South Carolina Law Review

Volume 65
Issue 4 *SURVEY OF SOUTH CAROLINA LAW and FOURTH CIRCUIT SURVEY*

Article 16

Summer 2014

To Lien Strip or Not to Lien Strip: Fourth Circuit Blesses Controversial Chapter 20 Valueless Lien Stripping in Re Davis

Timothy M. Todd
Liberty University

TO LIEN STRIP OR NOT TO LIEN STRIP: FOURTH CIRCUIT BLESSES CONTROVERSIAL "CHAPTER 20" VALUELESS LIEN STRIPPING IN *IN RE DAVIS*

Timothy M. Todd*

I. INTRODUCTION

In 2013, the United States Court of Appeals for the Fourth Circuit became the first circuit court to hold that a debtor can "strip off" a wholly valueless lien in a "Chapter 20" bankruptcy in *Branigan v. Davis* (*In re Davis*).[1] Addressing an issue that has divided bankruptcy courts, district courts, and bankruptcy appellate panels across the country,[2] the Fourth Circuit armed debtors in this circuit with a powerful (and controversial) tool to restructure (or avoid) debt—even if the debtor is ineligible for a bankruptcy discharge![3] With millions of homeowners still "underwater," and the housing market's future still precarious,[4] lawyers, creditors, and debtors in the Fourth Circuit—and the entire country generally—need to be well versed in the *Davis* decision. Moreover, this decision yet again brings into the crosshairs the Supreme Court's infamous interpretation of "allowed secured claim" from *Dewsnup v. Timm*.[5] Not only will the issue in *Davis* likely reach the Supreme Court, but it also may allow the Supreme Court to take a mulligan on its much-maligned analysis in *Dewsnup*.

---

* Assistant Professor of Law, Liberty University School of Law.

1. 716 F.3d 331, 332 (4th Cir. 2013).
2. *See infra* notes 151–54 and accompanying text.
3. *See In re Davis*, 716 F.3d at 338.
4. *See Legislative Highlights*, AM. BANKR. INST. J., Apr. 2012, 10, 122–23 (noting that "millions of homeowners remain underwater" and "the housing market remains volatile").
5. 502 U.S. 410, 417 (1992).

II. BACKGROUND

Bankruptcy offers the "honest, but unfortunate debtor"[6] a myriad of tools to achieve the coveted "fresh start."[7] These tools include the protection of the automatic stay,[8] the discharge of personal liability on debts,[9] and possibly even the ability to restructure debts.[10] Individuals declaring bankruptcy basically have two options. First, in a Chapter 7 bankruptcy—sometimes called a "straight bankruptcy"—the debtor's nonexempt assets are marshaled and then liquidated; afterwards, the debtor enjoys the fresh start of the discharge.[11] Second, in a Chapter 13 bankruptcy, the debtor generally gets to keep assets, but has to forgo a portion of future earnings over a period of time; after successfully completing these payments for a period of years—generally either three or five years—the debtor gets to enjoy a fresh start.[12] A powerful tool in the Chapter 13 arsenal has caused division in bankruptcy courts across the country—the ability for the debtor to "strip off," or remove, an "unsecured" junior lien attached to real property, normally a residence.[13]

A. Basic Principles of Lien Stripping

Lien stripping is the practice whereby a debtor uses the bankruptcy process to "avoid" (i.e., remove), either in whole or in part, a lien on the debtor's property.[14] If the debtor is successful in stripping the lien, the debtor can then enjoy that property free and clear of the creditor's security interest in the property.[15] The two types of lien stripping are (1) "strip downs" and (2) "strip offs."[16] *Strip down* refers to a situation in which the debtor avoids only some,

---

6. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citing Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915)).

7. *See id.* (quoting *Williams*, 236 U.S. at 554–55).

8. *See, e.g.*, 11 U.S.C. § 362 (2012) (providing that a petition in Chapter 11 bankruptcy operates as an automatic stay for enforcement of debts, judgments, and other proceedings against the debtor).

9. *See, e.g.*, *id.* § 727(b) (providing that if the debtor is discharged under this section, that order operates to discharge the debtor from all debts that arose before the bankruptcy order).

10. *See, e.g.*, *id.* § 1322(b)(2) (stating that the debtor's filed plan for bankruptcy may "modify the rights of holders of secured claims").

11. *See* 6 COLLIER ON BANKRUPTCY ¶ 700.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013).

12. *See* 8 *id.* ¶ 1322.02, p. 1322-8; 8 *id.* ¶ 1322.18, p. 1322-60.

13. *See, e.g.*, *In re Davis*, 716 F.3d at 336 (noting the split in authority).

14. *See* 4 COLLIER ON BANKRUPTCY, *supra* note 11, at ¶ 506.06, p. 506-132 (citing Talbert v. City Mortg. Servs. (*In re* Talbert), 344 F.3d 555, 556 n.1 (6th Cir. 2003); Ryan v. Homecomings Fin. Network, 253 F.3d 778, 781 n.3 (4th Cir. 2001)).

15. *See* 11 U.S.C. § 506(a)(1) (2012).

16. 4 COLLIER ON BANKRUPTCY, *supra* note 11, at ¶ 506.06[1][b], p. 506-136; *see also* Johnson v. Asset Mgmt. Grp., LLC, 226 B.R. 364, 365 n.3 (D. Md. 1998) (explaining the difference between *stripping off* and *stripping down* a lien in the bankruptcy context).

but not all, of a particular lien.[17] *Strip off* refers to the ability to remove a lien entirely from the property.[18] The ability to strip a lien arises by the interplay of several sections of the Bankruptcy Code.

The Bankruptcy Code segregates claims[19] into several categories.[20] The classification of a claim determines its treatment in the bankruptcy process.[21] Of the possible classification of claims, relevant here are the classifications of secured versus unsecured. Holders of secured claims are always preferred over unsecured claims.[22] The benefit of being a secured creditor is that the claim must be paid in full[23] up to the value of the collateral securing the claim.[24] An unsecured creditor, however, has no such protection.

Section 506(a)[25] provides that a creditor's claim is secured "to the extent of the value of such creditor's interest in the estate's interest in such property."[26] The remaining balance of the creditor's claim is unsecured.[27] In bankruptcy parlance, this is known as *bifurcating* the creditor's claim.[28] For example, if a creditor has a claim against the debtor for $125, and the collateral securing such debt is worth only $100, the creditor has a secured claim for $100 and an unsecured claim for $25.

Section 506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."[29] Based on a plain reading of § 506(d), it would appear in the example above that the debtor could avoid $25 of the lien because that portion is unsecured and, therefore, cannot be a secured claim. Due to the Supreme Court's decision in *Dewsnup*, however, the operation of § 506(d) depends greatly on whether the debtor files a Chapter 7 or Chapter 13 bankruptcy petition.[30]

---

17. *See Ryan*, 253 F.3d at 781 n.3; *Johnson*, 226 B.R. at 365 n.3.

18. *See Ryan*, 253 F.3d at 781 n.3; *Johnson*, 226 B.R. at 365 n.3.

19. The Bankruptcy Code deals with *claims*, not debts per se. While debts are claims, the term *claim* is more encompassing. *See* 11 U.S.C. § 101(5), (12) (2012).

20. For example, claims can be classified as, *inter alia*, "secured," *id.* § 506(a), "unsecured," *id.*, "priority," *id.* § 507(a), and "super priority," *see id.* § 503(b).

21. For example, a *priority* claim needs to be paid first in a liquidation bankruptcy (Chapter 7), *see id.* § 726(a)(1), and must be paid in full in a Chapter 13 bankruptcy, *see id.* § 1322(a)(2).

22. *See, e.g.*, 4 COLLIER ON BANKRUPTCY, *supra* note 11, at ¶ 506.02, p. 506-8 (setting forth a number of the special protections afforded to holders of secured claims).

23. *See* 11 U.S.C. § 1322(a)(2).

24. *See id.* § 506(a).

25. All section references are to Title 11 of the United States Code unless otherwise indicated.

26. 11 U.S.C. § 506(a).

27. *Id.*

28. *See* David Gray Carlson, *Bifurcation of Undersecured Claims in Bankruptcy*, 70 AM. BANKR. L.J. 1, 1–2 (1996).

29. 11 U.S.C. § 506(d). In § 506(d), the two exceptions to this rule are (1) if the claim was disallowed under § 502(b)(5) or § 502(e), or (2) if the failure to be a secured claim is due to the entity not filing a claim in accordance with § 501. *Id.*

30. *See* Woolsey v. Citibank, N.A. (*In re* Woolsey), 696 F.3d 1266, 1276 (10th Cir. 2012).

B. Lien Stripping in Chapter 7 Bankruptcy

Despite the clear language in § 506(d)—language that plainly allows a debtor to avoid the unsecured portion of a lien—the Supreme Court held that such liens could not be stripped down in Chapter 7 bankruptcies.[31] In *Dewsnup*, the debtors owned a piece of real property judicially valued at $39,000,[32] and the outstanding debt on that real property was $120,000.[33] The debtors moved to avoid, under § 506(d), the $81,000 portion in excess of the land's value and then redeem[34] the land by paying the secured creditor $39,000, instead of paying the debt in full.[35]

Whether the debtors' plan would work hinged upon how the Court interpreted the phrase *allowed secured claim* in § 506(d).[36] The Court interpreted *allowed secured claim* in § 506(d) not as one indivisible term, but rather "term-by-term to refer to any claim that is, first, allowed, and second, secured."[37] Therefore, because the claim at issue in *Dewsnup* was allowed pursuant to § 502[38] and secured by a lien, it did not come within the scope of § 506(d).[39] Bolstering its statutory construction gymnastics,[40] the Court relied

---

31. *See* Dewsnup v. Timm, 502 U.S. 410, 419–20 (1992).

32. *Id.* at 413. The valuation of collateral is a critical aspect of any bankruptcy. The bankruptcy court must determine the secured creditor's interest in the property, the relevant fair market value of the property, and any bankruptcy market adjustments specific to the bankruptcy process. *See* 4 COLLIER ON BANKRUPTCY, *supra* note 11, at ¶ 506.03[4][b] (quoting Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 961–65 (1997)) (citing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 327, 119 Stat. 23, 99–100).

33. *Dewsnup*, 502 U.S. at 413.

34. Section 722 allows Chapter 7 debtors to "redeem" personal property. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 11, at ¶ 722.01 (citing 11 U.S.C. § 506(a)). This means that the debtor can keep a particular piece of tangible personal property by paying the secured creditor the amount of the allowed secured claim. *Id.* This can often be advantageous to the debtor because it allows the individual to retain tangible personal property and avoid a potentially higher replacement cost—in the event the secured creditor takes the collateral. *See id.*

35. *See Dewsnup*, 502 U.S. at 413.

36. *See id.* at 414–16.

37. *See id.* at 415 (explaining the respondents' argument for a specific interpretation of *allowed secured claim* that the Court ultimately adopted).

38. Allowance is the process that entitles the holder of a claim to participate in the bankruptcy. *See* 4 COLLIER ON BANKRUPTCY, *supra* note 11, at ¶ 502.01. Therefore, the holder of an allowed claim is entitled to distributions of the estate or to vote on Chapter 11 plans. *Id.* Generally, a claim becomes allowed in one of three ways: "[F]irst, a proof of claim is filed or deemed filed and no party objects; second, a claim is allowed by the court after an objection is filed; and third, a claim is estimated by the court under the provisions of section 502(c)." *Id.* Sections 502(b), (d), and (e) regard the disallowance of claims. *Id.*

39. *Dewsnup*, 502 U.S. at 417.

40. *Dewsnup* has been severely attacked in academic literature. *See, e.g.*, Barry E. Adler, *Creditor Rights After* Johnson *and* Dewsnup, 10 BANKR. DEV. J. 1, 11 (1993) ("Apparently, the Court was willing to mind the White Queen, who, while admonishing Alice to believe the impossible, boasted that she sometimes believed as many as six impossible things before breakfast." (citing LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 176 (Signet 1960))); Carlson, *supra* note 28, at 14 ("Justice Blackmun's opinion will never

upon pre-Code bankruptcy law that allowed for liens on real property to "ride through" bankruptcy unaffected.[41] Therefore, in a Chapter 7 bankruptcy, "the creditor's lien stays with the real property until foreclosure."[42]

The policy enunciated in *Dewsnup* is clear: any post valuation date appreciation in the collateral's value should inure to creditors, not the debtor; otherwise, allowing such lien avoidance would grant the debtor a windfall at the creditor's expense.[43] After *Dewsnup*, therefore, courts have refused to permit lien stripping in Chapter 7 bankruptcies.[44] Although the lien in *Dewsnup* was a consensual lien, later cases have expanded *Dewsnup*'s application to nonconsensual liens as well.[45] Going back to the earlier example of a lien with a balance of $125 but collateral worth only $100, a Chapter 7 debtor—despite the plain language in § 506(d)—would not be able to strip the $25 unsecured portion of the lien under *Dewsnup*.

---

be offered up as an exemplar of clarity. Indeed, the opinion struggles simply to articulate the arguments of the various parties, culminating in little more than a declaration of the result." (citing Taras v. Commonwealth Mortg. Corp. (*In re* Taras), 136 B.R. 941, 949 (Bankr. E.D. Pa. 1992))); Margaret Howard, *Dewsnupping the Bankruptcy Code*," 1 J. BANKR. L & PRAC. 513, 513 (1992) ("Although the outcome of the case is questionable, the reasoning used by the Court in reaching its decision is of even more concern. This reasoning may carry such pernicious consequences in areas other than strip down that the Court needs to be reminded of the physicians' motto: First, do no harm." (internal citations omitted)); Margaret Howard, *Secured Claims in Bankruptcy: An Essay on Missing the Point*, 23 CAP. U. L. REV. 313, 318 (1994) ("Any assurance that the Supreme Court understood this fundamental bankruptcy principle was shattered by *Dewsnup v. Timm*." (citing *Dewsnup*, 502 U.S. at 410)).

41. *Dewsnup*, 502 U.S. at 418 (citing Johnson v. Home State Bank, 501 U.S. 78, 84 (1991); Farrey v. Sanderfoot, 500 U.S. 291, 297 (1991)).

42. *Id.* at 417. Moreover, this is bolstered by the legislative history:

> Subsection (d) permits liens to pass through the bankruptcy case unaffected. However, if a party in interest requests the court to determine and allow or disallow the claim secured by the lien under section 502 and the claim is not allowed, then the lien is void to the extent that the claim is not allowed. The voiding provision does not apply to claims disallowed only under section 502(e), which requires disallowance of certain claims against the debtor by a codebtor, surety, or guarantor for contribution or reimbursement.

H.R. REP. NO. 95-595, at 357 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313; *see also Dewsnup*, 502 U.S. at 419.

43. *Dewsnup*, 502 U.S. at 417.

44. *See, e.g.*, Enewally v. Wash. Mut. Bank (*In re* Enewally), 368 F.3d 1165, 1169 (9th Cir. 2004) (explaining that debtors cannot strip liens in Chapter 7 cases, but the extent to which that prohibition exists under other Chapters remains an open question); Talbert v. City Mortg. Servs. (*In re* Talbert), 344 F.3d 555, 561–62 (6th Cir. 2003) (holding that *Dewsnup* made clear the principle that the Chapter 7 debtor could not use § 506(a) and (d) to "strip off" a junior lien); Hamlett v. Amsouth Bank (*In re* Hamlett), 322 F.3d 342, 348 (4th Cir. 2003) (quoting *Dewsnup*, 502 U.S. at 417) (explaining that *Dewsnup* embraces the principle that a lien in Chapter 7 passes through bankruptcy unaffected).

45. *See, e.g.*, Crossroads of Hillsville v. Payne, 179 B.R. 486, 490–91 (Bankr. W.D. Va. 1995) (refusing to strip a nonconsensual judgment lien); Warner v. United States (*In re* Warner), 146 B.R. 253, 255 (Bankr. N.D. Cal. 1992) (refusing to strip a federal tax lien).

C. *Lien Stripping in Chapter 13 Bankruptcy*

Although a lien cannot be stripped in a Chapter 7 bankruptcy, that is not the case in a Chapter 13 bankruptcy.[46] In a Chapter 13 bankruptcy, when the debtor proposes a plan to pay back debts over time, that plan may—according to § 1322(b)(2)—"modify the rights of holders of secured claims . . . or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."[47] Courts have, therefore, interpreted § 1322(b)(2) to allow debtors to strip off valueless liens as unsecured claims.[48]

While the ability to strip liens generally in Chapter 13 is established, the Code has protections built in to prevent lien stripping in certain circumstances. The primary protection is in § 1322(b)(2), which provides that a plan may not modify the rights of "a security interest in real property that is the debtor's principal residence."[49] Consequently, substantial litigation ensued regarding the scope of this protection. Specifically, the litigation centered around whether § 506(a) operates to bifurcate the residential mortgagee's claim into secured and unsecured portions, with § 1322(b)(2)'s antimodification clause protecting only the former.[50] As in *Dewsnup*, the issue was how the bifurcation of § 506(a) affected other Code sections.[51] In *Nobelman v. American Savings Bank*,[52] the

---

46. *See, e.g.*, Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1227 (9th Cir. 2002) (holding that the rights of a creditor holding only an unsecured claim may be stripped down in Chapter 13); Lane v. W. Interstate Bancorp (*In re* Lane), 280 F.3d 663, 668 (6th Cir. 2002) (holding that Chapter 13 antimodification provision does not extend to the rights of holders of unsecured claims); Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122, 125–26 (2d Cir. 2001) (adopting the majority view that Chapter 13's antimodification exception is triggered only when the collateral has enough value to cover the creditor's claim); Tanner v. FirstPlus Fin., Inc. (*In re* Tanner), 217 F.3d 1357, 1359–60 (11th Cir. 2000) (holding that any completely unsecured claim is not protected from modification in a Chapter 13 case); Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 291 (5th Cir. 2000) (agreeing with the majority of courts that the holder of an unsecured claim cannot invoke the antimodification provisions of Chapter 13); McDonald v. Master Fin., Inc. (*In re* McDonald), 205 F.3d 606, 609 (3d Cir. 2000) (holding that "a wholly unsecured mortgage is not subject to the antimodification clause" in Chapter 13).

47. 11 U.S.C. § 1322(b)(2) (2012).

48. *See, e.g.*, *In re* Davis, 716 F.3d 331, 335 (4th Cir. 2013) (explaining that § 506(a) operates with § 1322(b)(2) to allow "a bankruptcy court, in a Chapter 13 case, to strip off a lien against a primary residence with no value").

49. 11 U.S.C. § 1322(b)(2).

50. Four courts of appeals ruled that the antimodification rule protected only the secured portion. *See* Bellamy v. Fed. Home Loan Mortg. Corp. (*In re* Bellamy), 962 F.2d 176, 179 (2d Cir. 1992), *abrogated by* Nobleman v. Am. Sav. Bank, 508 U.S. 324 (1993); Eastland Mortg. Co. v. Hart (*In re* Hart), 923 F.2d 1410, 1415 (10th Cir. 1991), *overruled by* Independence One Mortg. Corp. v. Wicks (*In re* Wicks), 5 F.3d 1372 (10th Cir. 1993); Wilson v. Commonwealth Mortg. Corp., 895 F.2d 123, 128 (3d Cir. 1990), *abrogated by Nobleman*, 508 U.S. 324; Hougland v. Lomas & Nettleman Co. (*In re* Hougland), 886 F.2d 1182, 1183 (9th Cir. 1989), *abrogated by Nobleman*, 508 U.S. 324.

51. *See, e.g.*, *In re Houghland*, 886 F.2d at 1183 (explaining that the resolution of the case depends on "the interplay between . . . 11 U.S.C. § 506(a) and 11 U.S.C. § 1322(b)(2)").

52. 508 U.S. 324 (1993).

Supreme Court held that the entire lien—including the unsecured portion—was protected and not subject to modification.[53]

Another protection offered to secured lien holders is found in § 1325(a)(5).[54] This section, which contains the required elements of a confirmable plan, provides that, if a secured party does not approve the plan, the plan must provide that the secured claim holder will retain liens until the earlier of either payment of the debt or a discharge.[55] This clause, in particular, was at the forefront of the issue in *In re Davis*.[56]

What if, though, the lien is completely undersecured (e.g., a junior lien that had no equity associated with it)? The rationale in *Nobelman* was that, even though a portion of the loan was unsecured, the creditor was, nevertheless, the holder of a secured claim.[57] Using that rationale, courts have held, in contrast, that completely undersecured claims are modifiable under § 1322(b)(2) because they are not even secured in part.[58]

Seemingly, then, the rules concerning lien stripping appeared quite settled. In Chapter 7, no lien stripping is allowed per *Dewsnup*.[59] In Chapter 13, lien stripping is allowed per *Nobelman*, so long as the lien does not secure, at least in part, a claim against the debtor's principal residence.[60] Is lien stripping available in a Chapter 13 case, however, when a debtor is not entitled to a discharge due to a recent Chapter 7 discharge? That was the issue squarely presented in *Davis*.

D. "Chapter 20" Bankruptcy

A "Chapter 20" bankruptcy is the colloquialism for a debtor who files Chapter 13 bankruptcy after already receiving a discharge in an earlier Chapter 7 bankruptcy.[61] Importantly, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) added § 1328(f)(1), which provides that a

---

53. *Id.* at 332; s*ee also* 8 COLLIER ON BANKRUPTCY, *supra* note 11, at ¶ 1322.06[1][a][i], pp. 1322-25 (citations omitted).

54. 11 U.S.C. § 1325(a)(5).

55. *Id.* § 1325(a)(5)(A)–(B).

56. 716 F.3d 331, 333, 336–37 (4th Cir. 2013).

57. *Nobelman*, 508 U.S. at 329 (citing United States v. Ron Pair Enters., 489 U.S. 235, 239 & n.3 (1989)).

58. *See, e.g.*, *In re Davis*, 716 F.3d at 335–37 (explaining that courts have permitted debtors in Chapter 13 cases to strip off completely valueless liens); Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1227 (9th Cir. 2002) (holding that the rights of a creditor holding only an unsecured claim may be stripped down in Chapter 13); Lane v. W. Interstate Bancorp (*In re* Lane), 280 F.3d 663, 665 (6th Cir. 2002) (holding that "modification of the rights of a totally unsecured homestead mortgagee is permitted by § 1322(b)(2)"); Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122, 127 (2d Cir. 2001) (quoting 11 U.S.C. § 1322(b)(2)) (ruling that because a lien was wholly unsecured, the lien was not protected under the antimodification exception in Chapter 13 cases).

59. *See* Dewsnup v. Timm, 502 U.S. 410, 417 (1992).

60. *Nobelman*, 508 U.S. at 331, 332.

61. *In re Davis*, 716 F.3d at 332 n.1.

debtor may not receive a Chapter 13 discharge within four years of a Chapter 7 petition that ultimately resulted in a discharge.[62] Therefore, the rub in a Chapter 20 bankruptcy is that, due to the earlier Chapter 7 discharge, a new discharge is not available in the Chapter 13 proceeding.[63] Despite not being able to receive a new discharge, the later Chapter 13 bankruptcy can still be appealing to debtors due to the automatic stay,[64] the ability to cure arrearages,[65] the ability to adjust interest rates under plan payments,[66] and the other panoply of tools a debtor has in a Chapter 13 bankruptcy generally.[67] Chapter 20 bankruptcy filings are permitted because "Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief."[68] With respect to lien stripping, though, the issue is whether the debtor may use the Chapter 13 proceeding to strip off a wholly unsecured junior mortgage that survived the earlier Chapter 7 proceeding, even though a new discharge is not available.[69] According to some, allowing this would allow an end run around *Dewsnup*'s prohibition against Chapter 7 lien stripping: the debtor would get the Chapter 7 discharge and then a Chapter 13 lien strip.[70]

III. *IN RE DAVIS*

In June of 2008, Bryan Davis and Carla Bracey-Davis filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Maryland.[71] Their financial situation was precarious: the Davises ran large monthly deficits and Mrs. Bracey-Davis was unemployed.[72] In their Chapter 7 bankruptcy, the Davises wanted to discharge their unsecured debt and strip down liens on their primary residence.[73] Although they were advised that lien stripping is not available in Chapter 7, they nevertheless continued the bankruptcy proceeding.[74]

---

62. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 312, 119 Stat. 23, 86–87 (codified at 11 U.S.C. § 1328(f)(1) (2012)).

63. 11 U.S.C. § 1328(f)(1) ("[T]he court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge . . . in a case filed under Chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter.").

64. *See id.* § 362(a).

65. *Id.* § 1322(b)(5).

66. *See id.* § 1325(a)(5)(B)(ii).

67. *See generally id.* § 1322(b) (providing all of the options a debtor has when constructing a plan in a Chapter 13 case, including the ability to add "any other appropriate provision not inconsistent with this title").

68. Branigan v. Bateman (*In re* Bateman), 515 F.3d 272, 281–82 (4th Cir. 2008) (quoting Johnson v. Home State Bank, 501 U.S. 78, 87 (1991)).

69. *See In re* Davis, 716 F.3d 331, 334 (4th Cir. 2013).

70. *Id.* at 337.

71. *Id.* at 333.

72. *Id.*

73. *Id.*

74. *Id.*

In September of 2008, the Davises received their Chapter 7 discharge, but their mortgage debt was unchanged.[75]

After their 2008 bankruptcy, and despite obtaining employment, the Davises still had no savings and had mounting mortgage arrearages.[76] In September of 2009, the Davises filed a Chapter 13 petition with the desire to reorganize their debts, pay the mortgage arrearages, pay consumer debt, and strip off junior liens.[77] At that time, their home had a value of $270,000, but "was encumbered by a first-priority lien with a balance of $275,373.59, a second-priority lien with a balance of $115,138.58, and a third-priority lien with a balance of $117,603.31."[78] The Davises eventually moved to strip off both junior liens.[79]

A. Bankruptcy Court Decision

The Davises first moved under § 506 to avoid the wholly unsecured third-priority junior lien held by TD Bank.[80] TD Bank objected to that motion and, along with the trustee, objected to the proposed Chapter 13 plan, arguing that § 1325 requires the entry of a discharge to strip a lien.[81] Both TD Bank and the trustee argued for a per se rule that prohibits lien stripping in a Chapter 20 bankruptcy unless the debtor receives a discharge.[82]

Despite authority supporting TD Bank's position,[83] Judge Lipp declined to adopt a per se rule.[84] Rather, the court adopted the position that the Bankruptcy Code does not condition the ability to strip off a wholly unsecured lien on the

---

75. *Id.* at 334.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Davis v. TD Bank (*In re* Davis), 447 B.R. 738, 741 (Bankr. D. Md. 2011).
81. *See id.* at 741–42, 743.
82. *Id.* at 741–42.
83. *See, e.g.*, Bank of the Prairie v. Picht (*In re* Picht), 428 B.R. 885, 890 (B.A.P. 10th Cir. 2010) ("We note that because the [debtor is] not entitled to a discharge . . . § 1325(a)(5)(B)(i)(I), which requires a plan to provide that a secured creditor retain its lien until discharge under § 1328, is inapplicable."); *In re* Fenn, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010) ("The court agrees that the junior lien can be valued at zero for plan confirmation purposes, however, the lien cannot be held to be unenforceable and void until the plan ends and the Debtors receive a section 1328 discharge."); *In re* Mendoza, No. 09-22395-HRT, 2010 WL 736834, at *5 (Bankr. D. Colo. Jan. 21, 2010) (holding that because a discharge had not occurred per § 1328(f), "the Debtors [could not] avoid the second mortgage lien . . . pursuant to 11 U.S.C. § 506(d)"); Blosser v. KLC Fin., Inc. (*In re* Blosser), Bankr. No. 07-28223-svk, Adv. No. 08-2353, 2009 WL 1064455, at *2 (Bankr. E.D. Wis. Apr. 15, 2009) ("Since avoidance of the lien is contingent upon a Chapter 13 discharge, and the Debtor does not qualify for a Chapter 13 discharge, the Complaint fails to state a claim upon which relief can be granted . . . ."); *In re* Jarvis, 390 B.R. 600, 605–06 (Bankr. C.D. Ill. 2008) ("A no-discharge Chapter 13 case may not, however, result in a permanent modification of a creditor's rights where such modification has traditionally only been achieved through discharge . . . .").
84. *In re Davis*, 447 B.R. at 745.

debtor's eligibility for discharge.[85] The court first noted that receiving a discharge is not always the desired goal in a Chapter 13 proceeding.[86] For example, in *Branigan v. Bateman* (*In re Bateman*),[87] the Fourth Circuit stated that "it is the ability to reorganize one's financial life and pay off debts, not the ability to receive a discharge, that is the debtor's 'holy grail'" in many Chapter 13 cases.[88] Consequently, Chapter 13 debtors who are ineligible for discharge may still "enjoy[ ] all of the rights of a [C]hapter 13 debtor, including the right to strip off liens."[89]

In response, TD Bank pointed to *In re Jarvis*,[90] in which a bankruptcy court held that when a Chapter 13 debtor is ineligible for discharge, the plan cannot strip off a wholly unsecured junior mortgage lien.[91] According to the *Jarvis* court:

> A no-discharge Chapter 13 case may not, however, result in a permanent modification of a creditor's rights where such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted. This Court can find no evidence that, by adding new § 1328(f), Congress intended to expand debtors' remedies in the way that the Debtor here proposes.[92]

Rebuffing *Jarvis*, the bankruptcy judge held that, although the *Jarvis* court recognized that a wholly unsecured claim is not a secured claim at all under § 1325, the court failed to appreciate the consequences of that determination—namely that modification of the claim is no longer protected under § 1325(a)(5)(B).[93]

TD Bank also argued that allowing the debtors to benefit from a Chapter 7 discharge and then immediately file a Chapter 13—ostensibly to strip liens only—would be an end run around *Dewsnup*'s lien stripping prohibition.[94] The bankruptcy court disagreed, noting that if the sole purpose in filing the Chapter 13 was to strip the lien, the debtors would still have to overcome allegations of bad faith at the plan confirmation stage.[95]

---

85. *Id.* at 745–46.
86. *Id.* at 746.
87. 515 F.3d 272 (4th Cir. 2008).
88. *Id.* at 283.
89. *In re* Tran, 431 B.R. 230, 237 (Bankr. N.D. Cal. 2010).
90. 390 B.R. 600 (Bankr. C.D. Ill. 2008).
91. *In re Davis*, 447 B.R. at 746 (citing *In re Jarvis*, 390 B.R. at 605–06).
92. *Id.* at 746–47 (quoting *In re Jarvis*, 390 B.R. at 605–06).
93. *Id.* at 747.
94. *See id.*
95. *Id.* (citing *In re* Tran, 431 B.R. 230, 237–38 (Bankr. N.D. Cal. 2010)).

The bankruptcy court also declined to follow *In re Fenn*.[96] In *Fenn*, the bankruptcy court focused its analysis on whether the underlying claim had been disallowed.[97] The *Fenn* court acknowledged that a junior lien could be valued at zero for confirmation purposes, but that the lien could not be avoided until completion of the plan and entry of a discharge order.[98] Focusing on § 506(d), the *Fenn* court held that the claim, although valueless, was still "allowed," i.e., neither rejected nor formally disallowed by the court.[99] Moreover, although § 506(a) "allows the bifurcation of the rights of holders of secured claims, . . . [i]t does not change the rights immediately allowing the permanent modification of a secured claim to unsecured status, as strip off or avoidance occurs at discharge."[100] According to the *Fenn* court, §§ 1322(b)(2), 1325(a)(5), and 506(d) can be reconciled by construing § 506(d) to avoid liens when the claim has been disallowed.[101] Rejecting *Fenn*, Judge Lipp noted that an unsecured lien holder cannot establish the required allowed secured claim needed to invoke any protection of § 1325(a)(5).[102]

Implicitly recognizing that Chapter 20 lien stripping could be abused, the court highlighted that other sections of the Code offer creditor protection.[103] For example, § 349(b)(1)(C) provides that if the debtor's case is dismissed or the plan is not completed, the lien will "spring back."[104]

In addition to holding that the impossibility of a Chapter 13 discharge does not bar the avoidance of a valueless lien, the bankruptcy court explained that it must still find that the plan was proposed in good faith.[105] This analysis is based on the totality of the circumstances on a case-by-case basis.[106] In *Deans v. O'Donnell*,[107] the Fourth Circuit suggested a nonexhaustive list of factors, including, *inter alia*, the percentage of proposed repayment, the debtor's financial situation, plan payment period, employment history and prospects, and past bankruptcy filings.[108]

With regard to Chapter 20 cases, the *Davis* court noted that the courts should also consider:

> (1) The proximity in time of the Chapter 13 filing to the Chapter 7 filing.

---

96. *Id.* at 748 (citing *In re* Fenn, 428 B.R. 494 (Bankr. N.D. Ill. 2010)).
97. *In re Fenn*, 428 B.R. at 498; *see also In re Davis*, 447 B.R. at 748.
98. *In re Fenn*, 428 B.R. at 500.
99. *See id.*
100. *Id.* at 501.
101. *Id.*
102. *In re Davis*, 447 B.R. at 748.
103. *Id.* (citing *In re* Tran, 431 B.R. 230, 236–37 (Bankr. N.D. Cal. 2010)).
104. *Id.* at 748–49.
105. *Id.* at 749 (citing 11 U.S.C. § 1325(a)(3) (2012)).
106. *Id.* (citing Deans v. O'Donnell (*In re* Deans), 692 F.2d 968, 972 (4th Cir. 1982)).
107. 692 F.2d 968.
108. *In re Davis*, 447 B.R. at 749 (citing *In re Deans*, 692 F.2d at 972).

> (2) Whether the debtor has incurred some change in circumstances between the filings that suggests a second filing was appropriate and that the debtor will be able to comply with the terms of the Chapter 13 plan.
>
> (3) Whether the two filings accomplish a result that is not permitted in either Chapter standing alone.
>
> (4) Whether the two filings treat creditors in a fundamentally fair and equitable manner or whether they are rather an attempt to manipulate the bankruptcy system or are an abuse of the purpose and spirit of the Bankruptcy Code.[109]

The bankruptcy court found that the totality of the factors weighed in favor of good faith.[110] Looking in particular at the Chapter 20 factors, the court concluded that the fifteen-month period between bankruptcies did not indicate a lack of good faith because, *inter alia*, the debtors found new employment and incurred new debt, which justified a second filing.[111] The court also did not find any evidence of the debtors trying to manipulate or otherwise abuse the bankruptcy process.[112]

B. Fourth Circuit Resolution[113]

On appeal, the Fourth Circuit framed the issue as "whether BAPCPA precludes the stripping off of valueless liens by Chapter 20 debtors ineligible for a discharge."[114] Before addressing that issue, though, the court first considered whether a bankruptcy court can strip off a valueless lien generally in Chapter 13 proceedings.[115] Following the circuit courts that had considered the issue,[116] the court agreed that such valueless liens could be stripped generally.[117] The court based this conclusion on the operation of § 506(a), which bifurcates claims into

---

109. *Id.* at 750 (citing *In re* Cushman, 217 B.R. 470, 477 (Bankr. E.D. Va. 1998)).

110. *Id.*

111. *Id.* at 751.

112. *Id.*

113. The district court consolidated *In re Davis* with *Branigan v. Moore* (*In re Moore*), No. 08:11-cv-01718 (D. Md. 2011), and summarily affirmed the bankruptcy court in both cases. *See* TD Bank, N.A. v. Davis, Civil Nos. PJM 11-1270, PJM 11-1718, PMJ 11-1940, 2012 WL 439701 (D. Md. Jan. 12, 2012). The Chapter 13 trustee appealed. *In re* Davis, 716 F.3d 331, 332 (4th Cir. 2013).

114. *In re Davis*, 716 F.3d at 334. While the appeal was a consolidated appeal, *In re Davis* was the focus. *See id.* at 333, 334 n.3.

115. *Id.* at 334–35.

116. *See id.* at 335.

117. *Id.* at 336. The Fourth Circuit had held the same in prior unpublished (non-precedential) opinions. *Id.* at 335.

secured and unsecured claims, as well as § 1322, which permits the modification of the rights of unsecured creditors.[118]

Addressing the ultimate issue, the court first noted that, even after BAPCPA was enacted, "a debtor may still take advantage of the protections offered by Chapter 13 short of a discharge."[119] As the court noted, debtors have several reasons—other than receiving a discharge—to file a Chapter 13, for example, "to cure a mortgage, deal with other secured debts, or simply pay debts under a plan with the protection of the automatic stay."[120] Therefore, according to the court, "if the Bankruptcy Code provides a mechanism for stripping off worthless liens absent a discharge, a debtor may avail himself of that relief."[121] The court ultimately agreed with the debtors that the Code does provide such a mechanism.[122]

The court noted that § 506(a) operated to classify the junior liens at issue as unsecured claims.[123] Moreover, "[S]ection 506 has always operated in tandem with [S]ection 1322(b) to strip liens in Chapter 13 cases."[124] Therefore, because the BAPCPA did not amend §§ 506 or 1322(b), "the analysis permitting lien-stripping in Chapter 20 cases is no different than that in any other Chapter 13 cases."[125] The Fourth Circuit rejected other courts that relied on § 1325(a)(5) because that provision applies only to allowed secured claims.[126] Relying on the Supreme Court's decision in *Nobelman*, the court noted that any claim must be valued under § 506 before any application of § 1322 is determined—and in this case, those liens were unsecured and, thus, valueless.[127]

The court made sure to focus on the trustee's *Dewsnup* end run argument.[128] The court noted that, even after BAPCPA, Congress left intact the general ability in a Chapter 13 bankruptcy to strip liens even in a situation in which a debtor could satisfy the requirements for filing a Chapter 20 bankruptcy.[129] Like the bankruptcy court, the Fourth Circuit highlighted the other anti-abuse provisions in the Code that protect debtors in a Chapter 13 or Chapter 20 lien stripping scenario: (1) good faith filing requirements, (2) good faith plan requirements, and (3) § 349(b)(1)(C)'s spring back.[130]

---

118. *See id.*; *see also supra* Parts II.A, II.C (explaining the operation of § 506 and § 1322).

119. *In re Davis*, 716 F.3d at 336.

120. *Id.* (quoting Branigan v. Bateman (*In re* Bateman), 515 F.3d 272, 283 (4th Cir. 2008)) (internal quotation marks omitted).

121. *Id.* at 338.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See id.*

129. *Id.*

130. *Id.*

In addition, the court held that the availability of a discharge is not dispositive.[131] The court explained that discharge affects only in personam rights—the ability to seek recourse against the debtor personally.[132] Lien stripping, on the other hand, affects the in rem liability against the collateral.[133] The court ultimately determined that it is not fatal that, at the completion of the plan, such orders modifying those in rem rights become permanent.[134] Consequently, the Fourth Circuit affirmed the decision.[135]

C. The Dissent

Judge Keenan dissented, arguing that the majority's holding resulted in a situation in which "a creditor whose rights are secured by real property with no present value . . . is treated less favorably than a wholly unsecured creditor."[136] In support of her position, she pointed to § 1325(a)(5)(B)(i), which provides that the holder of an allowed secured claim must retain its lien until discharge or full payment of the debt.[137] In rebuffing the majority's opinion—that § 1325 does not apply because the valuation rule in § 506 renders such valueless claims as unsecured—Judge Keenan posited that the operation of § 1325 does not hinge on the valuation process in § 506.[138] She stated that § 506(a) does not control the meaning of *allowed secured claim* in § 506(d).[139] Therefore, in a manner similar to the *Dewsnup* Court's analysis, she argued that the allowed secured claim meaning in § 1325 is simply (1) a claim, (2) that is allowed (i.e., not objected to), and (3) secured.[140]

In this case, according to Judge Keenan, TD Bank did have a claim that, although valueless, was allowed and secured by the house.[141] Judge Keenan asserted that because the Davises did not pay the debt in full, and because § 1325(f) prevents them from receiving a Chapter 13 discharge, § 1325(a)(5)(B)(i) should prevent them from stripping off their valueless junior mortgages.[142]

---

131. *Id.*

132. *Id.*

133. *Id.* (citing Johnson v. Home State Bank, 501 U.S. 78, 84 (1991)).

134. *Id.* The creditor is protected, moreover, if plan payments are not made or the case is dismissed. *See, e.g.*, 11 U.S.C. § 349(b)(1)(C) (2012) (providing the actions that take place upon dismissal).

135. *Id.* at 339.

136. *Id.* (Keenan, J., dissenting).

137. *Id.*

138. *Id.* at 340.

139. *Id.* (citing DaimlerChrysler Fin. Servs. Ams. LLC v. Ballard (*In re* Ballard), 526 F.3d 634, 640–41 (10th Cir. 2008)).

140. *Id.*

141. *Id.*

142. *Id.*

Judge Keenan also relied upon the legislative history surrounding the BAPCPA amendments to support her position.[143] Section 306 of BAPCPA, which added subsection (i)(I) to § 1325(a)(5)(B), was titled "Giving Secured Creditors Fair Treatment in Chapter 13."[144] Moreover, she highlighted a House Report noting that these additions were "to require—as a condition of confirmation—that a [C]hapter 13 plan provide that a secured creditor retain its statutory lien until the earlier of when the underlying debt is paid or the debtor receives a discharge."[145]

IV. SIGNIFICANCE OF THE *IN RE DAVIS* DECISION

Undoubtedly, *In re Davis* is a very important decision for debtors in the Fourth Circuit. The ability to strip off valueless liens can mean the difference between foreclosure and keeping the property after a Chapter 7 bankruptcy. For debtors with multiple liens against their property, in a Chapter 7 bankruptcy, the trustee will likely abandon the property—assuming the property has no equity in it—and leave the secured parties and the debtor to their bargained-for state law remedy of foreclosure.[146] Even after any discharge granted in the initial Chapter 7 proceeding, all the liens will "ride through" the bankruptcy, as lien stripping is prohibited.[147] Therefore, after the property has been abandoned, the debtor will need to either reaffirm the debt or remain current on the debt to stave off foreclosure.[148] Importantly, the debtor will need to remain current on *all* of the debts on the property, even ones secured by junior liens; this prevents junior lienholders from foreclosing.[149] Effectively, then, by filing later under Chapter 13 and avoiding the junior liens, the debtor will be able to reduce cash outlays—the payments to the junior lienholders—and, at the same time, keep the property.[150]

Not only is *In re Davis* significant for debtors practically, but it also magnifies the split on this issue. Bankruptcy and district court decisions have

---

143. *See id.* at 341 (quoting H.R. REP. NO. 109-31, at 71–72 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 103) (citing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 306, 119 Stat. 23, 80 (codified at 11 U.S.C. § 1325(a) (2012))).

144. *Id.* (citing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 306, 119 Stat. 23, 80 (codified at 11 U.S.C. § 1325(a)).

145. *Id.* (quoting H.R. REP. NO. 109-31, at 71–72 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 103).

146. This is because keeping the property in the estate would generate no value or benefit for the unsecured creditors, as any lien holder would need to be paid first in full if possible. *See* 11 U.S.C. § 554.

147. *See* Dewsnup v. Timm, 502 U.S. 410, 417 (1992).

148. *See* Dewsnup v. Timm (*In re* Dewsnup), 908 F.2d 588, 590 (10th Cir. 1990) (explaining that property abandoned under § 554 ceases to be property of the estate and reverts back to the debtor as if no bankruptcy petition was ever filed), *aff'd*, 502 U.S. 410 (1992).

149. *See* Moody v. FNB S. (*In re* Moody), 277 B.R. 858, 861 (Bankr. S.D. Ga. 2001) (citing *In re* R-B-Co., Inc., 59 B.R. 43, 45 (Bankr. W.D. La. 1986)).

150. *See supra* Part II.D.

come down on both sides of this issue,[151] and bankruptcy appellate panels are also divided.[152] Moreover, at least one unpublished court of appeals decision is contrary to *In re Davis*.[153] Cases are also pending or awaiting decisions at other courts of appeals.[154]

The issue of lien stripping in Chapter 20 bankruptcy may also give the Supreme Court an opportunity to revisit its schizophrenic statutory construction in *Dewsnup*.[155] Because of *Dewsnup*, two definitions of *allowed secured claim* effectively exist in § 506, depending solely on whether the debtor is in Chapter 7 or Chapter 13 bankruptcy.[156] This result has led to constant critiques of *Dewsnup*.[157] Some circuit courts of appeals have been more explicit with their assault on *Dewsnup*,[158] and with the Court's composition changing significantly since *Dewsnup*, now could be time for its reversal.[159]

---

151. The following cases are in favor of Chapter 20 lien stripping: Fisette v. Keller (*In re* Fisette), 455 B.R. 177, 186–87 (B.A.P. 8th Cir. 2011); *In re* Dang, 467 B.R. 227, 238 (Bankr. M.D. Fla. 2012); *In re* Okosisi, 451 B.R. 90, 103 (Bankr. D. Nev. 2011); *In re* Tran, 431 B.R. 230, 237 (Bankr. N.D. Cal. 2010). The following cases have rejected Chapter 20 lien stripping: *In re* Victorio, 454 B.R. 759, 781 (Bankr. S.D. Cal. 2011); *In re* Gerardin, 447 B.R. 342, 349 (Bankr. S.D. Fla. 2011); *In re* Fenn, 428 B.R. 494, 504 (Bankr. N.D. Ill. 2010); *In re* Jarvis, 390 B.R. 600, 605–06 (Bankr. C.D. Ill. 2008).

152. *Compare In re Fisette*, 455 B.R. at 186–87 (holding that a Chapter 13 debtor may strip off a wholly unsecured lien when he completes his obligations under the plan and this is not contingent upon discharge), *with* Bank of the Prairie v. Picht (*In re* Picht), 428 B.R. 885, 893 (B.A.P. 10th Cir. 2010) (holding that the unsecured lien could not be stripped until the debt was either paid or extinguished under other law).

153. *See* Colbourne v. Ocwen (*In re* Colbourne), No. 12-14722, 2013 WL 5789159, at *2 (11th Cir. Oct. 29, 2013).

154. *See, e.g.*, Litton Loan v. Blendheim, No. 13-35354 (9th Cir.); Wells Fargo v. Scantling, No. 13-10558 (11th Cir.).

155. Commentators are already speculating that this issue could be the straw that breaks *Dewsnup*'s back. *See, e.g.*, Benjamin A. Ellison, *Is it Possible that* Dewsnup v. Timm *Might Finally be Overturned?*, AM. BANKR. INST. J., June 2013, at 60, 92.

156. *See* Woolsey v. Citibank, N.A. (*In re* Woolsey), 696 F.3d 1266, 1276 (10th Cir. 2012).

157. *See supra* note 40; *see also* Dewsnup v. Timm, 502 U.S. 410, 420 (1992) (Scalia, J., dissenting) ("[T]he Court replaces what Congress said with what it thinks Congress ought to have said—and in the process disregards, and hence impairs for future use, well-established principles of statutory construction.").

158. *See, e.g.*, *In re Woolsey*, 696 F.3d at 1273 ("It's surely a topsy-turvy result to give these two related provisions in the same statutory section entirely different (even opposing) meanings.").

159. As noted by one commentator:

> Of the six majority members on the Court who rejected applying 11 U.S.C. § 506(a) to § 506(d) in 1992, only Justice Anthony Kennedy remains on the bench. The five other majority justices have all left the bench. By contrast, one of the two members of the dissent, Justice Antonin Scalia, remains on the Court. Justice Clarence Thomas did not participate in the original decision despite being on the Court at the time. However, one might predict that he would vote to reverse *Dewsnup* having criticized the decision in his concurring opinion in *203 North LaSalle Street P'ship*.

Ellison, *supra* note 155, at 92.

On the other hand, despite the maligned statutory construction in *Dewsnup*, its underpinnings and policy are clear. As deftly stated by the Sixth Circuit, *Dewsnup* stands for the following proposition:

> (1) [A]ny increase in the value of the property from the date of the judicially determined valuation to the time of the foreclosure sale should accrue to the creditor; (2) the mortgagor and mortgagee bargained that a consensual lien would remain with the property until foreclosure; and (3) liens on real property survive bankruptcy unaffected.[160]

Using these three legs, commentators have argued lien stripping should be equally disallowed in Chapter 13 and, by extension, Chapter 20.[161] From a policy perspective, it is easy to see why this line of argument is appealing. For example, going back to the original hypothetical of a lien with balance of $125, but collateral worth only $100, assume a junior lien is also securing a debt of $15. Under *In re Davis*, the junior lien can be stripped.[162] What if, though, after the judicial valuation, the property increases in value to $130? The debtor could possibly reap that $5 in equity; on the other hand, despite doing everything under state law to have recourse against that property, the junior lien holder cannot reap the benefit of the increased value due to its loss of the lien. This was the overarching problem that the *Dewsnup* majority was painfully trying to avoid.[163] But, the same problem remains nevertheless: the "Dewsnupian" legs do not fit nicely with the statute's plain language.

V. CONCLUSION

In conclusion, the Fourth Circuit fired the first shot in a long battle that is taking bankruptcy courts by storm. Eventually, this issue will need to be settled by the Supreme Court. Both camps have persuasive arguments: the statutory language seems clearly in favor of Chapter 20 lien stripping, but, on the other hand, *Dewsnup*'s policy should seemingly apply equally to prevent an end run around the Chapter 7 lien stripping prohibition. Regardless of the high court's decision—whenever it comes—debtors and lawyers in the Fourth Circuit can, and should, use *In re Davis* while they can. When the prospect of Chapter 20 lien stripping is finally settled, either *Dewsnup* will continue to be the law of the land or Chapter 20 lien stripping will make it an empty letter in many cases.

---

160. Talbert v. City Mortg. Servs. (*In re* Talbert), 344 F.3d 555, 559 (6th Cir. 2003) (citing *Dewsnup*, 502 U.S. at 417–18).

161. *See* David N. Saponara, Note, *Lien-Stripping in Consumer Bankruptcy: Debtors Cannot Strip Liens down Partially, but Can They Strip Them off Entirely? The Answer Should Be No*, 21 AM. BANKR. INST. L. REV. 257, 277 (2013).

162. *See In re* Davis, 716 F.3d 331, 336, 338 (4th Cir. 2013).

163. *See Dewsnup*, 502 U.S. at 417–18.

*

*

*

*

*

*