

1 October, 2007. In addition, they had accrued \$2,212.91 in unpaid
2 real property taxes, and their proposed plan indicated they had
3 accrued \$7,969 in arrears to Indymac between filings.

4 Because of their earlier Chapter 7 discharge, debtors listed
5 a number of unsecured creditors for "Notice Only", except for
6 three. One debt, scheduled as having been incurred in July, 2009
7 was for \$3,598 to WAMU's collection agent. The second was
8 incurred in August, 2009, also to WAMU and its agent. The third
9 was a debt of their daughter for \$402, on which they cosigned,
10 and was owed to United Consumer Financial.

11 Central to the multi-phased, and lengthy discussion which
12 follows, is the Victorios' proposal to strip off the junior lien
13 of CitiMortgage on their home on the theory that there was no
14 equity to which its lien could attach, all as set out in
15 paragraph 19 of their proposed plan. In addition, debtors
16 propose to pay 100% of unsecured claims.

17 The Chapter 13 trustee promptly objected to confirmation,
18 including as a ground for objection that debtors were not
19 eligible for a discharge so any interim lien strip would be
20 illusory. The trustee recognized that "[d]ismissal results in
21 reinstatement of voided lien under Section 349(b)." The trustee
22 cited to a then-recently published decision of this Court on a
23 relief from stay motion in a Chapter 13 case that had followed on
24 the heels of a Chapter 7 discharge.

25 ///

26 ///

1 The debtors responded to the trustee's objection, stating:

2 Debtors can infer from the reading of
3 the preliminary stay relief decision by this
4 Court in the Casey case that the Trustee is
5 disavowing any knowledge of the '4th option'.
6 Debtors suggest that the ruling of In re
7 Leavitt, 717 F.3d 1219 (9th Cir. 1999), is
8 distinguishable and now not applicable, as it
9 relates to the finding that "A Chapter 13
10 case concludes in one of three ways" Leavitt
11 at 1223, after the application of the 'new'
12 law as of 10/17/2005. The 4th option of
13 administrative closing of the Ch. 13 case
14 clearly exists and is used extensively by the
15 Court itself, since the 'new' law was
16 enacted.

17 The Court invited the parties to submit supplemental briefing,
18 which they have done.

19 The Chapter 13 trustee filed first, and makes a number of
20 arguments. The trustee asserts that the unsecured lien creditor
21 has an in rem claim which it retains throughout the case because
22 "the lien strip is complete only upon discharge." Because of
23 that legal fact, failure to make significant payments to that
24 creditor results in "undue delay". The trustee argues that upon
25 completion of a no-discharge Chapter 13 plan the case ought to be
26 "administratively dismissed", thereby invoking 11 U.S.C. § 349
and reinstating the lien on the property.

Debtors respond by asserting -- without citation to any
authority -- "Bankruptcy cases that are ineligible for discharge
have always been permitted to administratively close without
dismissal." They also assert that because they believe the value
of the creditor's claim is \$0 on a secured claim, there is no
undue delay. Debtors press their argument for the so-called

1 "4th option" of administrative closing by asserting that other
2 amendments to the Bankruptcy Code in 2005 as part of the
3 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)
4 contemplate a case ending without a discharge if, for example, a
5 debtor fails to obtain a certificate of completion of a financial
6 management course, 11 U.S.C. § 727(a)(11). That statute is
7 silent regarding closing the case, and it is an amendment to Rule
8 4006, enacted by the Judicial Conference in 2008 that mentions
9 "closing the case without the entry of a discharge".

10 After receiving the supplemental briefing from both sides,
11 the Court took the matter under submission. The issues raised
12 by both are important ones and, as discussed later, have been the
13 subject of careful consideration by courts all over the country,
14 albeit without unanimity of views.

15 As will be set out more extensively, this Court finds and
16 concludes that debtors in a Chapter 20 case cannot obtain a
17 "permanent" avoidance of a wholly unsecured junior lien on their
18 principal residence unless they pay the claim amount in full, or
19 obtain a discharge. Because the Victorios' Plan does not
20 contemplate paying the junior lien creditor at all, and because
21 if they did so intend, they could not do so with the present plan
22 over the maximum term allowed for a Chapter 13, the objection of
23 the Chapter 13 trustee is sustained.

24 ///

25 ///

26 ///

1 to address the complicated problems in other ways. In the
2 meantime, however, experienced bankruptcy practitioners
3 recognized that the Bankruptcy Code provided certain tools
4 debtors might invoke to attempt to address at least junior liens
5 on primary residences that had become wholly unsecured by any
6 value in the subject property after recognizing that the debt
7 owed to the senior lender exceeded the value of the property.
8 Among those tools is 11 U.S.C. § 1322(b)(2), which provides that
9 a Chapter 13 plan may:

10 (2) modify the rights of holders of secured
11 claims, other than a claim secured only by
12 a security interest in real property that
13 is the debtor's principal residence

14 See also 11 U.S.C. § 1123(b)(5), to the same effect in Chapter 11
15 cases.

16 In 1997 the Ninth Circuit Bankruptcy Appellate Panel handed
17 down its seminal decision in In re Lam, 211 B.R. 36, in which the
18 panel held that the prohibition against modification of a loan
19 secured by an interest in a debtor's principal residence, as set
20 out in § 1322(b)(2) does not apply if there is no value to which
21 the security interest could attach because already fully subsumed
22 by the security interest of a senior lienholder. Lam was
23 followed in 2002 by In re Zimmer, 313 F.3d 1220, decided by a
24 panel of the Ninth Circuit Court of Appeals.

25 Within the universe of Chapter 13 cases that propose to
26 strip off junior liens on homes that are principal residences,
there is a subset of cases that have become known as "Chapter 20"

1 cases. That is, the Chapter 13 case was preceded by a Chapter 7
2 case, and that Chapter 7 resulted in discharge of the debtor's
3 personal liability on the underlying obligation. Johnson v. Home
4 State Bank, 501 U.S. 78, 83 (1991). Johnson is recognized for
5 its holding that even though a debtor has discharged his or her
6 personal liability on the obligation on a mortgage in a Chapter 7
7 case, the debtor may still file a Chapter 13 case to address the
8 lender's claim against the debtor's real property because "the
9 Code provides that a creditor's right to foreclose on the
10 mortgage survives or passes through the bankruptcy." 501 U.S. at
11 83. Under Johnson, the fact that a debtor had already obtained a
12 Chapter 7 discharge of his or her personal liability on the same
13 debt did not preclude the debtor from filing a sequential Chapter
14 13 case to obtain a discharge through performance of a confirmed
15 plan in the Chapter 13. At the time Johnson was decided, there
16 was no statutory prohibition of a Chapter 13 discharge on the
17 heels of one under Chapter 7.

18 Then, in 2005 Congress enacted the Bankruptcy Abuse
19 Prevention and Consumer Protection Act. One of the provisions of
20 that Act is 11 U.S.C. § 1328(f), which provides in relevant part:

21 (F) Notwithstanding subsections (a) and (b),
22 the court shall not grant a discharge of all
23 debts provided for in the plan or disallowed
under section 502, if the debtor has received
a discharge -

24 (1) in a case filed under chapter 7, 11,
25 or 12 of this title during the 4-year
26 period preceding the date of the order
for relief under this chapter; . . .

1 Recognition of the foregoing parameters of bankruptcy relief
2 has led to some very creative lawyering on behalf of debtors,
3 culminating in the syllogistic argument that: a) debtor
4 discharged his or her personal liability on the promissory note
5 for the loan secured by a lien on the debtor's real property in
6 the preceding Chapter 7 case; b) debtor is not precluded from
7 filing a Chapter 13 within four years of the Chapter 7 discharge
8 - the debtor just is ineligible for the Chapter 13 discharge;
9 c) if the debtor can file a Chapter 13 even though ineligible for
10 a discharge, the debtor can avail himself of the lien strip-off
11 allowed by § 1322(b)(2); d) if the lien can be stripped off in
12 the Chapter 13, the lender cannot enforce the lien against the
13 real property to collect on the underlying debt; and e) the
14 lender cannot enforce the now-unsecured debt against the debtor
15 personally because the debtor's personal liability on it was
16 discharged in the preceding Chapter 7. Under that argument, the
17 lender would wind up holding an empty bag, without recourse
18 either to the property or to the debtor personally, on what was
19 once a consensual loan of money secured by a junior lien on
20 debtor's residence. The challenge for this and other courts is
21 to determine whether the syllogism withstands careful scrutiny.

22 The Supreme Court, in Dewsnup v. Timm, 502 U.S. 410 (1992),
23 began its efforts to find Congress' intent regarding lien
24 stripping by looking at established bankruptcy principles as they
25 existed prior to adoption of the Bankruptcy Code in 1978. The
26 Court did so in its effort to understand what Congress meant in

1 11 U.S.C. § 506(d) in its use of the phrase "allowed secured
2 claim." The majority opinion is shaky in its conviction, as
3 illustrated by the following passage:

4 We conclude that respondents alternate
5 position . . . , although not without its
6 difficulty, generally is the better of the
7 several approaches. Therefore, we hold that
8 § 506(d) does not allow petitioner to "strip
9 down" respondents' lien, because respondents'
10 claim is secured by a lien and has been fully
11 allowed pursuant to § 502. Were we writing
12 on a clean slate, we might be inclined to
13 agree with petitioner that the words "allowed
14 secured claim" must take the same meaning in
15 § 506(d) as in § 506(a). But, given the
16 ambiguity in the text, we are not convinced
17 that Congress intended to depart from the
18 pre-Code rule that liens pass through
19 bankruptcy unaffected.

20 502 U.S. at 417.

21 In support of its conclusion, the Court noted that the
22 Bankruptcy Act of 1898 expressly provided:

23 Liens given or accepted in good faith and
24 not in contemplation of or in fraud upon
25 this Act, and for a present consideration,
26 which have been recorded according to law
 . . . shall not be affected by this Act.

502 U.S. at 418, Fn.4. In the same footnote, the Court explained
that the principle remained in force despite not having been
expressly set out in the Chandler Act of 1938. Id.

Then the Dewsnup Court turned to a brief review of two of
its prior decisions on the subject of lien stripping -- as the
Court put it, "involuntary redirection of the amount of a
creditor's lien for any reason other than payment on the debt."

502 U.S. at 419. The first case reviewed was Long v. Bullard,

1 117 U.S. 617 (1886), where "the Court held that a discharge
2 in bankruptcy does not release real estate of the debtor from
3 the lien of a mortgage created by him before the bankruptcy."
4 502 U.S. at 419.

5 The second case reviewed by the Dewsnup Court warrants
6 more thorough discussion. It is Louisville Joint Stock Land Bank
7 v. Radford, 295 U.S. 555 (1935). The Radfords borrowed money
8 from the Land Bank on two occasions and gave the Bank mortgages
9 securing the loans by liens on their farm land. After the
10 Radfords defaulted, the Bank filed suit to foreclose. The
11 Radfords responded with their own federal action to seek a
12 composition of their debts. While that was pending, Congress
13 passed the Frazier-Lemke Act in June, 1934, which amended the
14 bankruptcy laws to provide certain forms of relief to farmers who
15 were at risk of losing their farms because of the Depression.

16 In essence, the new law provided that if a farmer could not
17 obtain sufficient consents from creditors for a composition, the
18 debtor could purchase the property at its appraised value with
19 payments spread out over six years at a prescribed rate, with
20 most of the debt payable in year six. That process required the
21 lender's consent. If the lender refused consent, the debtor
22 could ask the court to stay the proceedings for five years,
23 during which the debtor could continue to occupy and work the
24 property at an annual rent set for the amount of the property
25 the debtor retained. The debtor would have up to five years to
26 pay into court funds equal to the appraised value of the property

1 the debtor retained. If the debtor did so, the Act directed
2 that the debtor would receive clear title to the property he
3 kept, and the debtor could apply for a discharge. The Bank
4 challenged the constitutionality of the legislation, in
5 particular because the Act was expressly to apply only to
6 debts that were in existence on the date of enactment.

7 The Radford Court tipped its hand somewhat when it quoted
8 from a then-recent decision concerning state law provisions
9 impacting mortgages:

10 There we said: 'With studied indifference to
11 the interests of the mortgagee or to his
12 appropriate protection they have taken from
13 the mortgage the quality of an acceptable
14 investment for a rational investor.' and, 'So
viewed they are seen to be an oppressive and
unnecessary destruction of nearly all the
incidents that give attractiveness and value
to collateral security.'

15 295 U.S. at 578.

16 The Radford Court then reviewed the history of mortgages as
17 reflected in adjustments to the correlative -- and shifting --
18 rights of mortgagees and mortgagors. After noting that over time
19 mortgagors were "given a reasonable time to cure the default",
20 the Court stated:

21 But the statutory command that the mortgagor
22 should not lose his property on default had
23 always rested on the assumption that the
24 mortgagee would be compensated for the
25 default by a later payment, with interest,
26 of the debt for which the security was given;
and the protection afforded the mortgagor
was, in effect, the granting of a stay. No
instance has been found, except under the
Frazier-Lemke Act (11 USCA § 203(s)) of
either a statute or decision compelling the

1 mortgagee to relinquish the property to the
2 mortgagor free of the lien unless the debt
was paid in full.

3 295 U.S. at 579. In concluding its review of the history of
4 mortgages, the Court observed:

5 This right of the mortgagee to insist
6 upon full payment before giving up his
7 security has been deemed of the essence of a
8 mortgage To protect his right to full
9 payment or the mortgaged property, the
10 mortgagee was allowed to bid at the judicial
11 sale on foreclosure. In many states other
12 statutory changes were made in the form and
13 detail of foreclosure and redemption. But
14 practically always the measures adopted for
the mortgagor's relief, including moratorium
legislation enacted by the several states
during the present depression, resulted
primarily in a stay; and the relief afforded
rested, as theretofore, upon the assumption
that no substantive right of the mortgagee
was being impaired, since payment in full of
the debt with interest would fully compensate
him.

15 295 U.S. at 580-81.

16 The Radford Court then turned its attention to a review of
17 prior bankruptcy legislation. It noted:

18 Although each of our national bankruptcy
19 acts followed a major or minor depression,
20 none had prior to the Frazier-Lemke
21 amendment, sought to compel the holder
22 of a mortgage to surrender to the bankrupt
23 either the possession of the mortgaged
24 property or the title, so long as any
part of the debt thereby secured remained
unpaid. . . . But unless the mortgagee
released his security, in order to prove
in bankruptcy for the full amount of the
debt, a mortgage even of exempt property
was not disturbed by bankruptcy proceedings.

25 295 U.S. at 581-83.

26 ///

1 It is interesting to contemplate the Radford Court's setting
2 of the table, as it were. After all the foregoing discussion,
3 the Court stated:

4 It is true that the position of a
5 secured creditor, who has rights in specific
6 property, differs fundamentally from that of
7 an unsecured creditor, who has none; and that
8 the Frazier-Lemke Act (11 USCA s 203(s)) is
9 the first instance of an attempt, by a
10 bankruptcy act, to abridge, solely in the
11 interest of the mortgagor, a substantive
12 right of the mortgagee in specific property
13 held as security.

10 295 U.S. at 588-89. But then the Court says:

11 But we have no occasion to decide in this
12 case whether the bankruptcy clause confers
13 upon Congress generally the power to abridge
14 the mortgagee's rights in specific property.

14 Id. Why? Because the Frazier-Lemke amendment expressly applied
15 only to mortgages already existing at the time of its enactment.
16 That provision evoked the Fifth Amendment to the Constitution,
17 which prohibits the taking of property of another without just
18 compensation. The Court reviewed the multiple rights afforded
19 a mortgagee under applicable state law, all of which arose from
20 the mortgage agreement entered into prior to enactment of the
21 Frazier-Lemke amendment to the bankruptcy laws. The Court
22 observed about the amendment:

23 Its avowed object is to take from the
24 mortgagee rights in the specific property
25 held as security; and to that end 'to scale
26 down the indebtedness' to the present value
of the property.

26 295 U.S. at 594. It is of more than passing interest that the

1 Court noted that as passed by the House Frazier-Lemke would have
2 applied to future mortgages as well as existing ones, but the
3 Senate forced the limitation to existing mortgages, only, because
4 "if made applicable to future mortgages, [it] would destroy the
5 farmer's future mortgage credit." 295 U.S. at 595.

6 As already alluded to, the Radford Court, while having
7 engaged in a wide-ranging discussion of issues, returned to the
8 specific issue before it:

9 The province of the Court is limited to
10 deciding whether the Frazier-Lemke Act (11
11 USCA s 203(s)) as applied has taken from the
12 bank without compensation, and given to
13 Radford, rights in specific property which
14 are of substantial value. . . . As we
15 conclude that the act as applied has done so,
16 we must hold it void; for the Fifth Amendment
17 commands that, however great the nation's
18 need, private property shall not be thus
19 taken even for a wholly public use without
20 just compensation. If the public interest
21 requires, and permits, the taking of property
22 of individual mortgagees in order to relieve
23 the necessities of individual mortgagors,
24 resort must be had to proceedings by eminent
25 domain; so that, through taxation, the burden
26 of the relief afforded in the public interest
may be borne by the public.

19 295 U.S. at 601-02.

20 At the same time the Court was acknowledging that the
21 parameters of Frazier-Lemke were limited to mortgages existing
22 as of its enactment -- thus causing the Court to write:

23 But we have no occasion to decide in this
24 case whether the bankruptcy clause confers
25 upon Congress generally the power to abridge
26 the mortgagee's rights in specific property

26 ///

1 (295 U.S. at 589), the Court also pondered:

2 The power over property pledged as security
3 after the date of the act may be greater
4 than over property pledged before

4 Id.

5 Because the United States was deep in the throes of the
6 Depression, Congress responded quickly to the Radford decision.
7 In 1935, Congress amended the Frazier-Lemke Act to try to
8 establish a different procedure that would afford relief to
9 farmers at risk of losing their farms. In Wright v. Vinton
10 Branch of Mountain Trust Bank, 300 U.S. 440 (1937) Justice
11 Brandeis (who also authored Radford) explained that Wright had
12 granted the bank a mortgage in 1929, which had matured and was in
13 default, and the trustee under the deed of trust had advertised
14 the intended sale of the farm. Wright filed a bankruptcy
15 petition in 1935, asked for a stay of the sale, and made a
16 proposal for composition, which the bank did not accept. Then,
17 on August 28, 1935 Congress amended Frazier-Lemke and Wright
18 filed an amended petition, seeking relief under the new law. The
19 bank moved to dismiss, challenging the constitutionality of the
20 new law. That motion was granted, and affirmed on appeal.

21 Justice Brandeis began his analysis by starting with the
22 Radford decision. He wrote:

23 The decision in the Radford Case did not
24 question the power of Congress to offer to
25 distressed farmers the aid of a means of
26 rehabilitation under the bankruptcy clause.
 The original Frazier-Lemke Act was there held
 invalid solely on the ground that the
 bankruptcy power of Congress, like its other

1 great powers, is subject to the Fifth
2 Amendment; and that, as applied to mortgages
3 given before its enactment, the statute
4 violated that Amendment, since it effected a
5 substantial impairment of the mortgagee's
6 security.

5 300 U.S. at 456-57. Justice Brandeis continued:

6 The [Radford] opinion enumerates five
7 important substantive rights in specific
8 property which had been taken. It was not
9 held that the deprivation of any one of these
10 rights would have rendered the Act invalid,
11 but that the effect of the statute in its
12 entirety was to deprive the mortgagee of his
13 property without due process of law. The
14 rights enumerated were [citation omitted]:

11 (1) The right to retain the lien until the
12 indebtedness thereby secured is paid.

13 (2) The right to realize upon the security
14 by a judicial public sale.

15 (3) The right to determine when such sale
16 shall be held, subject only to the discretion
17 of the court.

18 (4) The right to protect its interest in the
19 property by bidding at such sale whenever
20 held, and thus to assure having the mortgaged
21 property devoted primarily to the
22 satisfaction of the debt, either through
23 receipt of the proceeds of a fair competitive
24 sale or by taking the property itself.

25 (5) The right to control meanwhile the
26 property during the period of default,
subject only to the discretion of the court,
and to have the rents and profits collected
by a receiver for the satisfaction of the
debt.

24 300 U.S. at 457.

25 Justice Brandeis wrote that Congress "sought to preserve to
26 the mortgagee all of these rights" in redrafting Frazier-Lemke,

1 so as to provide relief "free from the objectionable features
2 which had been held fatal to the original Act." Id. He noted
3 "that the new Act adequately preserves three of the five above
4 enumerated rights of a mortgagee." Id. The Court recognized
5 that the revised Act provided for retention of the lien "until
6 the indebtedness thereby secured is paid", as well as the right
7 to seek a public sale of the collateral. 300 U.S. at 458-59.
8 In addition, the Court was satisfied that Congress intended the
9 mortgagee could bid at any such sale.

10 According to Justice Brandeis, the bank's major argument was
11 with the provision that a debtor who cleared certain procedural
12 hurdles could ask for and receive a three year stay of all
13 foreclosure proceedings against the subject property and that:

14 'At the end of three years, or prior thereto,
15 the debtor may pay into court, the amount of
16 the appraisal of the property of which he
17 retains possession, including the amount of
encumbrances on his exemptions, up to the
amount of the appraisal, less the amount paid
on principal.'

18 300 U.S. at 460. Curiously, instead of addressing the
19 opportunity for the debtor to reduce the debt to the mortgagee to
20 the appraised value of the property within the three year window,
21 the court discussed: "[W]hile the Act affords the debtor,
22 ordinarily, a three-year period of rehabilitation, the stay
23 provided for is not an absolute one; and that the court may
24 terminate the stay and order a sale earlier." 300 U.S. at 461.
25 Much of the next several pages of the opinion is devoted to
26 construing Congress' intent in the revisions to provide that "the

1 property is virtually in the complete custody and control of the
2 court, for all purposes of liquidation." 300 U.S. at 464, Fn. 9.

3 In summing up, the Court stated:

4 The question which the objections raise
5 is not whether the Act does more than modify
6 remedial rights. It is whether the
7 legislation modifies the secured creditor's
8 rights, remedial or substantive, to such an
9 extent as to deny the due process of law
10 guaranteed by the Fifth Amendment.

11 300 U.S. at 470. The Court then stated: "A court of bankruptcy
12 may affect the interests of lienholders in many ways." Id.

13 After listing several, it concluded:

14 It may enjoin like action by a mortgagee
15 which would defeat the purpose of subsection
16 (s) to effect rehabilitation of the farmer
17 mortgagor. For the reasons stated, we are of
18 opinion that the provisions of subsection (s)
19 make no unreasonable modification of the
20 mortgagee's rights; and hence are valid.

21 Id.

22 The lengthy preceding discussion is relevant to the overall
23 discussion because in Wright the Supreme Court upheld as
24 constitutional a bankruptcy statutory provision that afforded a
25 farmer debtor who had proposed a composition in good faith, but
26 who was unable to gain acceptance, a procedure to ask the court
for a three year moratorium on foreclosure. During that three
years, the debtor could be required to pay a court-ordered rent
and, by the end of the three years the debtor could deposit with
the court funds equal to the appraised value of the property, and
thereby obtain title to it. In essence, the revised Frazier-
Lemke provision gave the debtor three years to redeem at the

1 appraised value the subject real property, regardless of how much
2 of the debt was unsecured by that valuation.

3 The very next year, the Supreme Court decided another
4 case involving the amended Frazier-Lemke Act. The debtor was
5 another Mr. Wright, unrelated to the one above. In Wright v.
6 Central Union Life Ins. Co., 304 U.S. 502 (1938), the issue
7 was whether foreclosed property reconveyed to debtor, after
8 he had filed his petition but before the state law period of
9 redemption had run, was brought into the estate such that the
10 amended Frazier-Lemke provision could operate to extend the
11 state law period of redemption. The Court found that Congress
12 had the power to so provide "under the bankruptcy clause."
13 304 U.S. at 515. After briefly reviewing ways in which
14 Congress had validly done so in the past, the Court stated:

15 The mortgage contract was made
16 subject to constitutional power in the
17 Congress to legislate on the subject of
18 bankruptcies. Impliedly, this was
19 written into the contract between
20 petitioner and respondent. 'Not only
21 are existing laws read into contracts in
22 order to fix obligations as between the
23 parties, but the reservation of essential
24 attributes of sovereign power is also read
25 into contracts as a postulate of the legal
26 order.'

22 304 U.S. at 516. The Court concluded:

23 Property rights do not gain any
24 absolute inviolability in the bankruptcy
25 court because created and protected by
26 state law. Most property rights are so
 created and protected. But if Congress
 is acting within its bankruptcy power,
 it may authorize the bankruptcy court

1 to affect these property rights, provided
2 the limitations of the due process clause
are observed.

3 304 U.S. at 518.

4 In 1940 the Supreme Court heard the sequel in Wright v.
5 Union Central Life Ins. Co., 311 U.S. 273. There, Justice
6 Douglas writing for the Court addressed the issue of whether
7 the debtor must be accorded an opportunity to redeem at the
8 appraised value "before the court could order a public sale."
9 311 U.S. at 276. The creditor had moved to either dismiss the
10 proceedings or order a sale because the debtor had not complied
11 with the court's order to deliver 40% of his crops to the
12 trustee, had made no payment on the principal of the debt since
13 1925, and none on interest since 1930. The creditor argued there
14 was no reasonable possibility of rehabilitation. Debtor
15 countered with his request to have the land appraised, to give
16 him an opportunity to redeem the property at that sum once it was
17 set, "and to be discharged from liability on account of any
18 deficiency." 311 U.S. at 276.

19 Justice Douglas wrote that while the Court recognized that
20 granting a lienholder's request for a public sale was mandatory,
21 so was granting the debtor's request for an appraisal and a
22 reasonable period of time to redeem. To reconcile the seemingly
23 conflicting provisions, the Court looked to "the purpose and
24 function of the Act". Justice Douglas wrote:

25 This Act provided a procedure to effectuate a
26 broad program of rehabilitation of distressed
farmers faced with the disaster of forced

1 sales and an oppressive burden of debt.
2 [Citations omitted.] Safeguards were
3 provided to protect the rights of secured
4 creditors, throughout the proceedings, to
5 the extent of the value of the property.
6 [Citations omitted.] There is no
7 constitutional claim of the creditor to
8 more than that. And so long as that right
9 is protected the creditor certainly is in
10 no position to insist that doubts or
11 ambiguities in the Act be resolved in its
12 favor and against the debtor. Rather, the
13 Act must be liberally construed to give
14 the debtor the full measure of the relief
15 afforded by Congress [citations omitted],
16 lest its benefits be frittered away in
17 narrow formalistic interpretations which
18 disregard the spirit and the letter of
19 the Act.

20 311 U.S. at 278-79.

21 The Court concluded:

22 We hold that the debtor's cross petition
23 should have been granted; that he was
24 entitled to have the property reappraised or
25 the value fixed at a hearing; that the value
26 having been determined at a hearing in
conformity with his request, he was then
entitled to have a reasonable time, fixed by
the court, in which to redeem at that value;
and that if he did so redeem, the land should
be turned over to him free and clear of
encumbrances and his discharge granted.

311 U.S. at 281.

This lengthy discussion started at Dewsnup v. Timm, 502 U.S.
410 (1992), to which it now returns. The central reason why the
foregoing discussion was so detailed is because none of the three
Wright cases are mentioned anywhere in Dewsnup -- not in the
majority opinion nor in the dissent. Radford was mentioned in
the majority opinion, as noted, while the Wright cases -- all

///

1 decided after Radford and citing extensively to it -- are nowhere
2 mentioned.

3 Even more central to the discussion substantively is that
4 the Dewsnup majority, in conjunction with citing to Long v.
5 Bullard and Radford, and quoting from Radford, stated:

6 The Court invalidated that statute under
7 the Takings Clause. It further observed:
8 "No instance has been found, except under
9 the Frazier-Lemke Act, of either a statute
10 or decision compelling the mortgagee to
11 relinquish the property to the mortgagor
12 free of the lien unless the debt was paid
13 in full."

14 502 U.S. at 419. Then the Dewsnup majority said:

15 Congress must have enacted the Code with
16 a full understanding of this practice.
17 [Citation omitted.]

18 When Congress amends the bankruptcy
19 laws, it does not write "on a clean slate."
20 [Citations omitted.] Furthermore, this
21 Court has been reluctant to accept
22 arguments that would interpret the Code,
23 however vague the particular language
24 under consideration might be, to effect a
25 major change in pre-code practice that is
26 not the subject of at least some discussion
in the legislative history. [Citations
omitted.] Of course, where the language
is unambiguous, silence in the legislative
history cannot be controlling. But, given
the ambiguity here, to attribute to Congress
the intention to grant a debtor the broad new
remedy against allowed claims to the extent
that they become "unsecured" for purposes
of § 506(a) without the new remedy's being
mentioned somewhere in the Code itself or in
the annals of Congress is not plausible, in
our view, and is contrary to basic bankruptcy
principles.

27 ///

1 502 U.S. at 419-20. If there are reasons why the Court
2 considered the strip-down provisions of § 506(a) and (d), of
3 § 1322(b)(2), and of § 1123(b)(5) as not "being mentioned
4 somewhere in the Code itself", or somehow irrelevant to the
5 discussion, the Court does not tell us why. Nor does the Court
6 tell us why the procedure and remedies of the amended Frazier-
7 Lemke Act -- after Radford was decided -- did not constitute the
8 practice Congress understood at the time of enacting the
9 Bankruptcy Code. It appears it was, and had been upheld as a
10 constitutional exercise of Congress' bankruptcy clause power.

11 The Dewsnup court did recognize that Dewsnup involved a
12 Chapter 7 debtor. The Court asserted:

13 Apart from reorganization proceedings
14 [citations omitted], no provision of the
15 pre-Code statute permitted involuntary
16 reduction of the amount of a creditor's
17 lien for any reason other than payment on
18 the debt.

19 502 U.S. at 318-19. But then the Court includes Radford in that
20 discussion, presumably as a product of an unsuccessful effort at
21 a consensual composition. To the extent the Court considered
22 Radford analogous to a Chapter 7, with its five year redemption
23 period, then it is even harder to understand why the Wright cases
24 are not relevant with a three year redemption period. To the
25 extent the Court is acknowledging, independent of how Radford is
26 analogized, that in reorganization proceedings "involuntary
reduction of the amount of a creditor's lien" was permissible,
that may help to confine Dewsnup to Chapter 7 cases.

1 Earlier in its opinion, the Court stated that the reach of
2 its decision was intended to be narrow. It wrote:

3 Hypothetical applications that come to
4 mind and those advanced at oral argument
5 illustrate the difficulty of interpreting
6 the statute in a single opinion that would
7 apply to all possible fact situations. We
8 therefore focus upon the case before us
9 and allow other facts to await their legal
10 resolution on another day.

11 502 U.S. at 416-17. And in footnote 3, the Court wrote:

12 "Accordingly, we express no opinion as to whether the words
13 'allowed secured claim' have different meaning in other
14 provisions of the Bankruptcy Code."

15 In theory, those statements support reading Dewsnup as
16 applicable only to Chapter 7 cases. But that does not appear
17 to be Congress' intent. Section 103 of Title 11, United States
18 Code states Congress' intent clearly:

19 (A) Except as provided in section 1161
20 of this title, chapters 1, 3, and 5 of this
21 title apply in a case under Chapter 7, 11,
22 12, or 13 of this title

23 Section 506(d) is part of Chapter 5 of Title 11 and under the
24 provision of § 103(a) would clearly apply to cases under Chapters
25 7, 11, 12 and 13. But Dewsnup says it does not apply to Chapter
26 7 cases, and the Court ostensibly leaves for another day its
applicability in other Chapters. That is the law that has been
applicable in bankruptcy since Dewsnup was decided in 1992.

Recognizing that § 506 is part of Chapter 5 of the
Bankruptcy Code, and was intended by Congress to be applicable

1 to cases brought under Chapters 7, 11, 12 and 13 raises more
2 issues in terms of how Congress intended to give effect to its
3 provisions. It has been suggested that it is a stand-alone
4 provision which grants the lien avoidance under § 506(a) and (d)
5 when invoked. Section 349 of the Code, specifying the effect of
6 dismissal of a case might seem to support that notion by the
7 language of § 349(b)(1)(C), which states that dismissal
8 "reinstates - (C) any lien voided under section 506(d) of this
9 title;" But at the same time, it makes clear that lien
10 avoidance under § 506(d) is intended to be provisional, subject
11 to reinstatement at least upon dismissal of the case.

12 There is a much stronger reason why § 506 is not a stand-
13 alone mechanism available to avoid a lien that is undersecured
14 or unsecured by the value of the collateral. There is no such
15 thing as a Chapter 5 case. Rather, it is a provision that has
16 to be utilized in the context of a case brought under Chapters 7,
17 11, 12 or 13. Dewsnup has already instructed that
18 notwithstanding the language of § 506, the remedy of § 506(d) is
19 not available in Chapter 7 cases. Chapters 13 and 11 have their
20 own limitation on its use under those Chapters, to the extent it
21 is necessary to look to § 506(d) at all, especially after
22 Dewsnup. Section 1322(b)(2) provides that a Chapter 13 plan "may
23 - (2) modify the rights of holders of secured claims, other than
24 a claim secured only by a security interest in real property that
25 is the debtor's principal residence" Section 1123(d)(5)
26 provides an identical limitation on any effort to strip down a

1 lien secured by the "debtor's principal residence" in a Chapter
2 11 case. That further illustrates that to the extent § 506(d)
3 has any applicability in Chapter 13 or 11 cases it cannot be a
4 stand-alone provision because it has no such limitation within
5 it. In other words, if it were a stand-alone mechanism for lien
6 avoidance, then it would make no difference if the collateral
7 was the debtor's principal residence. So the statutes would
8 conflict, and the specific provision applicable to Chapter 13
9 or Chapter 11 cases would control. See, e.g., In re Hill, 440
10 B.R. 176, 180-81 (Bankr. S.D. CA 2010); In re Fenn, 428 B.R. 494,
11 501 (Bankr. N.D. IL 2010).

12 The Supreme Court put an implicit point on the argument
13 that § 506 is not a stand-alone mechanism in Nobelman v. American
14 Savings Bank, 508 U.S. 324 (1993). There, a unanimous Court held
15 that the limiting language of § 1322(b)(2) applied to prevent a
16 Chapter 13 debtor from stripping down the undersecured portion of
17 the home loan secured by debtor's principal residence.

18 The Nobelman decision is instructive in multiple ways. The
19 basic facts were uncontroverted. Debtors fell behind on the home
20 loan on their principal residence, so they filed a Chapter 13
21 case. The value of the property was uncontroverted, and was
22 about 1/3 of the amount of the debt. Debtors proposed to pay
23 only the current value, and treat the difference as unsecured,
24 with unsecured creditors receiving nothing. Debtors argued that
25 the anti-modification language of § 1322(b)(2) "applies only to
26 the extent the mortgagee holds a 'secured claim' in the debtor's

1 residence and that we must look first to § 506(a) to determine
2 the value of the mortgagee's 'secured claim.'" 508 U.S. at 328.

3 The Court continued to explain the debtors' syllogism:

4 Section 506(a) provides that an allowed claim
5 secured by a lien on the debtor's property
6 "is a secured claim to the extent of the
7 value of [the] property"; to the extent the
8 claim exceeds the value of the property, it
9 "is an unsecured claim." Petitioners contend
10 that the valuation provided for in § 506(a)
11 operates automatically to adjust downward the
12 amount of a lender's undersecured home
13 mortgage before any disposition proposed in
14 the debtor's Chapter 13 plan.

15 Id.

16 The Nobelman Court responded to the debtors' argument with
17 an important discussion. The Court states:

18 This interpretation fails to take
19 adequate account of § 1322(b)(2)'s focus
20 on "rights." That provision does not
21 state that a plan may modify "claims" or
22 that the plan may not modify "a claim
23 secured only by" a home mortgage. Rather,
24 it focuses on the modification of the
25 "rights of holders" of such claims. By
26 virtue of its mortgage contract with
petitioners, the bank is indisputably the
holder of a claim secured by a lien on
petitioners' home.

27 Id. The Court recognized that applying § 506(a) in this case
28 would acknowledge the bank had a secured claim for the value of
29 the property; "however, that determination does not necessarily
30 mean that the 'rights' the bank enjoys as a mortgagee, which are
31 protected by § 1322(b)(2), are limited by the valuation of its
32 secured claim." 508 U.S. at 329.

33 ///

1 The Court continued:

2 The term "rights" is nowhere defined
3 in the Bankruptcy Code. In the absence of
4 a controlling federal rule, we generally
5 assume that Congress has "left the
6 determination of property rights in the
7 assets of a bankrupt's estate to state law,"
8 since such "[p]roperty interests are created
9 and defined by state law." [Citations
10 omitted.] Moreover, we have specifically
11 recognized that "[t]he justifications for
12 application of state law are not limited
13 to ownership interests," but "apply with
14 equal force to security interests,"
15 including the interest of a mortgagee."
16 [Citation omitted.] The bank's "rights,"
17 therefore, are reflected in the relevant
18 mortgage instruments, which are enforceable
19 under Texas law. They include the right
20 to repayment of the principal in monthly
21 installments over a fixed term at specified
22 adjustable rates of interest, the right
23 to retain the lien until the debt is paid
24 off, the right to accelerate the loan upon
25 default and to proceed against petitioners'
26 residence by foreclosure and public sale,
and the right to bring an action to recover
any deficiency remaining after foreclosure
. . . . These are the rights that were
"bargained for by the mortgagor and the
mortgagee," . . . and are rights protected
from modification by § 1322(b)(2).

18 508 U.S. at 329-30.

19 The Nobelman Court next returned to the debtors' argument
20 that the anti-modification language of § 1322(b)(2) only applied
21 to the secured portion of the bank's claim, after putting the
22 claim through the § 506(a) wringer. Indeed, the Ninth Circuit
23 Court of Appeals had previously so held in In re Houglund, 886
24 F.2d 1182 (1989). While acknowledging that such a construction
25 of § 1322(b)(2) was "quite sensible as a matter of grammar",
26 (508 U.S. at 330), it did not fit structurally because Congress

1 chose a different set of words:

2 Congress chose to use the phrase "claim
3 secured . . . by" in § 1322(b)(2)'s
4 exception, rather than repeating the term
5 of art "secured claim." The unqualified
6 word "claim" is broadly defined under the
7 Code to encompass any "right to payment,
8 whether . . . secure[d] or unsecured" or any
9 "right to an equitable remedy for breach of
10 performance if such breach gives rise to a
11 right to payment, whether secure[d] or
unsecured." 11 U.S.C. § 101(5) (1988 ed.,
Supp. III). It is also plausible, therefore,
to read "a claim secured only by a [homestead
lien]" as referring to the lienholder's
entire claim, including both the secured and
the unsecured components of the claim.
Indeed, § 506(a) itself uses the phrase
"claim . . . secured by a lien" to encompass
both portions of an undersecured claim.

12 508 U.S. at 331. The Court chose the latter interpretation
13 rather than debtors', and held that § 1322(b)(2) prohibited
14 modification of any part of the bank's lien.

15 Shortly before the Supreme Court considered Nobelman, it
16 decided Johnson v. Home State Bank, 501 U.S. 78 (1991), which is
17 helpful in understanding the nature of the obligation that
18 remains from a secured obligation after the obligor receives a
19 Chapter 7 discharge. There, the Court explained:

20 A mortgage is an interest in real property
21 that secures a creditor's right to repayment.
22 But unless the debtor and creditor have
23 provided otherwise, the creditor ordinarily
24 is not limited to foreclosure on the
25 mortgaged property should the debtor default
26 on his obligation; rather, the creditor may
in addition sue to establish the debtor's in
personam liability for any deficiency on the
debt and may enforce any judgment against
the debtor's assets generally. [Citation
omitted.] A defaulting debtor can protect
himself from personal liability by obtaining

1 a discharge in a Chapter 7 liquidation.
2 11 U.S.C. § 727. However, such a discharge
3 extinguishes only "the personal liability
4 of the debtor." 11 U.S.C. § 524(a)(1).
5 Codifying the rule of Long v. Bullard,
6 [citation omitted] the Code provides that
7 a creditor's right to foreclose on the
8 mortgage survives or passes through the
9 bankruptcy.

6 501 U.S. at 82-83.

7 The Johnson Court then examined the concept of a claim, as
8 defined under 11 U.S.C. § 101(5), and as understood in prior
9 decisions. The Court stated:

10 Applying the teachings of Davenport,
11 we have no trouble concluding that a
12 mortgage interest that survives the
13 discharge of a debtor's personal liability
14 is a "claim" within the terms of § 101(5).
15 Even after the debtor's personal obligations
16 have been extinguished, the mortgage holder
17 still retains a "right to payment" in the
18 form of its right to the proceeds from
19 the sale of the debtor's property.
20 Alternatively, the creditor's surviving
21 right to foreclose on the mortgage can be
22 viewed as a "right to an equitable remedy"
23 for the debtor's default on the underlying
24 obligation. Either way, there can be no
25 doubt that the surviving mortgage interest
26 corresponds to an "enforceable obligation"
of the debtor.

20 501 U.S. at 84. The Court then stated its conclusion:

21 The Court of Appeals thus erred in
22 concluding that the discharge of petitioner's
23 personal liability on his promissory notes
24 constituted the complete termination of the
25 Bank's claim against petitioner. Rather, a
26 bankruptcy discharge extinguishes only one
mode of enforcing a claim - namely, an action
against the debtor in personam - while
leaving intact another - namely, an action
against the debtor in rem.

1 Id. The Court continued:

2 In other words, the court must allow the
3 claim if it is enforceable against either the
4 debtor or his property. Thus, § 502(b)(1)
5 contemplates circumstances in which a
6 "claim," like the mortgage lien that passes
7 through a Chapter 7 proceeding, may consist
8 of nothing more than an obligation
9 enforceable against the debtor's property.
10 Similarly, § 102(2) establishes, as a
11 "[r]ul[e] of construction," that the phrase
12 "'claim against the debtor' includes claim
13 against property of the debtor." A fair
14 reading of § 102(2) is that a creditor who,
15 like the Bank in this case, has a claim
16 enforceable only against the debtor's
17 property nonetheless has a "claim against
18 the debtor" for purposes of the Code.

19 501 U.S. at 85.

20 The Johnson Court found support for its view in the
21 legislative history of § 102. The Court noted:

22 The legislative history surrounding
23 § 102(2) directly corroborates this
24 inference. The Committee Reports
25 accompanying § 102(2) explain that this
26 rule of construction contemplates, inter
alia, "nonrecourse loan agreements where
the creditor's only rights are against
property of the debtor and not against the
debtor personally." [Citation omitted.]
Insofar as the mortgage interest that
passes through a Chapter 7 liquidation is
enforceable only against the debtor's
property, this interest has the same
properties as a nonrecourse loan
[I]nsofar as Congress did not expressly
limit § 102(2) to nonrecourse loans but
rather chose general language broad enough
to encompass such obligations, we understand
Congress' intent to be that § 102(2) extend
to all interests having the relevant
attributes of nonrecourse obligations
regardless of how these interests come
into existence.

501 U.S. at 86-87.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Discussion

Courts generally accept the guidance of Dewsnup v. Timm, 502 U.S. 410, 417-18 (1992) and recognize that a debtor, after completing a Chapter 7, receives a discharge of his or her personal liability on non-reaffirmed debts. At the same time, creditors' lien rights ride through the Chapter 7 and remain obligations secured by the creditors' state law lien rights in property, although the debtor's personal obligation has been discharged. As Johnson v. Home State Bank, 501 U.S. 78, 85-86 (1991) describes it, the creditor's recourse after a Chapter 7 discharge is only to its state law rights in its collateral, but are now nonrecourse as to the debtor personally. That is the status of the debtor vis-a-vis the creditors with lien rights on the eve of the debtor now filing a Chapter 13 petition after receiving a Chapter 7 discharge.

What happens next, upon filing the Chapter 13 petition, is little short of alchemy for the debtor who owns real property which is the debtor's principal residence and is encumbered by a junior lien attached to no equity in the residence because the senior lienholder is owed more than the property is worth. With a wave of the virtual wand of 11 U.S.C. § 506(a), one instantly determines that for purposes of the Chapter 13 case the creditor's bundle of state law rights in the property have disappeared. That is the instruction of the Ninth Circuit Court of Appeals in In re Zimmer, 313 F.3d 1220 (2002), as anticipated by the Ninth Circuit Bankruptcy Appellate Panel in In re Lam,

1 211 B.R. 36 (1996). As a practical matter, the disappearance
2 occurs immediately under In re Scovis, 249 F.3d 975 (9th Cir.
3 2001), even before formally resorting to procedures of avoidance
4 of lien interests.

5 The foregoing process is ably discussed by the court in
6 In re Okosisi, ___ B.R. ____, 2011 WL 2292148 (Bankr. D. NV
7 2011). There, the court also explains why the anti-modification
8 language of 11 U.S.C. § 1322(b)(2) does not apply to a lien
9 wholly unsecured under 11 U.S.C. § 506(a). Simply stated,
10 § 1322(b)(2) applies to holders of secured claims. Under Zimmer
11 and § 506(a) the creditor with state law lien rights is not
12 secured where there is no value to which those lien rights can
13 attach at the time of filing the petition. It is sort of a
14 "which comes first, the chicken or the egg" proposition. In the
15 Ninth Circuit, the § 506(a) analysis comes first. Some courts
16 elsewhere start from the premise that the creditor was brought
17 into the case with enforceable lien rights and therefore is a
18 secured creditor. That shapes their analysis in decisions such
19 as In re Fenn, 428 B.R. 494 (Bankr. N.D. IL 2010); In re
20 Gerardin, 447 B.R. 342 (Bankr. S.D. FL 2011). Those courts were
21 led to the protections for secured creditors found in 11 U.S.C.
22 § 1325(a) because they proceeded on the premise that the lien
23 interest creditor with no collateral value was still a secured
24 creditor, despite § 506(a). While there is appeal to the
25 argument that it is performance of the reorganization plan
26 -- whether in Chapter 13 or 11 -- that effectuates the strip-off

1 of the wholly unsecured junior lien, Scovis and Zimmer hold
2 otherwise, and if it is correct that a creditor's status as
3 secured or unsecured is determined at the instant of filing, as
4 both opinions instruct, then it is sequentially logical that the
5 creditor's status is determined prior in time to the confirmation
6 of the reorganization plan, or even its successful completion.

7 This Court has held, as have many others, that the inability
8 of a debtor to receive a Chapter 13 discharge in a case filed
9 within four years of filing under Chapter 7 and receiving a
10 discharge there, does not make the debtor ineligible to file the
11 Chapter 13. In re Burnett, 427 B.R. 517, 521 (2010); In re
12 Casey, 428 B.R. 519, 522-23 (2010). In Burnett and Casey, the
13 Court noted the statutory requirements for all Chapter 13 plans
14 set out in 11 U.S.C. § 1322(a)(3) and (a)(7) regarding good
15 faith. And courts have been examining proposed Chapter 13 plans
16 to assess the good faith issues in determining whether to confirm
17 those plans. In re Tran, 431 B.R. 230 (Bankr. N.D. CA 2010);
18 In re Hill, 440 B.R. 176 (Bankr. S.D. CA 2010); In re Frazier,
19 448 B.R. 803 (Bankr. E.D. CA 2011); In re Okosisi, ___ B.R.
20 _____, 2011 WL 2292148 (Bankr. D. NV 2011).

21 Accordingly, the most important issue in this case is: What
22 does a Chapter 20 debtor wind up with at the end of a successful
23 performance of a no-discharge Chapter 13? Courts are looking for
24 an answer, and the answer may not be free from conflicting
25 opinions.

26 ///

1 As already noted, debtors argue that after adoption of
2 BAPCPA in 2005, there is a "fourth option" for concluding a
3 Chapter 13 case, in addition to the options of dismissal,
4 conversion and discharge which were recognized by the Ninth
5 Circuit in In re Leavitt, 171 F.3d 1219 (1999). Debtors cited no
6 authority in support of their argument, but support has arisen
7 since they filed their pleadings, in form of the decision In re
8 Okosisi, ___ B.R. ___, 2011 WL 2292148 (Bankr. D.NV 2011).
9 There, the court phrased the issue as follows:

10 Having determined that nothing in the
11 Bankruptcy Code prevents the chapter 20
12 debtor from avoiding a lien, the court now
13 turns to the question of when this avoidance
14 becomes permanent. Prior to the enactment
15 of the Bankruptcy Abuse Prevention and
16 Consumer Protection Act ("BAPCPA") by
17 Congress in 2005, chapter 13 cases could
18 end in one of three ways: conversion,
19 dismissal, or discharge. In re Leavitt,
20 171 F.3d 1219, 1223 (9th Cir. 1999).
21 Furthermore, actions taken to avoid a lien
22 are undone if a case is dismissed or
23 converted prior to the successful completion
24 of all plan payments,

18 However, BAPCPA added Section 1328(f),
19 and thus opened up the possibility of a
20 fourth option, the completion of all plan
21 payments without a discharge. In this post-
22 BAPCPA regime, lien avoidance actions are
23 still undone if the chapter 13 case is
24 converted or dismissed, as the operation of
those Code provisions was not changed. In
cases where the chapter 13 debtor is not
eligible for a discharge because of Section
1328(f), the proper determination of the
permanency of any action to avoid a lien is
less settled.

25 While the Okosisi court continued on, it is important to
26 stop at this point to examine the premise of a lien strip in a

1 no-discharge Chapter 13 becoming "permanent". The Okosisi court
2 acknowledges that prior to BAPCPA, the only way a lien strip
3 became permanent in any Chapter 13 case was through discharge.
4 That was at a time when there was no § 1328(f) barring any
5 Chapter 13 discharge, even on the heels of a Chapter 7 discharge.
6 The lien strip could not be "permanent" if the case was dismissed
7 because 11 U.S.C. § 349(b)(1)(c) expressly reinstated any such
8 lien avoided under § 506(d). The same result obtained pre-BAPCPA
9 for a case converted from Chapter 13 to Chapter 7 because of
10 Dewsnup v. Timm, 502 U.S. 410 (1992). So, as the Ninth Circuit
11 made clear in In re Leavitt, 171 F.3d 1219 (1999), the only ways
12 out of a Chapter 13 case pre-BAPCPA were conversion, dismissal or
13 discharge, as the Okosisi court recognizes. Moreover, the only
14 way to "permanently" maintain a lien strip obtained in the
15 Chapter 13 was through discharge because it was lost on
16 conversion or dismissal.

17 It is important to note that Congress fully understood how
18 to make lien avoidances "permanent", which they achieved for
19 avoidance of certain liens that impair exemptions under 11 U.S.C.
20 § 522(f). Unlike liens avoided under § 506(d), liens avoided
21 under § 522(f) are not reinstated on dismissal, nor set aside on
22 conversion. Had Congress intended avoidance of liens under
23 § 506(d) to be "permanent", other than by discharge, they easily
24 could have so provided.

25 Congress wanted to make "non-permanence" even more
26 clear when it amended the conversion statute, 11 U.S.C. § 348,

1 as part of BAPCPA in 2005. There, Congress provided in
2 § 348(f)(1)(C)(I):

3 (C) with respect to cases converted from
4 chapter 13 -

5 (1) the claim of any creditor holding
6 security as of the date of the filing
7 of the petition shall continue to be
8 secured by that security unless the
9 full amount of such claim determined
10 under applicable nonbankruptcy law
11 has been paid in full as of the date
12 of conversion, notwithstanding any
13 valuation or determination of the
14 amount of an allowed secured claim
15 made for the purposes of the case under
16 chapter 13;

17 In other words, before enactment of BAPCPA, even when a
18 debtor was eligible for a discharge, the only way to make
19 "permanent" a lien strip under § 506(d) and § 1322(b) was to
20 earn a discharge. Moreover, Congress strengthened its statement
21 of that intent by its amendment of § 348(f).

22 It has long been axiomatic that when Congress passes a law,
23 it is presumed to know and understand the then-current state of
24 affairs, both legally and factually. As stated long ago by the
25 Supreme Court in Lindsey, et al. v. Lessee of Miller, 31 U.S.
26 666, 669 (1832):

When in 1807 congress passed the law, they
must be presumed to have legislated on the
then existing state of things. It was then
well known that there were lands held under
claims drawn under surveys made for services
in the Virginia state line. It must be
presumed the act was intended to apply to
those cases.

In In re Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), the

1 court stated: "The Bankruptcy Code should not be read to abandon
2 past bankruptcy practice absent a clear indication that Congress
3 intended to do so." 2 F.3d at 912. And, paraphrasing Dewsnup,
4 the Ninth Circuit said:

5 Where the text of the Code does not
6 unambiguously abrogate pre-Code practice,
7 courts should presume that Congress intended
8 it to continue unless the legislative history
9 dictates a contrary result.

10 2 F.3d at 913.

11 Seemingly overlooked in discussions of what happens to a
12 lien strip in a no-discharge Chapter 20 is what happens to the
13 other debts a debtor proposes to pay in whole or in part through
14 the Chapter 13 plan. By way of example, in In re Tran the court
15 found that Tran was not proceeding in good faith because her only
16 objective was to strip off the junior lien, which she could not
17 accomplish in her preceding Chapter 7. 431 B.R. at 237. Courts
18 which have found good faith in the Chapter 20 context have found
19 there were other debts to be addressed in the Chapter 13. It is
20 appropriate to consider what happens to these debts, along with
21 the unsecured nonrecourse debt of the junior lien creditor in
22 understanding what happens at the end of a no-discharge Chapter
23 13 case.

24 As this Court discussed previously in In Casey, 428 B.R.
25 519, 522 (2010):

26 Under the Bankruptcy Code, there are
two ways to make an enforceable debt go
away permanently. One is to pay it, in
full. The other is to obtain a discharge
of any remaining obligation.

1 This Court then reviewed the decision in In re Lilly, 378 B.R.
2 232 (Bankr. C.D. Ill. 2007) which was a Chapter 20 case. In the
3 Chapter 13, the debtor proposed to reduce the contract rate of
4 interest on a vehicle for the duration of the plan. The Lilly
5 court noted:

6 When a debtor does not receive a
7 discharge, however, any modification to a
8 creditor's rights imposed in the plan are not
9 permanent and have no binding effect once the
10 term of the plan ends. See *In re Ransom*, 336
11 B.R. 790 (9th Cir. BAP 2005) (post petition
12 interest on nondischargeable student loan
13 continued to accrue at the contract rate and
14 could be collected after Chapter 13 case
15 terminated); *In re Holway*, 237 B.R. 217
16 (Bankr.M.D.Fla.1999) (tax debt continued to
17 accrue interest and penalties postpetition
18 where debtor did not receive Chapter 13
19 discharge); *In re Place*, 173 B.R. 911 (Bankr.
20 E.D.Ark.1994) (where Chapter 13 case was
21 dismissed without discharge, accrual of
22 interest on tax debt was not affected by
23 pendency of bankruptcy case).

16 378 B.R. at 236. The Lilly court found:

17 A debtor who files a Chapter 13 case despite
18 not being eligible for a discharge,
19 nevertheless has the power to modify a
20 secured creditor's rights under Section
21 1322(b)(2), and the power to pay the
22 creditor's claim with interest at the *Till*
23 rate under Section 1325(a)(5)(B)(ii).
24 Without a discharge, however these
25 modifications are effective only for the term
26 of the plan. The DEBTOR remains liable for
the full amount of the underlying debt
determined under nonbankruptcy law, including
her liability for interest calculated at the
contract rate. If the interest rate
reduction achieved under a confirmed plan was
determined to be permanent and binding on the
creditor, that would result in a *de facto*
discharge of a portion of the underlying
debt, a benefit to which the DEBTOR is not

1 entitled. Once the plan is completed, the
2 DEBTOR remains liable for the balance of the
3 "underlying debt determined under
4 nonbankruptcy law"

4 378 B.R. at 236-37.

5 In Bruning v. United States, 378 U.S. 358 (1964), the
6 debtor had been assessed for prepetition unpaid taxes. During
7 bankruptcy a small portion of the debt was paid on the IRS claim
8 pursuant to a proof of claim filed by the IRS. The debtor
9 acknowledged his liability on the underlying debt but contended
10 the IRS could not seek postpetition interest on that debt since
11 it chose to file a claim and receive a distribution. Writing for
12 a unanimous court, Chief Justice Warren wrote that debtor's
13 personal liability for post petition interest on the
14 nondischargeable debt remained the debtor's personal obligation.

15 In re Pardee, 218 B.R. 916 (9th Cir. BAP 1998) involved a
16 Chapter 13 plan that provided for full payment of the principal
17 and prepetition interest on a nondischargeable student loan.
18 Even though the plan paid that debt in full, postpetition
19 interest accrued over the life of the plan and was itself
20 nondischargeable. It was the personal liability of the debtor
21 and could be collected from his post-discharge.

22 The Ninth Circuit Court of Appeals reached the same
23 conclusion with respect to a Chapter 13 debtor who made full
24 payment of a child support debt. Again, postpetition interest
25 accrued and could be collected post-discharge from the debtor.

26 In re Foster, 319 F.3d 495 (9th Cir. 2003).

1 The Bankruptcy Appellate Panel of the Ninth Circuit
2 reiterated it's holding in Pardee in In re Ransom, 336 B.R. 790
3 (2005), rev'd on other ground in Espinosa v. United Student Aid
4 Funds, Inc., 553 F.3d 1192 (9th Cir. 2008), again holding that
5 postpetition interest accrued during the life of the Chapter 13
6 plan and was the personal obligation of the debtor post-petition.

7 In re Lewis, 339 B.R. 814 (Bankr. S.D. Ga. 2006) is a
8 decision made after enactment of BAPCPA and therefore does not
9 directly represent a part of the body of law Congress is presumed
10 to have understood at the time. But the decision does reflect
11 the continued understanding of the continuing liability for a
12 debt that is not paid in full or any remaining balance
13 discharged. In discussing the issue of "unreasonable delay" in
14 the context of possible confirmation of a no-discharge Chapter
15 13, the court noted:

16 Obviously, with the filing of these
17 chapter 13 cases and the reimposition of the
18 § 362 stay, all the debtors' creditors are
19 delayed in pursuing their obligations under
20 applicable non-bankruptcy law, but because a
21 creditor might be required to wait to pursue
22 the balance remaining under the obligation
23 after conclusion of the case standing alone
24 does not establish an unreasonable delay.

25 339 B.R. at 817.

26 With all the foregoing state of the law before the Congress
when it enacted BAPCPA, the Okosisi court, while paying lip
service to Leavitt, chooses to ignore the legal fact Leavitt
makes clear -- that the only way to make a lien strip "permanent"
is by discharge because conversion or dismissal reinstates the

1 avoided lien -- and instead declares:

2 At the successful completion of all
3 payments in a no-discharge chapter 13 case,
4 no order discharging the debtor will be
5 entered because the debtor is not eligible
6 for a discharge. 11 U.S.C. § 1328(f). The
7 court finds that in this situation the proper
8 result is for the court to close the case
9 without discharge. . . .

10 The enactment of BAPCPA created a fourth
11 option for the end result of a chapter 13
12 case, and Leavitt, as a result, is now
13 incomplete. To the available options of
14 discharge, dismissal, and conversion, the
15 fourth option of closed without discharge
16 must now be added.

17 Id.

18 Distilled, the essence of the foregoing is that the Okosisi
19 court first invents the idea that enactment of § 1328(f) "created
20 a fourth option" and then that the pre-BAPCPA Leavitt decision
21 "as a result, is now incomplete." Further, that a "fourth
22 option" -- invented by the court, not Congress -- must be added
23 to the Leavitt trilogy.

24 While this Court does not believe a court-invented "fourth
25 option" is either appropriate or necessary in light of Congress'
26 established intent, both debtors and the Okosisi court are not
alone in considering it as a way to conclude a no-discharge case.
While § 1328(f) was purposefully added by Congress in 2005 to
emphatically declare "no discharge in Chapter 13 if you already
received one in Chapter 7" within the time period set out, as
the debtors have argued (without citation to authority), there
have been other circumstances within the Bankruptcy Code when

1 Congress said "no discharge". One such provision is 11 U.S.C.
2 § 727(a)(8), which precludes granting a discharge if a debtor
3 had received one under Chapter 7 or 11 within the preceding (now)
4 8 years. The statute does not say that a debtor having received
5 a discharge cannot file a case under one of those chapters, just
6 that debtor cannot receive a discharge -- in contrast with 11
7 U.S.C. § 109(g), which says a debtor cannot file a petition. In
8 In re Asay, 364 B.R. 423 (Bankr. D. N.M. 2007), the court was
9 faced with the specific question of whether it could, on its
10 own initiative, deny the debtors a discharge because they were
11 ineligible to receive one, even though no party in interest had
12 timely commenced an adversary proceeding seeking denial under
13 11 U.S.C. § 727. After concluding that § 727(a)(8) took
14 precedence over Rule 4004(c), and without discussion of the
15 process it chose, the court simply ordered "that this bankruptcy
16 proceeding be closed without the entry of a discharge." 364 B.R.
17 at 427.

18 The Victorios are also correct in observing that courts
19 presently employ a closing without discharge in cases where a
20 debtor fails to complete a financial management course. Congress
21 simply provided in § 727(a)(11) that a debtor should not receive
22 a discharge, although otherwise eligible for one. Congress was
23 silent on how such a case should be handled administratively, and
24 the Rules Committee of the Judicial Conference proposed Rule
25 4006, Federal Rules of Bankruptcy Procedure, which obliquely
26 addresses the issue when it states:

1 If an order is entered: . . .; or in the case
2 of an individual debtor, closing the case
3 without the entry of a discharge, the clerk
 shall promptly notify all parties in interest
 in the manner provided by Rule 2002.

4 There is nothing in any of the foregoing which even hints that
5 Congress intended to change the pre-existing state of the law
6 that the only way a debtor could make a lien strip "permanent"
7 was through a discharge, because the lien was expressly
8 reinstated upon dismissal or conversion. To suggest that
9 Congress should be thought to have wittingly or otherwise
10 abrogated that requirement by adoption of § 1328(f) strains
11 credulity, especially when one contemplates that § 1328(f) was
12 adopted to restrict the relief a serial filing debtor could
13 obtain if the later filing was within a specified time after
14 the earlier discharged case.

15 It is appropriate to note that the act of closing without
16 a discharge creates problems of its own for a debtor. The
17 automatic stay of an act other than against property of the
18 estate terminates on the closing of the case under 11 U.S.C.
19 § 362(c)(2)(A). There is no discharge injunction arising from
20 the Chapter 13 because there is no discharge. Moreover, property
21 of the estate that was identified in a debtor's Schedules in
22 accordance with 11 U.S.C. § 521(a)1) is deemed abandoned to the
23 debtor upon closing, in accordance with 11 U.S.C. § 554(c), so
24 the property is no longer protected by any stay or injunction.
25 So the debts addressed in the Chapter 13, but not paid in full
26 through the plan, still exist because they have not been either

1 satisfied under nonbankruptcy law nor discharged in bankruptcy.
2 And there is nothing in the Bankruptcy Code to prevent creditors
3 from endeavoring to collect the remaining debts.

4 The Okosisi opinion has a curious section captioned: "The
5 Misnomer of the So-called 'De-facto Discharge". Curious, because
6 the opinion elsewhere discusses its view of the "permanence" of
7 the lien strip, meaning the estate's liability for the debt has
8 been rendered "permanently" uncollectable. As already noted, in
9 bankruptcy there are two ways to make a debt go away permanently.
10 One is to pay it, in full. The other is to provide for it in a
11 plan, pay none or some of it through a plan, and obtain a
12 discharge of any unpaid portion. Congress has made a policy
13 choice in § 1328(f) in declaring there shall be no discharge in a
14 Chapter 13 that follows a Chapter 7 discharge in the four years
15 immediately preceding. A discharge in bankruptcy is effectuated
16 by the provisions of 11 U.S.C. § 524. As it states there, a
17 discharge "operates as an injunction" against collection of any
18 debt discharged in the bankruptcy. Conversely, without a
19 discharge, there is no discharge injunction. Yet the debtors and
20 the Okosisi court would create a new "permanent" bar to
21 collection of all the debts provided for in the debtors' Chapter
22 13 plan, even though under § 1328(f) there can be no discharge.
23 A "permanent" bar to collection of an otherwise outstanding debt
24 is very properly called a "de facto discharge", because that is
25 the result the opinion endorses. The discharge is the ultimate
26 reward of bankruptcy [Tabb, "The Historical Evolution of the

1 Bankruptcy Discharge", 65 Am. Bankr. L.J. 325 (1991)], and
2 attempting to devise mechanisms to achieve a *de facto* discharge
3 of liability when Congress says "no discharge", is to attempt an
4 end run of a clear mandate.

5 Driving the effort of the Okosisi court to create a "fourth
6 option" for ending a Chapter 13 case is the argument that the
7 traditional three exits of Leavitt do not fit fully after
8 enactment of § 1328(f). The Okosisi court stated its view in
9 Fn.10:

10 While other courts have determined that
11 dismissal is the appropriate outcome upon the
12 completion of plan payments, this is
13 inappropriate because dismissal of a chapter
14 13 case is only to occur either voluntarily
15 or for cause. 11 U.S.C. § 1307. Because
16 dismissal is addressed in Section 1307, and
because the successful completion of all plan
payments does not constitute cause for
dismissal under subsection(c) of section
1307, it is inappropriate for the case to be
dismissed upon the successful completion of
all plan payments.

17 The foregoing characterization appears intentionally phrased to
18 deflect review of § 1307(c)(1), which provides as a ground for
19 conversion or dismissal "unreasonable delay by the debtor that is
20 prejudicial to creditors." While a plan may be reasonable and in
21 good faith at the time of confirmation, if at the end of required
22 payments some portion of the debts remain unpaid, and no
23 discharge is available, then a party in interest or the United
24 States Trustee may move to dismiss because the delay beyond the
25 plan term may no longer be reasonable. As already discussed,
26 unless paid in full during the plan term, the creditors are

1 entitled to collect the unpaid portion of the debts owed to them
2 unless the debts are discharged. With no discharge available and
3 no discharge injunction either, any other reading affords debtors
4 a *de facto* discharge, which flies directly in the face of
5 Congress' intent as declared in § 1328(f). It would be ironic if
6 Congress should be understood to have declared that if a debtor
7 eligible for a discharge is unable to complete a Chapter 13 case
8 involving a § 506(d) lien strip, then the avoided lien is
9 reinstated (as § 349 states), but a debtor not eligible for a
10 discharge in a Chapter 20 can just have the case closed and
11 thereby make the lien avoidance "permanent", as asserted in the
12 rationale of Okosisi, as well as the debtors' arguments. This
13 Court has found no support for such an outcome in BAPCPA, nor in
14 pre-BAPCPA practice.

15 After all the supplemental briefing was submitted by the
16 parties on the Chapter 13 trustee's objection to confirmation of
17 debtors' Chapter 13 plan, the debtors filed an objection to the
18 proof of claim filed by CitiMortgage in this case. The sole
19 ground asserted was: "The claim was listed and discharged in the
20 debtors prior ch. 7 case, 07-06247, filed on 10/31/07 and
21 discharged on 2/5/08. The claim should be disallowed in its
22 entirety." CitiMortgage filed no opposition, and another judge
23 of this court signed an order sustaining the unopposed objection.
24 There is a problem, however, because the objection and resulting
25 order are incomplete -- and therefore ambiguous -- as more fully
26 discussed, *supra*, in the discussion of the Supreme Court's

1 decision in Johnson v. Home State Bank, 501 U.S. 78 (1991).
2 There, it is made clear that the personal liability of the
3 debtors was discharged in the preceding Chapter 7 case. However,
4 under 11 U.S.C. § 102, the creditor still has a claim against the
5 debtors' estate. Here, neither the objection to CitiMortgage's
6 claim, nor the order drafted and submitted by debtors made any
7 distinction between the two facets implicit in CitiMortgage's
8 claim. Debtors are correct that the objection to the claim, to
9 the extent the claim is based on the debtors' personal liability,
10 should be sustained. However, to the extent their objection was
11 to the estate's liability on CitiMortgage's claim, it should be
12 overruled.

13 CitiMortgage's proof of claim was for \$91,538.46. Debtors
14 have not objected to the amount. Accordingly, CitiMortgage still
15 has an unsecured claim in this case, in accordance with Johnson
16 and 11 U.S.C. § 102, in the amount of \$91,538.46. Debtors' Plan
17 calls for payments of \$400 per month to the Chapter 13 trustee,
18 and for the trustee to pay 100% of the unsecured claims.
19 However, at that amount it would take debtors over 228 months
20 just to pay the CitiMortgage claim, not including the other
21 scheduled unsecured debts. Accordingly, as presently proposed as
22 a 100% dividend to unsecured creditors, the Plan is not
23 confirmable.

24 In their Reply brief, debtors argue that the value of
25 CitiMortgage's claim is \$0. This Court rejects that argument, as
26 have others. At least in part because the argument conflates the

1 value of the claim as secured with the value of the claim as
2 unsecured, arguing that as unsecured it was discharged in the
3 prior Chapter 7. As already discussed, only the personal
4 liability was discharged, while Johnson and § 102 make clear
5 CitiMortgage continues to have a claim against the estate. In re
6 Hill, 440 B.R. 176, 184 (Bankr. S.D. CA 2010); In re Frazier, 448
7 B.R. 803, 811 (Bankr. E.D. CA 2011); In re Okosisi, ___ B.R.
8 ____, 2011 WL 229248, at n.8 (Bankr. D. NV 2011).

9 ///
10 ///
11 ///
12 ///
13 ///
14 ///
15 ///
16 ///
17 ///
18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

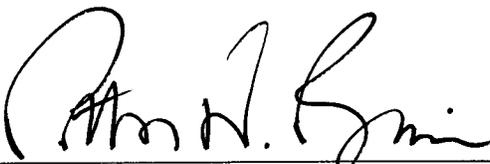
Conclusion

For all the foregoing reasons, the Court finds and concludes that debtors in a Chapter 20 case cannot "permanently" avoid a wholly unsecured junior lien without a discharge, or without paying it in full. They could not do so before BAPCPA, and there is nothing in the 2005 amendments that even hints that Congress believed that any ending other than conversion or dismissal was possible, much less desirable, as emphatically demonstrated by the amendments to 11 U.S.C. § 348 and § 1328(f).

Accordingly, the Court finds and concludes that as currently proposed the debtors' Chapter 13 Plan is not confirmable because it cannot be timely completed in 60 months with 100% payment to unsecured creditors while making monthly payments of \$400. Debtors shall be allowed forty-five (45) days to file and serve an amended plan consistent with the foregoing.

IT IS SO ORDERED.

DATED: JUL -8 2011


PETER W. BOWIE, Chief Judge
United States Bankruptcy Court