No. 14-

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

EDELMIRO TOLEDO-CARDONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 506(d) of the Bankruptcy Code provides in relevant part that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." In *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), this Court held that section 506(d) does not permit a chapter 7 debtor to "strip down" a mortgage lien to the current value of the collateral. The question presented in this case, on which the courts of appeals are divided, is whether section 506(d) permits a chapter 7 debtor to "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.

PARTIES TO THE PROCEEDINGS

Petitioner Bank of America, N.A. was the respondent in the bankruptcy court and the appellant in the district court and court of appeals.

Respondent Edelmiro Toledo-Cardona, the debtor in the bankruptcy case, was the movant in the bankruptcy court and the appellee in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bank of America, N.A. is a wholly-owned subsidiary of Bank of America Corporation, a publicly traded corporation (ticker symbol: BAC). Bank of America Corporation has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank of America, N.A. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' order affirming the district court is unpublished and appears at App. 1a-3a. The district court's order affirming the bankruptcy court is unpublished and appears at App. 5a-6a. The bankruptcy court's order granting respondent's motion to strip off Bank of America's junior lien on his house is unpublished and appears at App. 7a-9a. The Eleventh Circuit's decision in *McNeal* v. *GMAC Mortgage, LLC*, the basis for the holding in this case, is reported at 735

F.3d 1263. App. 11a-15a. On May 20, 2014, the Eleventh Circuit denied GMAC's petition to rehear *McNeal* en banc. App. 17a-18a.

JURISDICTION

The Eleventh Circuit entered its order affirming the district court on May 15, 2014. App. 1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 506 of the Bankruptcy Code provides in relevant part:

> (a)(1) 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.
>
> …
>
> (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—
>
> > (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
> >
> > (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506.

STATEMENT

This case is identical in substance to *Bank of America, N.A.* v. *Caulkett*, No. 13-1421, which is already awaiting this Court's review. Like *Caulkett*, it presents a square circuit split on an important and frequently recurring question of bankruptcy law: Whether a chapter 7 debtor may "strip off"—that is, void—a valid junior lien on the debtor's house when the debt owed to a senior lienholder exceeds the house's current value. In *McNeal* v. *GMAC Mortgage, LLC*, 735 F.3d 1263 (2012), *reh'g denied* (11th Cir. 2014), the Eleventh Circuit held that a debtor may strip off such a junior lien. That conclusion disregarded the holding and reasoning of this Court's decision in *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), and expressly rejected decisions from the Fourth, Sixth, and Seventh Circuits.

Despite pleas to reconsider, the Eleventh Circuit has continued to apply its flawed minority position to case after case—including this one, where it held that Bank of America's junior lien securing the loan it made to the respondent, Edelmiro Toledo-Cardona, could be stripped off in his chapter 7 bankruptcy case solely because at the time of the bankruptcy the lien was "wholly underwater." App. 2a. Indeed, since denying rehearing in *McNeal*, the Eleventh Circuit has twice refused to rehear this issue en banc, *see* Order, *Bank of Am., N.A.* v. *Bello*, No. 14-10062 (June 17, 2014); Order, *Wilmington Trust, N.A.* v. *Malone*, No. 13-13688 (July 16, 2014), leaving no doubt that the circuit split cannot and will not be resolved absent this Court's intervention.

In order to address this issue of central importance to the administration of chapter 7 cases and to restore uniform treatment of home mortgages in bankruptcy, the petition in *Caulkett* should be granted and the petition in this case held pending *Caulkett*'s disposition. In the alternative, the Court should grant this petition.

1. Chapter 7 of the Bankruptcy Code permits eligible individual debtors to obtain "a discharge of prepetition debts following the liquidation of the debtor's [non-exempt] assets by a bankruptcy trustee, who then distributes the proceeds to creditors." *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007); *see also* 11 U.S.C. §§ 524, 704, 727. Importantly, however, a chapter 7 proceeding discharges only the debtor's *personal* liability on his debts; it does not typically void a secured creditor's right to foreclose on the property securing the creditor's claim. 11 U.S.C. § 524(a)(1), (2) (providing that a discharge voids certain judgments and enjoins certain collection proceedings regarding debts that are the "personal liability of the debtor"); *see also, e.g.*, *Dewsnup*, 502 U.S. at 417 ("[T]he creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee.").

Many chapter 7 debtors have no equity in their houses because the houses are worth less than the amount outstanding on the mortgage loans they secure—that is, the loans are undersecured or "underwater." In such cases, rather than selling the house, the chapter 7 trustee may "abandon" it to the debtor as being "of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a), (b). If the debtor is in default on the mortgage and lacks the means to cure the default, he or she may surrender the house to the mortgage-holder in satisfaction of its secured claim, and any deficiency claim the mortgage-holder may have against the debtor is discharged. Alternatively, if the debtor is current on the mortgage, he or she may stay in the house and continue to pay the mortgage following the chapter 7 proceeding. In that scenario, too, any personal liability the debtor may have under the terms of the mortgage loan is discharged. In short, as this Court has explained, "the mortgage interest that passes through a Chapter 7 liquidation is enforceable only against the debtor's property" and "has the same properties as a nonrecourse loan." *Johnson* v. *Home State Bank*, 501 U.S. 78, 86 (1991).

This case presents the question whether, when a first mortgage on a chapter 7 debtor's house is undersecured, so that a second mortgage is completely "underwater," the debtor may not only discharge his or her personal liability for the second mortgage loan, but also "strip off" the lien itself, leaving the mortgage-holder without the right to foreclose on the property even if the value of the property subsequently increases. The answer to that question turns on the construction of section 506 of the Bankruptcy Code, which governs the treatment of undersecured claims.

Section 506(a) provides, as relevant here, that "[a]n allowed claim of a creditor secured by a lien on [estate] property … 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." 11 U.S.C. § 506(a). In essence, section 506(a) bifurcates a creditor's undersecured claim into a "secured claim" for the present value of the collateral and an "unsecured claim" for the remainder. Thus, a senior mortgage lender owed $150,000 on a loan secured by a house worth $100,000 would have a secured claim for $100,000 and an unsecured claim for $50,000, while a junior lender owed $25,000 on a loan secured by the same house would have only an unsecured claim for $25,000.

Section 506(d), the key provision at issue in this case, in turn provides—subject to exceptions not relevant here—that "[t]o 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).

Before this Court's decision in *Dewsnup*, some courts, including the Eleventh Circuit, had held that section 506(d) permitted a debtor to strip a secured creditor's lien down to the value of the collateral securing the creditor's claim. *See, e.g.*, *Folendore* v. *Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989). In *Folendore*, the creditor held a junior mortgage on the debtors' property. The creditor's claim was conceded to be valid and had been allowed. *Id.* at 1538. But its lien was completely underwater because the property's value was less than the outstanding debt on the two senior mortgage loans. *Id.* The Eleventh Circuit reasoned that because section 506(a) treats the portion of a secured claim in excess of the value of the security as unsecured, the creditor had no "allowed secured claim" within the meaning of section 506(d), and its lien could thus be stripped off. *Id.* at 1539.

2. In 1992, however, this Court decided *Dewsnup*, which decisively rejected that construction of section 506. In *Dewsnup*, the creditor had issued a pre-bankruptcy loan to the debtor secured by a lien on the debtor's real property. When the debtor filed for bankruptcy, the lien was partially underwater because the outstanding balance on the loan exceeded the then-current value of the property. The debtor moved, pursuant to section 506(d), to void the portion of the lien that was underwater, making the same statutory ar-

gument that the Eleventh Circuit had accepted in *Folendore*. That is, the debtor "t[ook] the position that §§ 506(a) and 506(d) are complementary and to be read together. Because, under § 506(a), a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed, a debtor can void a lien on the property pursuant to § 506(d) to the extent the claim is no longer secured and thus is not 'an allowed secured claim.'" *Dewsnup*, 502 U.S. at 414. In support of this position, the debtor expressly relied on *Folendore*, noting that the Eleventh Circuit had "flatly rejected" the view that section 506(d) does not authorize lien-stripping. *See* Reply Br. 13, *Dewsnup*, No. 90-741 (U.S. July 26, 1991).

This Court rejected the debtor's reading of the statute—and, by extension, the Eleventh Circuit's reading—and held that section 506(d) does not permit a debtor to void a lien securing an allowed claim. Adopting the statutory construction advocated by the United States, the Court reasoned that "the words 'allowed secured claim' in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a)." *Dewsnup*, 502 U.S. at 415. "Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured." *Id.* Where a claim "has been 'allowed' … and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d)." *Id.* That construction, the Court explained, gives section 506(d) "the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed" and "ensures that the Code's determination not to allow the underlying claim against the debtor personally is given full effect by preventing its assertion against the debtor's property." *Id.* at 415-416.

In reaching that conclusion, this Court emphasized the fundamental and longstanding principle that "liens pass through bankruptcy unaffected." *Dewsnup*, 502 U.S. at 417. As the Court explained, under well-established practice prior to the 1978 enactment of the Bankruptcy Code, "involuntary reduction of the amount of a creditor's lien" was not permitted "for any reason other than payment on the debt." *Id.* at 419. "Congress must have enacted [section 506(d)] with a full understanding of this practice." *Id.* Indeed, section 506(d)'s legislative history specified that the provision was intended to "permit[] liens to pass through the bankruptcy case unaffected." *Id.* (quoting H.R. Rep. No. 95-595, at 357 (1977)).

As this Court explained, the debtor's reading of the statute would have contradicted that basic principle. The "practical effect" of the debtor's approach would have been "to freeze the creditor's secured interest at the judicially determined valuation," depriving the creditor of "the benefit of any increase in the value of the property by the time of the foreclosure sale," and giving the debtor a potential "windfall." *Dewsnup*, 502 U.S. at 417. But, the Court recognized, the basic bargain of a mortgage requires that "the creditor's lien stays with the real property until the foreclosure," and any appreciation in the property's value "rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors." *Id.* Read against that backdrop, section 506 does not permit a debtor to strip a creditor's lien simply because it is undersecured in light of the current value of the collateral.

3. *Dewsnup* addressed what in bankruptcy jargon is called a "strip down"—that is, the creditor's mortgage was only partially, not completely, underwater.

Every court of appeals to address the issue, other than the Eleventh Circuit, has nonetheless correctly concluded that *Dewsnup*'s reasoning is equally applicable to "strip offs"—cases in which a mortgage is completely underwater, typically because a senior lienholder is undersecured. *See, e.g.*, *Ryan* v. *Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *In re Talbert*, 344 F.3d 555 (6th Cir. 2003); *Palomar* v. *First Am. Bank*, 722 F.3d 992 (7th Cir. 2013).

The Eleventh Circuit stands alone in holding that *Dewsnup*'s reasoning does not govern strip-offs. In *McNeal* v. *GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012), the Eleventh Circuit held that its pre-*Dewsnup* decision in *Folendore*, which permitted a chapter 7 debtor to strip off a wholly underwater mortgage, is still binding circuit precedent, notwithstanding *Dewsnup*. App. 14a-15a.

In *McNeal*, the Eleventh Circuit recognized that other courts of appeals had determined that *Dewsnup* precluded such a strip-off. App. 13a. It also acknowledged that *Dewsnup* "seems to reject the plain language analysis that we used in *Folendore*." *Id.* 14a. The court of appeals nonetheless concluded that, in light of its "prior panel precedent" rule (under which "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is clearly on point"), "*Folendore*—not *Dewsnup*—controls in this case." *Id.* (internal quotation marks omitted). The Eleventh Circuit reasoned that *Dewsnup* was not "'clearly on point'" because it "disallowed only a 'strip down' of a partially secured mortgage lien and did not address a 'strip off' of a wholly unsecured lien." *Id.*

On May 20, 2014—almost two years after the lienholder's petition for rehearing was filed—the court refused to rehear the case en banc. App. 17a-18a.[1]

4. The debtor in this case, Edelmiro Toledo-Cardona, filed a chapter 7 petition in the U.S. Bankruptcy Court for the Middle District of Florida on April 25, 2013. Toledo-Cardona has two mortgages on his house, and the outstanding balance on the first mortgage exceeds the house's market value. He filed a motion to strip off Bank of America's junior lien under section 506(d).

In light of *McNeal*'s conclusion that *Folendore* remained good law, Bank of America conceded that its junior lien could be stripped off under then-binding precedent, but requested that the bankruptcy court stay the effectiveness of the order granting Toledo-Cardona's motion pending a final resolution of the issue by the en banc court of appeals or by this Court. The bankruptcy court denied that request and granted Toledo-Cardona's motion to strip off the junior lien. App. 7a-9a. Bank of America appealed to the district court, where—in light of *McNeal* and *Folendore*—the Bank moved for summary affirmance subject to the Bank's right to seek further appellate review. The district

[1] This past March, the Court denied a petition for certiorari arising out of the Eleventh Circuit and raising the identical legal issue, *see Bank of America, N.A.* v. *Sinkfield*, 134 S. Ct. 1760 (2014), but at that time the petition for rehearing en banc in *McNeal* was still pending. Now that the court of appeals has denied that petition, App. 17a-18a, and has since denied rehearing en banc in two more cases presenting the same question, *see* Order, *Bank of Am., N.A.* v. *Bello*, No. 14-10062 (11th Cir. June 17, 2014); Order, *Wilmington Trust, N.A.* v. *Malone*, No. 13-13688 (11th Cir. July 16, 2014), any prudential considerations weighing against review of the issue have been eliminated.

court granted the motion and affirmed the bankruptcy court's decision. *Id.* 5a-6a.

Before the Eleventh Circuit, recognizing that it was futile to argue for overruling *Folendore* before a panel, Bank of America requested that the en banc court hear the matter. The court declined. On the same day, and just days before the court of appeals declined to rehear *McNeal* en banc, the panel issued a brief per curiam decision holding that it was "bound as a panel to follow our Court's decision in *McNeal*." App. 3a.

Since then, the Eleventh Circuit has continued to issue brief per curiam decisions applying the reasoning in *McNeal* and *Folendore*—and to deny petitions for rehearing those decisions en banc—making clear that the court has no intention of reconsidering its position.

REASONS FOR GRANTING THE WRIT

This case, like *Caulkett*, presents a critical issue of bankruptcy law affecting a large number of chapter 7 cases: Whether a wholly underwater lien can be "stripped off" under the authority of section 506(d). Under the logic of this Court's decision in *Dewsnup*, the answer should be no. And the Fourth, Sixth, and Seventh Circuits—all the courts of appeals to consider the question save the Eleventh Circuit—have so held. In the Eleventh Circuit, however, the answer is yes. And debtors' counsel have taken notice: Hundreds, likely thousands, of motions to strip off underwater second liens have been filed in Alabama, Florida, and Georgia since the Eleventh Circuit endorsed the practice two years ago in *McNeal*. And at this point there can be no doubt that the Eleventh Circuit will not solve the problem itself. This Court should intervene, clarify that

Dewsnup governs both "strip downs" and "strip offs," and restore uniformity to the administration of chapter 7 cases across the country.

I. THE ELEVENTH CIRCUIT'S POSITION IS IRRECONCILABLE WITH *DEWSNUP*

In *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), this Court squarely repudiated the interpretation of section 506(d) that the Eleventh Circuit had adopted in *Folendore* v. *Small Business Administration*, 862 F.2d 1537 (11th Cir. 1989), which held that section 506(d) permits a debtor to strip off a wholly underwater second lien. The Eleventh Circuit's resurrection of *Folendore* in *McNeal* v. *GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012), cannot be reconciled with *Dewsnup*.

As discussed above, *see supra* p. 6, *Folendore* had reasoned that because section 506(a) bifurcates undersecured claims into a secured claim for the value of the collateral and an unsecured claim for the remainder, a claim secured by a lien that is wholly underwater is not an "allowed secured claim" within the meaning of section 506(d), and the lien may therefore be stripped off. 862 F.2d at 1538-1539.

Dewsnup made clear, however, that *Folendore*'s reading of the phrase "allowed secured claim" was mistaken. As this Court explained in describing the argument made by the creditor and the United States—which the Court adopted, *see* 502 U.S. at 417—"the words 'allowed secured claim' in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a)," as *Folendore* had done, but instead "should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured." *Id.* at 415. If a claim "has been 'allowed' … and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d)." *Id.* Read that way, section 506(d) has "the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed." *Id.* at 415-416.

Folendore therefore could not have survived *Dewsnup*. Indeed, in *McNeal*, the Eleventh Circuit acknowledged that *Dewsnup*'s reasoning "seems to reject" the "analysis that we used in *Folendore*." App. 14a. *McNeal* opined, however, that "[b]ecause *Dewsnup* disallowed only a 'strip down' of a partially secured mortgage lien and did not address a 'strip off' of a wholly unsecured lien, it is not 'clearly on point' with the facts in *Folendore*," and therefore *Folendore* remained binding in the Eleventh Circuit. *Id.* The Eleventh Circuit's order in this case in turn relied on *McNeal* as the basis for stripping Bank of America's lien. *Id.* 2a-3a.

Under the reasoning of *Dewsnup*, however, *McNeal*'s distinction between "strip downs" and "strip offs" is a distinction without a difference. *Dewsnup* interpreted section 506(d) to apply only "whenever a *claim* secured by the lien itself has not been allowed." 502 U.S. at 415 (emphasis added). In *Folendore*, *McNeal*, and this case, just as in *Dewsnup*, the creditor's *claim* was concededly valid: The debtor entered into a valid agreement with the mortgage-holder to borrow money, secured by a lien on the debtor's real property. Under *Dewsnup*'s logic, then, because Bank of America has a valid claim for the money it lent respondent, section 506(d) provides no basis for respondent to strip off Bank of America's lien.

To be sure, in *Folendore*, *McNeal*, and this case, just as in *Dewsnup*, the creditor's mortgage was underwater because the total amount the debtor borrowed exceeded the value of the debtor's property when the debtor filed for bankruptcy. As *Dewsnup* made clear, however, that a mortgage is underwater matters only to the treatment of the creditor's *claim* under section 506(a)—the portion of the creditor's claim exceeding the value of the creditor's security interest is treated as unsecured. It has no effect on the treatment of the creditor's *lien* under section 506(d). Rather, consistent with well-established pre-Code practice, "liens pass through bankruptcy unaffected" unless the underlying claim is disallowed, and "[a]ny increase over the judicially determined valuation" of the collateral "during bankruptcy rightly accrues to the benefit of the creditor." *Dewsnup*, 502 U.S. at 417. As a logical matter, that is true regardless of whether, in light of the present value of the property, the lien is partially or wholly underwater. Had the Eleventh Circuit faithfully applied *Dewsnup*, it would have concluded that section 506(d), as this Court has interpreted it, does not permit respondent to strip off Bank of America's wholly underwater second lien.

II. THE ELEVENTH CIRCUIT'S POSITION CONFLICTS WITH RULINGS FROM THE FOURTH, SIXTH, AND SEVENTH CIRCUITS

The Eleventh Circuit stands alone in refusing to apply *Dewsnup* in strip-off cases. The Fourth, Sixth, and Seventh Circuits—all of the other courts of appeals to consider the issue—have concluded that *Dewsnup*'s interpretation of section 506(d) bars a chapter 7 debtor from stripping off a wholly underwater lien securing a valid mortgage loan.

The Fourth Circuit so held in *Ryan* v. *Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001).

The debtor in *Ryan* contended that the creditor's wholly underwater lien could be stripped off under section 506(d) because "*Dewsnup* controls only a 'strip down' of a partially secured lien, not a 'strip off' of a wholly unsecured lien." *Id.* at 781. The Fourth Circuit rejected that argument, explaining:

> "Whether the lien is wholly unsecured or merely undersecured, the reasons articulated by the Supreme Court for its holding in *Dewsnup*—that liens pass through bankruptcy unaffected, that mortgagee and mortgagor bargained for a consensual lien which would stay with real property until foreclosure, and that any increase in value of the real property should accrue to the benefit of the creditor, not the debtor or other unsecured creditors—are equally pertinent."

Id. at 783 (quoting *In re Laskin*, 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998) (brackets omitted)). Concluding that "[t]he Court's reasoning in *Dewsnup* is equally relevant and convincing in a case like ours where a debtor attempts to strip off, rather than merely strip down, an approved but unsecured lien," the Fourth Circuit held that a debtor may not strip off a lien securing an allowed claim under section 506(d) even if the lien is wholly underwater. *Id.* at 782.

The Sixth Circuit subsequently reached the same conclusion, holding that *Dewsnup* "applies with equal force and logic" to strip-offs. *In re Talbert*, 344 F.3d 555, 556 (6th Cir. 2003). As in *Ryan*, the debtors in *Talbert* argued that "the secured status of a claim is determined by the security-reducing provision of § 506(a), and that pursuant to this provision, their junior lien is completely unsecured, and, thus, according to § 506(d), may be 'stripped off.'" *Id.* at 558 (footnotes omitted). The Sixth Circuit noted that a "similar argument was rejected [by *Dewsnup*] in the analogous context of a debtor's attempt to 'strip down' an under-collateralized creditor's lien in a Chapter 7 case" and explained that *Dewsnup*'s reasoning "applie[d] with equal validity to a debtor's attempt to effectuate a Chapter 7 'strip off'":

> As in the case of a "strip down," to permit a "strip off" would mark a departure from the pre-Code rule that real property liens emerge from bankruptcy unaffected. Also, as in the case of a "strip down," a "strip off" would rob the mortgagee of the bargain it struck with the mortgagor, i.e., that the consensual lien would remain with the property until foreclosure. … Finally, as was true in the context of "strip downs," Chapter 7 "strip offs" also carry the risk of a "windfall" to the debtors should the value of the encumbered property increase by the time of the foreclosure sale.

Id. at 561.

The Seventh Circuit recently reached the same conclusion in *Palomar* v. *First American Bank*, 722 F.3d 992 (7th Cir. 2013) (Posner, J.). The Seventh Circuit first explained that section 506(d) is "best interpreted as confirming the venerable principle … that bankruptcy law permits a lien to pass through bankruptcy unaffected, provided that it's a valid lien and secures a valid claim." *Id.* at 993. It then concluded that *Dewsnup* defeated the debtor's attempt to strip off the creditor's wholly underwater lien: "*Dewsnup* … holds that section 506(d) does not allow the bankruptcy court to squeeze down a fully valid lien to the current value of the property to which it's attached. That's the relief the debtor in this case is seeking. The only difference between this case and *Dewsnup* is that our debtors want to reduce the value of the lien to zero"—a difference, the Seventh Circuit determined, that is immaterial in light of *Dewsnup*'s reasoning. *Id.* at 994 (citation omitted).[2]

The Fourth, Sixth, and Seventh Circuits are not alone. Every lower court outside the Eleventh Circuit to have addressed the issue of which Bank of America is aware has also held that *Dewsnup*'s reasoning forbids both strip-downs and strip-offs in chapter 7. *See, e.g.*, *Laskin*, 222 B.R. 872; *Wachovia Mortg.* v. *Smoot*, 478 B.R. 555 (E.D.N.Y. 2012); *In re Cook*, 449 B.R. 664 (D.N.J. 2011); *In re Richins*, 469 B.R. 375 (Bankr. D. Utah 2012); *In re Bowman*, 304 B.R. 166 (Bankr. M.D. Pa. 2003); *In re Fitzmaurice*, 248 B.R. 356 (Bankr. W.D. Mo. 2000). Like the Fourth, Sixth, and Seventh Circuits, these courts reject the superficial distinction between strip-offs and strip-downs. "Rather, what is controlling is the Supreme Court's construction of § 506(d)." *Wachovia Mortg.*, 478 B.R. at 568.[3]

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[2] Notably, *Palomar* was briefed and argued after *McNeal* was issued, and the debtor asked the Seventh Circuit to follow this Court's reasoning in *McNeal*. *See* Appellants' Br. 33, *Palomar*, No. 12-3492 (7th Cir. Dec. 10, 2012) ("Clearly, the courts that have chosen to extend the holding of *Dewsnup* did so although it was not warranted. As the Eleventh Circuit stated, '[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court … is another thing.'" (quoting *McNeal*, 735 F.3d at 1265-1266 (reprinted in App. 15a))). The Seventh Circuit declined to adopt *McNeal*'s reasoning.

[3] Although a handful of lower courts outside the Eleventh Circuit initially ruled that *Dewsnup* did not apply to strip-offs, those decisions have been overruled or reversed. *See, e.g.*, *In re Farha*,

III. THIS CASE, LIKE CAULKETT, PRESENTS AN IDEAL OPPORTUNITY TO ADDRESS A QUESTION THAT IS CENTRAL TO THE ADMINISTRATION OF CHAPTER 7 BANKRUPTCIES

The question presented here is of central importance to the administration of chapter 7 cases and to the treatment of home mortgages in particular. Following the housing crash, the decline in value of many houses across the country left many second mortgages completely underwater. While chapter 7 debtors can eliminate their personal liability for such mortgage loans through a discharge, until the Eleventh Circuit's decision in *McNeal*, it was settled law that a mortgage-holder remained entitled to exercise its security interest in its collateral. As this Court put it, "the creditor's lien stays with the real property until foreclosure. That is what was bargained for by the mortgagor and the mortgagee." *Dewsnup*, 502 U.S. at 417.

As this case reflects, *McNeal* significantly altered the landscape in the Eleventh Circuit. As two local practitioners put it, "[t]he significance of *McNeal* can hardly be [over]stated, especially in this depressed real estate market," because "numerous properties subject to multiple mortgage liens are worth less than the amount of the first-priority mortgage." Bruce & Popowitz, *Get Busy Stripping Until The Eleventh Circuit Says Otherwise*, 2 S.D. Fla. Bankr. Bar Ass'n J. 1, 9 (2013).

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246 B.R. 547 (Bankr. E.D. Mich. 2000), *overruled by Talbert*, 344 F.3d 555; *In re Zempel*, 244 B.R. 625 (Bankr. W.D. Ky. 1999), *overruled by Talbert*, 344 F.3d 555; *In re Yi*, 219 B.R. 394 (E.D. Va. 1998), *overruled by Ryan*, 253 F.3d 778; *In re Smoot*, 465 B.R. 730 (Bankr. E.D.N.Y. 2011), *rev'd*, 478 B.R. 555 (E.D.N.Y. 2012).

Indeed, since *McNeal*, chapter 7 debtors have filed a flood of motions and complaints to strip off wholly underwater junior liens. In the Northern District of Georgia alone—which is where *McNeal* originated—debtors had filed more than 500 such motions by March 31, 2013. *See* Certification of Direct Appeal of Order 4, *In re Malone*, No. 12-61289, Dkt. 54 (Bankr. N.D. Ga. Apr. 25, 2013). And the flood has not abated one bit: In the Middle District of Florida, where Toledo-Cardona's case originates, 59 such motions—or about two per day—were docketed last month alone.[4] And Bank of America itself is currently litigating 67 other strip-off proceedings within the Eleventh Circuit, 15 of which were filed in the last two months.[5] What is more, in

[4] Counsel for Bank of America reviewed all motions listed on PACER that were filed in June 2014 in the U.S. Bankruptcy Court for the Middle District of Florida.

[5] *Bank of Am., N.A.* v. *Belotserkovsky*, No. 14-11012 (11th Cir.); *Bank of Am., N.A.* v. *Boykins*, No. 13-14908 (11th Cir.); *Bank of Am., N.A.* v. *Braswell*, No. 13-15777 (11th Cir.); *Bank of Am., N.A.* v. *Brown*, No. 13-14298 (11th Cir.); *Bank of Am., N.A.* v. *Buenaseda*, No. 13-15037 (11th Cir.); *Bank of Am., N.A.* v. *Garro*, No. 14-11676 (11th Cir.); *Bank of Am., N.A.* v. *Hamilton-Presha*, No. 14-10137 (11th Cir.); *Bank of Am., N.A.* v. *Johnson*, No. 14-11387 (11th Cir.); *Bank of N.Y. Mellon* v. *Lang*, No. 14-11373 (11th Cir.); *Bank of Am, N.A.* v. *Lee*, No. 14-11353 (11th Cir.); *Bank of Am., N.A.* v. *Lopez*, No. 14-10518 (11th Cir.); *Bank of Am., N.A.* v. *Madden*, No. 13-14438 (11th Cir.); *Bank of Am., N.A.* v. *Nemcik*, No. 14-11290 (11th Cir.); *Bank of Am., N.A.* v. *Peele*, No. 13-15839 (11th Cir.); *Bank of Am., N.A.* v. *Waits*, No. 14-11408 (11th Cir.); *Bank of Am., N.A.* v. *Lakhani*, No. 14-12749 (11th Cir.); *Bank of Am., N.A.* v. *Phillips*, No. 14-12585 (11th Cir.); *Bank of Am., N.A.* v. *Vander Iest*, No. 14-12486 (11th Cir.); *Bank of Am., N.A.* v. *Vander Iest*, No. 14-12406 (11th Cir.); *Bank of Am., N.A.* v. *Evans*, No. 14-12887 (11th Cir.); *Bank of Am., N.A.* v. *Farmer*, No. 14-12444 (11th Cir.); *Bank of Am., N.A.* v. *Hall*, No. 14-11292 (11th Cir.); *Bank of Am., N.A.* v. *Allen*, No. 14-13002 (11th Cir.); *Bank of Am., N.A.* v. *Beursken*, No. 14-12546 (11th

many of these proceedings, the debtor is attempting to reopen a chapter 7 case that was closed months or even years ago in order to strip off a junior lien on the debtor's property. *See, e.g.*, *In re Davis*, No. 12-21148 (Bankr. N.D. Ga.) (bankruptcy case was closed in July 2012, but debtor filed strip-off motion in October 2013).

Cir.); *Bank of Am., N.A.* v. *Sardina*, No. 14-12563 (11th Cir.); *Bank of Am., N.A.* v. *Glaspie*, No. 14-743 (N.D. Ga.); *Bank of Am., N.A.* v. *Pampalon*, No. 14-2235 (N.D. Ga.); *Bank of Am., N.A.* v. *Bogdan*, No. 14-1598 (N.D. Ga.); *Bank of Am., N.A.* v. *Rayoni*, No. 14-2172 (N.D. Ga.); *Bank of Am., N.A.* v. *Miller*, No. 14-1377 (N.D. Ga.); *Bank of Am., N.A.* v. *Cumpson*, No. 14-2022 (N.D. Ga.); *Bank of Am., N.A.* v. *Marshall*, No. 14-2412 (N.D. Ga.); *Bank of Am., N.A.* v. *Brantley*, No. 14-774 (M.D. Fla.); *Bank of Am., N.A.* v. *Corrad*, No. 14-343 (M.D. Fla.); *Bank of Am., N.A.* v. *Hawkins*, No. 14-1088 (M.D. Fla.); *Bank of Am., N.A.* v. *Hackbart*, No. 14-1398 (M.D. Fla.); *In re Auriemmo*, No. 13-69444 (Bankr. N.D. Ga.); *In re Copeland*, No. 13-74750 (Bankr. N.D. Ga.); *In re Langford*, No. 13-74530 (Bankr. N.D. Ga.); *In re Lomax*, No. 13-62584 (Bankr. N.D. Ga.); *In re Maclin*, No. 13-76374 (Bankr. N.D. Ga.); *In re McDonald*, No. 13-11522 (Bankr. N.D. Ga.); *In re Rubio*, No. 13-43150 (Bankr. N.D. Ga.); *In re Smart*, No. 13-13053 (Bankr. N.D. Ga.); *In re Yarbrough*, No. 13-12547 (Bankr. N.D. Ga.); *In re Jackson*, No. 14-40990 (Bankr. N.D. Ga.); *In re Orea*, No. 13-20338 (Bankr. N.D. Ga.); *In re Charles*, No. 14-63276 (Bankr. N.D. Ga.); *In re Clay*, No. 14-60701 (Bankr. N.D. Ga.); *Thomas* v. *Bank of Am., N.A.*, No. 14-3032 (Bankr. M.D. Ga.); *In re Colon*, No. 13-13430 (Bankr. M.D. Fla.); *In re Corrad*, No. 14-5054 (Bankr. M.D. Fla.); *In re Gnerre*, No. 13-8158 (Bankr. M.D. Fla.); *In re Scharboneau*, No. 13-6751 (Bankr. M.D. Fla.); *In re Tower*, No. 13-10941 (Bankr. M.D. Fla.); *Million* v. *Bank of Am., N.A.*, No. 13-435 (Bankr. M.D. Fla.); *Violenusellis* v. *Bank of Am., N.A.*, No. 14-151 (Bankr. M.D. Fla.); *In re Fenton*, No. 14-868 (Bankr. M.D. Fla.); *In re Herrick*, No. 14-1087 (Bankr. M.D. Fla.); *In re Rodriguez*, No. 14-3540 (Bankr. M.D. Fla.); *In re Melendez*, No. 14-6291 (Bankr. M.D. Fla.); *In re Parada*, No. 14-6063 (Bankr. M.D. Fla.); *In re Gilleland*, No. 13-11801 (Bankr. M.D. Fla.); *In re Amador*, No. 13-15740 (Bankr. S.D. Fla.); *In re Corriveau*, No. 13-40717 (Bankr. N.D. Fla.); *In re Mayo*, No. 14-30209 (Bankr. N.D. Fla.); *In re Tabares*, No. 14-22694 (Bankr. S.D. Fla.).

Faced with this onslaught of motions, bankruptcy courts within the Eleventh Circuit have repeatedly expressed the need for guidance from a higher court. As one bankruptcy judge recently put it, "I really think the Eleventh Circuit did not correctly decide *McNeal*, but … I'm bound by that …. [T]here is a conflict in the circuits …. So something needs to happen somewhere." Tr. 6, *In re Langford*, No. 13-74530 (Bankr. N.D. Ga. Mar. 6, 2014); *see also, e.g.*, *In re Valone*, 500 B.R. 645, 650 n.23 (Bankr. M.D. Fla. 2013) (noting that "[t]he ability of chapter 7 debtors to strip off junior mortgages is questionable" but that *McNeal* so held); Tr. 6-7, *In re Jackson*, No. 14-40990 (Bankr. N.D. Ga. July 30, 2014) (granting motion to strip off junior lien in light of *McNeal* but noting that the court believes *McNeal* was wrongly decided and that the Eleventh Circuit or Supreme Court "ought to address" the issue); Tr. 2, *In re Tower*, No. 13-10941 (Bankr. M.D. Fla. Feb. 13, 2014) (noting that the court has "been granting these strip-offs because [*McNeal*] is the circuit precedent," although the court "frankly agree[d] with [Bank of America]").

Were the practice of voiding wholly underwater junior liens to spread beyond the Eleventh Circuit, it could have unexpected and undesirable consequences. As Judge Posner has noted, "bankruptcy provisions 'friendly to debtors' are so only in the short run; in the long run, the fewer rights that creditors have in the event of default, the higher interest rates will be to compensate creditors for the increased risk of loss." *In re River E. Plaza, LLC*, 669 F.3d 826, 833 (7th Cir. 2012). Secured loans, including home mortgages, provide borrowers with lower interest rates precisely because the creditor can look to its lien for repayment if the debtor defaults. *See* Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625, 683 (1997).

And a lien has value to a creditor even if it is currently underwater because the property securing the lien may appreciate in the future, causing the lien to regain value as well. *Dewsnup* explained that this appreciation in value "rightly accrues to the benefit of the creditor." 502 U.S. at 417. But the Eleventh Circuit's rule changes that equation, depriving junior lenders of their bargained-for rights and potentially leading to costlier mortgages.

Given the practical and economic importance of the question presented, the sheer volume of cases presenting this issue, *see supra* n.5, and the need for uniformity among the circuits in this central aspect of chapter 7 practice, the Eleventh Circuit's wrong-headed approach warrants immediate review. Like *Caulkett*, this case presents an ideal opportunity: There are no facts in dispute; the case is a particularly clean vehicle for reaching and deciding the question presented; and there is no need for further percolation in the lower courts because the question has been fully aired over the twenty years since *Dewsnup* and thoroughly discussed in decisions by four different courts of appeals. The Eleventh Circuit has also made clear that it will not reconsider its position. In short, there is no reason for delay. This Court should grant review of this issue now and reverse the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari in *Bank of America, N.A.* v. *Caulkett*, No. 13-1421, should be granted and this petition held pending that case's disposition. In the alternative, the petition in this case should be granted.

Respectfully submitted.

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AUGUST 2014

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-15855
Non-Argument Calendar

D.C. Docket Nos. 8:13-cv-02558-SDM,
8:13-bk-05393-KRM

IN RE: EDELMIRO TOLEDO-CARDONA,
Debtor.

BANK OF AMERICA, NA,
Plaintiff-Appellant,
versus

EDELMIRO TOLEDO-CARDONA,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(May 15, 2014)

Before TJOFLAT, MARTIN, and JORDAN, Circuit Judges.

PER CURIAM:

Bank of America appeals from the district court's order affirming an order from the bankruptcy court voiding Bank of America's lien on Edelmiro Toledo-

Cardona's property in a Chapter 7 bankruptcy proceeding he initiated. Toledo-Cardona's property was subject to two mortgage liens at the time he filed for bankruptcy. The debt owed on the first mortgage exceeded the fair market value of the property. Bank of America held the second mortgage, which had a value of over $100,000. Because the debt secured by the first lien exceeded the value of the property, Bank of America's junior lien was considered to be wholly "underwater." This being the case, Toledo-Cardona moved the bankruptcy court to "strip off" or "void"—that is, extinguish in its entirety—Bank of America's lien.

Bank of America's response to Toledo-Cardona's motion acknowledged that under binding Eleventh Circuit precedent holding that a wholly underwater junior lien is voidable, Toledo-Cardona's motion should be granted. *See Folendore v. U.S. Small Bus. Admin.*, 862 F.2d 1537, 1538-39 (11th Cir. 1989); *see also McNeal v. GMAC Mortg., LLC*, 735 F.3d 1263, 1265-66 (11th Cir. 2012) (per curiam). For that reason, the bankruptcy court granted Toledo-Cardona's motion. Bank of America appealed to the district court, but moved for summary affirmance in light of this Court's binding precedent. The district court granted the motion, and Bank of America now seeks the appellate review that its motion for summary affirmance was intended to expedite.

Bank of America maintains that *Folendore* and *McNeal* should be overturned in light of *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773 (1992), which held that a chapter 7 debtor could not "strip down" a creditor's lien on real property where the value of the property is less than what is due to be paid to the creditor. *Id.* at 417, 112 S. Ct. at 778. But in *McNeal*, we reaffirmed *Folendore* despite the holding in *Dewsnup*.

McNeal, 735 F.3d at 1265-66. As Bank of America concedes, we are bound as a panel to follow our Court's decision in *McNeal*. We therefore **AFFIRM**.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 8:13-cv-2558-T-23

BANK OF AMERICA, N.A.,
Appellant,

v.

EDELMIRO TOLEDO-CARDONA,
Appellee.

December 13, 2013

ORDER

Bank of America's amended, unopposed motion (Docs. 11 and 12) for summary affirmance is **GRANTED**, and the bankruptcy judge's September 10, 2013, order (Doc. 1-3) granting Edelmiro Toledo-Cardona's verified motion (Doc. 1-7) to determine Bank of America's secured status and to strip Bank of America's lien on discharge is **AFFIRMED**.*

The clerk will close the case and enter judgment accordingly.

ORDERED in Tampa, Florida, on December 13, 2013.

* Bank of America's original motion (Doc. 10) is DENIED AS MOOT.

/s/ Steven D. Merryday

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 8:13-bk-05393-KRM
Chapter 7

IN RE: EDELMIRO TOLEDO-CARDONA,
Debtor.

September 10, 2013

ORDER GRANTING VERIFIED MOTION TO DETERMINE SECURED STATUS OF BANK OF AMERICA, N.A. AND TO STRIP LIEN EFFECTIVE ON DISCHARGE

THIS CASE came on for hearing on September 3, 2013, upon Debtor's Motion to Determine Secured Status of Bank of America, N.A. and to Strip Lien Effective Upon Discharge (Docket #8). If Bank of America, N.A. has not timely filed a proof of claim in this case, the Motion is not deemed to be an informal proof of claim except for the purpose of initiating the Debtor's ability to request relief pursuant to 11 U.S.C. §506(a).

The real property (the "Real Property") that is the subject of the Motion is located at 6906 E Creek Dr, Tampa, Hillsborough County, Florida, and more particularly described as follows:

> The Southerly 80 fee of Lot 4, Block 5, BYARS HEIGHTS RESUBDIVISION of Block 5, as

recorded in Plat Book 32, Page 84, of the Public Records of Hillsborough County, Florida.

Parcel ID: **U-27-28-17-0AW-000005-00004.0**

For reasons stated orally and recorded in open Court that shall constitute the decision of this Court, it is

ORDERED:

1. The Motion is GRANTED.

2. If Bank of America, N.A. timely filed a proof of claim, the claim shall be treated as an unsecured claim in this Chapter 7 case.

3. The mortgage on the Real Property held by Bank of America, N.A on November 29 2007 in Official Record Book 18281, Page 1801 - 1808, Instrument #2007500493 of the official records of Hillsborough County, Florida, shall be deemed void, and shall be extinguished automatically, without further court order, upon the recordation in the public records of a certified copy of this Order together with (a) a certified copy of the Debtors' Chapter 7 discharge order in this case or (b) such other papers the Court may specify by separate order. However, the Court reserves jurisdiction to consider, if appropriate, the avoidance of Bank of America, N.A.'s mortgage lien prior to entry of the Debtor's discharge.

4. This Order does not prevent Bank of America, N.A. from asserting, at any time prior to entry of the Debtor's discharge, any rights it may have as a defendant in any foreclosure proceeding brought by a senior mortgagee, including the right to claim excess proceeds from any foreclosure sale.

DONE and ORDERED in Tampa, Florida on September 10, 2013.

/s/ K. Rodney May
K. Rodney May
United States Bankruptcy Judge

Attorney Kelley M. Petry is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

Copies furnished to:
Kelley M. Petry, Esq., attorney for debtor, P.O. Box 7866, Tampa, FL 33673
Shari Streit Jansen, trustee, P.O. Box 50667, Sarasota, FL 34232
Edelmiro Toledo Cardona, debtor, 6906 E Creek Dr, Tampa, FL 33615
Bank of America, N.A., Bankruptcy Department, P.O. Box 26012, NC4-105-02-99, Greensboro, NC 27420
Bank of America, N.A., c/o CT Corporation System, Registered Agent, 1200 S. Pine Island Dr., Plantation, FL 33324
Bank of America, N.A., c/o Bruce R. Thompson, Chief Financial Officer, 150 N. College St., NC1-028-17-06, Charlotte, NC 28255
Emily Y. Rottman, Esq., 50 N. Laura St, Ste 3300, Jacksonville, FL 32202

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-11352
Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-01612-TCB;
09-BKC-78173-PWB

IN RE: LORRAINE MCNEAL,
Debtor.

LORRAINE MCNEAL,
Plaintiff-Appellant,
v.

GMAC MORTGAGE, LLC, HOMECOMINGS FINANCIAL, LLC, a GMAC company,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Filed: May 11, 2012
[735 F.3d 1263]

* * *

[1264] Before TJOFLAT, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

Lorraine McNeal appeals the district court's affirmance of the bankruptcy court's denial of McNeal's "Motion to Determine the Secured Status of Claim." In her motion, McNeal sought to "strip off"[1] a second priority lien on her home, pursuant to 11 U.S.C. § 506(a) and (d). Reversible error has been shown; we reverse and remand for additional proceedings.

McNeal filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In her petition, McNeal reported that her home was subject to two mortgage liens: a first priority lien in the amount of $176,413 held by HSBC and a second priority lien in the amount of $44,444 held by Homecomings Financial, LLC, a subsidiary of GMAC Mortgage, LLC (colletively, "GMAC"). McNeal also reported that her home's fair market value was $141,416. The parties do not dispute these factual allegations.

McNeal then sought to "strip off" GMAC's second priority lien, pursuant to sections 506(a) and 506(d). McNeal contended that, because the senior lien exceeded the home's fair market value, GMAC's junior lien was wholly unsecured and, thus, void under section 506(d). The bankruptcy court denied the motion, concluding that section 506(d) did not permit a Chapter 7 debtor to "strip off" a wholly unsecured lien. The district court affirmed.

When the district court affirms the bankruptcy court's order, we review only the bankruptcy court's decision on appeal. *Educ. Credit Mgmt. Corp. v. Mosley*, 494 F.3d 1320, 1324 (11th Cir. 2007). And we review the bankruptcy court's legal conclusions *de novo*.

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[1] In bankruptcy terms, a "strip down" of an undersecured lien reduces the lien to the value of the collateral to which it attaches and a "strip off" removes a wholly unsecured lien in its entirety.

Hemar Ins. [1265] *Corp. of Am. v. Cox*, 338 F.3d 1238, 1241 (11th Cir. 2003).

That GMAC's junior lien is both "allowed" under 11 U.S.C. § 502 and wholly unsecured pursuant to section 506(a) is undisputed.[2] To determine whether such an allowed—but wholly unsecured—claim is voidable, we must then look to section 506(d), which provides that "[t]o the extent that a lien secures a claim against a debtor that is not an allowed secured claim, such lien is void." *See* 11 U.S.C. § 506(d).

Several courts have determined that the United States Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992)—which concluded that a Chapter 7 debtor could not "strip down" a partially secured lien under section 506(d)—also precludes a Chapter 7 debtor from "stripping off" a wholly unsecured junior lien such as the lien at issue in this appeal. *See, e.g.*, *Ryan v. Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *Talbert v. City Mortg. Serv.*, 344 F.3d 555 (6th Cir. 2003); *Laskin v. First Nat'l Bank of Keystone*, 222 B.R. 872 (B.A.P. 9th Cir. 1998). But the present controlling precedent in the Eleventh Circuit remains our decision in *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989). In *Folendore*, we concluded that an allowed claim that was wholly unsecured—just as GMAC's claim is here—was voidable

[2] 11 U.S.C. § 506(a) provides in pertinent part:

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

under the plain language of section 506(d).[3] 862 F.2d at 1538-39.

A few bankruptcy court decisions within our circuit—including the decision underlying this appeal—have treated *Folendore* as abrogated by *Dewsnup*. *See, e.g., In re McNeal*, No. A09-78173, 2010 Bankr. LEXIS 1350, at *9-12 (Bankr. N.D. Ga. Apr. 9, 2010); *In re Swafford*, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993); *In re Windham*, 136 B.R. 878, 882 n.6 (Bankr. M.D. Fla. 1992). But *Folendore*—not *Dewsnup*—controls in this case.

"Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'" *Atl. Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007). Because *Dewsnup* disallowed only a "strip down" of a partially secured mortgage lien and did not address a "strip off" of a wholly unsecured lien, it is not "clearly on point" with the facts in *Folendore* or with the facts at issue in this appeal.

Although the Supreme Court's reasoning in *Dewsnup* seems to reject the plain language analysis that we used in *Folendore*, "'[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding.'" *Atl. Sounding Co., Inc.*, 496 F.3d at 1284 (citing *Crawford-El v. Britton*, 118 S. Ct. 1584, 1590 (1998)). "[T]hat the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision." *Id.* "As we have stat-

[3] Although *Folendore* addressed the 1978 version of the Bankruptcy Code, the 1984 amendments to the Code did not alter the pertinent language in section 506(a) or (d).

ed, '[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit **[1266]** law is another thing." *Id.* In fact, the Supreme Court—noting the ambiguities in the bankruptcy code and the "the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations"—limited its *Dewsnup* decision expressly to the precise issue raised by the facts of the case. 112 S. Ct. at 778.

Because—under *Folendore*—GMAC's lien is voidable under section 506(d), we reverse and remand for additional proceedings consistent with this decision.

REVERSED AND REMANDED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-11352-CC

IN RE: LORRAINE MCNEAL,
Debtor.

LORRAINE MCNEAL,
Plaintiff-Appellant,
versus

GMAC MORTGAGE, LLC, HOMECOMINGS FINANCIAL, LLC, a GMAC Company,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

Filed: May 20, 2014

Before: TJOFLAT, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE