 722 establishes the debtor's right to redeem personal property at its market value in a chapter 7 proceeding.⁹⁴ If the term "secured claim" was given the same meaning in § 506(d) as in § 506(a), the debtor's ability to avoid a lien would be so expanded as to render redemption under § 722 meaningless.⁹⁵ Confronted by this dilemma, the Court reconciled the two Code

87. *See id.* at 420.

88. *See id.* at 417.

89. *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.").

90. *See, e.g.,* Margaret Howard, *Dewsnupping the Bankruptcy Code*, 1 J. BANKR. L. & PRAC. 513 (1992).

91. *See Dewsnup*, 502 U.S. at 416 (citing 3 COLLIER, *supra* note 4, ¶ 506.07). But Justice Scalia, in dissent, chided the majority, stating that it had found the provision ambiguous simply because the parties disagreed over its meaning. *See id.* at 422-23 (Scalia, J., dissenting).

92. *Id.* at 417 (emphasis added).

93. *See* Mark S. Scarberry & Scott M. Reddie, *Home Mortgage Strip Down in Chapter 13 Bankruptcy: A Contextual Approach to Sections 1322(b)(2) and (b)(5)*, 20 PEPP. L. REV. 425, 459 (1993).

94. *See* 11 U.S.C. § 722.

95. *See* Scarberry & Reddie, *supra* note 93, at 459.

sections by defining the term "secured claim" in § 506(d) as a claim prior to bifurcation under § 506(a).⁹⁶ This enabled § 722, a specific provision in the context of chapter 7 proceedings, to prevail over § 506(d), a general provision applicable to all chapters of the Code.⁹⁷ This analysis finds some support in the Court's statements that "§ 506 . . . and its relationship to other provisions . . . do embrace some ambiguities,"⁹⁸ and that it was only ruling on the facts presented.⁹⁹

But this theory falls short in two ways. First, although the argument was raised in respondents' brief,¹⁰⁰ this theory was never specifically addressed by the majority.¹⁰¹ Indeed, if this conflict exists, it is rather curious that the Court would not explicitly mention it while interpreting § 506(d).¹⁰² Second, it is questionable whether § 506(d) and § 722 actually conflict.¹⁰³

3. Justice Scalia's dissenting opinion

In dissent Justice Scalia, joined by Justice Souter, attacked the majority's decision because he saw no ambiguity in the plain lan-

96. *See id.* at 459-60.

97. *See id.* at 457-60.

98. *Dewsnup*, 502 U.S. at 416.

99. *See id.* at 416-17. Assuming, for a moment, that this theory is correct, the principle derived is that legislative history is controlling if there is an internal conflict within the Code that renders a provision ambiguous. Under this standard § 1322(c)(2) could not be seen as ambiguous in the context of the Code. *See In re Young*, 199 B.R. 643, 653 (Bankr. E.D. Tenn. 1996). Thus, the plain language would control and its sparse legislative history would not limit its effect. *See id.* Again, however, it is not clear that the Supreme Court based its finding on a contextual ambiguity. *See Scarberry & Reddie, supra* note 93, at 459 (stating that "the majority *probably* had in mind the relation between § 506(d) and § 722") (emphasis added).

100. *See Dewsnup*, 502 U.S. at 428 (Scalia, J., dissenting) (stating that "[r]espondents . . . identify supposed inconsistencies between petitioner's construction of § 506(d) and . . . § 722").

101. *See id.* at 414-20.

102. *See id.* Interestingly, the majority did adopt the "respondents alternative position" that § 506(d) should be applied on a case by case basis. *See id.* at 417. This position found support in the fact that § 506(d)'s legislative history did not indicate Congress intended to depart from the pre-Code practice that liens pass through bankruptcy unaffected. *See id.* at 416.

103. Justice Scalia, in his dissent, addressed the respondents' argument but found it unpersuasive. *See id.* at 428 (Scalia, J., dissenting) ("Section 722 is necessary, and not superfluous, because § 506(d) is not a *redemption* provision."). Justice Scalia reasoned that Congress made special mention of personal property, the object of § 722, because "state redemption laws are typically less generous for personality than for real property." *Id.* (Scalia, J., dissenting).

guage of § 506(d).¹⁰⁴ Justice Scalia chided the majority for finding § 506(d) ambiguous, writing that “[t]he Court . . . rests its decision upon . . . the principle that a text which is ‘ambiguous’ (a status apparently achieved by being the subject of disagreement between self-interested litigants) cannot change pre-Code law without the *imprimatur* of ‘legislative history.’”¹⁰⁵ Although this is likely no more than a facetious dig at the majority opinion, it demonstrates the uncertainty caused by the majority’s analysis.

4. An alternative view: ambiguity is not required

In the absence of an explanation for the Court’s finding, a careful reading of *Dewsnup* raises the question of whether an ambiguous text is required at all before a court should resort to the legislative history of a provision that may alter an existing practice.¹⁰⁶ After all, the Court scrutinized § 506(d)’s legislative history even though the language at issue appears clear on its face.¹⁰⁷ It can be reasonably inferred that the Court was being prudent and resorted to the provision’s legislative history to ensure that Congress did intend to change pre-Code law.¹⁰⁸ In the absence of such congressional intention, the Court was reluctant to give the plain language of § 506(d) its full effect.

Support for this position is found within the *Dewsnup* opinion¹⁰⁹ and other cases interpreting Code provisions that might alter an existing practice.¹¹⁰ The Court stated that if it were writing on a “clean slate,” it would have agreed with the debtors’ position that § 506(d) permitted lien stripping.¹¹¹ The following statement exemplifies the Court’s wary attitude towards a Code provision that purports to change a prior practice:

[T]his Court has been reluctant to accept arguments that would interpret the Code, *however vague* the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at

104. *See id.* at 420 (Scalia, J., dissenting).

105. *Id.* at 422-23 (Scalia, J., dissenting). The dissent illustrates the uncertainty surrounding the majority’s finding § 506(d) ambiguous.

106. *See id.* at 414-20.

107. *See* 11 U.S.C. § 506(a), (d).

108. *See Dewsnup*, 502 U.S. at 417, 419-20.

109. *See id.*

110. *See, e.g., United States v. Ron Pair Enters.*, 489 U.S. 235, 252 (1989) (O’Connor, J., dissenting).

111. *See Dewsnup*, 502 U.S. at 417.

least some discussion in the legislative history.¹¹²

The Court's use of "however vague" demonstrates its reluctance to interpret a Code provision to alter existing practice without at least some indication in the provision's legislative history that Congress intended such a change.¹¹³

Interestingly, if the Court examined § 506(d)'s legislative history solely because it altered an existing practice, the *Dewsnup* decision creates a standard for interpreting the Code similar to that described in Justice O'Connor's dissent in *United States v. Ron Pair Enterprises*.¹¹⁴ In *Ron Pair Enterprises* O'Connor wrote that "bankruptcy statutes will not be deemed to have changed pre-Code law unless there is some indication that Congress thought that it was effecting such a change."¹¹⁵

Accordingly, under this standard, Code provisions that change preexisting bankruptcy practice require legislative history to that effect. In essence, a court faced with interpreting a section of the Code that could alter an established practice must engage in a two part inquiry.¹¹⁶ First, it must determine whether an established practice exists; second, it must decide whether Congress indicated its intent to change that practice in the legislative history of the Code section in question.¹¹⁷

Admittedly, this interpretive method turns traditional notions of statutory construction on its head. But one cannot ignore the implications of the Supreme Court's analysis in *Dewsnup*.¹¹⁸

112. *Id.* at 419 (emphasis added) (citing *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988)).

113. It is this rule of statutory construction that prevents a debtor from using the cramdown pursuant to § 1322(c)(2). *See infra* Part IV.

114. *See Ron Pair Enters.*, 489 U.S. at 252 (O'Connor, J., dissenting).

115. *Id.* (O'Connor, J., dissenting) (citing *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986)). Justice O'Connor also cited *United Savings Association of Texas*, as did the majority in *Dewsnup*, for the proposition that "[i]t is most improbable that [a change in the existing bankruptcy rules] would have been made without even any mention in the legislative history." *Id.* at 254 (O'Connor, J., dissenting) (alteration in original) (quoting *United Sav. Ass'n of Texas*, 484 U.S. at 380 (1988)).

116. *See id.* at 253-54 (O'Connor, J., dissenting).

117. *See id.* (O'Connor, J., dissenting).

118. *See In re Bowen*, 174 B.R. 840, 853 (Bankr. S.D. Ga. 1994) ("[T]he cow is, so to speak, out of the barn. Courts in the wake of *Dewsnup* are forced to either duplicate a questionable rationale and disregard accepted canons of interpretation, or disregard the rationale in favor of divining the Supreme Court's concerns and giving full force and effect to the laws of Congress.").

IV. THE SCOPE OF § 1322(C)(2) UNDER A *DEWSNUP* ANALYSIS

A. Does § 1322(c)(2) Alter a Preexisting Practice?

Although § 1322(c)(2) may be used to adjust the monthly principal or interest payment under a mortgage agreement,¹¹⁹ it may also allow debtors to cramdown an undersecured homestead mortgagee's claim.¹²⁰ Such a plan, however, runs afoul of the Court's holding in *Nobelman v. American Savings Bank*, which expressly prohibits bifurcation and cramdown of homestead mortgagees' claims.¹²¹ Because § 1322(c)(2) could be, and has been, interpreted as overruling an established bankruptcy practice,¹²² a court should conclude that it alters a preexisting practice under *Dewsnup v. Timm*.¹²³

On the other hand, a court may be reluctant to give the *Nobelman* decision the same effect as a common law pre-Code practice like the one at issue in *Dewsnup*.¹²⁴ But the Court's language in *Dewsnup* indicates that the rule of *Nobelman* should be equated to a common law pre-Code practice.¹²⁵ In *Dewsnup* the Court stated that "[w]hen Congress *amends* the bankruptcy laws, it does not write 'on a clean slate.'"¹²⁶ Thus, in amending the Code in 1994,¹²⁷ particularly with the addition of § 1322(c)(2), which affects the treatment of homestead mortgagees' claims, Congress was not writing on a clean slate.

Further, the controversy surrounding the *Nobelman* decision and the effect of § 1322(b)(2)'s antimodification clause¹²⁸ accentuate the need for caution when interpreting legislation that may change the status quo. When examining legislation in this area, a court, like the Court in *Dewsnup*, should be wary of interpreting statutes in a manner that would lead to drastic changes in existing

119. See *supra* text accompanying notes 43-47.

120. See *In re Young*, 199 B.R. 643, 654 (Bankr. E.D. Tenn. 1996); see also *supra* text accompanying notes 48-50.

121. See *Nobelman v. American Sav. Bank*, 508 U.S. 324, 332 (1993); see also *supra* Part III (discussing the *Nobelman* litigation and the effect of the Court's holding).

122. See *Young*, 199 B.R. at 654.

123. See *supra* text accompanying notes 94-95.

124. See *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992).

125. See *id.* at 419.

126. *Id.* (emphasis added) (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)).

127. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4131 (1994) (codified at 11 U.S.C. § 1322(c)(1)-(2) (1994)).

128. See *supra* Parts III.A-B.

practice.

In addition, implicit in the Court's opinion in *Dewsnup* is that Congress must indicate with sufficient definiteness the extent of a change in order to provide for consistent interpretation and administration of the Code.¹²⁹ Indeed, this rationale is consistent with requiring that Congress demonstrate, beyond the plain language of a new provision, that it intends to alter established law.

B. Section 1322(c)(2)'s Legislative History

The second inquiry under *Dewsnup* is whether § 1322(c)(2)'s legislative history demonstrates Congress's intent to allow debtors to bifurcate and cramdown claims protected by the rule announced in *Nobelman*.¹³⁰

Section 1322(c)(2)'s legislative history indicates that Congress intended to overrule a case from the Third Circuit, *First National Fidelity Corp. v. Perry*.¹³¹ Curiously, there is no mention of *Nobelman* in § 1322(c)(2)'s legislative history.¹³² Indeed, if Congress intended to overrule *Nobelman*, it is strange that there would be no mention of that recent Supreme Court case in § 1322(c)(2)'s legislative history. But Congress's failure to mention *Nobelman* does not end the inquiry. Whether the debtor can bifurcate and cramdown an undersecured homestead mortgagee's claim depends upon an analysis of the *Perry* holding, the case Congress expressly intended to overrule with this new provision.¹³³

1. *First National Fidelity Corp. v. Perry*

In *Perry* a fully secured mortgagee, First National Fidelity Corp., obtained a foreclosure judgment against the mortgagor's principal residence.¹³⁴ Prior to the foreclosure sale, Perry filed a petition under chapter 13.¹³⁵ Her plan proposed to pay First National a total of \$17,292 over five years,¹³⁶ an amount that was less than the amount First National was due under the mortgage

129. See *Dewsnup*, 502 U.S. at 419-20.

130. See *supra* Part III.A.

131. 945 F.2d 61 (3d Cir. 1991); see 140 CONG. REC. H10,769 (daily ed. Oct. 4, 1994); 5 COLLIER, *supra* note 4, ¶ 1322.14B.

132. See 140 CONG. REC. H10,769 (daily ed. Oct. 4, 1994).

133. See *id.*

134. See *Perry*, 945 F.2d at 62.

135. See *id.*

136. See *id.*

agreement.¹³⁷ Accordingly, First National moved for relief from the automatic stay,¹³⁸ arguing that Perry's plan proposed an impermissible modification of its rights.¹³⁹ The bankruptcy court denied the motion.¹⁴⁰ But on appeal to the district court, First National successfully argued that the proposed plan constituted an impermissible modification under § 1322(b)(2).¹⁴¹

The Third Circuit affirmed the district court, holding that § 1322(b)(2) prohibited confirmation of Perry's plan, which allowed for payment of the foreclosure judgment over the plan's duration.¹⁴² The court's analysis was based on the fact that New Jersey law entitled the creditor to immediate payment.¹⁴³ To allow payment over the duration of the plan would permit a modification of First National's rights.¹⁴⁴ Because First National was secured only by Perry's principle residence, § 1322(b)(2)'s antimodification clause precluded her from altering First National's right to immediate payment.¹⁴⁵

2. By hitting *Perry*, Congress missed *Nobelman*

The factual scenario in *Perry* indicates that Congress intended to allow debtors to extend payment of an obligation immediately due over the life of their plan. This is consistent with Congress's desire to help debtors retain their residences during chapter 13 reorganization.¹⁴⁶ It does not, however, lead one to believe that Congress intended to allow debtors to bifurcate and cramdown undersecured homestead mortgagees' claims. The case did not even involve an undersecured creditor!

137. See *id.* Perry's proposed plan called for 10% interest on \$13,562, thus totaling \$17,292 over the plan's five-year duration, while the original terms of the agreement called for 20.99% interest on \$11,844.22. See *id.*

138. See 11 U.S.C. § 362 (1994). The debtor's filing of a bankruptcy petition triggers the automatic stay, which prohibits creditors from seizing the debtor's assets.

139. See *Perry*, 945 F.2d at 62.

140. See *id.*

141. See *id.*

142. See *id.* at 67.

143. See *id.* at 65.

144. See *id.* at 65-66. It had been argued that Ms. Perry was curing the defaulted mortgage. See *id.* A cure is most often defined as restoring the obligation to the status quo and is permissible even if the creditor is protected by § 1322(b)(2)'s anti-modification clause. See 11 U.S.C. § 1322(b)(5) (1994).

145. See *Perry*, 945 F.2d at 65 (citing *In re Seidel*, 752 F.2d 1382, 1384 (9th Cir. 1985)).

146. See *In re Jones*, 188 B.R. 281, 284 (Bankr. D. Or. 1995) (stating that the policy of supporting debtors' attempts to retain their residences pervades § 1322(c)(2)).

Furthermore, the court in *Perry* stated in dicta that it would have been permissible to bifurcate First National's claim had it been undersecured.¹⁴⁷ The court relied on *Wilson v. Commonwealth Mortgage Corp.*,¹⁴⁸ a case that was clearly rejected by the Supreme Court in *Nobelman*.¹⁴⁹ By overruling *Perry*, albeit on other grounds, Congress was indirectly supporting the Court's decision in *Nobelman*.

To summarize, Congress's express mention of *Perry* indicates that § 1322(c)(2) permits debtors to modify principal and interest payments of mortgage obligations that mature immediately before the filing of, or during, a chapter 13 plan. But Congress's desire to overrule *Perry* does not support an interpretation of § 1322(c)(2) that permits bifurcation and cramdown of undersecured homestead mortgagees' claims. Rather, under the Supreme Court's analysis in *Dewsnup*, a court should not interpret § 1322(c)(2) as permitting bifurcation and cramdown of undersecured homestead mortgagees' claims that come due before or during a chapter 13 plan because Congress did not indicate it intended to overrule *Nobelman* with respect to such mortgages. Indeed, if Congress wanted to overrule a recent United States Supreme Court case, why would it not say so?

C. Early Application of § 1322(c)(2)

There have been several recent decisions involving § 1322(c)(2).¹⁵⁰ The first case to interpret the new provision was *In re Escue*.¹⁵¹ In *Escue* the court held that § 1322(c)(2) applies to mortgages that mature prepetition.¹⁵² Although the plain language of § 1322(c)(2) does not include obligations that mature prepetition,¹⁵³ the legislative history expressly mentions *Perry*, a case that involved that type of obligation.¹⁵⁴ Like *Perry*, *Escue* dealt with a

147. See *Perry*, 945 F.2d at 66 n.6.

148. 895 F.2d 123 (3d Cir. 1990), overruled by *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993).

149. See *supra* notes 55-57 and accompanying text.

150. See *In re Watson*, 190 B.R. 32 (Bankr. E.D. Pa. 1995); *In re Sarkese*, 189 B.R. 531 (Bankr. M.D. Fla. 1995); *Jones*, 188 B.R. at 281; *In re Chang*, 185 B.R. 50 (Bankr. N.D. Ill. 1995); *In re Escue*, 184 B.R. 287 (Bankr. M.D. Tenn. 1995).

151. 184 B.R. 287 (Bankr. M.D. Tenn. 1995).

152. See *id.* at 293.

153. See 11 U.S.C. § 1322(c)(2).

154. See *Escue*, 184 B.R. at 293. Because *Perry* did not deal with the factual scenario expressly addressed by § 1322(c)(2), one court concluded that § 1322(c)(2) has no legislative history. See *Jones*, 188 B.R. at 283.

homestead mortgagee's claim that was due prepetition.¹⁵⁵ Thus, the result reached in *Escue* is consistent with the result Congress sought to achieve by overruling *Perry*. Further, the *Escue* court's analysis is consistent with the Supreme Court's analysis in *Dewsnup*: both looked to legislative history to determine the scope of a Code provision that altered established bankruptcy law.

In addition, the court viewed the section's general purpose—to help debtors keep their home—as grounds for extending its scope to encompass mortgages that mature prepetition.¹⁵⁶ This interpretation has been accepted by other courts.¹⁵⁷

More recently a bankruptcy court held that § 1322(c)(2) does allow bifurcation and cramdown of an undersecured homestead mortgagee's claim.¹⁵⁸ In *In re Young* the court relied upon the Supreme Court's statement in *Dewsnup* that “where the language is unambiguous, silence in the legislative history can not [sic] be controlling.”¹⁵⁹ Finding the language of § 1322(c)(2) unambiguous, the *Young* court permitted the debtor to bifurcate and cramdown the undersecured homestead mortgagee's claim under § 1322(c)(2).¹⁶⁰

But the *Young* court's reliance on this statement is misplaced. As stated earlier, it is unclear why the Court found the provision at issue in *Dewsnup* ambiguous.¹⁶¹ The Supreme Court's failure to explain its conclusion should make lower courts wary, absent at least some indication by Congress that it intended to effect such a change, of interpreting a new Code provision to alter preexisting practice. Indeed, relying on the Court's finding of ambiguity as the basis for its examination of § 506(d)'s legislative history ignores the Court's underlying concern that it should be prudent when interpreting a Code provision that might alter a preexisting bankruptcy practice.

155. See *Perry*, 945 F.2d at 62; *Escue*, 184 B.R. at 287-88.

156. See *Escue*, 184 B.R. at 293. The court also stated § 1322(c)(2) overruled *Novelman* as to claims covered by § 1322(c)(2). See *id.* But this statement was dicta and appears to have come straight from an oft cited bankruptcy treatise. See *id.* at n.7. (citing 5 COLLIER, *supra* note 4, ¶ 1322.14B).

157. See *Watson*, 190 B.R. at 32; *Sarkese*, 189 B.R. at 531; *Jones*, 188 B.R. at 281; *Chang*, 185 B.R. at 50.

158. See *In re Young*, 199 B.R. 643 (Bankr. E.D. Tenn. 1996).

159. *Id.* at 653 (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992)).

160. See *id.* at 654.

161. See *supra* Part III.C.4.

VI. CONCLUSION

The addition of § 1322(c)(2) raises the issue of whether debtors can bifurcate and cramdown certain undersecured homestead mortgagees' claims. Admittedly, construing § 1322(c)(2) to allow debtors to cramdown an undersecured homestead mortgagee's claim is consistent with the BRA of 1994's general purpose to help debtors retain their homes throughout a chapter 13 reorganization. However, because of Supreme Court precedent and an inconclusive legislative history, courts should not interpret § 1322(c)(2) to empower chapter 13 debtors to that extent.

*Timothy B. McCaffrey, Jr.**

* I would like to thank Professor Dan Schechter for his interest and insight. I would also like to thank the *Loyola of Los Angeles Law Review* editors and staff for their assistance.