Johnson v. Home State Bank: Seven Plus Thirteen Can Equal Twenty

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Johnson v. Home State Bank: Seven Plus Thirteen Can Equal Twenty

I. INTRODUCTION

In Johnson v. Home State Bank (In re Johnson),¹ the United States Supreme Court approved the property-saving strategy of filing under Chapter 7² of the Bankruptcy Code, immediately followed by a filing under Chapter 13,³ the so-called “Chapter 20.” The Court held that a mortgage lien that survived the discharge of the debtor's personal obligations in Chapter 7 is a “claim” for purposes of 11 U.S.C. § 101(5),⁴ and thus may be included by the debtor in a subsequent Chapter 13 plan.⁵

Chapter 20 procedures typically follow a similar pattern. A debtor defaults on loan payments, including a home mortgage. The debtor does not possess sufficient income to pay his total debt owing under a Chapter 13 restructuring and cannot eliminate the home mortgage and prevent foreclosure under Chapter 7.

By first filing under Chapter 7, the debtor eliminates all personal liabilities, including personal liability on the home mortgage. With a decreased total debt burden, the debtor files under Chapter 13; forcing the bank to de-accelerate the loan, thereby allowing the debtor to cure any arrearages and keep the house.

II. PROCEDURAL HISTORY OF THE CASE

Johnson executed promissory notes totalling approximately $470,000 to the Home State Bank (the “bank”).⁶ As security, Johnson executed a mortgage on his farm property. Johnson defaulted, and the bank began foreclosure proceedings in state court. Johnson then filed a petition for

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3. Id. §§ 1301-30. Chapter 13 provides for an adjustment of debt for wage earners (salary, commissions, etc). The debtor formulates and files a plan that provides extra time to pay off creditors. Id.
4. 111 S. Ct. at 2154.
5. Id. at 2152.
6. Id.
liquidation under Chapter 7 of the Bankruptcy Code. The bankruptcy court discharged Johnson’s personal liability on the note, then lifted the automatic stay. The bank proceeded to foreclose, and the state granted the bank an in rem judgment of approximately $200,000. After the judgment, but before the foreclosure sale, Johnson filed a petition for reorganization under Chapter 13, listing the bank’s mortgage as a “claim” against his estate.7

The bankruptcy court confirmed the Chapter 13 plan. The bank appealed, and the district court reversed, holding that the Bankruptcy Code does not allow a debtor to include in a Chapter 13 plan a mortgage upon which personal liability was discharged in Chapter 7.8 The Tenth Circuit Court of Appeals affirmed, reasoning that the Bank no longer had a “claim” against the debtor which could be rescheduled under Chapter 13.8 Since two other Circuit Courts of Appeals concluded that a mortgage lien could be included in a Chapter 13 plan subsequent to a Chapter 7 discharge,9 the Supreme Court granted certiorari to resolve the conflict10 and reversed.11

III. HISTORICAL BACKGROUND OF “CHAPTER 20”

Before the Supreme Court’s holding in Johnson, the courts were split on the question of whether a debtor whose personal liability on a mortgage had been discharged in Chapter 7 could then file a Chapter 13 and force his mortgagee to accept the cure of any outstanding defaults, thereby preventing foreclosure.12

The traditional authority had its genesis in In re Cowen,14 in which the debtors filed a petition under Chapter 7.14 The trustee disclaimed any interest in their real estate and attempted to get the debtors to convert to Chapter 13. A junior mortgagee, listed as a party secured by the debtor’s home in the Chapter 7 suit, began foreclosure proceedings in state court. The state court entered a default judgment and scheduled a sheriff’s sale of the debtor’s residence. Before the sale, and with the Chapter 7 suit still

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7. Id.
10. In re Saylors, 869 F.2d 1434 (11th Cir. 1989); In re Metz, 820 F.2d 1495 (9th Cir. 1987).
11. 111 S. Ct. at 781.
13. Id.
15. Id. at 889.
pending, the debtor filed a Chapter 13 petition, to which the creditor objected. A Chapter 7 discharge was granted two months later.\textsuperscript{16}

The court held that the Chapter 13 petition was a nullity since the Chapter 7 suit was pending when the debtors filed the Chapter 13 petition.\textsuperscript{17} The court went on to say “in what must be considered dicta”\textsuperscript{18} that

[t]he granting of a [Chapter 7] discharge relieves a debtor from personal liability on the discharged debt. Thus, although a lien may survive, . . . a discharged debt which was not properly reaffirmed is not cognizable as “debt” in a subsequent proceeding without either a novation of the prior obligation or the creation of an entirely new debt. Thus, the proposal “to cure” a previously discharged debt is itself an impossibility, despite . . . remedies accorded a lienholder under state law by virtue of a lien based on such discharged debt.\textsuperscript{19}

The court in \textit{In re Fryer}\textsuperscript{20} quoted and applied this reasoning without further explanation.\textsuperscript{21} The debtor apparently still had a Chapter 7 suit pending,\textsuperscript{22} and the court chose not to dispose of the case as it had in \textit{Cowen}\textsuperscript{23} (by declaring the Chapter 13 petition a “nullity”).\textsuperscript{24}

The court extended this reasoning in \textit{In re Brown},\textsuperscript{25} when the question presented was “whether a chapter 13 case filed after a discharge in a chapter 7 case may be utilized to compel a mortgagee to accept the cure of an arrearage owed to it on the defaulted mortgage.”\textsuperscript{26} Answering in the negative, the court reasoned as follows: (1) the chapter 13 plan could only deal with creditors; (2) a creditor is an entity with a claim against the debtor; (3) claim is defined in the Bankruptcy Code\textsuperscript{27} as “a right to payment, or a right to an equitable remedy for breach of performance”; and, therefore, (4) the mortgagee was not a creditor since its contractual right to payment disappeared with the discharge, and the mortgagor’s equitable right to redemption did not create any status between the parties as to which there could be a breach of performance.\textsuperscript{28} The court buttressed its unduly technical reasoning with a finding that the debtor’s conduct

\begin{itemize}
  \item [16.] \textit{Id.} at 892.
  \item [17.] \textit{Id.} at 894-95.
  \item [18.] \textit{In re Hagberg}, 92 B.R. 809, 812 (Bankr. W.D. Wis. 1988).
  \item [19.] 29 B.R. at 895.
  \item [20.] 47 B.R. 180 (Bankr. S.D. Ohio 1985).
  \item [21.] \textit{Id.} at 182.
  \item [22.] \textit{Id.}
  \item [23.] See \textit{supra} text accompanying note 26.
  \item [24.] 47 B.R. at 180.
  \item [25.] 52 B.R. 6 (Bankr. S.D. Ohio 1985).
  \item [26.] \textit{Id.} at 6.
  \item [28.] 52 B.R. at 7.
\end{itemize}
also called for sustaining the objection to confirmation of the debtor's plan.\textsuperscript{29} In re Binford\textsuperscript{30} adopted the Brown reasoning, including a parenthetical notation that redemption and reaffirmation are the exclusive methods for Chapter 7 bankrupts to keep their property.\textsuperscript{31} The court explained that the debtor was trying to "do indirectly that which he cannot do directly, [that is] file a Chapter 13 and compel reaffirmation of a debt . . . ."\textsuperscript{32} In re Lewis\textsuperscript{33} was the first case to break with this line of reasoning.\textsuperscript{34} The debtors received their Chapter 7 discharge some years before filing under Chapter 13.\textsuperscript{35} Judge Goldhaber believed the new definition of claim in the Bankruptcy Act of 1978 was dispositive.\textsuperscript{36} He cited the legislative history, which revealed that Congress believed it was giving the word "claim" its broadest possible definition, and by use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.\textsuperscript{37}

The court stated that all legal obligations constitute claims, and that any equitable obligation giving rise to a right of payment is also a claim.\textsuperscript{38} The court then held that "a claim may include a creditor's encumbrance against property of the estate although there is no in personam liability against the debtor. This would, of course, include the situation presented in the instant case."\textsuperscript{39} The lienholder also argued that it was not a creditor and was thus not barred from foreclosing by the automatic stay.\textsuperscript{40} The court disagreed, refusing to find bad faith per se in the filing of a Chapter 13 suit within two years of a Chapter 7 discharge.\textsuperscript{41}
In the same year, another bankruptcy court dissented from what it called the "majority view." In *In re Lagasse*, the court stated that a Chapter 7 discharge converts a recourse debt into a nonrecourse obligation and that nonrecourse debt could be rescheduled under Chapter 13.48 "The clear language of [11 U.S.C. §§ 102(2) and (4), and §] 1322(b)(5) does not forbid it, and the legislative history of [§] 102(2) supports it." The court then quoted from the legislative history as follows:

Paragraph (101)(2) specifies that "claim against the debtor" includes claim against property of the debtor. This paragraph is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally: Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally, for the purposes of bankruptcy code.49

In *In re Metz,* the Ninth Circuit Court of Appeals became the first circuit court to address the question. The court in *Metz* reviewed both lines of authority and held the *Lagasse/Lewis* reasoning more persuasive, adding "although a chapter 13 plan may, as a matter of law, cure arrearages on a mortgage debt discharged by chapter 7, the plan may nevertheless violate the purpose and spirit of chapter 13 and thus not be submitted in good faith." The court then applied the "totality of the circumstances" test to determine the good faith of the debtors.48

Due to improved circumstances ("precisely what the bankruptcy judge should examine to see if successive filings are proper"), the debtor proposed to pay the arrears on his mortgage over time and keep his regular payments current.60 Holding the bankruptcy court's finding of good faith was not clearly erroneous, the court rejected the creditor's contentions.61 The tide had clearly turned in favor of allowing the "Chapter 20" strategy, and the courts began to focus their attention on the question of good faith.62

42. *In re Lagasse*, 66 B.R. 41, 43 (Bankr. D. Conn. 1986). See also *In re Klapp*, 80 B.R. 540 (Bankr. W.D. Oklahoma 1987), comparing *Lagasse* and *Lewis* to the earlier authority and adopting them as the "clearly the better view." *Id.* at 542.

43. 66 B.R. at 43.
44. *Id.*
46. 820 F.2d 1495 (9th Cir. 1987).
47. *Id.* at 1498.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1499.
52. See, e.g., *In re Hagberg*, 92 B.R. 809 (Bankr. W.D. Wis. 1988) (Chapter 13 petition dismissed for bad faith when debtor had obtained a Chapter 7 discharge and filed two previ-
In 1989 the Eleventh Circuit settled the question in *In re Saylors.*

This case followed the typical pattern. Saylors and his wife filed under Chapter 7, listing a debt to Jim Walter Homes, and obtained a discharge. Jim Walter moved for relief from the automatic stay, and the court granted the motion. The Saylors then filed a Chapter 13 petition, seeking relief from the arrearage on the mortgage debt. The Chapter 7 trustee subsequently filed his final report and abandoned all interest in the property.

Over the objection of Jim Walter Homes, the bankruptcy court confirmed the Saylors’ plan to pay a portion of the arrearage plus a full regular monthly payment. Jim Walter appealed, and the district court reversed. The Saylors then appealed to the Eleventh Circuit Court of Appeals.

Relying on *In re Metz,* the court held that, at least in Alabama (where the Saylors’ home was located), a home mortgage debt is transformed into a nonrecourse obligation upon discharge in Chapter 7, since in Alabama the home owner still retains two property rights, the equitable and statutory rights of redemption. The court held that, although the creditor's rights were modified by the debtor's discharge, the debtor's property rights were unchanged. Taking into account the intent of Congress to create an “equitable and feasible way for the honest and conscientious debtor to pay off his debts,” the court stated that deserving debtors should not be absolutely prohibited from using this procedure. The good faith filing requirement is sufficient to prevent improper use of Chapter 13.

The district court asserted two arguments thought demonstrative of the bad faith of the debtors as a matter of law. First, the debtor filed for
Chapter 13 protection before the Chapter 7 trustee filed his final report.62 Second, the debtor filed one day before the automatic stay was lifted, and this was a final adjudication of Jim Walters right to foreclose.63

The Eleventh Circuit Court of Appeals found that the Code sets forth no rule against filing a Chapter 13 petition between discharge and the filing of the final report.64 Also, the court summarily dismissed the res judicata argument as without merit.65

After Sylors, the Chapter 7 and Chapter 13 strategy became so common that one court stated that malpractice would probably exist should an attorney not utilize Chapter 20 when appropriate.66 The Ninth and Eleventh Circuit Courts of Appeals were the only appellate courts to directly address the Chapter 20 question until the Tenth Circuit decided Johnson.67

V. RECENT DEVELOPMENTS

The Supreme Court set the stage with its reasoning in Pennsylvania Department of Public Welfare v. Davenport.68 The debtors in Davenport pleaded guilty to welfare fraud, and a Pennsylvania court ordered them to make restitution payments. The debtors filed a Chapter 13 petition listing the restitution payments to the county as an unsecured debt. The bankruptcy court confirmed the debtors' plan and labeled the restitution obligation a dischargeable debt under Chapter 13. The district court reversed, relying on the Supreme Court's decision in Kelly v. Robinson,69 and noting federalism concerns.70 The Third Circuit Court of Appeals reversed, "concluding that 'the plain language of the chapter' demonstrated that restitution orders are debts within the meaning of the Code and hence dischargeable in proceedings under Chapter 13."71

62. Id. at 1436.
63. Id. at 1437-38.
64. Id. at 1437.
65. Id. at 1438. "The . . . order . . . merely lifted the automatic stay in the chapter 7 case. In no way did the order purport to be a permanent adjudication of Jim Walter's right to foreclose." Id.
69. 479 U.S. 36 (1986). The Court holding that restitution obligations imposed as conditions of probation in state criminal action are non-dischargeable in proceedings under Chapter 7, but declined to reach the question of whether restitution obligations are "debts" under the Code. Id. at 50.
70. 110 S. Ct. at 2130 (citing Davenport v. Pennsylvania, 89 B.R. 428 (Bank. E.D. Pa. 1988)).
71. Id. (quoting In re Johnson-Allen, 871 F.2d 421; 428 (3rd Cir. 1989)).
The Supreme Court granted certiorari, and first determined that the terms "debt" and "claim" were co-extensive. Second, the definition of "claim" in 11 U.S.C. § 104(a) includes a "right to payment." Third, Congress had a "broad rather than restrictive" view of "claims" under the Bankruptcy Code. And finally, an obligation enforceable through criminal rather than civil mechanisms is still a "right of payment." Restitution orders, therefore, were within the scope of claims included in a Chapter 13 plan.

Justices Blackmun and O'Conner dissented, and Congress quickly amended the Bankruptcy Code to "overrul[e] the Supreme Court's recent decision . . ." with the Criminal Victims Protection Act of 1990. The legislative history makes it clear Congress was dissatisfied with criminals using the Bankruptcy Code to avoid payment of restitution, but it does not indicate dissatisfaction with the court's interpretation of claim as "broad rather than restrictive."

VI. THE DECISION IN Johnson

In In re Johnson, the United States Supreme Court reversed the Tenth Circuit's holding that since the debtor's personal liability was discharged in Chapter 7, the Bank no longer had a "claim" against Johnson subject to rescheduling under Chapter 13. Focusing on the meaning of the word claim as it is used in Chapter 13 of the Bankruptcy Code, the Court held that a mortgage lien in this situation is a claim subject to rescheduling.
The Court first described the nature of mortgage interests that survive discharge under Chapter 7. A creditor may proceed both in personam and in rem to satisfy his debt, unless the debtor and creditor agree otherwise. Chapter 7 will protect the debtor against the in personam action, but not the proceeding in rem. This result is mandated by the Bankruptcy Code. The Code also mandates that a creditor’s right to foreclose survives bankruptcy.

The Court then addressed the question of whether a surviving mortgage interest is a claim subject to Chapter 13 rescheduling as “a straightforward issue of statutory construction.” Claim is defined in the Bankruptcy Code as either

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured: or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Relying on its holding in Pennsylvania Department of Public Welfare v. Davenport, that Congress intended to adopt “the broadest available definition of ‘claim,’” the Court had “no trouble concluding that a mortgage interest that survives the discharge of a debtor’s personal liability is a claim within the terms of §101(5).” The Court offered two rationales. First, even though the Chapter 7 discharge releases the debtor from personal liability, the bank still has a “right to payment” out of the foreclosure sale proceeds. Second, the bank has a “right to an equitable remedy” since it can foreclose on the debtor’s property after the automatic

85. Id. at 2153.
86. Id.
87. Id.
A discharge in a case under this title (1) voids any judgement at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived.

Id.
89. Id. § 522(c)(2), codifying Long v. Bullard, 117 U.S. 617, 620-21 (1886).
90. 111 S. Ct. at 2153.
92. 110 S. Ct. 2126.
93. 111 S. Ct. at 2154.
95. 111 S. Ct. at 2154.
Regardless, the bank retains an "enforceable obligation" against the debtor.\textsuperscript{98} A Chapter 7 discharge, therefore, only extinguishes one of two ways to enforce a claim, not the claim itself.\textsuperscript{99} The in personam enforcement method is frustrated, but the in rem enforcement method survives.\textsuperscript{100}

The Court stated that this interpretation was consistent with other parts of the Code.\textsuperscript{101} Section 502(b)(1) instructs a bankruptcy court to allow claims against either the debtor or his property.\textsuperscript{102} Also, as a rule of construction, section 102(2) defines "claim against the debtor" to include a "claim against the property of the debtor."\textsuperscript{103} The Court interpreted this language to mean that a creditor (the Bank) with a claim against the debtor's property has a "claim against the debtor" under the Code.\textsuperscript{104}

The Court then turned to the prior Bankruptcy Act for support.\textsuperscript{105} The pre-1978 Bankruptcy Act had no single definition of claim, but for purposes of Chapter X corporate reorganizations, it did define claim to include claims against both the debtor and the debtor's property.\textsuperscript{106} Congress, when defining claim for the new 1978 Bankruptcy Act, intended an even broader term.\textsuperscript{107} The Court assumed Congress was aware of the existing interpretation under Chapter X of the old Act and inferred that Congress intended an obligation enforceable against the debtor only in rem be a claim under the new Code.\textsuperscript{108}

Next, the Court examined the legislative history surrounding the passage of section 102(2) of the Code.\textsuperscript{109} Based on the House and Senate Reports,\textsuperscript{110} the Court said "this rule of construction contemplates, inter alia, 'nonrecourse loan agreements where the creditor's only rights are

\begin{itemize}
  \item \textsuperscript{97} 111 S. Ct. at 2154.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id. The court states that if Long v. Bullard, 117 U.S. 617 (1886) (see supra note 105 and accompanying text) had not been codified, a Chapter 7 discharge would eliminate the creditor's in rem rights as well.
  \item \textsuperscript{101} 111 S. Ct. at 2154.
  \item \textsuperscript{102} Id. at 2154-55.
  \item \textsuperscript{103} Id. at 2155.
  \item \textsuperscript{104} Id.
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Id. See also 11 U.S.C. § 506(1) (1976), repealed by 1978 Bankruptcy Act (codified as Title 11 of the U.S.C.).
  \item \textsuperscript{107} 111 S. Ct. at 2155 (citing H.R. Rep. No. 95-595 at 309).
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id. See also supra text accompanying note 45.
\end{itemize}
against property of the debtor, and not against the debtor personally.'

The Court held a nonrecourse loan and a mortgage that passes through Chapter 7 to have the "same properties." Though admitting the creditor never bargained for a nonrecourse loan, the Court decided it made no difference, as Congress did not limit section 102(2) to nonrecourse debts. The Court held the intent of Congress to be that "§ 102(2) extend[s] to all interests having the relevant attributes of nonrecourse obligations regardless of how these interests come into existence." The Bank (creditor) argued even if an action in rem is ordinarily an allowable Chapter 13 claim, allowing the claim to be rescheduled when it is merely the remainder of a personal liability discharged in Chapter 7 is beyond what Congress intended to allow. The Court rejected this argument, listing several types of serial filings that Congress had expressly forbidden. The "evident care" Congress used in fashioning these restrictions, and the absence of any similar restrictions on the serial filing under Chapter 13 after a Chapter 7 discharge, led the Court to conclude that Congress did not foreclose this remedy.

The Court also stated that the Bank's position failed to consider the safeguards the Code provided for Chapter 13 creditors. First, the Code requires a plan be proposed in good faith. Second, the plan must give unsecured creditors approximately the same recovery as they would have gotten under Chapter 7. Next, the Court noted that secured creditors must "either have 'accepted the plan,' obtained the property securing their claims, or 'retained[ed] the[ir] lien[s]' where the 'value . . . of property to be distributed under the plan . . . is not less than the allowed amount of such claim[s].'" As a final safeguard, Congress mandated that the debtor fully comply with and be able to make all payments under a Chapter 13 plan. The Court finally observed that the bankruptcy courts retained broad equitable power to "'carry out the provi-
sions of the [C]ode.' 123 Given the protection provided to creditors and the broad interpretation of claim intended by Congress, the Court expressed doubt that "Congress intended the bankruptcy courts to use the Code's definition of 'claim' to police the Chapter 13 process for abuse." 124

The Bank renewed its claim that the debtor had not filed the plan in good faith and that the plan was not feasible, but as neither the district court nor the court of appeals addressed these issues, the Court left them for consideration on remand. 125

VII. ANALYSIS

With In re Johnson, the "uncertainty in the law is removed completely." 126 The Court is firmly within the Lagrasse/Metz line of authority, which construes claim in the Bankruptcy Code very broadly. 127 The courts that had refused to allow the Chapter 20 strategy "seem to ignore or gloss over the existence of 11 U.S.C. section 102(2) and the language of 11 U.S.C. section 101(4)." 128

The major arguments raised by the lower courts against allowing "Chapter 20" filings have been rebutted. 129 The Cowen reasoning, 130 that there is no "debt" so cure of it is impossible, 131 was not specifically dealt with in Johnson. But in Davenport the Court said Congress intended debt and claim to mean the same thing under the Code. 122 Johnson and Davenport make the supposed "impossibility" quite possible.

The decision in Brown that the mortgagee's "right to payment pursuant to a contractual arrangement" 123 disappeared upon discharge, and therefore there was no section 101(4) right to payment is dealt with directly and dismissed. 134 The Court states that the creditor has a right to

123. Id. (quoting 11 U.S.C. § 105(a) (1979 & Supp. 1991)).
124. Id.
125. Id.
127. See supra text accompanying notes 51-80.
129. But see Joann Henderson, The Gagli-Loory Brief: A Quantum Leap From Strip Down to Chapter 7 Cram Down, 8 BANKR. J. 131 (1991). "A Chapter 20 . . . only prolongs the whole process, costs more money, and interferes with the debtor's fresh start. No one gains from this two step process, and requiring a Chapter 20 elevates form over substance." Id. at 141-42. Henderson advocates "restoration" a "Chapter 7 power to restructure secured debt" which is the "logical terminal" of the courts' efforts to allow deserving debtor's to save their home and get a fresh start. Id. at 131.
130. See supra text accompanying notes 20-32.
133. 52 B.R. 6, 7 (Bankr. S.D. Ohio 1985).
payment in that it has a right to the proceeds from the debtor's home,\textsuperscript{135} and the discharge terminated only one way of enforcing the claim, not the claim itself.\textsuperscript{136}

The Court dismissed the concern in \textit{Binford} that the debtor is compelling the debtor to accept a reaffirmation of the debt\textsuperscript{137} by saying since Congress "did not expressly limit \$ 102(2) to nonrecourse loans, but rather chose general language broad enough to encompass such obligations,"\textsuperscript{138} any obligation that had the "relevant attributes" of a nonrecourse obligation was covered, no matter how it came about.\textsuperscript{139}

The major weakness in \textit{Johnson} and the cases leading up to it is their reliance on their interpretation of how broad Congress really intended the term claim to be read. The Court already made one mistake that is strikingly similar to the one it may be making here.\textsuperscript{140} In \textit{Davenport} the Court found that "[T]he statutory language plainly reveals Congress' intent not to except restitution orders from discharge in certain Chapter 13 proceedings."\textsuperscript{141} Congress, however, considered and passed legislation specifically to overturn the result in \textit{Davenport} within nine months.\textsuperscript{142} The Court in \textit{Davenport} also relied on Congress' failure to include restitution in the list of specific exceptions to discharge applicable to Chapter 13.\textsuperscript{143} Similarly, the Court now relies on the fact that Congress expressly prohibited certain serial filings but did not specifically prohibit the "Chapter 20" scenario.\textsuperscript{144} Again, Congress promptly added restitution to the list of exceptions, thereby indicating that its "intent" was not revealed so plainly as the Court thought.\textsuperscript{145}

\textsuperscript{135} Id.

\textsuperscript{136} \textit{Id.} See In re Saylors, 869 F.2d 1434, 1436 ("Although . . . no longer personally liable . . . [the debtor] still has two valuable property rights . . . ."); In re Ligon, 97 B.R. 398, 400 (Bankr. N.D. Ill. 1989) (" . . . when that case was closed without the trustee selling the debtor's home, the home was abandoned to the debtor, i.e. title to the home reverted to the debtor."); See also BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE (1989) § 24A.22, particularly note 255.


\textsuperscript{138} 111 S. Ct. at 2155.

\textsuperscript{139} \textit{Id.} See In re Ligon, 97 B.R. at 402-03.

\textsuperscript{140} See 111 S. Ct. at 2154 n.5.

\textsuperscript{141} \textit{Davenport}, 110 S. Ct. 2126, 2133.


\textsuperscript{144} 111 S. Ct. at 2156. For a discussion of the unreliability of this reasoning, see REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, Chap. 12, sec. F. (Little, Brown & Co. 1975).

Courts have cited the decision in *Johnson* in a variety of contexts. A Wisconsin court cited it as support for allowing Chapter 13 plans which end in balloon payments.146 A Florida court used it as a guide for general statutory interpretation.147 Another court in Florida cited *Johnson* in refraining from imposing sanctions against a debtor in an attempted Chapter “62.”148 The Second Circuit Court of Appeals held that unincurred environmental response costs under the Comprehensive Environmental Response Compensation Liability Act are “claims” dischargeable in bankruptcy.149 The Ninth Circuit Court of Appeals held this broad reading of the definition of “claim” includes punitive damages under section 523 (a)(6)150 of the Bankruptcy Code.151

An Illinois court cited the broad definition of “claim” in *Johnson* and *Davenport* in denying a motion by the United States to dismiss a dispute between a debtor and the Internal Revenue Service (the “IRS”).152 The debtor was involved in thirty-one corporations, many with potential liability for unpaid employment taxes. The debtor had a “pot” of some $640,000 with which to pay his creditors, but the IRS refused to immediately pursue its potential claim. If the court had granted the motion, debtor's unsecured creditors would have taken all the pot and left the debtor still liable for the claims of the IRS.153 The court held that the contingent and unliquidated claim of the IRS was “exactly the kind of obligation Congress wanted to have resolved.”154

The decision in *Johnson* should overrule *In re Honacker,*155 at least in part. In *Honacker* a bank that lent money to the defendant debtor on two snowmobiles filed its proof of claim in defendant’s Chapter 13 case almost one month after the hearing date.156 Debtor attempted to avoid the lien

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149. *In re Chateaugay Corp.,* 944 F.2d. 997, 1005 (2nd Cir. 1991). See also *In re Torwico Electronics, Inc.,* 131 B.R. 561, 567 (Bankr. D. N.J. 1991) (when the debtor couldn't clean up the pollution himself without paying money, the obligation to clean up is a dischargeable debt).
150. 11 U.S.C. § 523 (1979). “[A] discharge . . . does not discharge an individual debtor form any debt . . . for money, property, [etc.] . . . obtained under . . . false pretenses, a false representation, or actual fraud.”
153. *Id.* at 538-40.
154. *Id.* at 548.
156. *Id.* at 416-17.
under section 1327 of the code which binds all creditors and vests all property in the debtor on confirmation free and clear of any claim of any creditor provided for by the plan. The court held the word claim found in section 1327 did not include lien, and therefore a lien is unaffected by section 1327. The court's decision in Honacker led the Fifth Circuit Court of Appeals in In re Simmons to conclude that a secured creditor, who did not object to a plan listing him as unsecured, did not have his lien lifted from debtor's homestead by section 1327. As Johnson makes clear, a lien is a claim, weakening both Honacker and Simmons.

Finally, the decision in Johnson establishes that a secured claim is actually two claims, one for money and one for a lien on the property.

VIII. Conclusion

If Johnson stands, the courts will turn to the question of good faith, using it to police the "jocular" Chapter 20. Remember that the Supreme Court did not address this issue in Johnson. The Bankruptcy Court for the Middle District of Florida, in a post Johnson decision, held that a debtor may not "manipulate the system by pre-planning a Chapter 7 case in order to obtain a discharge and then turn around and file a Chapter 13 case for the sole purpose of frustrating a mortgagee ...." Even though parallels with Davenport and its subsequent demise are interesting, the use by deserving debtors of the Chapter 20 device to save their homes is more in line with the purposes of the Bankruptcy Code.
than use of the code by criminal debtors to avoid restitution.\textsuperscript{166} Current legislative history reveals no action in Congress to overturn \textit{Johnson}.\textsuperscript{169}

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\textsuperscript{166} "Discouragement of preexisting debt." Groban v. Garner, 111 S. Ct. 654, 659 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)). The purpose of Chapter 13 of the Bankruptcy Code is specifically to "achieve broad, extensive, and unqualified discharge of the debts for a working debtor." In re Rasmussen, 888 F.2d 703, 705 (10th Cir. 1989).


\textsuperscript{169} The congressional record was searched using both the LEXIS/NEXIS and WESTLAW computer data bases.