By Benjamin A. Ellison

Is It Possible that *Dewsnup v. Timm* Might Finally Be Overturned?

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Editor's Note: *ABI conducted its Fifth Annual Bankruptcy Law Student Writing Competition during the first semester of 2013. Law students from 17 schools submitted papers, which focused on current issues such as bankruptcy sales, plan confirmation and other topics that involve jurisdiction, litigation or evidence in the bankruptcy courts. All papers were judged by a panel of bankruptcy experts on style, substance and relevance.* ***Benjamin A. Ellison*** *of St. John's University School of Law won first place in the competition. As the winner of the competition, he received a $2,000 cash prize (sponsored by Invotex), a one-year ABI membership and publication of the paper in the* Journal.

In 1992, the U.S. Supreme Court in *Dewsnup v. Timm*[1] came to the surprising conclusion that the defined term "allowed secured claim" in § 506(d) had different meanings depending on whether a case was in chapter 7 vs. chapter 13 (or elsewhere in the Bankruptcy Code). As a result of this holding, two diametrically opposed rules concerning lien-strips exist.[2] The first rule is that liens cannot be stripped in a chapter 7 proceeding. The second rule, which relies on the definition of "allowed secured claim" taken from § 506(a), applies in chapter 13 proceedings, wherein liens may be stripped.[3]

Twenty years ago, when the majority *Dewsnup* opinion was issued, it was savaged by dissenting members of the Court,[4] criticized by substantial academic literature[5] and met with confusion by bankruptcy courts. A bankruptcy court has noted the *Dewsnup* opinion has been "roundly criticized, and not always followed."[6] Nonetheless, the *Dewsnup* decision has endured, and a begrudging acceptance has emerged that *Dewsnup* controls.[7]

Accordingly, without a split for the Supreme Court to resolve, few commentators anticipate that after more than two decades *Dewsnup* will be overturned. Nonetheless, based on a one-two punch of recent events, the author predicts that *Dewsnup*'s days are numbered. First, there is a new vehicle that provides the opportunity to reconsider *Dewsnup*: There is a growing split within the circuits[8] concerning the propriety of a different but related issue to *Dewsnup*, a strategic type of bankruptcy filing called "chapter 20." Second, if a chapter 20 circuit split brings consumer lien-stripping before the Supreme Court, the opportunity exists to revisit—and perhaps reverse—*Dewsnup*. New court of appeals decisions are identifying additional defects in *Dewsnup* even now,[9] and since the composition of the Supreme Court has changed decidedly

1 502 U.S. 410 (1992).

2 A lien is a constitutionally protected interest in specific property that may ripen into a possessory interest if the property owner fails to meet certain payment contingencies. *See* 11 U.S.C. § 101(37) (defining lien as "charge against or interest in property to secure payment of a debt or performance of an obligation"); *In re Trejos*, 352 B.R. 249, 262-63 (Bankr. D. Nev. 2006) (noting constitutional aspect). Under certain conditions, in bankruptcy a lien may be partially removed ("stripped down") or wholly removed ("stripped off") from collateral property. *See, e.g., Domestic Bank v. Mann (In re Mann)*, 249 B.R. 831, 832 n.1 (B.A.P. 1st Cir. 2000).

3 When it applies in 11 U.S.C. § 506(d), the defined phrase "allowed secured claim" in § 506(a) causes liens to be stripped because its definition limits a security interest inside of bankruptcy only to the extent of its value. Therefore, in bankruptcy, § 506(a) writes down state law security interests to their actual value. If a senior lien is partially underwater, there is a strip-down and an allowed secured claim exists for that lesser amount. If a junior mortgage is wholly unsecured, the lien on that mortgage would be stripped off and not be recognized as an in rem claim in bankruptcy. Some courts dispute whether, as a definitional provision, § 506(a) has the power alone to effectuate lien-strips. *See, e.g., In re Fenn*, 428 B.R. 494, 506 (Bankr. N.D. Ill. 2010). Whether § 506(a) strips liens or other provisions incorporating the phrase "allowed secured claim," the way §§ 506(d), 1322(b)(2) or 1325(a)(5) do, is a technical issue not fully relevant to the resolution of the issues discussed in this article.

4 502 U.S. 410, 420 (1992) (Scalia, J., dissenting, joined by Souter, J.) ("[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.").

5 Margaret Howard, "*Dewsnup*ping the Bankruptcy Code," 1 *J. Bankr. L. & Prac.* 513, 519 (1992); Mary Josephine Newborn, "Undersecured Creditors in Bankruptcy: *Dewsnup*, *Nobelman* and the Decline of Priority," 25 *Ariz. St. L. J.* 547, 582 (1993); Mark E. MacDonald, "Confirmation by Cramdown through the New-Value Exception in Single Asset Cases," 1 *ABI L. J.* 65, 75 (1993); Barry E. Adler, "Creditor Rights after *Johnson* and *Dewsnup*," 10 *Bankr. Dev. J.* 1, 10 (1993); David Gray Carlson, "Bifurcation of Undersecured Claims in Bankruptcy," 70 *Am. Bankr. L. J.* 1, 12 (1996).

6 *In re Webster*, 287 B.R. 703, 707 (Bankr. N.D. Ohio 2002) (citing Mark E. MacDonald, "Confirmation by Cramdown through the New Value Exception in Single Asset Cases," 1 *Am Bankr. Inst. L. J.* 65, 75 (1993), for proposition that *Dewsnup* is "the strangest case of statutory interpretation in recent years").

7 *See* Jacob Mitrani, "Strip Tease: *Lavelle* and the Future of Lien Avoidance in Chapter 7," 30-Nov. *Am. Bankr. Inst. J.* 20, 61 (2011) (citing series of subsequent cases that have all rejected *In re Lavelle*, No. 09-72389-470, 2009 WL 4043089 (Bankr. E.D.N.Y. Nov. 19, 2009) (recent case that refused to apply *Dewsnup* to wholly underwater mortgage in chapter 7 case)).

8 Supportive of chapter 20 lien-strips, *see In re Okosisi*, 451 B.R. 90, 100 (Bankr. D. Nev. 2011); *Fisette v. Taylor (In re Fisette)*, 455 B.R. 177, 184 (B.A.P. 8th Cir. 2011); *In re Jennings*, 454 B.R. 252, 255 (Bankr. N.D. Ga. 2011); *In re Waterman*, 447 B.R. 324, 329 (Bankr. D. Colo. 2011), *aff'd*, 469 B.R. 334, 338 (D. Colo. 2012); *In re Tran*, 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010), *aff'd*, 814 F. Supp. 2d 946 (N.D. Cal. 2011); *In re Hill*, 440 B.R. 176, 182 (Bankr. S.D. Cal. 2010); *In re Scantling*, 465 B.R. 671, 682 (Bankr. M.D. Fla. 2012); *In re Miller*, 462 B.R. 421, 431 (Bankr. E.D.N.Y. 2011); *In re Scotto-DiClemente*, 459 B.R. 558, 566 (Bankr. D.N.J. 2011); *In re Gloster*, 459 B.R. 200, 206 (Bankr. D.N.J. 2011); *In re Dang*, 467 B.R. 227, 237 (Bankr. M.D. Fla. 2012); *In re Fair*, 450 B.R. 853, 857 (E.D. Wis. 2011); *In re Frazier*, 448 B.R. 803, 807 (Bankr. E.D. Cal. 2011), *aff'd*, 469 B.R. 889, 895 (E.D. Cal. 2012); *Hart v. San Diego Credit Union*, 449 B.R. 783, 792 (S.D. Cal. 2010); *In re Blenheim*, No. 09-10283-MLB, 2011 WL 6779709, at *6 (Bankr. W.D. Wash. Dec. 27, 2011). Supportive of the approach that chapter 20 lien-strips are not permitted, *see In re Victorio*, 454 B.R. 759, 774 (Bankr. S.D. Cal. 2011), *aff'd*, 470 B.R. 545, 553 (S.D. Cal. 2012); *In re Sadowski*, 473 B.R. 12, 16 (Bankr. D. Conn. 2011); *In re Woolsey*, 438 B.R. 432, 438 (Bankr. D. Utah 2010), *aff'd*, 696 F.3d 1266 (10th Cir. 2012); *In re Quiros-Amy*, 456 B.R. 140, 146 (Bankr. S.D. Fla. 2011); *Bank of the Prairie v. Picht (In re Picht)*, 428 B.R. 885, 890 (B.A.P. 10th Cir. 2010); *In re Gerardin*, 447 B.R. 342, 349 (Bankr. S.D. Fla. 2011); *In re Jarvis*, 390 B.R. 600, 603 (Bankr. C.D. Ill. 2008); *Orkwis v. Mers (In re Orkwis)*, 457 B.R. 243, 248 (Bankr. E.D.N.Y. 2011); *Lindskog v. M&I Bank FSB (In re Lindskog)*, 451 B.R. 863, 866 (Bankr. E.D. Wis. 2011), *aff'd*, 480 B.R. 916, 919 (E.D. Wis. 2012); *Erdmann v. Charter One Bank (In re Erdmann)*, 446 B.R. 861, 868 (Bankr. N.D. Ill. 2011); *In re Fenn*, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010); *In re Lilly*, 378 B.R. 232, 236 (Bankr. C.D. Ill. 2007).

9 *Woolsey v. Citibank NA (In re Woolsey)*, 696 F.3d 1266 (10th Cir. 2012).

from what it was in 1992, the result of a new review of *Dewsnup* may provide a different result.

Dewsnup: Infirm Precedent Concerning Chapter 7 Lien-Stripping

Dewsnup involved a question of statutory interpretation, and the Supreme Court looked at the lien-disallowance provision in 11 U.S.C. § 506(d), which voids liens to the extent that they are not "allowed secured claims." Neighboring subsection (a) defines "allowed secured claim," but citing "ambiguity," the Supreme Court refused to apply this definition to 11 U.S.C. § 506(d).

In reaching its ultimate holding, the *Dewsnup* Court abandoned clearly established rules of statutory interpretation that provide that Congress's plain language must be applied as written.[10] In this instance, a phrase was statutorily defined, in plain language, but the Court refused to utilize the definition. Moreover, holding that "allowed secured claim" means something different in § 506(a) than the same phrase means in § 506(d) of the Bankruptcy Code defies the Court's own "normal rule of statutory construction that identical words used in different parts of the same act [have] the same meaning."[11] The Court's preference for eschewing normal statutory construction rules was apparently prompted by a fear that to do otherwise would abrogate long-standing pre-Code bankruptcy policy that liens could not be stripped in a liquidation.[12]

It is generally acknowledged that the Court was unable to reach its preferred conclusion by applying sound statutory construction principles.[13] Indeed, to sidestep normal statutory conventions, the Supreme Court found § 506(d) ambiguous "based on no more than the fact the litigants before it happened to disagree over the statute's meaning."[14]

The *Dewsnup* court protected this policy even though it may have strongly suspected that Congress misspoke in 1978 when it first promulgated these contrary-worded provisions.[15] Nonetheless, the proper constitutional role for the Court is to apply a statute as written and leave the statutory amendment for Congress to determine.[16] Instead, the Court's interference has created the strange hybrid system that we have today, where lien-strips are prohibited in chapter 7 but permitted in chapter 13.

Conflicting Chapter 20 Jurisprudence Could Be a Vehicle to Reassess *Dewsnup*

The increasingly contentious practice of filing a chapter 7 petition followed by a chapter 13 petition as a so-called "chapter 20"[17] brings into sharp relief the tension between the divergent lien-stripping rules applicable in liquidations vs. wage-earner plans. As long as chapters 7 and 13 are carefully segregated from one another, the two opposite rules concerning lien-stripping can coexist. Sequencing chapters 7 and 13 cases one after the other, however, brings the two sets of rules into sharp contrast, thereby implicating the question of *Dewsnup*'s applicability: Do the lien-stripping rules outside of chapter 7 or the no-lien-stripping rule within chapter 7 have priority?

Recent decisions criticizing chapter 20 proceedings are often decided on the basis that the sequential filing is an end-run around *Dewsnup* and its prohibition on lien-stripping in liquidations.[18] The argument typically tracks the following syllogism: (1) the default bankruptcy filing is a chapter 7, (2) a debtor only obtains the enhanced benefits of a chapter 13 (*i.e.*, lien-stripping) because the debtor agrees to repay unsecured creditors a higher recovery than they would otherwise receive in a chapter 7,[19] and (3) by obtaining a chapter 7 discharge *prior* to filing the sequenced chapter 13 case, higher repayment of unsecured debts is impossible.[20] Accordingly, because the subsequent chapter 13 is a chimera, the entire chapter 20 gambit should be collapsed into its essential nature, which is a liquidation—under which no lien-strips are permitted.[21] If courts find that a chapter 20 is functionally a chapter 7, then pursuant to *Dewsnup*, which applies in all liquidations, lien-stripping should be prohibited.

More than 10 reported decisions permitting and 10 prohibiting chapter 20 lien-stripping have been issued in the last 18 months alone.[22] These courts have noted the divisive and unresolved nature of the split concerning chapter 20 lien-stripping,[23] and the dispute over whether debtors can lien-strip in a chapter 13 following a chapter 7 is growing and probably irreconcilable without a decision by the Supreme Court. Most importantly, adjudicating *Dewsnup* in the chapter 20 context may well require reconsideration of the persuasiveness of *Dewsnup*'s underlying logic.

Unintended Expansiveness and Current Court Membership

Dewsnup was intended to be a decision of limited application: "We ... focus upon the case before us and allow other facts to await their legal resolution on another day."[24] Based on this language, courts unanimously agree that *Dewsnup*'s

10 *See, e.g., U.S. v. Ron Pair Enterps. Inc.*, 489 U.S. 235, 241 (1989).
11 *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quotations omitted).
12 *See Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992).
13 Justice Thomas, who did not participate in the original opinion although he was a member of the Court at the time, later concluded that *Dewsnup* created "methodological confusion ... enshroud[ing] both the Courts of Appeals and, even more tellingly, Bankruptcy Courts, which must interpret the Code on a daily basis." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 463 (1999) (Thomas, J., concurring).
14 *In re Woolsey*, 696 F.3d 1266, 1273 (10th Cir. 2012).
15 "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." *Fulbright v. U.S. Dep't of Educ. (In re Fulbright)*, 319 B.R. 650, 659 (Bankr. D. Mont. 2005).
16 *See, e.g., In re Williams*, BK No. 10-13531, 2007 WL 2122131, at *5 (Bankr. E.D. Va. July 19, 2007) ("[T]he courts must apply that language as written. Otherwise, the courts would, in effect, be amending the statute and usurping the function of the legislature.").
17 *In re Perretta*, 2011 WL 6305552, at *1 n.1 (Bankr. D.R.I. Dec. 16, 2011) (noting that "'[c]hapter 20' is a well-known strategy in the consumer bankruptcy lexicon").
18 *See In re Okosisi*, 451 B.R. 90, 99 n.9 (Bankr. D. Nev. 2011) (characterizing adverse authority).
19 11 U.S.C. § 1325(a)(4). The purpose of chapter 13 is to reward debtors who undertake to repay unsecured creditors with more lenient treatment than would be accorded to a liquidating chapter 7 debtor. H.R. Rep. No. 95-595, at 118, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6079. *See also Moser v. Mullican (In re Mullican)*, 417 B.R. 389, 399 (Bankr. E.D. Tex. 2008) ("In exchange for giving up their right to future earnings and property acquired post-petition, a debtor gains many benefits in Chapter 13, such as the ability … to modify the rights of secured creditors, and to cure and reinstate mortgages.").
20 *Downey Sav. & Loan Assoc. v. Metz (In re Metz)*, 67 B.R. 462, 465 (B.A.P. 9th Cir. 1986) ("Unless there are nondischargeable unsecured debts [following a chapter 7 discharge], the only debts remaining will be secured. The Chapter 20 case thus becomes, in effect, a zero payback Chapter 13 plan for unsecured creditors.").
21 *See, e.g., Victorio v. Billingslea*, 470 B.R. 545, 555-56 (S.D. Cal. 2012).
22 *See supra*, n.9.
23 *See, e.g., Zeman v. Waterman (In re Waterman)*, 469 B.R. 334, 336 (D. Colo. 2012) ("[T]he sole issue in this appeal is one that has generated a nationwide split among bankruptcy courts."); *Frazier v. Real Time Resolutions Inc.*, 469 B.R. 889, 895 (E.D. Cal. 2012) ("[T]here is a growing split of authority among courts across the country regarding the permissibility and permanence of Chapter 20 lien-stripping. This issue is a divisive one in many jurisdictions."); *In re Gloster*, 459 B.R. 200, 204 (Bankr. D.N.J. 2011) ("The split of case authority on this issue is significant.").
24 *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992).

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holding is limited to chapter 7[25] and applies to no other bankruptcy chapters, even though § 506(a) and (d) are common bankruptcy provisions, applicable throughout the Code.[26]

By contrast, a Sept. 4, 2012, Tenth Circuit opinion adhering to the holding of *Dewsnup* nonetheless identified a dangerous aspect of the *Dewsnup* decision that had not been completely understood until now. *Woolsey* makes it clear that the logic of *Dewsnup* cannot be limited to the chapter 7 context, and presumably, all § 506(a) lien-strips, regardless of the chapter under which they are filed, could be prohibited.[27]

The court of appeals in *Woolsey* pointed out that § 506(d) cannot mean something in one factual posture (the fact that a case is a liquidation proceeding under chapter 7), and mean something wholly different in a different factual posture (the fact that a case is a wage-earner plan under chapter 13).[28] It has long been acknowledged that when a term has a fixed meaning in one part of a statute, the term should *typically* carry the same meaning when it appears in a different part of the same statute.[29] However *Woolsey* importantly identified the fact that since *Dewsnup*, Supreme Court precedent, in the form of *Clark v. Martinez*, has clarified that changing statutory meaning in *the exact same provision* of legislation based on context is "a ploy not just frowned upon but [is] methodologically incoherent and categorically prohibited."[30]

In light of the new jurisprudence of *Clark v. Martinez*, the conventional wisdom that *Dewsnup* can be cabined just to the chapter 7 context is probably wrong. Every time § 506(d) is relied on, either in chapter 7 or 13, *it must mean the same thing*. Accordingly, the lien-stripping regimes in chapter 7 and 13 must in fact have the same rules when § 506(d) is involved. If *Dewsnup* is taken to its extreme, the chapter 7 no-lien-strip rule could get exported to chapter 13, and eventually lead some courts to deny lien-strips in chapter 13.[31] In short, *Woolsey* unmasks the volatility of the *Dewsnup* decision and warns that if *Dewsnup* is not revisited, it could wreak further havoc on bankruptcy jurisprudence, more than two decades after it was originally penned. In short, the *Dewsnup* decision continues to be a "loaded gun" waiting to go off.

The second reason that the Supreme Court might reject *Dewsnup* (if confronted with the opportunity) is that the Court of today is not the Court that decided *Dewsnup*. The composition of the Supreme Court has almost completely turned over since 1992, and political cross-winds may be blowing in such a way that none of the justices wish to see *Dewsnup* continue as precedent.

The change in membership of the Court is striking: 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*.[32]

The prohibition on chapter 7 lien-strips may soon become a thing of the past, and although that might create a disincentive against debtors filing chapter 13 cases, at least bankruptcy practice concerning § 506(d) lien-strips would finally be consistent.

Taking into account the six new justices, including Samuel Alito, Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, Sonia Sotomayor and Chief Justice John Roberts, it is not difficult to envision a conservative/liberal coalition cobbled together between conservative justices emphatic about applying the Bankruptcy Code as written (Alito), and liberal justices concerned about alleviating the effects of the mortgage crisis for the most vulnerable (Breyer, Ginsburg, Kagan and Sotomayor), which might join forces to reverse *Dewsnup*. That would produce at least seven votes, two more votes than necessary, in favor of overturning *Dewsnup* and ruling that the phrase "allowed secured claim" in § 506(d) as it does in § 506(a).

If still interested in preserving the *Dewsnup* decision, Justice Kennedy would be unable to secure any votes other than that of Chief Justice Roberts, whose stated preference for judicial modesty in the Obama health care case *National Federal of Independent Business, et al. v. Sibelius* might restrain him from joining his ideological fellow travelers on the Court—Scalia, Thomas and Alito—who frequently emphasize textualism as their guiding jurisprudential principle.

Conclusion

Less than six months ago, the Tenth Circuit posed the following challenge in rendering the Woolsey decision:

> Right or wrong, the Dewsnuppian departure from the statute's plain language is the law. It may have warped the Bankruptcy Code's seemingly straight path into

25 *See In re Young*, 199 B.R. 643, 651 (Bankr. E.D. Tenn. 1996) (collecting cases).
26 11 U.S.C § 103(a) ("[C]hapters 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12 or 13 of this title, and this chapter.").
27 *In re Woolsey*, 696 F.3d at 1274.
28 *Id.* at 1276.
29 *Id.* at 1277 (citing *Ratzlaf v. U.S.*, 510 U.S. 135, 143 (1994)).
30 *Id.* at 1277 (citing *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (for the proposition that "[t]o give these same words a different meaning for each category [of cases to which they apply] would be to invent a statute rather than interpret one"); *see also Clark v. Martinez*, 543 U.S. at 386 (rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases"); *U.S. v. Santos*, 553 U.S. 507, 522-23, (2008) (opinion of Scalia, J.) (*Clark* "forcefully rejected" notion that courts could "giv[e] the same word, in the same statutory provision, different meanings in different factual contexts").
31 Nonetheless, lien-strips based on § 322(b)(2) might still be possible.
32 *Bank of Am. Nat'l Trust & Sav. Assoc. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 463 (1999).

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a crooked one. It may not be infallible. But until and unless the Court chooses to revisit it, it is final.[33]

Based on the three developments of (1) the increasing contentiousness of the chapter 20 jurisprudential split, (2) the unintended expansiveness of *Dewsnup* outlined recently by the Tenth Circuit and (3) the Court's changed composition, this venerable decision may be in a much more precarious position than ever before. The author believes that the time for the Supreme Court to revisit *Dewsnup* is ripe and that if reviewed by the Supreme Court, the ultimate decision may surprise practitioners. The prohibition on chapter 7 lien-strips might soon become a thing of the past, and although that could create a disincentive against debtors filing chapter 13 cases, at least bankruptcy practice concerning § 506(d) lien-strips would finally be consistent. abi

33 *In re Woolsey*, 696 F.3d at 1274.