No. 13-

IN THE
Supreme Court of the United States

BANK OF AMERICA, N.A.,
Petitioner,

v.

DAVID LAMAR SINKFIELD,
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

CRAIG GOLDBLATT
DANIELLE SPINELLI
Counsel of Record
ISLEY MARKMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

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.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 13-

BANK OF AMERICA, N.A.,

Petitioner,

v.

DAVID LAMAR SINKFIELD,

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

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 in this case.

OPINIONS BELOW

The Eleventh Circuit's order summarily affirming the district court is unpublished and appears at App. 1a-2a. The Eleventh Circuit's order denying Bank of America's petition for rehearing en banc (which the court construed as a motion for reconsideration) is unpublished and appears at App. 11a. The district court's order and judgment affirming the bankruptcy court are unpublished and appear at App. 3a. The bankruptcy

court's order granting respondent's motion to strip off Bank of America's second lien on his house is unpublished and appears at App. 5a-9a. The Eleventh Circuit's decision in *McNeal* v. *GMAC Mortgage, LLC*, 2012 WL 8964264 (11th Cir. May 11, 2012), the basis for the summary affirmance in this case, is published but does not yet have a reported citation, and is reproduced at App. 15a-19a.

JURISDICTION

The Eleventh Circuit entered its order summarily affirming the district court on July 30, 2013. App. 1a-2a. It entered its order denying Bank of America's petition for rehearing en banc (which the court construed as a motion for reconsideration) on September 9, 2013. App. 11a. 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 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 holding that a chapter 7 debtor may strip off a lien in such circumstances, the Eleventh Circuit disregarded this Court's holding and reasoning in *Dewsnup* v. *Timm*, 502 U.S. 410 (1992)—which should have dictated the opposite conclusion—and expressly rejected the contrary holdings of the Fourth, Sixth, and Seventh Circuits. This Court should grant review.

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. *See* 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 its value 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. *See 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. *See 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. *See 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 argument 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*, 2012 WL 8964264 (11th Cir. May 11, 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. 15a-19a.

In *McNeal*, the Eleventh Circuit recognized that other courts of appeals had determined that *Dewsnup* precluded such a strip-off. App. 17a. It also acknowledged that *Dewsnup* "seems to reject the plain language analysis that we used in *Folendore*." *Id.* 18a. 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.* 18a, 19a. 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.* 18a.[1]

4. The debtor in this case, David Lamar Sinkfield, filed a chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of Georgia. Sinkfield has two mortgages on his house, and the outstanding balance on the first mortgage exceeds the house's current market

[1] The creditor in *McNeal*, GMAC Mortgage, filed a petition for rehearing en banc in June 2012, but the court of appeals has taken no action on the petition. After filing the petition, GMAC sought bankruptcy protection, delaying consideration of the petition. On August 2, 2013, however, the Eleventh Circuit issued an order noting that the automatic stay in the GMAC bankruptcy had been lifted to allow the rehearing proceedings in *McNeal* to go forward, ordering that the panel decision in *McNeal* be published, and stating that the court would not rule on the rehearing petition until at least 30 days later. Order, *McNeal*, No. 11-11352, (11th Cir. Aug. 2, 2013). More than four months later, the Eleventh Circuit has still taken no action on the petition.

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* remains binding precedent, the parties agreed to resolve the motion by stipulated order, while preserving Bank of America's right to seek appellate review. The parties stipulated, and the bankruptcy court held, that under *McNeal* and *Folendore*, section 506(d) permits Sinkfield to strip off Bank of America's second lien. App. 5a-9a. The bankruptcy court ordered that the second lien be cancelled "upon the later of (a) the Debtor's receipt of a discharge, and (b) this order becoming final and not subject to further appeal or review." *Id.* 7a. Bank of America appealed to the district court, where—in light of *McNeal* and *Folendore*—the parties filed a joint motion for summary affirmance, again expressly reserving the Bank's right to seek further appellate review. The district court entered an order summarily affirming the bankruptcy court. *Id.* 3a.

Because *McNeal* had held that *Folendore* was binding on panels within the Eleventh Circuit, and it would thus have been futile for Bank of America to argue for overruling *Folendore* before a panel, the parties jointly filed a motion requesting that the Eleventh Circuit panel summarily affirm the district court, so that Bank of America could promptly seek en banc review and/or certiorari. The panel granted the parties' motion and summarily affirmed the district court, noting that the parties "jointly request[ed] summary disposition of this appeal to allow [Bank of America] to seek *en banc* review in this Court and/or petition the Supreme Court for a writ of certiorari regarding the continued viability of *Folendore*." App. 1a-2a.

Bank of America then filed a petition for rehearing en banc, requesting that the en banc court of appeals reconsider and overrule *Folendore* and *McNeal*. Despite previously acknowledging that the purpose of the motion for summary affirmance was to permit Bank of America promptly to seek en banc review, the Eleventh Circuit construed the petition as a motion for reconsideration of the summary affirmance order and referred it to the panel, which denied the motion without explanation. App. 11a.[2] The upshot is that the Eleventh Circuit has upheld the order stripping Bank of America's second lien, on the authority of *McNeal* and *Folendore*, and has refused to reconsider its ruling—even while openly acknowledging that the ruling is in substantial tension with *Dewsnup* and splits with three other courts of appeals.

REASONS FOR GRANTING THE WRIT

This case 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(b). 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

[2] In subsequent conversations with Bank of America's counsel, the Eleventh Circuit clerk's office stated that, under the court's local rules, a summary affirmance order was an "administrative order" and would not be reconsidered en banc. *See* 11th Cir. R. 35-4 ("A petition for rehearing *en banc* tendered with respect to [an administrative order] will not be considered by the court *en banc*, but will be referred as a motion for reconsideration to the judge or panel that entered the order sought to be reheard"). The clerk's office informed Bank of America that it could not seek any further relief in the Eleventh Circuit.

Circuit, however, the answer is yes. And debtors' counsel have taken notice: Hundreds, perhaps thousands, of motions to strip off underwater second liens have been filed in Alabama, Florida, and Georgia since the Eleventh Circuit endorsed the practice 16 months ago in *McNeal*. The Eleventh Circuit has shown that it is unwilling to 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 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*, 2012 WL 8964264 (11th Cir. May 11, 2012), cannot be reconciled with *Dewsnup*.

As discussed above, *see supra* pp. 5-6, *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. *See* 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. 18a. *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.* 1a-2a.

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 away 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 all 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 se-

cures 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).[3]

The Fourth, Sixth, and Seventh Circuits are not alone. Every lower court outside the Eleventh Circuit to have addressed the issue 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

[3] 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*, 2012 WL 8964264, at *2 (App. 19a))). The Seventh Circuit declined to adopt *McNeal*'s reasoning.

the Supreme Court's construction of § 506(d)." *Smoot*, 478 B.R. at 568.[4]

III. This Case 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 &

---

[4] 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*, 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).

Popowitz, *Get Busy Stripping Until The Eleventh Circuit Says Otherwise*, 2 S.D. Fla. Bankr. Bar Ass'n J. 9 (2013).

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, 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—nearly 50 such motions were docketed in the Northern District of Georgia just in November 2013.[5] In addition to this case, Bank of America itself is currently litigating 35 strip-off proceedings within the Eleventh Circuit.[6] What is more, in many of these pro-

---

[5] Counsel for Bank of America reviewed all motions listed on PACER filed in November 2013 in the U.S. Bankruptcy Court for the Northern District of Georgia and found 46 strip-off motions in chapter 7 cases.

[6] *Bank of Am., N.A.* v. *Banks*, No. 13-13867 (11th Cir.); *Bank of Am., N.A.* v. *Madden*, No. 13-14438 (11th Cir.); *Bank of Am., N.A.* v. *Boykin*, No. 13-14908 (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. *Bello*, No. 13-2519 (N.D. Ga.); *In re Garro*, No. 13-3405 (N.D. Ga.); *In re Lomax*, No. 13-62584 (Bankr. N.D. Ga.); *In re Jackson*, No. 13-66882 (Bankr. N.D. Ga.); *In re McDonald*, No. 13-11522 (Bankr. N.D. Ga.); *In re Peele*, No. 12-81760 (Bankr. N.D. Ga.); *In re Sagoes*, No. 13-66247 (Bankr. N.D. Ga.); *In re Johnson*, No. 13-64749 (Bankr. N.D. Ga.); *In re Reid*, No. 13-68943 (Bankr. N.D. Ga.); *In re Auriemmo*, No. 13-69444 (Bankr. N.D. Ga.); *In re Hamilton-Presha*, No. 13-68483 (Bankr. N.D. Ga.); *In re Beloteserkovsky*, No. 13-74836 (Bankr. N.D. Ga.); *In re Waits*, No. 11-70660 (Bankr. N.D. Ga.); *In re Lee*, No. 13-72055 (Bankr. N.D. Ga.); *In re Glaspie*, No. 13-69958 (Bankr. N.D. Ga.); *Bank of Am., N.A.* v. *Toledo-Cardona*, No. 13-2558 (M.D. Fla.); *In re Maisonet*, No. 13-4396 (Bankr. M.D. Fla.); *Lang* v. *Bank of N.Y. Mellon*, No. 13-265 (Bankr. M.D. Fla.); *In re*

ceedings, 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).

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 chang-

---

Braswell, No. 13-5806 (Bankr. M.D. Fla.); *In re Thompson*, No. 13-6516 (Bankr. M.D. Fla.); *In re Lopez*, No. 13-7503 (Bankr. M.D. Fla.); *In re Farmer*, No. 13-10595 (Bankr. M.D. Fla.); *In re Gnerre*, No. 13-8158 (Bankr. M.D. Fla.); *In re McGinnis*. No. 13-8714 (Bankr. M.D. Fla.); *In re Hall*, No. 13-10498 (Bankr. M.D. Fla.); *In re Caulkett*, No. 13-5537 (Bankr. M.D. Fla.); *Allen* v. *Bank of Am., N.A.*, No. 13-216 (Bankr. M.D. Fla.); *In re Nemcik*, No. 13-9954 (Bankr. M.D. Fla.); *In re Beursken*, No. 13-3686 (Bankr. M.D. Fla.); *In re Brantley*, No. 13-500 (Bankr. M.D. Fla.).

es 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 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. This case presents an ideal opportunity. Because the parties have stipulated to all the relevant facts, the case is a particularly clean vehicle for reaching and deciding the question presented. There is no need for further percolation in the lower courts; the question has been fully aired over the twenty years since *Dewsnup*, and thoroughly discussed in decisions by four different courts of appeals.

Nor is there any reason to believe that the Eleventh Circuit will switch gears and on its own initiative solve the problem it has created. As discussed above, *see supra* pp. 9, 11, the court has been given multiple opportunities to do so and has failed to take those opportunities despite being made aware of the profound disruption *McNeal* has caused within the circuit in the nineteen months since it was decided. In this very case, the Eleventh Circuit refused to consider the issue en banc despite affirming the strip-off of Bank of America's lien based on its panel precedent in *McNeal* and *Folendore*. In view of the acknowledged split of authority among the circuits, and Bank of America's having made all possible efforts to obtain en banc review from the Eleventh Circuit in this case, it would be inequitable for this Court to permit this judgment to become final in the hope that the Eleventh Circuit may eventually take action in some other case. In short, there is no reason for delay. This Court should grant review now and reverse the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CRAIG GOLDBLATT
DANIELLE SPINELLI
Counsel of Record
ISLEY MARKMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

DECEMBER 2013

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-12141-EE
Filed: July 30, 2013

IN RE: DAVID LAMAR SINKFIELD,
Debtor.

BANK OF AMERICA, NA,
Plaintiff-Appellant,
v.

DAVIS LAMAR SINKFIELD,
Defendant-Appellee.

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

BEFORE: HULL, MARCUS, and JORDAN, Circuit Judges.

BY THE COURT:

Now before the Court is the parties' joint motion for summary affirmance or, in the alternative, to expedite the appeal.

The parties have stipulated that, under the reasoning in *McNeal v. GMAC Mortgage, LLC*, No. 11-11352, 477 F. App'x 562, 564 (11th Cir. May 11, 2012) (unpubl.), *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989), remains binding precedent in this Circuit notwithstanding *Dewsnup v. Timm*, 502

U.S. 410, 112 S.Ct. 773 (1992). They jointly request summary disposition of this appeal to allow Appellant to seek *en banc* review in this Court and/or petition the Supreme Court for a writ of certiorari regarding the continued viability of *Folendore*.

The joint motion for summary affirmance is GRANTED. The district court's May 9, 2013, order summarily affirming the bankruptcy court's April 29, 2013, order is summarily AFFIRMED.

The parties' alternative motion to expedite the appeal is DENIED AS MOOT.

The Clerk is directed to close the file on this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No.: 1:13-cv-01541-TCB
Filed: May 9, 2013

IN RE: DAVID LAMAR SINKFIELD,
Debtor.

BANK OF AMERICA, NA,
Appellant,
v.
DAVIS LAMAR SINKFIELD,
Appellee.

ORDER

For the reasons forth in the Joint Motion for Summary Affirmance filed by Bank of America, N.A. and David Lamar Sinkfield, the Stipulated Order Resolving Contested Matter Subject To Appellate Review entered by the United States Bankruptcy Court for the Northern District of Georgia (Sacca, J.) on April 29, 2013 is hereby AFFIRMED.

IT IS SO ORDERED, this 9th day of May, 2013.

/s/ Timothy C. Batten, Sr.
HON. TIMOTHY C. BATTEN, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IT IS ORDERED as set forth below: [Court Seal]

Date: April 29, 2013

/s/ James R. Sacca
James R. Sacca
U.S. Bankruptcy
Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No.: 12-81094-JRS
Chapter 7
CONTESTED MATTER

IN RE: DAVID LAMAR SINKFIELD,
Debtor.

DAVID LAMAR SINKFIELD,
Movant,
v.
BANK OF AMERICA, N.A.,
Respondent.

STIPULATED ORDER RESOLVING CONTESTED MATTER SUBJECT TO RIGHT OF APPELLATE REVIEW

WHEREAS, David Lamar Sinkfield, Debtor in the above-captioned Chapter 7 case ("Movant") filed a motion (the "Motion") seeking an order voiding a junior

lien held and/or serviced by Bank of America, N.A. (the "Respondent") [ECF No. 9] (Movant and Respondent are referred to collectively herein as the "Parties"), and

WHEREAS the Parties do not dispute the material facts bearing on the Motion, and seek a ruling that will permit them to seek an expeditious resolution of the disputed question of law raised by the Motion,

THE PARTIES HEREBY STIPULATE AND AGREE, AND THE COURT SO ORDERS, THAT:

1. Jurisdiction over this matter is proper pursuant to 28 U.S.C. §§ 1334 and 157. Venue is proper pursuant to 28 U.S.C. § 1409. This matter is a core proceeding. Accordingly, the Court's entry of this Consent Order shall constitute a final judgment in this contested matter.

2. Movant is a debtor in the above-captioned chapter 7 bankruptcy case, which was initiated by the Movant's filing of a voluntary petition on December 18, 2012.

3. Movant owns real property located at 648 River Bend Drive, Jonesboro, GA 30238 (the "Property").

4. The Property is subject to two mortgage liens. As of the filing of the voluntary petition (and as of the date of this Order), the amount outstanding on the first-priority mortgage (approximately $102,000.00) exceeds the fair market value of the Property.

5. Respondent is the holder and/or servicer in respect of a second-priority mortgage, in the approximate amount of $21,300.

6. Under the reasoning of the U.S. Court of Appeals for the Eleventh Circuit in *McNeal v. GMAC Mortgage, LLC*, No. 11-11352 (May 11, 2012), on the

facts as stipulated above, Respondent's second-lien may be "stripped off," or "voided," under 11 U.S.C. § 502(d).

7. Respondent disputes the correctness of the analysis in *McNeal* and expressly reserves its rights in respect thereof. The Parties agree, however, that unless and until *McNeal's* reasoning is rejected by the U.S. Court of Appeals for the Eleventh Circuit or the Supreme Court of the United States (including on appeal from the entry of this stipulated order), that reasoning is applicable to this contested matter.

8. For the foregoing reasons, effective upon the later of (a) the Debtor's receipt of a discharge, and (b) this order becoming final and not subject to further appeal or review:

A. Respondent's lien is void; and

B. Respondent shall release its lien.

9. Each party shall be responsible for its own fees and costs.

10. All parties reserve all rights to appeal (and/or seek certiorari in the Supreme Court of the United States) from this Order, and any order entered on appeal herefrom. The Parties expressly agree that the determination to proceed by means of this Stipulated Order reflects only an agreement that the *McNeal* decision is applicable hereto, but that a genuine and concrete dispute remains with respect to the Movant's ultimate entitlement to the relief sought in this action. Unless and until this Order becomes final and non-appealable, the parties agree that they will take no action that might render moot any appeal herefrom, or contend in any forum that such an appeal is or has become moot.

END OF DOCUMENT

STIPULATED AND AGREED TO BY:

Bank of America, N.A.

By: /s/ *J. Kelsey Grodzicki*
J. Kelsey Grodzicki
Georgia Bar No. 134259
Rubin Lublin LLC
3740 Davinci Court, Suite 150
Peachtree Corners, Georgia 30092
(770) 246-3324

Craig Goldblatt
Wilmer Cutler Pickering Hale & Dorr LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

David Lamar Sinkfield

By: /s/ *A. Allen Hammond (with express permission)*
A. Allen Hammond
Georgia Bar No. 321659
122 South Main Street
Jonesboro, GA 30236
(770) 603-6572

DISTRIBUTION LIST

David Lamar Sinkfield
River Bend Drive
Jonesboro, Georgia 30238

A Allen Hammond
122 South Main Street
Jonesboro, Georgia 30236

J. Kelsey Grodzicki
Rubin Lublin, LLC
3740 Davinci Court
Suite 150
Peachtree Corners, Georgia 30092

Jordan E. Lublin
Building 2
8325 Dunwoody Place
Atlanta, Georgia 30350

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-12141-EE
Filed: September 9, 2013

IN RE: DAVID LAMAR SINKFIELD,
Debtor.

BANK OF AMERICA, NA,
Plaintiff-Appellant,
v.

DAVIS LAMAR SINKFIELD,
Defendant-Appellee.

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

Before: MARCUS, MARTIN and JORDAN, Circuit Judges.

BY THE COURT:

Appellant's "Petition for Rehearing en banc or, in the alternative, motion for reconsideration en banc," construed as a motion for reconsideration of this Court's July 31, 2013, order is denied.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Bankruptcy Case No. 12-81094-JRS
Adversary No.
Civil Action File No. 1:13-cv-1541-TCB
Filed: May 10, 2013

IN RE: DAVID LAMAR SINKFIELD,
Debtor.

DAVID LAMAR SINKFIELD,
Movant,
v.
BANK OF AMERICA, N.A.,
Respondent.

JUDGMENT

This action having come before the court, Honorable Timothy C. Batten, Sr., United States District Judge, for consideration of the appeal of the bankruptcy order entered 4/29/13, and the court having rendered its decision, it is

Ordered and Adjudged that the order of the bankruptcy court is **affirmed** and the appeal is **dismissed**.

Dated at Atlanta, Georgia this 10th day of May, 2013.

JAMES N. HATTEN
CLERK OF COURT

By: /s/ Janice Micallef
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
May 10, 2013
James N. Hatten
Clerk of Court

By: /s/ Janice Micallef
Deputy Clerk

APPENDIX F

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,
versus

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

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

---

[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.

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*, 112 S. Ct. 773 (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 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.