

AUG 28 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NC-14-1230-DKiTa
)
 GREGORY PAUL BEARDSLEY and) Bk. No. 11-55414-MEH
 REBECCA HARO BEARDSLEY,)
)
 Debtors.)
)
 _____)
 RABOBANK, N.A.,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 GREGORY PAUL BEARDSLEY;)
 REBECCA HARO BEARDSLEY;)
 JOHN W. RICHARDSON, CHAPTER 7)
 TRUSTEE,)
)
 Appellees.)
 _____)

Argued and Submitted on May 14, 2015
at San Francisco, California

Filed - August 28, 2015

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Charles D. Novack, Bankruptcy Judge, Presiding

Appearances: _____
George Cameron Hollister argued for appellant
Rabobank, N.A.; Charles Patrick Maher of Dentons
US LLP argued for appellee John W. Richardson,
Chapter 7 Trustee.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 Before: DUNN, KIRSCHER AND TAYLOR, Bankruptcy Judges.

2 Memorandum by Judge Dunn

3 Concurrence by Judge Taylor

4
5 Rabobank, N.A. ("Rabobank") appeals the bankruptcy court's
6 order denying its motion under § 506(a) seeking to recharacterize
7 its secured claim as wholly unsecured.² We AFFIRM.

8 **FACTS**

9 The debtors, Gregory and Rebecca Beardsley, filed their
10 chapter 11 bankruptcy petition on June 7, 2011. Among their
11 assets, they scheduled a commercial real property located in
12 Pacific Grove, California ("Pacific Grove Property") with a value
13 of \$880,000.³ The debtors listed a total of \$593,108.79 in
14 secured claims encumbering the Pacific Grove Property:

15 1) Monterey County Tax Collector's \$48,174 tax lien; 2) Phillip
16 Giammanco's \$344,000 first deed of trust; and 3) Rabobank's
17 \$200,934.79 second deed of trust.

18 On January 30, 2012, Rabobank filed a proof of claim valuing
19 the Pacific Grove Property at \$325,000 and asserting a secured
20 claim in the amount of \$201,942.81.

21 The debtors' chapter 11 case was converted to chapter 7 on
22 October 12, 2012. A month after the conversion, the chapter 7

23
24 ² Unless otherwise indicated, all chapter and section
25 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
26 1532, and all "Rule" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

27 ³ The Pacific Grove Property consists of four separate but
28 contiguous lots with a kiosk and a storage building located
thereon.

1 trustee ("Trustee") employed a broker to market the Pacific Grove
2 Property.

3 On January 4, 2013, Rabobank filed an amended proof of claim
4 valuing the Pacific Grove Property at \$750,000, but leaving the
5 amount of its asserted secured claim unchanged. Shortly
6 thereafter, Rabobank obtained an appraisal of the Pacific Grove
7 Property. The appraisal valued the Pacific Grove Property at
8 \$185,000 as of January 16, 2013, based on its "as is" condition.
9 Rabobank also discovered that accrued unpaid real property taxes
10 were approaching \$70,000.

11 Based on this information, Rabobank concluded that its lien
12 "was then and had likely always been wholly unsecured."
13 Consequently, on June 26, 2013, Rabobank filed a second amended
14 proof of claim,⁴ this time valuing the Pacific Grove Property at
15 \$185,000 and characterizing its entire claim as unsecured.

16 On January 29, 2014, the Trustee filed a motion to abandon
17 the Pacific Grove Property under § 554(a) ("Motion to Abandon").
18 He explained that, despite his efforts to market the Pacific
19 Grove Property, he had been unable to negotiate a sale that would
20 "benefit the [bankruptcy] estate sufficiently." In fact, the
21 Trustee negotiated a sale but it fell through because he could
22 not meet the buyer's condition: that there would be sufficient
23 water service available to develop the Pacific Grove Property.

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25
26 ⁴ In its opposition to the debtors' motion to dismiss their
27 chapter 7 case, Rabobank disclosed that it had "amended its claim
28 to concede that its lien position [was] fully unsecured,
resulting in an additional unsecured claim of \$201,942.81 against
the Debtors' Estate."

1 Because of the water availability issue, the value of the Pacific
2 Grove Property was less than the Trustee had anticipated and
3 significantly less than as scheduled by the debtors. He thus
4 concluded that the Pacific Grove Property was burdensome to the
5 bankruptcy estate and that "further efforts to market [it] and
6 maximize its value [were] not warranted."

7 On February 19, 2014, Rabobank filed an opposition
8 ("Opposition") to the Motion to Abandon. It contended that the
9 Trustee failed to provide evidence supporting the abandonment of
10 the Pacific Grove Property. Rabobank also argued that formal
11 abandonment of the Pacific Grove Property was unnecessary and
12 premature as abandonment would occur automatically upon closing
13 of the case, which was imminent.

14 Rabobank moreover averred that it would suffer prejudice if
15 the Pacific Grove Property was abandoned before it obtained a
16 ruling on its motion to determine the status of its claim under
17 § 506(a) ("Status Motion"), **which it planned to file**. Rabobank
18 claimed that a "manifest injustice" would occur if the bankruptcy
19 court denied the Status Motion on the ground that the Trustee had
20 abandoned the Pacific Grove Property. This "manifest injustice"
21 would appear in the form of a "windfall distribution" to the
22 debtors, who could be paid before creditors received full payment
23 on their claims, as the debtors held equity interests.

24 On February 25, 2014, Rabobank filed the Status Motion
25 seeking a determination that it held a wholly unsecured claim in
26 the amount of \$201,942.81, because its collateral, the Pacific
27 Grove Property, had no value beyond the secured claims of the
28 senior lienholders. It referenced the second amended proof of

1 claim, asking the bankruptcy court to determine that its second
2 amended proof of claim was "a wholly unsecured claim." It sought
3 a "finding that [its] Amended Claim #22 in the amount of
4 \$201,942.81 [was] an entirely unsecured claim because there [was]
5 no value in the [Pacific Grove] Property beyond the liens of the
6 senior lienholders Monterey County Tax Collector and Phillip
7 Giammanco." Rabobank submitted its appraisal, among other
8 documents, in support of its assertion as to the value of the
9 Pacific Grove Property.

10 In reply to the Opposition, the Trustee countered that
11 Rabobank itself "made the case for abandonment" in its Status
12 Motion. He pointed out that in the Status Motion, Rabobank
13 sought a determination that its claim was unsecured instead of
14 secured because "its deed of trust attache[d] to no value in the
15 [Pacific Grove] Property." Rabobank even submitted evidence -
16 the appraisal - showing that the Pacific Grove Property had no
17 value in excess of the first two priority liens.

18 The Trustee filed an opposition to the Status Motion as
19 well. He argued that, assuming the bankruptcy court granted the
20 Motion to Abandon, the Pacific Grove Property would no longer be
21 property of the bankruptcy estate, thereby rendering the Status
22 Motion moot.

23 The Trustee reported that timely-filed general unsecured
24 claims totaled \$140,000 approximately. He estimated that he
25 would have approximately \$330,000 on hand to pay these claims
26 after paying allowed administrative expenses. He went on to note
27 that if Rabobank's claim was reclassified as a general unsecured
28 claim, holders of timely-filed general unsecured claims would not

1 be paid in full.⁵

2 The Trustee further contended that Rabobank was trying to
3 "strip off" its lien through the Status Motion, which was
4 prohibited under Dewsnup v. Timm, 502 U.S. 410 (1992).⁶

5 The bankruptcy court set a hearing on both the Motion to
6 Abandon and the Status Motion for March 28, 2014 ("Hearing"). A
7 few weeks before the Hearing, on March 3, 2014, the debtors filed
8 an objection to Rabobank's second amended proof of claim ("Claim
9 Objection"), seeking disallowance of the second amended proof of
10 claim in its entirety.

11 The debtors pointed out that Rabobank held a secured claim
12 against the Pacific Grove Property, which the Trustee intended to
13 abandon. Once the abandonment was confirmed, they argued,
14 Rabobank was required to proceed against the Pacific Grove
15 Property as its sole remedy under state law.

16 Rabobank filed a response to the Claim Objection, requesting
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18 ⁵ The Trustee also argued that the "one action rule" set
19 forth in California Civil Procedure ("CCP") § 726 precluded
20 Rabobank from seeking to recharacterize its claim unless and
21 until: 1) it obtained a deficiency judgment through judicial
22 foreclosure; 2) Giammanco foreclosed on his first deed of trust,
23 which would extinguish Rabobank's second deed of trust, thereby
24 making it unsecured; or 3) its lien became valueless subsequent
to its creation. He argued that Rabobank's proposed "strip off"
under § 506 would run contrary to CCP § 726. The debtors echoed
these arguments in their own opposition to the Status Motion.

25 On appeal, Rabobank contends that CCP § 726 does not apply
26 because § 506(a), a federal statute, trumps CCP § 726, a state
statute. We decline to address this argument as the bankruptcy
court did not make any determinations under CCP § 726.

27 ⁶ The debtors also opposed the Status Motion, echoing the
28 Trustee's arguments regarding Dewsnup.

1 a hearing. However, no hearing was set.

2 At the Hearing, the bankruptcy court addressed the Motion to
3 Abandon first as "dealing with one makes the other far easier."
4 Counsel for Rabobank protested, asking the bankruptcy court to
5 address the Status Motion **before** addressing the Motion to Abandon
6 because "that way, there wouldn't be any inequity because we
7 could just simply have that ruled on."⁷ Tr. of March 28, 2014
8 hr'g, 5:6-8. He also informed the bankruptcy court that the
9 debtors had filed the Claim Objection.

10 The bankruptcy court neither acknowledged Rabobank's request
11 for a determination on the second amended proof of claim nor the
12 filing of the Claim Objection. Instead, it considered the
13 fairness argument by Rabobank's counsel regarding the order in
14 which it would handle the Motion to Abandon and the Status
15 Motion. The bankruptcy court stated that § 554(a) does not
16 require abandonment to be fair or equitable for "one particular
17 creditor." Tr. of March 28, 2014 hr'g, 4:22. Section 554(a) did
18 not require it to carry out "a balancing of the equities to
19 determine whether or not" to approve abandonment of property.
20 Tr. of March 28, 2014 hr'g, 6:6-7.

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23 ⁷ At the hearing, counsel for Rabobank claimed that the
24 Status Motion was noticed before the Motion to Abandon. However,
25 we note that the Trustee filed the Motion to Abandon on
26 January 29, 2014. He also filed and served a Notice of
27 Abandonment on the same day. Rabobank did not serve the Status
28 Motion until February 24, 2014, and filed the Status Motion on
February 25, 2014.

The bankruptcy court dealt with this assertion by telling
counsel for Rabobank that "this [wasn't] a first-in-line
analysis." Tr. of March 28, 2014 hr'g, 5:12.

1 The bankruptcy court considered the Trustee's proposed
2 abandonment of the Pacific Grove Property to be typical and
3 straightforward: the abandonment was "for the simple reason that
4 there's no equity in this property [and it] had no value for the
5 bankruptcy estate." Tr. of March 28, 2014 hr'g, 4:7-8. The
6 bankruptcy court pointed out that Rabobank even conceded in its
7 Status Motion that the Pacific Grove Property had no equity and
8 no value for the bankruptcy estate. The bankruptcy court thus
9 granted the Motion to Abandon.

10 Although it believed that the Motion to Abandon had resolved
11 the issue, the bankruptcy court turned to the Status Motion. It
12 noted that if it granted the Status Motion, Rabobank would
13 receive a dividend as an unsecured creditor yet still have a lien
14 when the bankruptcy case closed.

15 Counsel for Rabobank asserted that Rabobank was secured
16 under California law - that it had a lien still. However,
17 Rabobank's lien had no value because the Pacific Grove Property
18 had no equity. That is, because the value of its collateral, the
19 Pacific Grove Property, was less than the combined amount of the
20 prior two secured liens, its entire claim was unsecured.
21 Accordingly, Rabobank requested that the bankruptcy court
22 "bifurcate" its claim under §506(a) - to determine that the full
23 amount of its claim was unsecured.

24 Counsel for Rabobank further argued that if the bankruptcy
25 court granted the Status Motion, Rabobank still would retain its
26 lien, but the amount of its lien would be reduced by the amount
27 of any distribution it received from the bankruptcy estate on its
28 general unsecured claim.

1 The bankruptcy court was not swayed by Rabobank's arguments.
2 It denied the Status Motion on the ground that it had granted the
3 Motion to Abandon. Because the Pacific Grove Property was no
4 longer property of the bankruptcy estate, the bankruptcy court
5 concluded it had "no reason . . . to value [the Pacific Grove
6 Property] under any circumstances." Tr. of March 28, 2014 hr'g,
7 11:24-25, 12:1.

8 On April 1, 2014, the bankruptcy court entered an order
9 granting the Motion to Abandon ("Abandonment Order"). On
10 April 14, 2014, it entered an order denying the Status Motion
11 "for the reasons stated on the record" ("Status Motion Order").

12 Rabobank timely appealed the Status Motion Order. It did
13 not appeal the Abandonment Order.

14 On December 10, 2014, the Trustee filed an interim final
15 report, conditionally listing Rabobank as a general unsecured
16 creditor in light of its second amended proof of claim. He noted
17 that its "claim [was the] subject of dispute" because Rabobank
18 had appealed the bankruptcy court's decision "to disallow [its]
19 claim in full based on the Trustee's abandonment [of its
20 collateral, the Pacific Grove Property]."

21 The Trustee indicated that he would reserve the funds that
22 could be paid to Rabobank as a general unsecured creditor until
23 final resolution of the dispute. He also indicated that if the
24 dispute was resolved in its favor, Rabobank would receive a pro
25 rata distribution of \$81,792.30 (i.e., 40.5% of its asserted
26 general unsecured claim of \$201,942.81).

27 The Trustee also mentioned that Charles and Debra Beardsley,
28 the brother and sister-in-law of the debtor, Gregory Beardsley,

1 tardily filed a proof of claim in the amount of \$180,000 ("Family
2 Claim").⁸ He noted that the Family Claim was deemed allowed,
3 though it would not receive any distribution once all allowed
4 administrative, priority and timely general unsecured claims
5 (including Rabobank's second amended claim) received
6 distributions. He also indicated that the U.S. Department of
7 Education had filed an untimely proof of claim as well.

8 On January 12, 2015, an order was entered, stating that the
9 Trustee's interim account was "approved and settled" and that he
10 "shall distribute the estate"

11 At oral argument, the Trustee advised us that he intended to
12 file an objection to Rabobank's second amended proof of claim
13 because he considered the Family Claim to be valid. He explained
14 that if he did not, the Family Claim would not receive any
15 distribution, not only because it was late filed, but also
16 because of the potential distribution on Rabobank's second
17 amended claim. The Trustee further noted that if Rabobank's
18 second amended claim was not allowed, then all timely allowed
19 general unsecured claims would receive one hundred cents on the
20 dollar.

21 JURISDICTION

22 The bankruptcy court had jurisdiction under 28 U.S.C.
23 §§ 1334 and 157(b) (2) (A) and (K). We have jurisdiction under
24 28 U.S.C. § 158.

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27 ⁸ Charles and Debra Beardsley filed their proof of claim on
28 January 21, 2014, nearly one year after the deadline.

1 **ISSUE**

2 Did the bankruptcy court err in refusing to recharacterize
3 Rabobank's secured claim as a wholly unsecured claim under
4 § 506(a)?

5 **STANDARDS OF REVIEW**

6 We review the bankruptcy court's conclusions of law and
7 interpretation of provisions of the Bankruptcy Code de novo.
8 Anwar v. Johnson, 720 F.3d 1183, 1186 (9th Cir. 2013) (quoting
9 Greene v. Savage (In re Greene), 583 F.3d 614, 618 (9th Cir.
10 2009)). We review its findings of fact for clear error. Id.,
11 quoting Greene, 720 F.3d at 1186.

12 **DISCUSSION⁹**

13 At the Hearing, Rabobank sought to have its secured second
14 lien claim recharacterized as a general unsecured claim,
15 referring to its second amended proof of claim, so that it could
16 share in a distribution from the bankruptcy estate. On appeal,
17 Rabobank claims that, in its Status Motion, it only wanted a
18 determination under § 506(a) that "the value of the secured
19 portion of [its] claim as of the Petition Date was zero dollars,
20 and therefore that the entire balance of the claim was
21 unsecured." Appellant's Opening Br. at 16. Rabobank argues that
22 the bankruptcy court erred in denying the Status Motion because

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24 ⁹ On July 11, 2014, the debtors filed a notice of joinder
25 ("Joinder") to the Trustee's response brief, simply stating that
26 they joined in the Trustee's response brief. Notably, they have
27 not filed a notice of appearance in the appeal. In its reply
28 brief, Rabobank objected to the Joinder, arguing that the debtors
should not be allowed to participate in the appeal because they
failed to file the Joinder timely. Neither the debtors nor their
counsel appeared to participate at oral argument.

1 the abandonment of the Pacific Grove Property under § 554 did not
2 and should not prevent Rabobank from seeking to recharacterize
3 its claim under § 506(a).¹⁰

4 The bankruptcy court expressly based its denial of the
5 Status Motion on its grant of the Motion to Abandon. At the
6 Hearing, the bankruptcy court explained that it was

7 granting the Trustee's [Motion to Abandon], and upon
8 granting the motion to abandon, [the Pacific Grove
9 Property was] no longer property of the estate and
10 therefore there's no reason for [it] to value [the
Pacific Grove Property] under any circumstances. And
given my ruling, the [Status Motion] filed by Rabobank
is denied.

11 Tr. of March 28, 2014 hr'g, 11:22-25, 12:1-2.

12 Section 506(a)(1) in relevant part provides that, "an
13 allowed claim of a creditor secured by a lien on property **in**
14 **which the estate has an interest . . .** is a secured claim **to the**
15 **extent of the value of such creditor's interest in the estate's**
16 **interest in such property . . .**, and is an unsecured claim to
17 the extent that the value of such creditor's interest . . . is
18 less than the amount of such allowed claim." Section 554(a) and
19 (d) provide:

20 (a) After notice and a hearing, the trustee may abandon
21 any property of the estate that is burdensome to the
22 estate or that is of inconsequential value and benefit
23 to the estate.

(d) Unless the court orders otherwise, property of the

24 ¹⁰ Rabobank also argues that the bankruptcy court abused its
25 discretion in denying the Status Motion without considering the
26 evidentiary record. We disagree. The bankruptcy court
27 repeatedly referred to the fact that Rabobank conceded in its own
28 pleadings that the Pacific Grove Property had no equity.
Rabobank moreover had included a copy of its appraisal in its
submissions.

1 estate that is not abandoned under this section and
2 that is not administered in the case remains property
of the estate.

3 Accordingly, consistent with § 554, when the bankruptcy court
4 granted the Motion to Abandon, the estate no longer had an
5 interest in the Pacific Grove Property, and by its terms,
6 § 506(a) no longer applied.

7 Rabobank did not appeal the Abandonment Order, and Rabobank
8 contends that the Trustee's abandonment of the Pacific Grove
9 Property did not affect its right to seek bifurcation of its
10 secured claim. We disagree.

11 Rabobank challenges the bankruptcy court's reliance on the
12 Supreme Court's Dewsnup decision on the ground that Dewsnup dealt
13 with a chapter 7 debtor's attempt to use § 506(d) to strip down
14 an undersecured lien to the value of the collateral. However, in
15 its Status Motion, Rabobank argues that it was seeking to
16 bifurcate or recharacterize its **claim** under § 506(a), not to
17 strip its **lien** under § 506(d). Thus, it contends, Dewsnup does
18 not apply.

19 At least two bankruptcy courts have noted that, in Dewsnup,
20 the Supreme Court did not address directly the issue of whether a
21 wholly unsecured lien could be stripped when the property to
22 which the lien was attached had been abandoned. See
23 In re Bodensiek, 522 B.R. 737, 738-39 (Bankr. S.D. Fla. 2015);
24 Cole v. Fifth Third Bank (In re Cole), 521 B.R. 410, 414-15
25 (Bankr. N.D. Ga. 2014). These bankruptcy courts noted that, in
26 Dewsnup v. Timm, 908 F.2d 588 (10th Cir. 1990), the Tenth Circuit
27 had held that § 506(a) applies where the collateral is property
28 in which the estate has an interest. Because the bankruptcy

1 estate retains no interest in abandoned property, the Tenth
2 Circuit reasoned, § 506(a) bifurcation does not apply. The Tenth
3 Circuit then concluded that if § 506(a) does not apply, the
4 chapter 7 debtor cannot strip down a lien under § 506(d).
5 However, the bankruptcy courts recognized that the Supreme Court
6 decided Dewsnup on a different ground. See Bodensiek, 522 B.R.
7 at 739; Cole, 521 B.R. at 415.

8 We agree with these bankruptcy courts that the Supreme Court
9 in Dewsnup did not address § 506(a) head on.

10 Were we writing on a clean slate, we might be inclined to
11 agree with petitioner that the words "allowed secured claim"
12 must take the same meaning in § 506(d) as in § 506(a). But,
13 given the ambiguity in the text, we are not convinced that
14 Congress intended to depart from the pre-Code rule that
15 liens pass through bankruptcy unaffected.

16 Dewsnup, 502 U.S. at 417.

17 Moreover, we note that the Supreme Court issued a decision
18 recently, Bank of America, N.A. v. Caulkett, 135 S. Ct. 1995
19 (2015), that revisits its decision in Dewsnup. In Caulkett, the
20 Supreme Court repeated the holding in Dewsnup: a debtor cannot

21 strip down the creditors' lien to the value of the
22 property under § 506(d) "because the [creditors'] claim
23 [wa]s secured by a lien and ha[d] been fully allowed
24 pursuant to § 502." . . . In other words, Dewsnup
25 defined the term "secured claim" in § 506(d) to mean a
26 claim supported by a security interest in property,
27 regardless of whether the value of that property would
28 be sufficient to cover the claim. Under this
29 definition, § 506(d)'s function is reduced to "voiding
30 a lien whenever a claim secured by the lien itself has
31 not been allowed." . . . Because the Bank's claims here
32 are both secured by liens **and allowed under § 502**, they
33 cannot be voided under the definition given to the term
34 "allowed secured claim" by Dewsnup.

35 Caulkett, 135 S. Ct. at 1999, quoting Dewsnup, 502 U.S. at 416,
36 417. As we read Caulkett, the Supreme Court still has not

1 addressed directly the application of § 506(a) where the
2 characterization or allowance of a claim as secured or unsecured,
3 rather than lien avoidance under § 506(d), is at issue.

4 Rabobank still urges us to consider Dewsnup - at least,
5 Justice Scalia's dissent, which **does** analyze the interplay
6 between § 506(a) and (d). Although we acknowledge that dissents
7 can be persuasive, they are not precedential. See U.S. v.
8 Ameline, 409 F.3d 1073, 1083 n.5 (citing Purcell v. BankAtlantic
9 Fin. Corp., 85 F.3d 1508, 1513 (11th Cir. 1996)). Also, more
10 importantly, Rabobank did not raise this argument before the
11 bankruptcy court. We thus decline to consider it. See
12 In re Healthcentral.com, 504 F.3d 775, 789 (9th Cir. 2007)
13 (citation omitted).

14 Contrary to Rabobank's contention, we determine that the
15 Trustee's abandonment of the Pacific Grove Property **does** affect
16 its ability to seek a determination of the secured or unsecured
17 status of its claim under § 506(a). As noted above, § 506(a)(1)
18 provides for determination of a creditor's claim as secured
19 and/or unsecured with respect to property **in which the estate has**
20 **an interest.**

21 "Where the statute's language is plain, the sole function
22 of the courts is to enforce it according to its terms, for courts
23 must presume that a legislature says in a statute what it means
24 and means in a statute what it says there.'" Meruelo Maddux
25 Props-760 S. Hill Street, LLC v. Bank of America, N.A.
26 (In re Meruelo Maddux Props., Inc.), 667 F.3d 1072, 1076 (9th
27 Cir. 2012) (quoting Int'l Ass'n of Machinists & Aerospace Workers
28 v. BF Goodrich Aerospace Aerostructures Grp., 387 F.3d 1046, 1051

1 (9th Cir. 2004)). Again, by its terms, § 506(a) requires the
2 creditor to have a lien on property **in which the estate has an**
3 **interest** in order to obtain a decision as to the secured and/or
4 unsecured status of its claim.

5 However, when property has been formally abandoned under
6 § 554(a), the bankruptcy estate no longer has an interest in it.

7 Within the context of bankruptcy, abandonment is
8 the formal relinquishment of the property at issue from
9 the bankruptcy estate. Upon abandonment, the debtor's
interest in the property is restored **nunc pro tunc** as
of the filing of the bankruptcy petition.

10 Catalano v. Comm'r, 279 F.3d 682, 687 (9th Cir. 2002) (italics in
11 original). See also Slates v. Reger (In re Slates), 2012 WL
12 5359489 at *10 (9th Cir. BAP 2012); Achi v. Casey (In re Achi),
13 2001 WL 36354910 at *1 (9th Cir. BAP 2008). Here, the Trustee
14 abandoned the Pacific Grove Property, as confirmed by the
15 bankruptcy court in the Abandonment Order. Once abandoned, the
16 bankruptcy estate no longer had an interest in the Pacific Grove
17 Property. Because the bankruptcy estate did not have an interest
18 in the Pacific Grove Property, Rabobank could no longer obtain a
19 determination that its claim was unsecured with respect to the
20 Pacific Grove Property under § 506(a). The bankruptcy court thus
21 did not err in denying Rabobank's Status Motion consistent with
22 the provisions of the Bankruptcy Code.

23 We recognize that the bankruptcy court's ruling imposes a
24 potentially unfair result in the real world. But we cannot
25 conclude that the bankruptcy court erred in denying the Status
26 Motion when the Pacific Grove Property was abandoned by the
27 Trustee, which eliminated the estate's interest in the property.
28 And Rabobank did not appeal the Abandonment Order.

1 We further note that, in light of the Trustee's interim
2 final report, the debtors will not benefit from the bankruptcy
3 court's ruling. Although Rabobank will not receive a
4 distribution from the estate if its second amended claim is
5 disallowed, the debtors will not receive any surplus
6 distribution, as the Trustee will be using any remaining funds to
7 pay the Family Claim and the tardy proof of claim filed by the
8 Department of Education pro rata.

9 **CONCLUSION**

10 For the reasons set forth above, we AFFIRM.

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15 CONCURRENCE BEGINS ON NEXT PAGE.
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1 TAYLOR, Bankruptcy Judge, Concurring:

2 I concur in the result reached by the Panel because I agree
3 with the technical determination that § 506(a) applies only to
4 property in which the estate has an interest and that it cannot
5 be used to bifurcate Rabobank's claim after abandonment of the
6 Pacific Grove Property. I write separately to discuss in more
7 detail the interaction between § 506(a) and CCP § 726(a).

8 The bankruptcy court was concerned that Dewsnup v. Timm,
9 502 U.S. 410 (1992), barred the result Rabobank sought. I do not
10 share this concern; neither Dewsnup nor the more recently decided
11 Bank of America, N.A. v. Caulkett, 135 S. Ct. 1995 (2015), are
12 controlling case authority here or even particularly relevant.
13 These cases make clear that a chapter 7 debtor cannot use §
14 506(d) as a basis for a lien strip where the creditor's "claim is
15 secured by a lien and [is an allowed claim] pursuant to § 502."
16 Dewsnup, 502 U.S. at 417. The distinctions here, however, are
17 that Rabobank requested the § 506(a) valuation and that
18 California law, not § 506(d) or any other federal statute,
19 bankruptcy or otherwise, would have formed the basis for a lien
20 strip.

21 As stated in the Memorandum at footnote 6, the bankruptcy
22 court did not make any determination under CCP § 726; I suggest
23 that it should have. CCP § 726(a) states that there can be only
24 "one form of action for the recovery of any debt . . . secured by
25 a [deed of trust] upon real property." California law defines an
26 "action" as: "[a]n ordinary proceeding in a court of justice by
27 which one party prosecutes another for the declaration,
28 enforcement, or protection of a right [or] the redress or

1 prevention of a wrong" Cal. Code Civ. P. § 22.
2 CCP § 726(a), thus, forces a California real property secured
3 lender to seek recovery of a deficiency claim through one
4 judicial action and only after obtaining recovery from its real
5 property collateral in the judicial action. Metro. Life Ins. Co.
6 v. Sunnymead Shopping Ctr. Co. (In re Sunnymead Shopping Ctr.
7 Co.), 178 B.R. 809, 815 (9th Cir. BAP 1995). Almost always, the
8 trustor can require that the judicial action take the form of a
9 judicial foreclosure. See All. Mortg. Co. v. Rothwell, 10 Cal.
10 4th 1226, 1236 (1995).

11 I suggest that Rabobank's recovery on its claim from
12 non-collateral estate assets pursuant to an order on its § 506(a)
13 motion would have constituted an action as contemplated by
14 CCP § 726(a); and loss of lien would have followed under
15 California law. See Shin v. Super. Ct., 26 Cal. App. 4th 542,
16 545-46 (1994) (creditor waived collateral where it obtained a
17 prejudgment attachment against non-collateral located in Korea
18 from a Korean court); Sec. Pac. Nat'l Bank v. Wozab, 51 Cal. 3d
19 991 (1990) (creditor waived collateral after it exercised its
20 banker's right of offset and recovered on non-collateral); see
21 also Disalvo v. Disalvo (In re Disalvo), 221 B.R. 769, 774-75
22 (9th Cir. BAP 1998).

23 Given my view that Dewsnup is inapposite, I cannot determine
24 whether the bankruptcy court's refusal to conduct a § 506(a)
25 valuation prior to abandonment constituted error. No one
26 disputes that this valuation would result in a determination that
27 Rabobank was entirely unsecured or, to place this determination
28 in the context of a California judicial foreclosure, that

1 Rabobank was entitled to a deficiency judgment equal to 100% of
2 its claim. I acknowledge, however, that a bankruptcy court
3 applying California law either must or generally should refrain
4 from such a valuation determination and, instead, require a
5 judicial foreclosure.

6 And I also acknowledge that the Trustee was in a difficult
7 position; he was subject to criticism if he did not exercise his
8 probable right under California law, as successor to the debtors,
9 to the affirmative defense that Rabobank could recover against
10 non-collateral only through a judicial foreclosure. Indeed, the
11 Trustee was as even-handed as he could be.

12 In a narrow circumstance, California law does not allow a
13 trustor to require that the § 726(a) action be a judicial
14 foreclosure; in particular, where real property collateral had
15 value at the time of trust deed recordation, but becomes
16 valueless through no fault of the secured lender, a direct action
17 for collection of the deficiency is permitted without the useless
18 act of foreclosure. See 4 Miller & Starr, California Real
19 Estate, § 10:197 (3d ed. 2013) (citing Cohen v. Marshall,
20 197 Cal. 117, 123 (1925)). Here, the Trustee acknowledged the
21 possibility that Rabobank could establish that judicial
22 foreclosure was unnecessary.

23 The record is undeveloped in this respect, but I agree that
24 it is possible, if not probable, that this case is subject to
25 this exception; certainly, no one provided evidence definitively
26 to the contrary. If a judicial foreclosure is not required prior
27 to establishment of a deficiency under California law, then I see
28 no reason why the right to a deficiency could not be accomplished

1 through a § 506(a) valuation and the bankruptcy claims process,
2 with the lien strip resulting as a matter of California law.

3 I finally acknowledge, however, that Rabobank did not help
4 its cause. It made statements suggesting that it intended its
5 lien to ride through the bankruptcy notwithstanding recovery from
6 estate assets and failed to clearly acknowledge the implications
7 of California law. It also failed to appreciate the very limited
8 range of options available to the bankruptcy court. This was not
9 helpful.

10 At oral argument, the Trustee conceded that the outcome of
11 the bankruptcy court's ruling in this case was "harsh" and
12 "unfair" and to this end stated that "it wouldn't break my heart
13 if I lost [on appeal]." Oral Argument (May 14, 2015). Here,
14 Rabobank will recover zero from the estate where other unsecured
15 creditors filing timely claims get paid 100% and the late filed
16 claim of an insider is also paid meaningfully. Rabobank,
17 further, will be barred from any deficiency claim against debtors
18 as a result of the bankruptcy discharge; it merely retains a
19 worthless lien.

20 The bankruptcy court stated that "[t]here is no such
21 requirement in § 554(a) for it to be fair to any one particular
22 creditor." Hr'g Tr. (Mar. 28, 2014) at 4:20-22. This is true as
23 far as it goes, but a decision can be so clearly unfair that this
24 broad statement must fail. This might be true where a
25 fundamental principle of bankruptcy law, the requirement that
26 similarly situated creditors be treated similarly, is violated.
27 It certainly could be the case where a creditor entitled to a
28 lesser level of priority receives preferment.

1 Balanced against this inequity are at least three
2 considerations. First, the Trustee's objection was based, in
3 part, on his desire to close the case promptly. Second, Rabobank
4 retains another option – stay relief, judicial foreclosure, and a
5 request that the estate remain open. And, third, although there
6 is no dispute that the Pacific Grove Property is now valueless as
7 to Rabobank, it is unclear whether this was a result of a post-
8 trust deed recordation loss of value; if not, then only judicial
9 foreclosure is an option. The bankruptcy court did not consider
10 these factors as a basis for its decision to immediately abandon;
11 but as to the first point I note that as a result of this appeal,
12 the estate remains open. Were I at liberty to do so, I would
13 consider a remand for additional findings regarding the
14 bankruptcy court's decision to hear the abandonment motion first.