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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. OR-11-1005-PaJuCl
)	OR-11-1085-PaJuCl
MARY C. BENAFEL,)	(consolidated appeals)
)	
Debtor.)	Bk. No. 10-61542
_____)	
)	
MARY C. BENAFEL,)	
)	
Appellant,)	
)	
v.)	O P I N I O N
)	
ONE WEST BANK, FSB; FRED LONG,)	
Trustee,)	
)	
Appellees.)	
_____)	

Argued and Submitted on October 20, 2011
at Portland, Oregon

Filed - December 9, 2011

Appeal from the United States Bankruptcy Court
for the District of Oregon

Hon. Frank R. Alley, III, Chief U.S. Bankruptcy Judge, Presiding

Appearances: Judson M. Carusone argued for Appellant Mary C. Benafel. Joshua Schaer argued for Appellee One West Bank, FSB.

Before: PAPPAS, JURY and CLARKSON,¹ Bankruptcy Judges.

¹ The Honorable Scott C. Clarkson, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 PAPPAS, Bankruptcy Judge:

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3 Appellant, chapter 13² debtor Mary C. Benafel ("Benafel"),
4 appeals the bankruptcy court's orders denying confirmation of her
5 original plan on December 22, 2010, and confirming her amended
6 plan on February 11, 2011. Because the bankruptcy court erred in
7 ruling that the date for determining whether real property is a
8 debtor's principal residence for purposes of § 1322(b)(2) is the
9 loan transaction date, not the petition date, we REVERSE and
10 REMAND for further proceedings consistent with this Opinion.

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FACTS

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The material facts in this case are undisputed.

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In 1996, Benafel purchased a house in Springfield, Oregon
(the "Property") which she occupied as her principal residence.
On June 22, 2007, Benafel refinanced the existing loan on the
Property with a new loan in the amount of \$301,500. The new loan
was evidenced by a Promissory Note (the "Note") and secured by a
Deed of Trust on the Property in favor of American Mortgage
Network, Inc. The Note provided:

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Occupancy. Borrower shall occupy, establish, and
use the Property as Borrower's principal residence
within 60 days after the execution of this Security
Instrument and shall continue to occupy the Property as
Borrower's principal residence for at least one year
after the date of occupancy[.]

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Appellee One West Bank, FSB ("One West") thereafter succeeded to
the lender's interest under the Note and Deed of Trust.

Approximately two years later, in July 2009, Benafel's mother

² Unless otherwise indicated, all chapter, section and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 suffered a stroke. Benafel gave up her employment and assumed
2 full-time care giver responsibilities for her mother. In her
3 words, Benafel assisted her mother on a "24/7 around the clock"
4 basis at her mother's residence. As a result, from July through
5 at least the end of 2009, Benafel was absent from the Property for
6 extended periods of time.

7 Benafel contacted One West in July 2009, to inform the lender
8 that she would have difficulties meeting her mortgage payments
9 because she was no longer employed. One West's agent inspected
10 the Property several times and reported that the Property had been
11 abandoned. When discussions between Benafel and One West produced
12 no solution to her mortgage payment problems, Benafel defaulted
13 and, in October 2009, One West served Benafel with a notice of a
14 nonjudicial foreclosure. After several delays, a foreclosure sale
15 was set for March 25, 2010.

16 Attempting to avoid foreclosure, Benafel sought a renter for
17 the Property. Sometime in March 2010, Benafel leased the Property
18 to another person, who moved into the Property.

19 Benafel filed a chapter 13 petition on March 24, 2010, the
20 day before the scheduled foreclosure sale on the Property. On
21 April 12, 2010, she filed a proposed chapter 13 plan (the
22 "Original Plan"). The Original Plan provided that she would make
23 payments to the trustee of \$3,065 per month for sixty months. Of
24 that total, Benafel proposed to pay \$2,735 per month to One West
25 in full satisfaction of its allowed secured claim for the debt
26 secured by the Property. Benafel based that payment amount on
27 what she alleged was the current value of the Property of
28 \$148,500. Benafel suggested that One West had waived its right to

1 full payment of the loan under § 1322(b) (2) because of the Note
2 provision that required Benafel to reside at the Property for only
3 one year. The Original Plan also provided for payment of a one
4 percent distribution on claims of unsecured creditors, including
5 the unsecured portion of the One West loan.

6 One West objected to confirmation of the Original Plan on
7 April 20, 2010; it submitted a memorandum of points and
8 authorities supporting its objection on November 6, 2010. In its
9 memorandum, One West pointed out that through the Original Plan,
10 Benafel was attempting to "cram down" its secured claim in
11 violation of § 1322(b) (2)'s prohibition on modification of loans
12 secured by a debtor's principal residence. Additionally, One West
13 objected to the valuation assigned by Benafel to the Property in
14 the Original Plan. Finally, One West argued that, regardless of
15 the current value of the Property, the proper amount of its
16 secured claim was the total of the unpaid principal due on the
17 loan on the petition date, \$301,500, plus accumulated interest and
18 fees of \$25,003.88.

19 The bankruptcy court conducted a hearing on confirmation of
20 the Original Plan on November 9, 2010. After hearing testimony
21 about the value of the Property, the court ruled that the Original
22 Plan could not be confirmed. As the court observed, and the
23 parties acknowledged, confirmation of the Original Plan was
24 premised on Benafel's ability to cram down the One West claim
25 secured by the Property. Though Benafel was not residing at the
26 Property on the date the bankruptcy petition was filed, the
27 bankruptcy court noted that it had previously ruled that, "the
28 appropriate time to look to ascertain the status of the loan under

1 [\$ 1322(b)(2)] is the time the borrower borrowed the money and
2 granted the security interest to the secured creditor." Hr'g Tr.
3 51:21-25, November 9, 2010. The court indicated its intent to
4 adhere to the rule announced in its prior decision and offered two
5 reasons for adopting the loan transaction date for application of
6 § 1322(b)(2).

7 First, referring to the concurrence of Justice Stevens in
8 Nobleman v. Am. Sav. Bank, 508 U.S. 324 (1993), the bankruptcy
9 court observed that,

10 Congress enacted [\$ 1322(b)(2)] to encourage the flow of
11 capital into housing. . . . It follows logically that
12 the whole purpose of the anti-cramdown provision is to
13 encourage lenders to make loans. They could only make
14 the loan in light of the circumstances that exist at the
15 time the property is acquired and for that reason they
16 have to be able to rely on the anti-cramdown provision
17 not only at the time, but throughout the lifetime of the
18 loan.

19 If the court were to adopt the [petition date as
20 determinative of the date of principal residency for
21 § 1322(b)(2) purposes], the purpose of the provision
22 would be suborned. Debtors could buy a house one year,
23 move away from it another, file their bankruptcy the
24 third, and claim a right to cramdown notwithstanding the
25 fact that the creditor was relying on a provision
26 Congress intended to protect it for the lifetime of the
27 loan.

28 Hr'g Tr. 52:16-53:6.

Second, responding to Benafel's argument that the lender had
waived its right to assert its status under § 1322(b)(2) by the
term in the Note that Benafel was only obligated to reside at the
Property for one year, the bankruptcy court ruled that, to be
effective, any waiver of the lender's rights had to be explicit
and knowing, and the court could not make such a finding based
merely on the Note.

On December 22, 2010, the bankruptcy court entered an order

1 denying confirmation of the Original Plan, without prejudice to
2 Benafel's submission of a plan without the One West cram down
3 provision (the "Denial Order"). At the same time, the court
4 entered a Memorandum of Decision explaining its reasons for
5 denying confirmation of the Original Plan. The court's analysis
6 in the decision is generally consistent with its comments on the
7 record at the hearing on December 10, 2010. In particular, the
8 court provided an extended explanation of its response to
9 Benafel's argument that the lender had waived its right to assert
10 its status under § 1322(b)(2) by the language in the Note that
11 Benafel was only obligated to reside at the Property for one year.
12 After a discussion of the case law, the bankruptcy court wrote,
13 consistently with its earlier remarks, that "whatever the parties'
14 intentions, the Court may not find that the language operates as a
15 waiver of the lender's protections under Code § 1322(b)(2) unless
16 the contractual language is explicit to that effect, and reflects
17 a knowing and purposeful waiver of the bank's rights under the
18 Bankruptcy Code." In re Benafel, 2010 WL 5373127, at *2 (Bankr.
19 D. Or. December 22, 2010). Benafel filed a timely appeal of the
20 Denial Order on January 4, 2011.

21 Earlier, on December 10, 2010, Benafel had filed a
22 Preconfirmation Amendment of Plan (the "Amended Plan"). The
23 Amended Plan provided for payments to the trustee of \$552 per
24 month for sixty months, including \$417 per month to cure estimated
25 arrearages on the debt to One West, and that Benafel would pay
26 directly to One West "the regular payment due postpetition on
27 these claims." In other words, the Amended Plan abandoned the
28 cram down request.

1 On February 11, 2011, the bankruptcy court entered an order
2 confirming the Amended Plan. Benafel filed a timely appeal of the
3 confirmation order on February 22, 2011. The Panel consolidated
4 these appeals on March 2, 2011.

5 JURISDICTION

6 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
7 and 157(b) (2) (L). We have jurisdiction under 28 U.S.C. § 158.

8 ISSUE

9 What is the appropriate date for determining whether a claim
10 is secured by a debtor's principal residence for purposes of
11 § 1322(b) (2)?

12 STANDARD OF REVIEW

13 This appeal requires the Panel to review the bankruptcy
14 court's interpretation of § 1322(b) (2). We review the bankruptcy
15 court's construction of the Bankruptcy Code de novo. Educ. Credit
16 Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878, 881 (9th Cir.
17 2006); W. States Glass Corp. v. Barris (In re Bay Area Glass,
18 Inc.), 454 B.R. 86, 88 (9th Cir. BAP 2011).

19 DISCUSSION

20 I.

21 The bankruptcy court entered its orders denying confirmation
22 of the Original Plan, and confirming the Amended Plan, based upon
23 its interpretation of § 1322(b) (2) that whether a claim is secured
24 by a debtor's principal residence is determined as of the loan
25 transaction date, rather than the bankruptcy petition date. Under
26 the facts, the bankruptcy court determined that Benafel's Original
27 Plan violated § 1322(b) (2), and that Benafel could not modify or,
28 in the bankruptcy vernacular "cram down," One West's secured

1 claim.

2 After briefing by the parties in this appeal was completed, a
3 three-judge panel of this BAP issued a published Opinion holding
4 that "the appropriate time for determining whether property is a
5 debtor's principal residence is the petition date." BAC Home
6 Loans Serv., LP v. Abdelgadir (In re Abdelgadir), 455 B.R. 896,
7 898 (9th Cir BAP 2011).³ Although Abdelgadir was a chapter 11
8 case, and the Panel's Opinion construed § 1123(b) (5) rather than
9 § 1322(b) (2), the material provisions of these two Code provisions
10 are identical.⁴ While the issues presented involve different Code
11 provisions, because the Panel's analysis in Abdelgadir is highly
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13 ³ The decision of the bankruptcy court underlying the
14 Abdelgadir appeal was not published. All quotations from that
15 bankruptcy court presented in this Opinion were taken from the
16 Panel's Abdelgadir opinion.

17 ⁴ Compare:

18 (b) Subject to subsection (a) of this section, a plan may--
19 . . . (5) modify the rights of holders of secured claims,
20 other than a claim secured only by a security interest in
21 real property that is the debtor's principal residence, or of
22 holders of unsecured claims, or leave unaffected the rights
23 of holders of any class of claims[.]

24 § 1123(b) (5)

25 with:

26 (b) Subject to subsections (a) and (c) of this section, the
27 plan may--(2) modify the rights of holders of secured claims,
28 other than a claim secured only by a security interest in
real property that is the debtor's principal residence, or of
holders of unsecured claims, or leave unaffected the rights
of holders of any class of claims[.]

§ 1322(b) (2) .

Note: The restrictions under § 1123(a) and § 1322(a)and (c) are
not relevant here.

1 persuasive, we adopt the rule announced in Abdelgadir to resolve
2 the issue in this chapter 13 appeal.

3 In Abdelgadir, the debtors originally filed a bankruptcy
4 petition under chapter 13. In their petition and schedules, the
5 Abdelgadirs listed a home address in Las Vegas (the "Las Vegas
6 Property"). The Las Vegas Property was encumbered by first and
7 second deeds of trust. According to the security instruments, the
8 Abdelgadirs were required to occupy the Las Vegas Property as a
9 "primary year-round residence."

10 The Abdelgadirs later moved to convert their case to chapter
11 11, a motion the bankruptcy court granted. Then they filed a
12 notice with the bankruptcy court, changing their address to a
13 different location, and leased the Las Vegas Property to a third
14 party.

15 The Abdelgadirs filed a chapter 11 plan on March 9, 2010, in
16 which they proposed to modify the terms of the loan secured by the
17 first mortgage on the Las Vegas Property. According to the plan,
18 at that time, the Las Vegas Property was no longer their
19 residence, but was now an investment property, and therefore,
20 modification of the terms of the loan secured by the Las Vegas
21 Property was no longer barred under of § 1123(b)(5). They argued
22 that whether the Las Vegas Property was their principal residence
23 for purposes of § 1123(b)(5) was a determination that should be
24 made by the bankruptcy court as of the time of plan confirmation.

25 The creditor holding the deed of trust on the Las Vegas
26 Property objected to the plan and argued that whether the Las
27 Vegas Property was the Abdelgadirs' principal residence must be
28 determined by the bankruptcy court at the time the lender was

1 granted its security interest in the collateral, or alternatively,
2 on the petition date, but not on the date of plan confirmation.

3 After conducting evidentiary hearings, the bankruptcy court
4 agreed with the Abdelgadirs that the time to determine whether the
5 Las Vegas Property was their principal residence was at plan
6 confirmation. The bankruptcy court reasoned that "this whole
7 process involves valuing. And we know from the [Bankruptcy]
8 [C]ode that you value in connection with what you're doing, and we
9 know that you value a plan, creditor's rights, as of the effective
10 date which then refers to confirmation." In re Abdelgadir, 455
11 B.R. at 902.

12 The secured creditor appealed the bankruptcy court's order
13 confirming the Abdelgadirs' chapter 11 plan. The issue on appeal,
14 as framed by the Panel, was, "[w]hat is the determinative date for
15 whether a claim is secured by a debtor's principal residence
16 subject to the Bankruptcy Code's anti-modification provision?"
17 Id. at 900.

18 In Abdelgadir, as an initial observation, the Panel noted
19 that while there was little case law discussing the anti-
20 modification rule in § 1123(b) (5),

21 [t]he language of § 1123(b) (5) is identical to that of
22 § 1322(b) (2) and was added to the Bankruptcy Code in
23 1994 to harmonize the treatment of home mortgage loans
24 in chapter 11 and chapter 13. See Granite Bank v. Cohen
25 (In re Cohen), 267 B.R. 39, 42 (Bankr. D.N.H. 2001);
Lomas Mortg., Inc. v. Louis, 82 F.3d 1, 6 (1st Cir.
1996) (citing legislative history). Therefore, case law
that examines § 1322(b) (2) is persuasive in our analysis
of § 1123(b) (5).

26 Id. at 900, n.7.

27 The Panel perhaps understated the problem of a lack of
28 decisional law addressing the proper construction of § 1123(b) (5).

1 Of the nine cases cited by the Panel concerning the anti-
2 modification clauses in the Bankruptcy Code, eight were chapter 13
3 cases analyzing § 1322(b)(2).⁵ The ninth case, In re Cohen, was a
4 chapter 11 case addressing § 1123(b)(5), but all the cases Cohen
5 cited and analyzed regarding the anti-modification rule were
6 § 1322(b)(2) cases.

7 While Abdelgadir relied almost exclusively on chapter 13
8 cases interpreting § 1322(b)(2) in construing the anti-
9 modification rule in § 1123(b)(5), we find no error in that
10 approach. Both provisions of the Code provide special plan
11 treatment protections for home loans in the bankruptcy cases of
12 individual debtors. As the Cohen bankruptcy court observed,
13 "Congress intended to amend Chapter 11 of the Bankruptcy Code to
14 include the same anti-modification provision applicable to Chapter
15 13 plans under section 1322(b)(2)." In re Cohen, 267 B.R. at 42;
16 see H.R. Rep. No. 835 (1994), reprinted in 1994 U.S.C.C.A.N.
17 3340, 3354 ("This amendment conforms the treatment of residential
18 mortgages in chapter 11 to that in chapter 13, preventing the
19 modification of the rights of a holder of a claim secured only by
20 a security interest in the debtor's principal residence."); see
21 also Lievsay v. W. Fin. Sav. Bank, F.S.B. (In re Lievsay), 199
22 B.R. 705, 708 (9th Cir. BAP 1996) (Although Lievsay was a chapter

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24 ⁵ Nobelman v. Am. Sav. Bank, 508 U.S. 324, 331 (1993);
25 Scarborough v. Chase Manhattan Mortg. Corp. (In re Scarborough),
26 461 F.3d 406, 411 (3d Cir. 2006); Zimmer v. PSB Lending Corp. (In
27 re Zimmer), 313 F.3d 1220, 1223, 1226-27 (9th Cir. 2002); Lomas
28 Mortg., Inc. v. Louis, 82 F.3d 1, 6 (1st Cir. 1996); Dean v.
LaPlaya Inv., Inc. (In re Dean), 319 B.R. 474, 478-79 (Bankr. E.D.
Va. 2004); Crain v. PSB Lending Corp. (In re Crain), 243 B.R. 75,
83 (Bankr. C.D. Cal. 1999); In re Smart, 214 B.R. 63 (Bankr. D.
Conn. 1997); In re Wetherbee, 164 B.R. 212, 215 (Bankr. D.N.H.
1994).

1 11 case, it ruled that “[g]iven the congressional intent to
2 harmonize the two chapters' treatment of home mortgages, and the
3 nearly identical language of the two sections, we will use
4 [§ 1322(b)(2)] cases to guide us[.]”). Thus, even though the
5 Abdelgadir opinion dealt with the anti-modification rule under
6 § 1123(b)(5), the Panel’s analysis was based on cases and
7 reasoning construing the anti-modification rule in § 1322(b)(2).
8 We therefore confidently regard Abdelgadir as highly persuasive in
9 resolving the issue in the current appeal.

10 Moving to the merits, the Abdelgadir Panel examined what it
11 believed was the plain meaning of § 1123(b)(5). The Panel
12 reasoned that, by its plain language, § 1123(b)(5) allows a debtor
13 to modify the rights of creditors holding certain claims - secured
14 claims and unsecured claims - but prohibits the modification of
15 the rights of creditors holding claims secured by a debtor's
16 principal residence. Id. at 901.

17 The Panel then engaged in a discussion of the meaning of
18 “claim” in the Bankruptcy Code, and why the bankruptcy court
19 erred in using the plan confirmation date as determinative of
20 principal residence for purposes of the anti-modification rule.
21 As the Panel explained, “claim” is a defined term under the
22 Bankruptcy Code. § 101(5) (A claim is a “right to payment, whether
23 . . . secured, or unsecured.”). It noted that whether a claim is
24 secured or unsecured is determined by application of § 506(a).
25 However, the Panel observed, a claim is deemed allowed when a
26 creditor files a proof of claim in the bankruptcy case, and the
27 Code requires that the amount of that claim be fixed as of the
28 date of filing a bankruptcy petition. Id.

1 The Abdelgadir bankruptcy court had explained that its
2 decision to use the plan confirmation date for determining whether
3 § 1123(b) (5)'s anti-modification rule applied to the secured
4 creditor's claim was because "this whole process involves valuing.
5 And we know from the [Bankruptcy] [C]ode that you value in
6 connection with what you're doing, and we know that you value a
7 plan, creditor's rights, as of the effective date which then
8 refers to confirmation." Id. at 902. However, in Abdelgadir, the
9 Panel concluded that, even though the bankruptcy court's rationale
10 for valuing the secured creditor's claim at confirmation was a
11 correct one, its interpretation of § 1123(b) (5) as measuring
12 whether a claim is protected from modification at the date of plan
13 confirmation was flawed. It reasoned that the bankruptcy court's
14 approach improperly shifted the time for fixing a creditor's claim
15 from the petition date to some future valuation date and conflated
16 the analysis of whether a creditor held a claim secured by the
17 debtor's principal residence with a determination of the value of
18 that claim. In reaching its conclusion, the Panel relied on the
19 several § 1322(b) (2) decisions mentioned above, including In re
20 Crain, 243 B.R. at 83-34 (valuation, not existence, of claim
21 determined at plan confirmation); In re Dean, 319 B.R. at 478-79
22 (court does not have to wait for confirmation to determine
23 principal residence for anti-modification purposes).

24 In its review of the bankruptcy court's ruling, Abdelgadir
25 also addressed and rejected the "last antecedent" argument offered
26 by the debtors in that case, and by Benafel here. In particular,
27 the Panel acknowledged that some bankruptcy courts, including In
28 re Smart, 214 B.R. at 63, have reasoned that the phrase "real

1 property that is the debtor's principal residence" in
2 §§ 1123(b) (5) and 1322(b) (2) is intended to modify the term
3 "security interest." As a result, the courts concluded that the
4 phrase, "security interest in real property that is the debtor's
5 principal residence" is ambiguous (i.e., it could refer to the
6 debtor's home at the present time, the petition date, or when the
7 security interest was created). Those courts therefore consulted
8 the Code's legislative history to resolve the ambiguity, and in
9 particular, noted Justice Stevens' concurrence in Nobleman, where
10 Justice Stevens suggests that the legislative history shows that
11 the purpose of the anti-modification clause was to provide
12 favorable treatment of home mortgages in order to encourage
13 capital into the home lending market. See 508 U.S. at 332. In
14 order to align with that purpose, those courts concluded that the
15 appropriate reference date for determining if a property is a
16 principal residence of the debtor is the date that the security
17 interest was created. See In re Smart, 214 B.R. at 68.⁶

18 The Abdelgadir Panel noted the case of Milavetz, Gallop &
19 Milavetz, P.A. v. United States, 130 S.Ct 1324, 1332 (2010), which
20 is the most recent statement of the U.S. Supreme Court regarding
21 interpretation of the Code. "Reliance on legislative history is
22 unnecessary in light of the statute's unambiguous language."
23 Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S.Ct. at
24 1332 n.3. According to the Panel, because the plain language of §

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26 ⁶ In its Memorandum of Decision, the bankruptcy court
27 seemed to approve In re Smart's reliance on the last antecedent
28 argument to support the Smart court's conclusion that a debtor's
principal residence is determined at the loan transaction date.
In re Benafel, 2010 WL 5373127, at *2. That argument was rejected
by the Abdelgadir Panel.

1 1123(b) (5) excepts a particular type of claim from modification in
2 a debtor's plan, the creditor's right to payment is fixed at the
3 petition date. §§ 101(5), 502; In re Dean, 319 B.R. at 478.
4 Therefore, the Panel concluded, "the determinative date for
5 whether a claim is secured by a debtor's principal residence is,
6 like all claims, fixed at the petition date." In re Abdelgadir,
7 455 B.R. at 903.

8 Because the statutes under scrutiny in Abdelgadir and in this
9 appeal are different, that decision does not technically control
10 the outcome here. Hart v. Massanari, 266 F.3d 1155, 1170 (9th
11 Cir. 2001) ("In determining whether it is bound by an earlier
12 decision, the court considers not merely 'the reason and spirit of
13 cases' but also 'the letter of particular precedents.' . . . [T]he
14 precise language employed is often crucial to the contours and
15 scope of the rule announced." (quoting Fisher v. Prince, 97 Eng.
16 Rep. 876, 876 (K.B. 1762)). Even so, because the Abdelgadir
17 Panel's analysis of § 1123(b) (5)'s anti-modification rule was
18 informed almost exclusively by the decisional law construing the
19 identical language of § 1322(b) (2), the Panel's opinion in
20 Abdelgadir must be regarded as highly persuasive that
21 § 1322(b) (2)'s anti-modification rule is also fixed on the
22 petition date. In deference to Abdelgadir, and because there
23 would be no honest basis to engage in a different analysis in this
24 appeal, we conclude that the bankruptcy court's decision in this
25 appeal that the loan transaction date determines principal
26 residence for § 1322(b) (2)'s purposes must be reversed.⁷

27
28 ⁷ We acknowledge that the Abdelgadir decision has been
appealed to the Ninth Circuit, Case No. 11-60061. However, since
(continued...)

1 II.

2 Even if we did not look to the Panel's opinion in Abdelgadir
3 to determine the outcome of the issue in this appeal, the majority
4 of other cases and authorities interpreting § 1322(b)(2) have
5 concluded that the petition date should be used in determining the
6 debtor's principal residence for purposes of that statute.

7 One popular treatise on Chapter 13 observes that "[u]ntil
8 recently, a majority of the reported decisions concluded that
9 entitlement to the protection from modification in § 1322(b)(2) is
10 determined based on circumstances at the petition." Keith M.
11 Lunden & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th ed. § 121.2,
12 Sec. Rev. April 11, 2011, www.ch13online.com. On the other hand,
13 the authors suggest that the trend in recent cases may favor the
14 view that the status of a debtor's property should be made at the
15 time of the loan origination.⁸

16 In contrast, another respected treatise, Colliers, posits
17 that a 2010 technical amendment to the Bankruptcy Code adding to
18 the definition of "debtor's principal residence" the requirement
19 that the structure be "used as the principal residence by the
20 debtor" may imply a present use by the debtor, thus favoring the

21
22

⁷(...continued)

23 we do not consider Abdelgadir to be binding on this Panel, that
24 the rule its announces might be modified, or even rejected, by the
25 Court of Appeals does not dictate whether we should find the
Abdelgadir analysis persuasive at this time.

26 ⁸ The statement that there is a "trend" favoring the loan
27 transaction date is somewhat puzzling because the treatise cites
28 to fewer cases decided in the last eleven years to support that
statement than it cites supporting use of the petition date. The
most recent addition to the list favoring the loan transaction
date is the bankruptcy court's decision in In re Abdelgadir, which
the Panel reversed in favor of the petition date. In re
Abdelgadir, 455 B.R. at 903.

1 petition date rather than the loan transaction date. 8 COLLIER ON
2 BANKRUPTCY §1322.06[1][a] (Alan N. Resnick & Henry J. Sommer, eds.,
3 16th ed. 2011); compare § 101(13A) (repealed 2010) (“The term
4 ‘debtor’s principal residence’ – (A) means a residential
5 structure, including incidental property, without regard to
6 whether that structure is attached to real property; and (B)
7 includes an individual condominium or cooperative unit, a mobile
8 or manufactured home, or trailer.”) with § 101(13A) (2010) (The
9 term ‘debtor’s principal residence’ – (A) means a residential
10 structure if used as the principal residence by the debtor,
11 including incidental property, without regard to whether that
12 structure is attached to real property; and (B) includes an
13 individual condominium or cooperative unit, a mobile or
14 manufactured home, or trailer if used as the principal residence
15 by the debtor.) (emphasis added).

16 Regardless of recent “trends” in case law and commentary,
17 however, we find that the majority of the cases interpreting
18 § 1322(b) (2) favor use of the petition date to determine principal
19 residence. For example, in In re Christopherson, 446 B.R. 831,
20 835 (Bankr. N.D. Ohio 2011), the bankruptcy court reasoned that,
21 “[t]he majority of courts has determined that the critical date is
22 the petition filing date. . . . A minority of courts hold that a
23 debtor's [principal] residence is determined at the time the
24 security interest was created. . . . The minority position
25 requires a subjective look into the parties intentions which is
26 difficult to ascertain after the fact, and could lead to
27 inconsistent rulings.” The court decided to “follow[] the
28 majority view that a bright line rule should be applied.”

1 Another recent Ohio case held that the petition date was
2 preferred, because "failure to consider the petition date could
3 lead to creditor manipulation." In re Baker, 398 B.R. 198, 203
4 (Bankr. N.D. Ohio 2008).

5 In Wells Fargo Bank, N.A. v. Jordan (In re Jordan), 330 B.R.
6 857, 860 (Bankr. M.D. Ga. 2005) the bankruptcy court held that,
7 "The law in this district is that the critical date for deciding
8 whether a creditor qualifies for section 1322(b)(2) protection is
9 the date the petition is filed." (Internal quotation marks
10 omitted.) The petition date has also been applied in the District
11 of Massachusetts, In re Leigh, 307 B.R. 324, 331 (Bankr. D. Mass.
12 2004); the Eastern District of Missouri, In re Bosch, 287 B.R.
13 222, 226 (Bankr. E.D. Mo. 2002); the District of New Hampshire, In
14 re Schultz, 2001 Bankr. LEXIS 1319 (Bankr. D.N.H. 2001); and the
15 Northern District of Illinois, In re Larios, 259 B.R. 675 (Bankr.
16 N.D. Ill. 2001).

17 Moreover, a significant majority of cases decided before 2000
18 also held that the petition date determines principal residence
19 for purposes of the anti-modification rule in §1322(b).
20 2 K. Lunden, CHAPTER 13 BANKRUPTCY § 121.2 at 121-3 – 121-9 (3d ed.
21 2000)); see In re Donahue, 221 B.R. 105, 111 (Bankr. D.Vt. 1998)
22 ("A determination as to when Debtor's property is his [principal]
23 residence for purposes of § 1322(b)(2) is made at the commencement
24 of the case"); In re Howard, 220 B.R. 716, 718 (Bankr. S.D. Ga.
25 1998) (The court must determine whether security interest is
26 protected from modification by § 1322(b)(2) with reference to the
27 date of the Chapter 13 petition and the language of the security
28 instrument without regard to whether collateral described in the

1 agreement continues to exist or has any value); In re Lebrun, 185
2 B.R. 665 (Bankr. D. Mass. 1995) (observing that, at the time of the
3 loan origination, the debtor occupied the real estate collateral,
4 but had rented it out on the petition date. The court held that
5 § 1322(b) (2) did not protect the mortgage from modification.); In
6 re Wetherbee, 164 B.R. 212, 215 (Bankr. D. N.H. 1994) ("A 'claim'
7 is a term of art in a bankruptcy proceeding which defines a
8 creditor's right of payment in the bankruptcy proceeding. A
9 'claim' in bankruptcy arises on the date of the filing of the
10 petition. Therefore, only if a claim is secured by the debtor's
11 principal residence at the time of the bankruptcy petition is the
12 debtor prohibited from modifying the creditor's interest under the
13 plain language of [§ 1322(b) (2)]."); In re Churchill, 150 B.R.
14 288, 289 (Bankr. D. Me. 1993) (That the debtor's real property was
15 not her principal residence at the time of the loan transaction
16 does not defeat the protection from modification in § 1322(b) (2)
17 where the property was the debtor's principal residence at the
18 time of filing of the Chapter 13 case.); see also (for the
19 proposition that the petition date controls), In re Boisvert, 156
20 B.R. 357, 359 (Bankr. D. Mass. 1993); In re Dinsmore, 141 B.R.
21 499, 505-06 (Bankr. W.D. Mich. 1992); In re Amerson, 143 B.R. 413,
22 416 (Bankr. S.D. Miss. 1992); In re Groff, 131 B.R. 703, 706
23 (Bankr. E.D. Wis. 1991).

24 In numbers, the courts that rely upon the loan transaction
25 date for determining a chapter 13 debtor's principal residence
26 amount to a distinct minority. The Third Circuit has held that
27 "the critical moment [for purposes of § 1322(b) (2)] is when the
28 creditor takes a security interest in the collateral. . . . [W]e

1 look to the character of the collateral at the time of the
2 mortgage transaction.” Scarborough v. Chase Manhattan Corp. (In
3 re Scarborough), 461 F.3d 406 (3d Cir. 2006). One First Circuit
4 BAP decision looked to the loan transaction date as the reference
5 date for determining application of the anti-modification clause.
6 However, in that case, the panel’s stated motivation was to use
7 the date resulting in the most favorable treatment for the debtor
8 under the circumstances, and not as the result of adoption of any
9 generally applicable rule. GMAC Mortg. Corp. v. Marenaro (In re
10 Marenaro), 217 B.R. 358, 360 (1st Cir BAP 1998). Other cases
11 favoring use of the loan transaction date are: In re Smart, 214
12 B.R. 63, 67 (Bankr. D. Conn. 1997) (bankruptcy court held that the
13 appropriate reference date is the date the security interest was
14 created rather than the date the petition was filed); Parker v.
15 Fed. Home Loan Mortg. Corp., 179 B.R. 492, 494 (E.D. La. 1995)
16 (same); In re Hildebran, 54 B.R. 585, 586 (Bankr. D. Or. 1985)
17 (same, and a case cited by the bankruptcy court in this appeal in
18 support of its position favoring the loan transaction date).

19 It may be ironic in the current appeal, where One West argues
20 in favor of using the loan transaction date, that some cases
21 aligning with One West’s position did not result in a desirable
22 outcome for the secured creditor. For example, in In re Roemer, a
23 provision in the loan documents limited the debtor’s obligation to
24 remain in the house securing the loan for one year. The
25 bankruptcy court ruled that this provision “limited its anti-
26 modification protection to at most one year (and arguably [the
27 secured creditor] was not entitled to anti-modification protection
28

1 at all.).” 421 B.R. 23, 26 (Bankr. D.D.C. 2009).⁹

2 Based upon our survey of the case law, we conclude that the
3 use of the petition date for determining the anti-modification
4 provision of § 1322(b)(2) is the clear majority rule. When this
5 is taken together with the Panel’s holding in In re Abdelgadir
6 that the petition date is the appropriate date for determining
7 debtor’s principal residence for purposes of § 1123(b)(5), we
8 conclude that the bankruptcy court erred in fixing the loan
9 transaction date as the appropriate date for that determination.¹⁰

10
11 III.

12 While the Panel’s Abdelgadir decision was published after
13 briefing had been completed in this appeal, in an order issued
14 before oral argument in this appeal, the Panel instructed counsel
15 for the parties to be prepared to discuss the implications of the
16 Abdelgadir decision for this appeal. At argument, One West raised
17 two points in its analysis of Abdelgadir we should address.

18 One West argued that the Abdelgadir Panel erred in equating
19 §§ 1322(b)(2) and 1123(b)(5) because, in context, the provisions
20 should be distinguished. In particular, counsel for One West

21
22
23 ⁹ Of course, other decisions have held that where the loan
24 transaction documents contemplate some commercial use by the
25 debtor of the subject property, the anti-modification rule may not
26 apply. Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885,
27 888 (10th Cir. BAP 2010); In re Moore, 441 B.R. 732 (Bankr.
N.D.N.Y. 2010); In re Grimes, 2009 WL 960143 (Bankr. D. Or. 2009).
The issue here, though, does not involve whether Benafel used the
Property as something other than her principal residence, but
rather, the relevant date to be used by the bankruptcy court in
asking that question.

28 ¹⁰ Under the circumstances, we find it unnecessary to include
a detailed analysis of the various arguments advanced by parties
and discussed by courts in reaching their decisions.

1 noted that § 1322(b) (3), (5) and (c) (1) and (2), provisions which
2 directly or indirectly affect the anti-modification rule in
3 § 1322(b) (2), do not appear in § 1123. Therefore, One West
4 contends, we should consider a different approach in interpreting
5 § 1322(b) (2) than the construction given § 1123(b) (5) in
6 Abdelgadir. We disagree.

7 None of the other chapter 13 provisions cited by One West
8 relate to the date to be used to determine a debtor's principal
9 residence. Subsections 1322(b) (3), (b) (5) and (c) (1) all deal with
10 curing defaults; subsection 1322(c) (2) provides an exception to
11 (b) (2) in that, if the last payment on the original payment
12 schedule for a mortgage is due before the final plan payment, the
13 debtor may pay the claim as modified pursuant to § 1325(a) (5). As
14 a result, these four provisions are equally applicable whether the
15 debtor's principal residence is fixed as of the loan transaction
16 date or the petition date. Moreover, these provisions have been
17 part of the Bankruptcy Code since 1994, and presumably the
18 bankruptcy courts that have adopted the petition date for applying
19 § 1322(b) (2) were aware of their existence, but were unpersuaded
20 that these other provisions added anything to the required
21 analysis. In short, to the extent that One West argues that
22 § 1322(b) (2) should be interpreted differently than § 1123(b) (5)
23 because of these other subsections, it is a distinction without a
24 difference.

25 One West's second argument was that, even if Abdelgadir's
26 ruling that the petition date controls is correct, the facts of
27 this case would support a conclusion that the Property was
28 Benafel's principal residence on the petition date. One West

1 noted that Benafel left the Property and leased it only shortly
2 before filing for bankruptcy. Even though Benafel was not living
3 at the Property on the petition date, One West suggests that she
4 may have intended to return to live there later. If so, the
5 bankruptcy court could have determined that the Property was
6 Benafel's domicile, and consequently deemed the Property to be her
7 principal residence for § 1322(b)(2) purposes.

8 Regarding this point, the bankruptcy court observed that:

9 The parties agree that the [Property] is not the
10 Debtor's principal residence, and was not as of the
11 petition date. It was, however, her principal residence
12 at the time the existing loan was obtained, and the
13 security interest in the property granted.

14 In re Benafel, 2010 WL 5373127, at *1 (Bankr. D. Or. December 22,
15 2010). Upon closer examination of the record, however, One West
16 is correct that there is no indication that the parties had
17 agreed, or that either party had even contended, that the Property
18 was, or was not, Benafel's principal residence on the petition
19 date. Instead, the bankruptcy court's "finding" in its decision
20 was likely based on an opening colloquy between the court and
21 counsel for One West:

22 THE COURT: I understand you're agreeing that [at] the
23 time [] the loan was taken out, that Ms. Benafel lived
24 in the subject property, but that she did not live there
25 at the time the petition was filed.

26 MILLS [attorney for One West]: I believe that's an
27 accurate representation of the facts, Your Honor.

28 Hr'g Tr. 4:11-15. Counsel for Benafel did not attempt to correct
the court's statement. But as can be seen, at best, this was a
concession by One West about Benafel's living arrangements, not
technically whether the Property was her principal residence on
either the loan transaction or petition date.

