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HOW 11 U.S.C. § 522(C) EXPANDS AND CONTRACTS STATE−LAW EXEMPTIONS IN BANKRUPTCY

George M. Prescott Jr., Esq. [1]

Introduction

Can a debtor in bankruptcy use the Bankruptcy Code to avoid debts that arose, and judicial liens that were imposed, before she had declared her residence a homestead under state law, even though state homestead−exemption law expressly excludes prehomestead debts and judicial liens from the scope of the exemption? Or, must a bankruptcy court applying state homestead−exemption law take the exemption wholesale and give effect to exceptions therein for prehomestead debts and judicial liens? These important, knotty questions of federalism, property rights, and distribution of assets to creditors have generated a split of authority between the United States Courts of Appeals for the First and Fifth Circuit, [2] and await definitive resolution by the Supreme Court of the United States. Apart from their doctrinal implications, these questions are of fundamental economic importance to creditors whose levies of judicial liens on their debtors' realty, imposed before their debtors declared their homestead exemptions, would otherwise entitle them to sell their debtors' homesteads under state law but for their levies' having become unenforceable against bankruptcy debtors' homesteads in those jurisdictions, such as the First Circuit, that have invalidated, under the Bankruptcy Code, prehomestead−debt and −lien exceptions in state homestead statutes.

In Patriot Portfolio, the First Circuit resolved a split of authority in the District of Massachusetts in holding that 11 U.S.C. § 522(c) and § 522(f)(1) respectively preempted certain preexisting−debt and preexisting−lien exceptions to the Massachusetts homestead exemption statute, so that a chapter 7 debtor who had claimed his homestead as exempt could avoid, under § 522(f)(1), the judicial lien of a creditor who had levied an execution on the debtor's residence before the debtor had recorded a declaration of homestead, and who therefore had a preexisting lien excepted from exemption under the Massachusetts statute. [3]

By contrast, in Davis, a majority of the Fifth Circuit held that § 522(c) did not preempt Texas's homestead exemption statute, which contained no exception subjecting a debtor's homestead to liability for a judgment in favor of a debtor's ex−spouse for alimony, maintenance or support, so that such creditor ex−spouse was unable to satisfy her judgment from the homestead of her former husband – a chapter 7 debtor who claimed his homestead as exempt under Texas law – notwithstanding that Congress has made such a debt nondischargeable in § 523(a)(5), and has subjected a debtor's exempt property to liability for such a nondischargeable debt in § 522(c)(1). [4]

To resolve this conundrum, we must assay the nature and extent of Congress's power under the Bankruptcy and Supremacy Clauses of the United States Constitution. We must also understand how the following sections of the Bankruptcy Code interact: § 522(b)(2)(A), which incorporates state−law exemptions into bankruptcy; § 522(c), which governs the federal−law immunization of exempt property from debt in and after bankruptcy; § 522(d), which governs federal bankruptcy exemptions; § 522(f)(1), which allows for the avoidance of judicial liens that impair bankruptcy exemptions; § 523(a), which governs the dischargeability vel non of the debtor's personal liability for debts in and after bankruptcy; § 524(a), which enjoins postbankruptcy actions seeking to hold a former bankruptcy debtor personally liable upon a discharged debt; and § 727(b), which dictates the scope of a chapter 7 debtor's discharge from debt.

We begin with a brief discussion of exemptions. We then examine § 522 vis−à−vis the Supreme Court's coeval yet seemingly contradictory opinions in Farrey v. Sanderfoot [5] and Owen v. Owen [6] to determine just how these cases affect the bankruptcy−exemption, debt−collection, and lien−avoidance calculi. We then survey the pre−Patriot Portfolio and −Davis legal landscape, training our attention especially tightly upon the seminal cases for and against § 522(c)'s having preemptive effect that have emerged from the District of Massachusetts. Next, we compare and contrast the doctrinal and policy rationales underlying the Patriot Portfolio and Davis decisions, and demonstrate why, in Patriot Portfolio, the First Circuit correctly decided that § 522(f)(1) preempts state−law preexisting−judicial−lien exceptions to exemption laws that conflict with § 522(f)(1), and that § 522(c) preempts state−law preexisting−debt exceptions to exemption laws that conflict with § 522(c). Finally, having considered these pivotal sections of the Bankruptcy Code, we study a case decided in the wake of Patriot Portfolio and Davis, and bolster our arguments for the rectitude of Patriot Portfolio.

Exemptions

An exemption is a "privilege allowed by law to a judgment debtor, by which he may retain property to a certain amount or certain classes of property, free from all liability to levy and sale on execution, attachment, or bankruptcy." [7] Congress has created a set of federal bankruptcy exemptions in § 522(d); under § 522(b)(1), a bankruptcy debtor may choose these exemptions, including a federal homestead exemption, [8] unless, under a Congressional delegation of power, a state has "opted out" of the federal bankruptcy exemption scheme. [9] Whether or not a state has so opted out, a bankruptcy debtor may claim those exemptions to which she is entitled under state, local, and federal nonbankruptcy law. [10] When a debtor asserts a claim of exemptions, [11] and the claim is granted either by passage of time or over timely objection, [12] the debtor's exempt property is removed from her bankruptcy estate and is "immunized against liability," during or after bankruptcy, on any debt not listed in § 522(c). [13]

The Bankruptcy Clause of the United States Constitution vests in Congress the power "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." [14] This power encompasses Congress's right to recognize and incorporate state−law exemptions in the bankruptcy system; this right has been held constitutional under the Bankruptcy Clause because the "general operation of the law is uniform although it may result in certain particulars differently in different states." [15] Under the Bankruptcy Clause, the Bankruptcy Code preempts any state law in actual conflict with the Code's provisions. [16]

Generally speaking, "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." [17] There is no question that Congress has left it to the states to prescribe their own state−law exemptions from process, and that state law defines the nature and amount of the property a debtor may exempt from her bankruptcy estate under § 522(b)(2)(A). [18] This is because both federal bankruptcy exemptions under § 522(b)(1) and § 522(d) and state−law bankruptcy exemptions under § 522(b)(2)(A) further, in the first analysis, the overarching federal interest in providing the bankruptcy debtor with a fresh start. [19]

But Congress has not left it to the states to define what debts may be collected from exempt property. Under § 522(c), property exempted under state law and § 522(b)(2)(A), or under federal bankruptcy law via § 522(d), "is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case," except for certain debts deemed nondischargeable under the Bankruptcy Code, [20] and for debts secured by certain liens, including liens not avoided under § 522(f). [21] Section 522(f)(1), in turn, allows the debtor to "avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under [§ 522(b)], if such lien is a judicial lien" [22] other than a judicial lien that secures a debt for alimony, maintenance or support that is nondischargeable under § 523(a)(5). [23]

Subsections 522(c) and (f)(1) beg the question whether state−law exceptions for prehomestead debts and judicial liens present limitations that may be disregarded for § 522(c) debt−collection and § 522(f)(1) lien−avoidance purposes.

Farrey and Owen

To begin to answer this question, we must turn to Farrey and Owen. In Farrey, the Supreme Court construed the lien−fixing language of § 522(f)(1), and held that Sanderfoot, the bankruptcy debtor, could not avoid his ex−wife Farrey's judicial lien on his exempt homestead because the divorce decree that vested title to the homestead in Sanderfoot simultaneously gave Farrey a lien against the homestead for money due her from a property division award. [24] The Court, speaking through Justice White, held less than apodictically that § 522(f)(1) "requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest." [25] Earlier in his opinion, however, Justice White had stated that for a debtor to be entitled to avoid a judicial lien under § 522(f)(1), the debtor must have had "the property interest" to which the lien attached at some point before the lien attached to "that interest." [26] As we will see in Patriot Portfolio, this linguistic imprecision can give rise to an argument against a debtor's avoiding liens that impair exempt homestead realty, even when the debtor held fee title to the realty when the lien attached prehomestead, because the debtor's declaration of the homestead (which may be seen as the carving−out of a lesser estate in realty), and the imposition of preexisting liens upon the homestead, can be seen as occurring simultaneously. [27]

In Owen, the Supreme Court construed the impairment−of−exemption language of § 522(f)(1) and held that "Florida's exclusion of certain [prehomestead] liens from the scope of its homestead protection does not achieve a similar exclusion from the Bankruptcy Code's lien avoidance provision [§ 522(f)(1)]." [28] The Court, speaking through Justice Scalia, enounced a hypothetical test for determining whether a judicial lien impairs an exemption: if the debtor would be entitled to claim the exemption but for the judicial lien – i.e. if avoiding the lien would entitle the debtor to claim the exemption – then avoid the lien under § 522(f)(1). [29] In applying this hypothetical test – which requires answering the question whether the judicial lien impairs an exemption to which the debtor would have been entitled, as of the petition−filing date, either under § 522(b)(1) and § 522(d) or under § 522(b)(2)(A) [30] – the Court adopted the holdings of inferior federal courts that had applied § 522(f)(1) to federal exemptions, and refused to treat state−law bankruptcy exemptions under § 522(b)(2)(A) differently from those under § 522(d). [31] The Court rejected the notion that bankruptcy debtors must accept state−law bankruptcy exemptions "with all their built−in limitations," [32] and held it was not inconsistent for Congress to recognize state−law exemptions in bankruptcy while also "disfavoring the impingement of certain types of liens upon exemptions, whether federal− or state−created." [33]

Unfortunately, the Court sowed the seeds of confusion when it refused to decide whether, under Farrey, the judicial lien in question had ever fixed on the debtor's interest in homestead property before that interest was created. [34]

In Owen, debtor Dwight Owen's ex−wife Helen obtained a judgment against him and recorded it, creating a judicial lien. Under Florida law, the judgment attached to after−acquired property in the county of recordation. Dwight bought a condominium, which became subject to Helen's lien. One year later, Florida amended its homestead law to create a self−effectuating homestead exemption in condominia; however, preexisting liens were putatively excepted from the Florida homestead exemption embodied in the Florida Constitution. Dwight then filed bankruptcy, and claimed a homestead exemption in the condominium.

In Owen, the Court invalidated this preexisting−lien exception in the face of the lien−avoidance powers given to bankruptcy debtors in § 522(f)(1) – even though Dwight's title in the condominium, and his subsequently created homestead estate in it, were likely taken and created concomitantly with the imposition of Helen's judicial lien upon those interests, which meant Dwight may never have had an interest, fee simple or homestead, in the condominium on which Helen's lien fixed. [35]

In all likelihood, the sweep of the Court's holding is Owen is not broad enough under Farrey, simpliciter, to protect property made subject to a lien by after−acquired provisions of state law or contract. This has troubling implications for debtors seeking to claim homestead exemptions in bankruptcy and to avoid judicial liens upon homestead realty.

On remand, a panel of the United States Court of Appeals for the Eleventh Circuit (with retired Associate Supreme Court Justice Lewis F. Powell Jr. sitting by designation) affirmed the judgment of the United States District Court for the Middle District of Florida that Dwight Owen could not avoid his ex−wife Helen's judicial lien on his homestead under § 522(f)(1). [36] The panel held that because Helen's judgment was recorded in 1976, and Dwight acquired the property in 1984, "there was never a fixing of a lien on an interest of the debtor, as the debtor had no property interest prior to the fixing of the lien." [37] Thus, Dwight's property "was never exempt from foreclosure of this lien." [38]

The Eleventh Circuit opinion deals a critical but not fatal blow to the Supreme Court's opinion in Owen. In the § 522(f)(1) judicial lien−avoidance context, Owen on its face invalidates those provisions of state homestead−exemption law that purport to leave homestead property subject to prehomestead judicial liens. [39] However, if a state−law homestead−exemption exception for preexisting judicial liens prevents the debtor from ever holding the homestead estate free and clear of the lien – or if the judicial lien is deemed under state law to have attached as of the time the debtor first gained rights in the property – then it may be argued that there has been no fixing of the judicial lien upon the homestead estate (as opposed to the fee simple estate), which would preclude § 522(f)(1) judicial−lien avoidance under Farrey. In other words, the hypothetical test for lien avoidance in Owen will not triumph over a state−law exception in a homestead−exemption law that prevents the fixing of a lien as required, simpliciter, by Farrey.

Our having said this, courts have routinely held, despite the amphibolous language of Farrey, that a debtor who held any interest in property – not necessarily the exemptible interest – before a creditor's judicial lien fixed upon that property, may avoid the creditor's judicial lien under Owen, Farrey, and § 522(f)(1). [40] Thus, so long as a debtor holds any interest in the property at any time before a creditor's judicial lien fixes upon it, she may declare her homestead in the property, declare bankruptcy, claim her homestead as exempt in bankruptcy, eradicate any prehomestead−lien exception to the state−law homestead exemption, and avoid the creditor's judicial lien under § 522(f)(1).

Although the Supreme Court in Owen stopped short of holding that § 522(f)(1) preempts state−law preexisting−lien exceptions in homestead laws, at least one court adumbrated this precept before Owen was decided; [41] and the First Circuit in Patriot Portfolio clearly held that § 522(f)(1), as construed in Owen, preempted the preexisting−lien exception to the Massachusetts homestead−exemption statute. [42]

Precedential Prelude:

Section 522(c) Cases Decided Before Patriot Portfolio and Davis A Chrestomathy from Cases Beyond the Bay State

Prior to 1999, when Patriot Portfolio and Davis were decided, several courts considered the avoidability of judicial liens under § 522(f)(1) vis−à−vis § 522(c), and held, in two complementary lines of cases, that judicial liens secured by nondischargeable debts not listed in § 522(c) are avoidable under § 522(f)(1), whereas judicial liens secured by nondischargeable debts listed in § 522(c) are not.

In In re Vasquez Jr., [43] the creditor had obtained a state−court garnishment lien upon the debtor's wages just before the debtor filed a voluntary chapter 7 petition. [44] This qualified as a "judicial lien" under § 101(36). [45] The creditor sought to impose the lien upon wages held by the debtor's employer; the debtor claimed the wages as exempt in bankruptcy under state law, and sought to avoid the creditor's judicial lien under § 522(f)(1). [46] The creditor objected to lien avoidance, arguing that part of the judgment upon which it had procured its garnishment lien was nondischargeable under § 523(a)(17). [47]

The court avoided the judicial lien because § 522(c) does not by its terms render exempted property liable on a § 523(a)(17) nondischargeable debt during or after bankruptcy. [48] "Congress has determined that a debtor's exempt property rights under § 522(f), as a part of his fresh start, are superior to the limitation created on that fresh start when it made certain court fees nondischargeable under § 523(a)(17)." [49] Significantly, the court avoided the judicial lien without prejudice to the creditor's filing an adversary proceeding under Federal Rules of Bankruptcy Procedure 4007(c) and 7001(6) to have the debt declared nondischargeable under § 523(a)(17). [50]

The same result obtained in In re Evaul [51] and In re Gartrell: [52] the judicial liens in question were avoided because they secured debts not listed in § 522(c)(1) or (c)(3).

Conversely, at least one court has declined to avoid judicial liens under § 522(f)(1) that secure nondischargeable debts listed in § 522(c). In In re Citrone, [53] the creditor's judicial lien secured the debtor's child and spousal support debts, which were nondischargeable under § 523(a)(5). [54] The court held that "the legislative policy intended to protect a debtor's ability to exempt property under 11 U.S.C. § 522(f)(1), by providing that the debtor may avoid judicial liens to the extent the property could have been exempted in the absence of such lien, must give way to a more compelling

specific legislative mandate." [55] That mandate was contained in § 522(c)(1) and § 523(a)(5). [56]

Courts have also considered the effect of a debtor's chapter 7 discharge under § 524(a)(1) and (a)(2) and § 727, and have concluded that a lien listed in § 522(c)(2) that is not voided or avoided under one of the sections listed therein survives the debtor's discharge of personal liability, and can be satisfied from the debtor's exempted property in a postdischarge in rem action. [57] (Of course, any creditor with a discharged debt ostensibly protected by a preexisting−debt exception to an exemption will not be able to reduce that preexisting debt to judgment in the wake of the debtor's exoneration by her bankruptcy discharge – protected by the discharge injunction [58] – from personal liability on that discharged debt.)

Two crucial cases that anticipated the holding in Patriot Portfolio are In re Scott [59] and In re Conyers. [60] In In re Scott, the court considered the effect of various preexisting−debt exceptions to the Virginia homestead and poor debtor's exemption statutes, which exceptions included obligations "resulting from an intentional tort"; [61] state or local tax levies or distraints; [62] and "spousal or child support obligations." [63] The court held that § 522(b)(1) did not allow states to opt out of any provisions of the Code other than § 522(d). This holding insured the continuing availability of § 522(f)(1) to a debtor who claimed either federal bankruptcy exemptions under § 522(b)(1) and § 522(d) or state−law bankruptcy exemptions under § 522(b)(2)(A), "[n]otwithstanding any waiver of exemptions"; [64] the continuing avoidability of nonpossessory, nonpurchase−money security interests in a debtor's tools of the trade, "notwithstanding Virginia's restriction to the contrary"; [65] and the continuing right of a husband and wife jointly to claim a homestead exemption in a joint bankruptcy case, notwithstanding the statutory definition of "householder" in the Virginia homestead−exemption statute. [66]

Given the clear language of § 522(c), the court in In re Scott heralded a "compelling argument" that the preexisting−debt exceptions in the Virginia homestead statute were preempted thereby under the Bankruptcy Clause, [67] and adopted the view that a state may, under § 522(b), "define only the nature and amount of the property that may be exempted," [68] not the debts that may be collected from exempted property. This result "furthers the overall policy goals of the bankruptcy process such as ensuring uniformity under a federal distribution scheme, providing the debtor with a fresh start, and treating classes of creditors equally." [69]

In In re Conyers, Kentucky's homestead−exemption statute allowed for a homestead exemption unless, inter alia, "the debt or liability existed prior to the purchase of the property." [70] Though the debtor became indebted to the creditor before the debtor and his wife purchased the subject property, the debts secured by the creditor's judicial liens were nowhere listed in § 522(c). [71] In dispensing with the creditor's argument that Kentucky's opt−out power under § 522(b) trumped the debtor's rights under § 522(c), the court observed:

If under the authority reserved to them by Congress states have the power to permit or deny collection of certain claims from exempt property after bankruptcy whether or not such claims are dischargeable in bankruptcy, such power would appear to conflict with sections 522(c)(1), 523 and 524 of the Bankruptcy Code. Theoretically, a state could deny collection from exempt property after bankruptcy of nondischargeable debts for taxes or for alimony, maintenance or support even though section 522(c)(1) of the Code permits collection of such debts from exempt property. [72]

The court avoided the creditor's judicial liens. [73]

Finally, the aberrational case In re Godfrey Jr. [74] is indeed a weak reed. There, the court based its holding that the debt−for−rent exception in Virginia's homestead statute [75] was not preempted by § 522(c) under the Supremacy Clause upon the then−vital district−court decision in In re Snow. [76] "While the District Court in Snow did not consider specifically the Supremacy Clause of the United States Constitution, the Snow court's observation that the State of Virginia [sic] exercises a right granted by the Bankruptcy Code to opt out of the federal exemption scheme, sufficiently addresses the debtor's concern." [77] Not only is the opt−out argument jejune, [78] but In re Snow has been reversed. [79]

Shots Heard 'Round the Bankruptcy World:

Revolutionary Pronouncements from the District of Massachusetts

Whether by happenstance, or by virtue of the ingenuity and fecundity of the local bar and judiciary, § 522(c) jurisprudence has found its fullest flowering in the District of Massachusetts.

The first important case in point is In re Boucher, decided by Bankruptcy Judge James F. Queenan Jr. [80] The dispute in that case, as in all the cases from the District of Massachusetts (culminating in Patriot Portfolio), turned on the preexisting−debt exception to Massachusetts's homestead−exemption statute, which states the exemption does not protect against "a debt contracted prior to the acquisition of said estate of homestead." [81]

Judge Queenan began his analysis by pointing out that the question whether this preexisting−debt exception to the homestead−exemption statute survived § 522(c) was res nova. [82] He then saliently held that the states' power to opt out under § 522(b)(1) from operation of the federal bankruptcy exemptions provided by § 522(d) did not extend to two general rules, which apply both to state−law and to federal−bankruptcy−law exemptions. The first rule invalidates exemption waivers. [83] The second rule is that exempt property is "liable only for certain nondischargeable debts and unavoided liens" under § 522(c). [84]

Under § 522(c), the debtor's "election of the state exemption stands, but the state exception for prehomestead debts does not." [85] This result follows from the Bankruptcy Clause, and is directly analogous to invalidating waivers of state−law exemptions under § 522(e) "notwithstanding the waiver's validity under state law." [86] Judge Queenan recognized the difficulty some courts have had in meshing state−law exemptions from process with state−law bankruptcy exemptions from the bankruptcy estate, [87] especially in the § 522(f)(1) judicial−lien−avoidance context. Some courts have erroneously reasoned that "if state exemption law applies to the case, the state's definition of exempt property must control in its totality, even though the result is denial of section 522(f) lien avoidance rights." [88] But the Supreme Court in Owen put this notion out to pasture when it stated that it had to apply the opt−out policy "along with whatever other competing or limiting policies the statute contains." [89] "The policy 'competing' with the Massachusetts exception for prehomestead debts is section 522(c). That subsection makes exempt property liable only for certain nondischargeable debts and unavoided liens. Debts contracted prior to a declaration of homestead are not among these." [90]

The seminal opinion in a case decided before Patriot Portfolio was rendered by Bankruptcy Judge Joan N. Feeney in In re Whalen−Griffin. [91] She began by citing In re Boucher with approval, [92] and by distinguishing In re Van Rye, as Bankruptcy Judge Queenan had done in In re Boucher, because the court in that case "did not discuss § 522(c) or Owen." [93] She then elucidated Bankruptcy Judge Hillman's tenebrous reasoning in his original January 29, 1997 slip opinion in In re Weinstein, wherein he held that lien−avoidance would be no alexipharmic for the debtor's ills because an unsecured claim predating the homestead exemption would still remain, and that § 522(c) did not conflict with the Massachusetts preexisting−debt exception because the judicial lien secured by an excepted debt would not be avoided under § 522(f)(1). [94] "[I]f the Weinstein court had begun its analysis with Boucher, followed that decision, and determined that the provisions of § 522(c) preempted the exception to the Massachusetts homestead law regarding prehomestead debts, then application of § 522(f) would have led to a different result, as the lien would have impaired an exemption to which the debtor would have been entitled absent the lien." [95] This led her to probe the "seeming circularity" of analyzing § 522(c) vis−à−vis § 522(f)(1). [96]

As Judge Feeney illustrated, the concrete, actual, past−tense language "property exempted under this section" in § 522(c) must be contrasted with the unusual, hypothetical language "an exemption to which the debtor would have been entitled under subsection (b)" in § 522(f)(1). [97] Section 522(c) appears to contemplate two time frames: the petition−filing date, as of which the debtor's right to an exemption is gauged; and postdischarge/postbankruptcy, at which time creditors may attempt to reach exempt property. [98] This leads to the question "whether the statute compels the Court to define 'property exempted' for purposes of § 522(c) after application of any applicable state law exceptions." [99] If the answer to this question were "yes," the homestead's exempt value would be reduced despite the debtor's discharge of personal liability on such a prehomestead debt under § 727(b) and § 524(a). [100]

After a debtor receives her discharge under these subsections, Massachusetts law dictates that her homestead "simply remains subject to attachment, levy on execution and sale for payment of debts contracted prior to the acquisition of

the estate of homestead." [101] Yet her creditors with discharged debts will not be able to reduce their debts to judgment in order to avail themselves of the final judicial processes of execution, levy, and sale under state law because of the discharge under § 727(b) and the discharge injunction under § 524(a). [102] Therefore, if the amount of the homestead were somehow automatically reduced by the amount of prehomestead debt, with that amount set aside for prehomestead creditors only, as opposed to all creditors, these prehomestead creditors would receive a windfall "at the expense of the priority scheme set forth in 11 U.S.C. §§ 507 and 726." [103] This approach Judge Feeney refused to countenance; for it would mean, in essence, that unsecured, prehomestead debts would be treated as secured debts or nondischargeable debts. [104]

When Judge Feeney compares and contrasts the Massachusetts preexisting−debt exception with § 522(c), she concludes that some creditors with debts listed in both subsections will receive a double recovery. [105] For instance, a creditor with a prehomestead alimony debt, nondischargeable under § 523(a)(5), could cull the debtor's homestead exemption in bankruptcy by the amount of the debt and then pursue whatever homestead property remained after bankruptcy. While this argument seems plausible, it is likely a debtor facing such circumstances would try to forfend a second haircut in state court by pleading the affirmative defense of discharge in bankruptcy under the state analogue to Federal Rule of Civil Procedure 8(c). Of course, this defense might be unavailing, as the creditor gave the debtor her first haircut in bankruptcy irrespective of the debtor's discharge. Regardless, one must note that the lack of this one−to−one correspondence between a nondischargeable debt listed in § 522(c) and an equivalent state−law preexisting−debt exception to a homestead law was precisely what led the en banc majority to rule as it did in Davis: [106] namely, the debtor shall enjoy no double recovery. In sum, Judge Feeney's double−recovery argument cuts both ways.

In the end, however, Judge Feeney concluded that the Massachusetts preexisting−debt exception to the homestead exemption statute was preempted by § 522(c) under the Supremacy Clause. [107]

The next decision of consequence, which took the opposite tack, was rendered by Bankruptcy Judge Henry J. Boroff in In re Fracasso. [108] In that case, Judge Boroff was confronted with the stark choice of granting the chapter 7 Trustee's objection to the debtor's claim of homestead exemption – which would result in the creditors' being paid in full – or denying the objection, which would result in no distribution to unsecured creditors. [109] He chose the latter.

Judge Boroff characterizes the holdings of In re Boucher, In re Whalen−Griffin, In re Scott, and In re Conyers as turning on what he calls a "debt/property" distinction: that is, § 522(b) describes what property is exemptible in bankruptcy; § 522(c) describes what debts may be recovered from exempt property; "and both must be examined to determine the true nature of the exemption." [110] He then sets out immediately to destroy the "debt/property" straw man he has just erected by analogizing inaptly to a First Circuit case construing § 522(b)(2)(B), which governs a debtor's exemption of an interest in property in which the debtor had, immediately before the commencement of the case, an interest as a joint tenant or as a tenant by the entirety. [111] Under that subsection, such an interest is exempt "to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law." [112] Since Massachusetts law subjects property held by joint tenants and tenants by the entirety to seizure by a creditor with a claim against both tenants, the First Circuit held in Edmonston that a debtor may not exempt property under § 522(b)(2)(B) to the extent there are joint debts. This was relevant to Judge Boroff because he conceived that the First Circuit had therein "looked to § 522(b) to determine both the property and debt elements of an exemption without reference to § 522(c)." [113]

Whether the First Circuit conducted such an homogenized analysis in Edmonston is simply beside the point. The language of § 522(b)(2)(A) (exempt property is that which is "exempt under . . . State . . . law") is qualitatively different from that of § 522(b)(2)(B) (a debtor's interest in property held as a joint tenant or as a tenant by the entirety is exempt "to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law."). Property must be exempt from all legal and equitable mesne and final judicial process under state law to be exempt in bankruptcy under § 522(b)(2)(A); [114] by contrast, state joint−tenancy and tenancy−by−the−entirety laws differ widely in their scope from state to state. Section 522(b)(2)(B) has no bearing on the § 522(c) preemption analysis.

Unlike Judge Feeney, who found § 522(c) adamantine in its clarity, [115] Judge Boroff perceived several alternative readings of § 522(c). [116] He resolved this perceived ambiguity by reference to the use of the past tense in § 522(c); his

ipse dixit was that "property exempted" can only be property defined without restriction under § 522(b). [117] He overlooked the plain language of the opt−out section, § 522(b)(1), and erroneously held that Congress gave the states under that subsection the right to opt out of § 522(c). [118]

In In re Mills, [119] Bankruptcy Judge Carol J. Kenner agreed with Judge Boroff that one could construe § 522(c) in several ways, but she found the legislative history unavailing. She held that § 522(c) preempted the Massachusetts preexisting−debt exception to the homestead exemption, and that this in no wise interfered with the states' traditional right to decide what property should be exempt. [120]

The third substantive pre−Patriot Portfolio opinion to emerge from the District of Massachusetts was Bruin Portfolio, LLC v. Leicht (In re Leicht). [121] The panel, speaking through Bankruptcy Judge James B. Haines Jr., acknowledged the creditor's argument that because a homestead is an estate less than a fee simple interest in real estate, a debtor who declares a homestead in her realty must take that lesser estate subject to all preexisting debts under the Massachusetts homestead−exemption statute. [122] The panel also addressed the debtor's argument, resolved in the debtor's favor below by Judge Queenan, that "a state law exemption, when invoked in bankruptcy proceedings, becomes the platform for bankruptcy law remedies (e.g. § 522(f) lien avoidance) and for the federal fresh start (e.g. § 522(c)), and, therefore, a state may not – even by way of exemption definition – override the competing or limiting policies codified in the federal statute." [123]

In the end, the panel was convinced that although states have plenary congressional authority "to define the category and content of exemptions . . . , it defined the operative effect of exemptions in bankruptcy through §§ 522(c) and (f). We reject In re Fracasso's conclusion because it rests on a fundamental mis−perception [sic] regarding the extent to which Congress truncated its deference to state exemption policy through § 522(c)'s provisions. We embrace, instead, the In re Boucher/In re Whalen−Griffin/In re Weinstein construct." [124]

The panel also handily distinguished Edmonston, [125] holding that § 522(c) complements § 523(a), § 524(a)(3), and § 727(b) before noting the amphisbaenic effect of § 522(c): "[i]ndeed, § 522(c) may not be a one−way street. It may operate to subject exempt property to liabilities for which it could not be reached under state law." [126] Once the panel accorded § 522(c) preemptive effect, [127] no dispute remained that Bruin Portfolio's judicial lien – a prejudgment writ of attachment – impaired the Leichts' exemption and had to be avoided in toto under § 522(f)(2)(A). [128]

Patriot Portfolio and Davis

In Patriot Portfolio, the First Circuit relied on Owen in invalidating a preexisting−lien exception in the Massachusetts homestead−exemption statute. [129] The First Circuit, speaking through Judge Reavley, [130] deemed Owen to be directly in point, and took it to its logical, implicit conclusion by holding the Massachusetts preexisting−lien exception to the homestead exemption was preempted by § 522(f)(1). Judge Reavley refused to give meaning to the "distinction without a difference" between Florida's providing a homestead exemption in a debtor's realty itself and Massachusetts's countenancing the creation of a homestead estate as an exempt lesser estate. [131] He also refused to hold that the Massachusetts Homestead Act prevented the fixing of a lien under Farrey simply because it made the creation of the homestead estate putatively subject to preexisting liens. [132] Instead, he noted that the debtor, Weinstein, had possessed an interest in his residence when his creditor, Patriot Portfolio, lodged a judgment lien against it, which meant that its judgment lien had fixed for § 522(f)(1) lien−avoidance purposes even though it predated Weinstein's declaration of homestead in his residence. [133]

Judge Reavley built upon this analysis in holding the preexisting−debt exception in the Massachusetts Homestead Act had been preempted by § 522(c). [134] He harked back to the Supreme Court's qualification in Owen on the effectiveness of state−law preexisting−lien exceptions vis−à−vis § 522(f)(1), [135] and held that Massachusetts's right to define exemptions does not include the right to dictate for what debts, including prehomestead debts, otherwise exempt homestead property may be liable:

[E]xempt property in a bankruptcy case remains liable only for the specific types of debt listed in § 522(c)(1) – (3). Because the Massachusetts prior contracted debt exception is not one of the types of debt specified in § 522(c), it is invalid in bankruptcy. [136]

For Judge Reavley and the First Circuit, the language of § 522(c) is unambiguous, controlling, and preemptive. [137]

For the majority of the Fifth Circuit in Davis, however, the statutory language of § 522(c) was ambiguous, [138] not dispositive, [139] and not preemptive. [140] The majority, speaking through Judge Jones, refused to allow Sandra Davis, debtor Cullen Davis's ex−wife, to recover a debt owed to Sandra by Cullen from Cullen and his new wife Karen's residence, which Cullen and Karen had declared as exempt homestead property under Texas law when they filed for bankruptcy relief. Even though Sandra's debt for alimony, maintenance, and child support was nondischargeable under § 523(a)(5), and even though such debts are included in the short list of debts for which exempt property is liable under § 522(c), Judge Jones held that Cullen and Karen's homestead could not be subjected to liability on such a debt, since Texas homestead law contained no exception for such family−support debts. [141] She found no express conflict between § 522(c) and Texas homestead and asset−seizure law, and so she refused to give § 522(c) preemptive effect. [142]

Judge Jones began her analysis by outlining the policy controversies that swirl around exemption claims in bankruptcy. She noted that while exemptions do further the fresh start policy that is central to the Bankruptcy Code, they are "fought over by states'−rights advocates, who value the traditional state legislative prerogative to adjust exemptions to local economic conditions, and by advocates of federal uniformity, who want to raise – or lower – exemptions based on conceptions of national equity." [143] She also noted that exemptions "reduce assets available to pay creditors and arouse charges of abuse of bankruptcy." [144]

She next distinguished Patriot Portfolio by noting the First Circuit therein construed § 522(c) "in conjunction with § 522(f) in the course of avoiding certain liens on exempt property." [145] By contrast, Sandra Davis had no judicial lien securing the nondischargeable family−support debt, and so Judge Jones pointed to a complete lack of judicial authority for the proposition that § 522(c) establishes a separate, independent means of enforcing liens against exempt property. [146] She agreed with the bankruptcy court below that § 522(c) is not a congressional subjection of exempt property to federal−law liability for the debts listed in § 522(c), but is merely a grant of congressional permission to the states to allow – or to enjoin, as Texas has done – the continued subjection of exempt property to state−law liability for the listed debts. [147] For Judge Jones, the contrapositive of the plain language of § 522(c)(1), which states that property exempted from the bankruptcy estate "is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except a debt of a kind specified in . . . § 523(a)(5) [sc. Sandra Davis's family−support debt] . . . ," simply does not exist. [148]

Judge Jones also put no stock in Sandra's argument that § 522(f)(1), a lien−avoidance provision that preserves judicial liens securing § 523(a)(5) debts, [149] would be rendered superfluous if § 522(c)(1) also preserves judicial liens securing § 523(a)(5) debts but does not create liability for them. [150] She eschewed reliance on Owen, arguing that if Sandra's reading of § 522(c)(1) were correct, then creditors with other kinds of nondischargeable debts listed in § 522(c) and § 523(a) (e.g. a non−liened tax debt made nondischargeable by § 523(a)(1)) could force the sale of a debtor's exempt homestead property without recourse to other federal law or state law. "The impact of such a construction would put the preferred creditors in a better position after the debtor has filed bankruptcy than before and may create an incentive for filing involuntary bankruptcies." [151]

Judge Jones concluded her analysis by finding no basis for express or implied preemption of Texas homestead law by § 522(c) under the Supremacy Clause of the United States Constitution. [152] She held that since Congress had allowed for the creation and recognition of state−law bankruptcy exemptions in § 522(b), Congress had not "occupied the field," in implied−preemption parlance, so as to preclude state supplementation of bankruptcy−exemption law. [153] She further held there is no conflict between § 522(c)(1) and Texas homestead−exemption and debt−collection law – for Texas law would allow Sandra to perfect a judgment lien against Cullen and Karen's homestead property, which lien would be satisfied if and when the property ceased to be their homestead. According to Judge Jones, this is all that § 522(c)(1) requires. [154]

Judge Dennis, writing for the dissent, would have upheld the panel's decision that Cullen and Karen's homestead was liable for Sandra's nondischargeable family−support debt under § 522(c). [155] Judge Dennis finds support for this preemptive reading of § 522(c) in the scholarly literature and the legislative history. [156] He also takes the en banc majority to task for failing to recognize that § 522(c) must impose substantive, federal−law liability on exempted

property in order for that subsection not to be superfluous makeweight vis−à−vis the lien−avoidance and lien−preservation provisions of § 522(f)(1) and the nondischargeability provisions of § 523(a)(5). [157]

The bulk of the dissent is a refutation of the majority's "indiscriminate rendering of § 522(c)." [158] The dissent demonstrates convincingly that § 522(c)(1) is not ambiguous but amphisbaenic, as it subjects exempted property to liability for the satisfaction of the small class of nondischargeable debts and nonavoidable liens catalogued therein: [159]

[Section] 522(c) is designed to perform two essential functions. In general, it shields exempted property from liability to seizure and sale for the payment of nondischargeable debts. As exceptions to that general rule, it allows piercings of the shield and permits levies upon exempted property for the payment of a small number of certain types of nondischargeable debts. The exceptions are narrowly and carefully drawn to uniformly further several policies deemed by Congress to be of national importance. [160]

Congress maintained the tension between competing bankruptcy policies in § 522(c). Section 522(c) promotes the debtor's fresh start by sheltering a debtor's exempted property from liability on debts, including most nondischargeable debts, that are secured by voided or avoided pre−petition liens. [161] In this, it expands state−law exemptions in bankruptcy. However, § 522(c) also recognizes certain creditors' preferred right to recovery by subjecting exempt property to federal−law liability and to turnover proceedings, irrespective of state law, upon a few nondischargeable debts and nonavoidable liens such as family−support obligations. [162] In this, it contracts state−law exemptions in bankruptcy. Section 522(c) is the amphisbaenic mechanism that maintains dynamic equilibrium between opposing policies.

Recall too that the bankruptcy trustee stands as the fiduciary guardian of the rights of all unsecured creditors, including those with § 523(a) nondischargeable debts covered by § 522(c). A state−law exemption in bankruptcy (which in the state−law context is usually an exemption from process, though a state may create an exemption operative specifically in bankruptcy) frees a debtor's exempt property from liability for seizure and sale by his or her judgment creditors under state−law judicial process, unless the debt is a § 523(a) debt listed in § 522(c). [163] This effect of a state−law exemption in bankruptcy bolsters the dissent's argument that Congress's use of the word "liable" renders exempted property "liable for seizure and sale" by either the judgment creditor with a specified nondischargeable debt or by the trustee in his stead for the benefit of all unsecureds, and that Congress has neither, as the majority contemplated, merely allowed exempted property to be "liable to attachment by a nonavoidable but [currently] unenforceable lien," [164] nor allowed exempted property to be currently liable by virtue of a specific preexisting debt exception to a state exemption.

The dissent also lambastes the majority for employing "circular and obverse reasoning in an attempt to show that Texas state exemption law (by virtue of Federal Rule of Civil Procedure 69(a)) 'reverse preempts' federal court enforcement of judgments for nondischargeable alimony and support debts under § 522(c) of the Bankruptcy Code." [165] This rule provides, in pertinent part, as follows:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. [166]

Judge Jones's reliance upon Rule 69(a) was misplaced: though the Texas turnover statute Sandra Davis sought to employ did not permit seizure and sale of a homestead to satisfy a family−support obligation, [167] this is irrelevant in view of the countervailing federal statutes, 11 U.S.C. §§ 522(c) and 542, which allow the trustee to proceed with a turnover action against the debtor's exempt property, and which trump both Rule 69 and Texas turnover law. [168]

Finally, the dissent holds there is an unmistakable and unavoidable conflict between the clear language of § 522(c)(1) and Texas homestead−exemption and asset−turnover law. As did Judge Reavley in Patriot Portfolio, Judge Dennis for the dissent in In re Davis recalls the Supreme Court's admonition in Owen that "the state's ability to define its exemptions is not absolute and must yield to the conflicting policies in the Bankruptcy Code." [169]

The First Circuit's opinion in Patriot Portfolio and the dissent's opinion in Davis correctly hold that § 522(c)(1) preempts state preexisting−debt and –lien exceptions to state homestead−exemption laws when those exceptions are not mirrored in § 522(c). The plain language of § 522(c) both immunizes exempt property from most nondischargeable debts and subjects it to liability – federally created, bankruptcy−law liability – for satisfaction of a few nondischargeable debts and the nonavoidable liens that secure them. Section 522(c), with its amphisbaenic modality, is the alpha and omega of the preemption analysis.

Judge Jones voiced the fear in Davis that Sandra Davis's plenary construction of § 522(c) as a liability−creating as well as a liability–insulating provision could force the sale of a debtor's exempt homestead property without recourse to other federal law or state law, and would put the preferred creditors in a better position after a debtor has filed bankruptcy than before. [170] But Judge Jones failed to see the obverse of the coin: with respect to most nondischargeable debts, Congress has accorded to bankruptcy debtors' exempt property, but not to the debtors themselves, bankruptcy−law immunity from liability under § 522(c), § 523(a), and § 524(a), even where a state homestead−exemption law purports to except from its ambit certain prehomestead debts and liens. [171] Congress has, in § 522(c), struck a deliberate and carefully calibrated balance between the fresh−start policy and the protection of those creditors whose nondischargeable debts should be recoverable from assets other than the "scarce non−exempt assets of the debtor." [172]

There should be no question that Congress may so legislate. The twin pillars of the bankruptcy power are the ratable distribution of a debtor's property amongst his creditors and the discharge of a debtor from his contracts, even state−law contracts. [173] Where federal interests are at stake – as the fresh−start and enhancement−of−recovery policies are here – Congress may preempt state law and subject a bankruptcy debtor's exempt property, including her homestead, to a federal−law rule of liability for certain nondischargeable debts and to another federal−law rule of immunity from liability for most nondischargeable (and dischargeable) debts. [174]

An apposite example of Congress's power to preempt state−law in altering state−law rights – in fact, an example of Congress's power prospectively to alter creditors' property rights – is its enactment of the lien−avoidance provisions of § 522(f)(1). While the Bankruptcy Code generally enshrines and honors the rule that valid liens pass through bankruptcy unaffected, [175] Congress has declared, in derogation of certain lienholders' state−law rights, that certain liens, including judicial liens, should be avoided in bankruptcy to the extent they impair a debtor's exemptions. The Supreme Court ratified this exercise of bankruptcy power in Owen; a fortiori, Congress should be able to alter contractual rights by eliminating certain preexisting−debt exceptions to state−law exemptions.

Precedential Postlude:

A Section 522(c) Case Decided In the Wake of Patriot Portfolio and Davis

The case of In re Fishman [176] features confusion boats in full flotilla.

In In re Fishman, creditor RoxAnne Rochester obtained a judgment against Gerald Fishman in federal district court for seven hundred fifty thousand dollars. [177] Fishman responded by filing a voluntary chapter 11 petition, in the schedules accompanying which he claimed certain items of personalty as exempt under Illinois law. [178] Rochester timely filed an objection to Fishman's claim of exemptions. [179] Under Illinois's exemption statute, no personalty can be exempted for "wages due"; [180] Rochester alleged her debt was a claim for "wages due." [181]

In In re Fishman, Bankruptcy Judge Eugene Wedoff refused to follow Patriot Portfolio, not only because he deemed he was bound to follow the Seventh Circuit's decision in In re Ondras, [182] but also because he disagreed with the First Circuit's analysis and holding. Judge Wedoff fell into the opt−out trap of § 522(b)(1), as he construed that subsection as a grant of broad congressional license to the states for their exercise of "wide discretion over the exemptions applicable in bankruptcy" – which discretion is apparently, in Judge Wedoff's view, wide enough to eclipse § 522(c). [183] He magnified this confusion by proposing a hypothetical contrary to law: if state law declared all realty to be exempt from library fines, then the Patriot Portfolio approach would yield the result that all realty was exempt under § 522(b)(2)(A), and state law that excluded other debts from the realty's exemptibility would invalidly be negated by § 522(c). "Such a result cannot be reconciled with an intent to incorporate state law meaningfully into § 522(b)." [184]

The legal contrariety lies in the notion that property can be "exempted" from library fines – or indeed from any debts at all. On the contrary, and to repeat one last time: property must be exempt from all legal and equitable mesne and final judicial process under state law to be exempt in bankruptcy under § 522(b)(2)(A) (unless the state has enacted a bankruptcy−specific exemption statute). [185] The hypothetical is a non sequitur.

Judge Wedoff also places great stock in a quotation from Owen: "Nothing in subsection [522](b) (or elsewhere in the Code) limits a State's power to restrict the scope of its exemptions; indeed, it could theoretically accord no exemptions at all." [186] True enough; but if a state does accord exemptions, even an opt−out state, the courts must apply the opt−out policy of § 522(b)(1) "along with whatever other competing or limiting policies the statute contains" – such as the fresh−start and ratable distribution policies enshrined in § 522(c) and § 522(f). [187] This is just a variant on a well−established principle of federal constitutional law (applicable here under the Bankruptcy Clause). [188]

Judge Wedoff errs once more after he correctly declares the effect of § 522(b) and (c): "under the Bankruptcy Code, all of the property of a debtor's estate is either exempt or nonexempt." [189] He immediately contradicts himself, however, by declaring that "priority of distribution is not affected by denying an exemption to the extent that property is subject to claims excluded from exemption by state law." [190] This contradiction points up the fallacy of granting primacy to state−law preexisting−debt exceptions in the face of § 522(b) and (c).

Conclusion

In lieu of a true schematic, the following description captures the dynamic, amphisbaenic interaction of § 522(b)(2)(A), § 522(d), § 522(c), § 522(f)(1), § 523(a), § 524(a), and § 727(b):

- if, at the time the debtor files bankruptcy, a creditor holds a judicial lien securing a nondischargeable debt listed in § 522(c), then the lien may not be avoided under § 522(f)(1), and both the debtor, in personam, and his exempted property, in rem, will be liable for collection of the debt and for satisfaction of the lien;
- if, at the time the debtor files bankruptcy, a creditor holds a judicial lien securing a nondischargeable debt not listed in § 522(c), then the lien may be avoided under § 522(f)(1), and only the debtor, in personam, but not his exempted property, in rem, will be liable for collection of the debt, for the lien may not be satisfied from the debtor's exempted property;
- if, at the time the debtor files bankruptcy, a creditor holds a judicial lien securing a dischargeable debt, then neither the debtor nor his exempted property will be liable for collection of the debt or for satisfaction of the lien, and the creditor will be unable to obtain a judicial lien to secure such debt;
- if, at the time the debtor files bankruptcy, a creditor holds a nondischargeable debt listed in § 522(c), but not a judicial lien securing such debt, then both the debtor, in personam, and his exempted property, in rem, will eventually be liable for collection of such debt; the creditor will be able to obtain a judicial lien to secure such debt, and will be able to satisfy such judicial lien from the debtor's exempted property;
- if, at the time the debtor files bankruptcy, a creditor holds a nondischargeable debt not listed in § 522(c), then only the debtor, in personam, but not his exempted property, in rem, will be liable for collection of the debt; though the creditor will be able to obtain a judicial lien to secure such debt, it will be unable to satisfy such lien from the debtor's exempted property; and
- if, at the time the debtor files bankruptcy, a creditor holds a dischargeable debt, then neither the debtor nor his exempted property will be liable for collection of the debt, and the creditor will be unable to obtain a judicial lien to secure such debt.

In closing: what does all this mean to borrowers and lenders in the residential real−estate market, and to judicial−lien creditors who have availed themselves of their state−law rights? Well, since consensual mortgage liens cannot be avoided under § 522(f)(1), and pass through bankruptcy under Long v. Bullard [191] if they are valid, it seems highly unlikely that any bankruptcy court would attempt to bootstrap the exoneration of exempt homestead realty from precontracted mortgage debt under § 522(c)(1) into avoidance of the mortgage lien due to its failure to secure an underlying obligation. [192] Moreover, lenders in the residential real−estate market are well aware that their mortgagors' personal liability on promissory notes or underlying debts secured by their mortgages will usually be dischargeable under § 523(a), [193] and that in many cases they will have to look to the realty or to nonbankruptcy−debtor guarantors for maximum satisfaction of the mortgage debt.

As for judicial lien creditors: the principle that bankruptcy debtors should not receive "a windfall merely by reason of the happenstance of bankruptcy" [194] has no application when a federal interest, especially one as centrally important as the fresh−start policy in bankruptcy, moves Congress to alter debtor−creditor relationships, and to maximize a debtor's right to keep exempt property exempt. [195] Congress's enactment of § 522(f)(1), which the Supreme Court in Owen has construed to nullify preexisting−lien exceptions in state−law homestead−exemption statutes, [196] is ample evidence of Congress's perspicuous intent to preserve to bankruptcy debtors the fruits of their exemptions free from state−law interference. Judicial lien creditors certainly would like to reach their debtors' homesteads in satisfaction of their debts – and Congress will let them do so, in or after bankruptcy, if they hold nondischargeable debts or nonavoidable liens under § 522(c). To the extent such creditors hold nondischargeable debts under § 523(a) that are not included in § 522(c), they still enjoy better treatment than their general−unsecured counterparts, because they can pursue the debtor himself postdischarge. To the extent such creditors hold prehomestead liens against the debtor's homestead that secure dischargeable debts, the creditors must look to the debtor's nonexempt assets for satisfaction.

Allowing bankruptcy debtors to keep their homesteads exempt from most preexisting debts under § 522(c)(1), and to free their homesteads from preexisting judicial liens that impair their expanded exemptions under § 522(c) and § 522(f)(1), is constitutionally countenanced, statutorily required, and furthers the fundamental bankruptcy policy of providing debtors with a fresh start.

FOOTNOTES:

[1] B.A., Williams College, 1991; J.D. cum laude, Vermont Law School, 1997; LL.M. in Bankruptcy, St. John's University School of Law, 2000; Law Clerk to the Honorable Dickinson R. Debevoise, United States Senior District Judge for the District of New Jersey, 2000−2001. This Master's Thesis was submitted and defended in May, 2000, in partial satisfaction of the requirements for the Master of Laws in Bankruptcy at St. John's University School of Law.

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This article is dedicated to my father, George M. Prescott, Esq., the finest lawyer in the land.

"I think of it as it should have been, with its prolixities docked, its dullnesses enlivened, its fads eliminated, its truths multiplied." H.W.F. Back To Text

[2] Compare Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677 (1st Cir. 1999), cert. denied, 119 S. Ct. 2394 (1999), with Davis v. Davis (In re Davis), 170 F.3d 475 (5th Cir. 1999) (en banc), cert. denied, 120 S. Ct. 67 (1999). Back To Text

[3] Patriot Portfolio, 164 F.3d at 683−84. Back To Text

[4] Davis, 170 F.3d at 481−83. Back To Text

[5] Farrey v. Sanderfoot, 500 U.S. 291, 111 S. Ct. 1825, 114 L. Ed. 2d 337 (1991) (White, J.). Back To Text

[6] Owen v. Owen, 500 U.S. 305, 111 S. Ct. 1833, 114 L. Ed. 2d 350 (1991) (Scalia, J.). Back To Text

[7] Black's Law Dictionary 571 (6th ed. 1990), quoted in In re Davis, 170 F.3d at 489 n.2 (Dennis, J., with whom Politz & Parker, JJ., joined, dissenting). Back To Text

[8] 11 U.S.C. § 522(d)(1). Back To Text

[9] 11 U.S.C. § 522(b)(1); Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 679 n.1 (1st Cir. 1999). Back To Text

[10] 11 U.S.C. § 522(b)(2)(A). Property must be exempt from all legal and equitable mesne and final judicial process under state law to be exempt in bankruptcy under § 522(b)(2)(A). E.g. Scarlett v. Barnes, 121 B.R. 578, 579−80 (W.D. Mo. 1990).

It is meet to note proleptically that one court based its refusal to hold § 522(c) preempts the debt−for−rent exception in the Virginia exemption statute upon the irrelevant fact that the state opted out of the federal bankruptcy exemptions. In re Godfrey Jr., 93 B.R. 451, 453 n.3 (Bankr. E.D. Va. 1988); In re Shines Jr., 39 B.R. 879, 882 (Bankr. E.D. Va. 1984). This is plainly wrong. In re Scott, 199 B.R. 586, 591, 592−93 (Bankr. E.D. Va. 1996) (holding § 522(c) invalidated all specific debt exceptions in the Virginia exemption statute, in part because states can only opt−out of operation of § 522(d), not of § 522(c)). See Owen, 500 U.S. at 313, 111 S. Ct. at 1838 ("Respondent asserts that it is inconsistent with the Bankruptcy Code's 'opt−out' policy . . . to refuse to take [state−law] exemptions with all their built−in limitations. That is plainly not true, however, ... We have no basis for pronouncing the opt−out policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains.") (construing § 522(f)(1)); Hall v. Fin. One (In re Hall), 752 F.2d 582, 587 (11th Cir. 1985) (holding opt−out power only allows states to refuse their domiciliaries the right to invoke federal bankruptcy exemptions under § 522(d), and does not allow states to enact legislation that conflicts with any other provision of the Bankruptcy Code) (construing § 522(f)(1)), criticized but aff'd, Fin. One v. Bland (In re Bland), 793 F.2d 1172, 1173, 1174 (11th Cir. 1986); McManus v. Avco Fin. Servs. of La. (In re McManus), 681 F.2d 353, 358 (5th Cir. 1982) (Dyer, J., dissenting) (construing § 522(f)(1)), majority opinion abrogated by Owen, 500 U.S. at 310 & n.1, 313−14, 111 S. Ct. at 1836 & n.1, 1838. Back To Text

[11] See generally Official Form 6, Schedule C; Fed. R. Bankr. P. 1007(b); 11 U.S.C. § 522(l); Fed. R. Bankr. P. 4003(a). Back To Text

[12] Under 11 U.S.C. § 522(l) and Fed. R. Bankr. P. 4003(b), unless a party in interest objects to a debtor's claim of exemptions within the requisite time, the property claimed as exempt is exempt, even if the debtor had no colorable, good−faith basis for the exemption. See Taylor v. Freeland & Kronz, 503 U.S. 638, 643−44, 112 S. Ct. 1644, 1648, 118 L. Ed. 2d 280 (1992). Back To Text

[13] Owen v. Owen, 500 U.S. 305, 308, 111 S. Ct. 1833, 1835 (1991) (emphasis added); 11 U.S.C. § 522(c)(1) – (c)(3). Cf. In re Whalen−Griffin, 206 B.R. 277, 289 n.9 (Bankr. D. Mass. 1997) (§ 522(c) "insulates exempt property from pre−petition claims," except debts listed in § 522(c)) (quoting H.R. Rep. No. 595, at 361 (1977)) (emphasis added). Back To Text

[14] U.S. Const. art. I, § 8, cl. 4. Back To Text

[15] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190, 22 S. Ct. 857, 861, 46 L. Ed. 1113 (1902) (enouncing principle of geographic uniformity). Back To Text

[16] See U.S. Const. art. VI, cl. 2 (Supremacy Clause); Butner v. United States, 440 U.S. 48, 54 n.9, 99 S. Ct. 914, 918 n.9, 59 L. Ed. 2d 136 (1979). Back To Text

[17] Butner, 440 U.S. at 55, 99 S. Ct. at 918 (emphasis added). Back To Text

[18] E.g. In re Stewart, 246 B.R. 134, 139 (Bankr. D.N.H. 2000); In re Scott, 199 B.R. 586, 593 (Bankr. E.D. Va. 1984). "It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws." Holden v. Stratton, 198 U.S. 202, 213−14, 25 S. Ct. 656, 659, 49 L. Ed. 1018 (1905). Accord Myers v. Matley, 318 U.S. 622, 63 S. Ct. 780, 87 L. Ed. 1043 (1943); White v. Stump, 66 U.S. 310, 44 S. Ct. 103, 69 L. Ed. 301 (1924); Eaton v. Boston Safe Deposit & Trust Co, 240 U.S. 427, 36 S. Ct. 391, 60 L. Ed. 723 (1916) (Holmes, J.); Smalley v. Laugenour, 196 U.S. 93, 25 S. Ct. 216, 49 L. Ed. 400 (1905). Back To Text

[19] See United States v. Sec. Indus. Bank, 459 U.S. 70, 72 n.1, 103 S. Ct. 407, 409 n.1, 74 L. Ed. 2d 235 (1982); Burlingham v. Crouse, 228 U.S. 459, 473, 33 S. Ct. 564, 568, 57 L. Ed. 2d 920 (1913). See generally Local Loan Co. v. Hunt, 292 U.S. 234, 244−45, 54 S. Ct. 695, 699, 78 L. Ed. 2d 1230 (1934).

Homestead exemption laws "are designed to benefit the homestead declarant and his or her family by protecting the family residence from the claims of creditors." Shamban v. Masidlover, 429 Mass. 50, 53, 705 N.E.2d 1136, 1138 (Mass. 1999). "Homestead laws are based on public policy that favors preservation of the family home regardless of the householder's financial condition." Id. "Furthermore, homestead laws tend to prevent debtors and their families from becoming public charges." Id. "In light of the public policy and the purpose of the statutes, this court has construed the State homestead exemptions liberally in favor of debtors." Id. This state−law rule of construction must be followed by federal courts construing state−law homestead exemptions. Goldman v. Salisbury (In re Goldman), 70 F.3d 1028, 1029 (9th Cir. 1995). In general, federal courts must construe all exemption statutes liberally, in the debtor's favor, "to reflect their remedial purposes." Caron v. Farmington Nat'l Bank (In re Caron), 82 F.3d 7, 10 (1st Cir. 1996). Back To Text

[20] 11 U.S.C. § 523(a)(1), (a)(4), (a)(5), (a)(6), cited in 11 U.S.C. § 522(c)(1), (c)(3). Nondischargeable debts may be recovered from the debtor after her bankruptcy case is closed or dismissed, notwithstanding a bankruptcy court's discharge order. 11 U.S.C. § 523(a). Back To Text

[21] 11 U.S.C. § 522(c)(2)(A)(i). Back To Text

[22] A "judicial lien" is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). Back To Text

[23] 11 U.S.C. § 522(f)(1)(A). Back To Text

[24] Farrey v. Sanderfoot, 500 U.S. 291, 293, 299−300, 111 S. Ct. 1825, 1827, 1830−31 (1991). Back To Text

[25] Id., 500 U.S. at 301, 111 S. Ct. at 1831 (emphasis added). Back To Text

[26] Id., 500 U.S. at 296, 299, 111 S. Ct. at 1829, 1830 (emphasis added). Back To Text

[27] Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 683 (1st Cir. 1999) (rejecting this argument). Back To Text

[28] Owen v. Owen, 500 U.S. 305, 313−14, 111 S. Ct. 1833, 1838 (1991). Back To Text

[29] Id., 500 U.S. at 311, 312−13, 111 S. Ct. at 1837. Back To Text

[30] Id., 500 U.S. at 314 n.6, 111 S. Ct. at 1838 n.6. Back To Text

[31] Id., 500 U.S. at 313, 111 S. Ct. at 1838. Back To Text

[32] Id. Back To Text

[33] Id. Back To Text

[34] Owen v. Owen, 500 U.S. 305, 314, 111 S. Ct. 1833, 1838 (1991). Back To Text

[35] Id., 500 U.S. at 306−08, 111 S. Ct. at 1834−35. Back To Text

[36] Owen v. Owen (In re Owen), 961 F.2d 170, 171, 173 (11th Cir. 1992), aff'g per curiam Owen v. Owen (In re Owen), 86 B.R. 691 (M.D. Fla. 1988). Back To Text

[37] Id. at 172 (citing Farrey v. Sanderfoot, 111 S. Ct. 1825, 1829 (1991)). Back To Text

[38] Id. Back To Text

[39] Owen, 500 U.S. at 313−14, 111 S. Ct. at 1838. Back To Text

[40] E.g. Hastings v. Holmes (In re Holmes), 185 B.R. 811, 815 (B.A.P. 9th Cir. 1995); Tower Loan v. Maddox Jr. (In re Maddox), 15 F.3d 1347, 1351−52 & n.27 (5th Cir. 1994) ("Nothing in the statute [§ 522(f)(1)] specifies the need for attachment to an exemptible interest of the debtor in property . . . ."), cited with approval in In re VanZant, 210 B.R. 1011, 1015−16 (Bankr. S.D. Ill. 1997). Back To Text

[41] See Hall v. Fin. One (In re Hall), 752 F.2d 582, 586 n.4 (1985) (cited supra note 9). Back To Text

[42] Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 681, 682 n.4 (1st Cir. 1999). Back To Text

[43] 205 B.R. 136 (Bankr. N.D. Ill. 1997). Back To Text

[44] See id. at 137. Back To Text

[45] See id. at 138. Back To Text

[46] See id. at 137. Back To Text

[47] See id. Back To Text

[48] See id. at 139. Back To Text

[49] In re Vasquez Jr., 205 B.R. 136, 139 (Bankr. N.D. Ill. 1997). Back To Text

[50] Id. Back To Text

[51] 152 B.R. 31, 32 (Bankr. W.D.N.Y. 1993) (construing § 523(a)(8) vis−à−vis § 522(c), (f)(1)). Back To Text

[52] 119 B.R. 405, 405−06 (Bankr. W.D.N.Y. 1990) (construing § 523(a)(7) vis−à−vis § 522(c), (f)(1)). Back To Text

[53] 159 B.R. 144 (Bankr. S.D.N.Y. 1993). Back To Text

[54] See id. at 146. Back To Text

[55] Id. (internal citation to legislative history omitted). Back To Text

[56] See id. Back To Text

[57] See Smiley v. Assocs. Fin. Servs. (In re Smiley), 26 B.R. 680, 683−84 (Bankr. D. Kan. 1982), cited in In re Shines Jr., 39 B.R. 879, 882 (Bankr. E.D. Va. 1984) (cited supra note 9). Back To Text

[58] See 11 U.S.C. § 524(a)(1), (a)(2), (a)(3) (limiting the scope of the debtor's discharge to freedom from personal liability, except for extension of the discharge protection to a debtor's community property acquired after the commencement of the bankruptcy case); 11 U.S.C. § 727(b) (prescribing the scope of the debtor's discharge in a chapter 7 case); Birney v. Smith (In re Birney), 200 F.3d 225, 228 (4th Cir. 1999) (construing § 524(a)(1)) ("[N]o lien could attach to the [exempted] property because the discharge extinguished the debt upon which the lien was based."). Cf. 11 U.S.C. § 102(2) (furnishing the rule of construction that the phrase "claim against the debtor," which phrase does not appear in § 524(a), includes "claim against property of the debtor"). Back To Text

[59] 199 B.R. 586 (Bankr. E.D. Va. 1996); see supra notes 9 and 17. Back To Text

[60] 129 B.R. 470 (Bankr. E.D. Ky. 1991). Back To Text

[61] Va. Code Ann. § 34−1 (Michie 1999), quoted in In re Scott, 199 B.R. at 590. Back To Text

[62] Va. Code Ann. § 34−3 (Michie 1999), quoted in In re Scott, 199 B.R. at 591. Back To Text

[63] Va. Code Ann. § 34−5(2) (Michie 1999), quoted in In re Scott, 199 B.R. at 591. Back To Text

[64] 11 U.S.C. § 522(f)(1); Owen v. Owen, 500 U.S. 305, 313, 111 S. Ct. 1833, 1838 (1991), both cited in In re Scott, 199 B.R. at 591. Back To Text

[65] In re Scott, 199 B.R. 586, 592 (Bankr. E.D. Va. 1996); 11 U.S.C. § 522(f)(1)(B)(ii); see supra note 9. Back To Text

[66] See In re Scott, 199 B.R. at 592 n.10 (citing Cheeseman v. Nachman (In re Cheeseman), 656 F.2d 60, 63−64 (4th Cir. 1981) (holding states are not free to classify which debtors should be entitled to exemptions when the classification conflicts with federal bankruptcy law)). See generally 11 U.S.C. § 302 (governing joint bankruptcy cases); § 522(m) (governing claims of exemptions in joint cases). Back To Text

[67] See In re Scott, 199 B.R. at 592. Back To Text

[68] Id. at 593; see supra notes 9 and 17 and accompanying text. Back To Text

[69] Id. Back To Text

[70] Ky. Rev. Stat. Ann. § 427.060 (Michie 1998), quoted in In re Conyers, 129 B.R. 470, 472 (E.D. Ky. 1991). Back To Text

[71] See In re Conyers, 129 B.R. at 472. Back To Text

[72] Id. (emphasis added). Note this last was the very fate that befell the helpless creditor in Davis. See Davis v. Davis (In re Davis), 170 F.3d 475 , 483 (5th Cir. 1999). Back To Text

[73] See In re Conyers, 129 B.R. at 473. Back To Text

[74] 93 B.R. 451 (Bankr. E.D. Va. 1988) (cited supra note 9). Back To Text

[75] Va. Code Ann. § 34−5(5) (Michie 1999), quoted in In re Godfrey Jr., 93 B.R. at 452 n.2. Back To Text

[76] 92 B.R. 154 (W.D. Va. 1988). Back To Text

[77] In re Godfrey Jr., 93 B.R. at 453 n.3 (citing In re Snow, 92 B.R. 154, 156 (W.D. Va. 1988); § 522(b)(1)). Back To Text

[78] See supra note 9. Back To Text

[79] Snow v. Green (In re Snow), 899 F.2d 337, 340 (4th Cir. 1990), rev'g In re Snow, 92 B.R. 154 (W.D. Va. 1988). Back To Text

[80] 203 B.R. 10 (Bankr. D. Mass. 1996) (Queenan Jr., J.). Back To Text

[81] Mass. Gen. Laws ch. 188, § 1(2) (1991 & Supp. 2000), quoted in id., 203 B.R. at 11 n.1. Back To Text

[82] See In re Boucher, 203 B.R. 10, 12 n.2 (Bankr. D. Mass. 1996) (distinguishing In re Van Rye, 179 B.R. 375 (Bankr. D. Mass. 1995) (Boroff, J.), aff'd per curiam, 96 F.3d 1340 (table), 1996 WL 521185 (unpublished disposition) (1st Cir. 1996); In re Miller, 113 B.R. 98 (Bankr. D. Mass. 1990) (Kenner, J.)). Back To Text

[83] See In re Boucher, 203 B.R. at 12 (citing § 522(e), (f)). Accord Owen v. Owen, 500 U.S. 305, 313, 111 S. Ct. 1833, 1838 (1991); In re Scott, 199 B.R. at 591 (cited supra note 63). Back To Text

[84] See In re Boucher, 203 B.R. at 12−13 (quoting § 522(c)). Back To Text

[85] Id. at 13. Back To Text

[86] Id. (citing with approval In re Scott, 199 B.R. at 590−95; In re Conyers, 129 B.R. 470). Back To Text

[87] See id. Back To Text

[88] Id. at 14 (citations omitted). Back To Text

[89] Owen v. Owen, 500 U.S. 305, 313, 111 S. Ct. 1833, 1837−38 (1991), quoted in In re Boucher, 203 B.R. 10, 14 (Bankr. D. Mass. 1996). Back To Text

[90] In re Boucher, 203 B.R. at 14. Back To Text

[91] 206 B.R. 277 (Bankr. D. Mass. 1997); see supra note 12. Back To Text

[92] See id. at 281−82. Back To Text

[93] See id. at 284−85 (distinguishing also, for the same reason, In re Duda, 182 B.R. 662 (Bankr. D. Conn. 1995), aff'd sub nom. Gernat v. Belford (In re Gernat), 192 B.R. 601 (D. Conn. 1996), aff'd per curiam, 98 F.3d 729 (2d Cir. 1996)). Back To Text

[94] See id. at 285 (quoting slip opinion of Hillman, J., in In re Weinstein). Bankruptcy Judge Hillman sua sponte reopened the bankruptcy case to reverse the order underlying this slip opinion on March 25, 1997, in light of In re Whalen−Griffin. This new order was affirmed by the District Court. In re Weinstein, 217 B.R. 5, 8−9 n.2 (D. Mass. 1998), aff'd sub nom. Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 687 n.6 (1st Cir. 1999). Bankruptcy Judge Hillman rendered a coeval decision, identical in result, in In re Griffin, 208 B.R. 608 (Bankr. D. Mass. 1997). Back To Text

[95] In re Whalen−Griffin, 206 B.R. at 285. Back To Text

[96] Id. (italics added). Back To Text

[97] See In re Whalen−Griffin, 206 B.R. 277, 285−86 (Bankr. D. Mass. 1997) (quoting § 522(c), (f)(1)). Back To Text

[98] See id. at 286. Back To Text

[99] Id. Back To Text

[100] See id. Back To Text

[101] Id. at 288. Back To Text

[102] See supra note 57 and accompanying text. Back To Text

[103] In re Whalen−Griffin, 206 B.R. 277, 288 (Bankr. D. Mass. 1997). Back To Text

[104] See id.; accord 2 David G. Epstein et al., Bankruptcy § 8−9, at 476 (West 1992), quoted in id. at 289. Back To Text

[105] See In re Whalen−Griffin, 206 B.R. at 290. Back To Text

[106] Cf. supra note 71. Back To Text

[107] See In re Whalen−Griffin, 206 B.R. at 291 n.10, 292. Back To Text

[108] 210 B.R. 221 (Bankr. D. Mass. 1997), rev'd per curiam sub nom. Fracasso v. Reder (In re Fracasso), 222 B.R. 400, 401 (B.A.P. 1st Cir. 1998), aff'd per curiam, 187 F.3d 621 (table), 1999 WL 529529 (unpublished disposition) (1st Cir. 1999). Back To Text

[109] See id. at 222. Back To Text

[110] See id. at 224. Back To Text

[111] See Edmonston v. Murphy (In re Edmonston), 107 F.3d 74 (1st Cir. 1997), cited in id. at 224 n.7. See 11 U.S.C. § 522(b)(2)(B). Back To Text

[112] 11 U.S.C. § 522(b)(2)(B) (emphasis added). Cf. § 522(b)(2)(A) (exempt property is any property that is "exempt under . . . State . . . law . . . .") (emphasis added). Back To Text

[113] See In re Fracasso, 210 B.R. at 224 n.7. Back To Text

[114] See Scarlett v. Barnes, 121 B.R. 578, 579−80 (W.D. Mo. 1990); see supra note 9. Back To Text

[115] See In re Whalen−Griffin, 206 B.R. 277, 289 n.9 (Bankr. D. Mass. 1997). Back To Text

[116] See In re Fracasso, 210 B.R. 221, 225 n.8 (Bankr. D. Mass. 1997). Back To Text

[117] See id. at 225. Back To Text

[118] See id. at 226. Back To Text

[119] 211 B.R. 1, 2 (Bankr. D. Mass. 1997). Back To Text

[120] See id. Back To Text

[121] 222 B.R. 670 (B.A.P. 1st Cir. 1998). Back To Text

[122] See id. at 675. Back To Text

[123] Id. at 676 (internal quotation marks and citation omitted). Back To Text

[124] Id. at 677 (italics added). Back To Text

[125] Id. at 678 n.8. Back To Text

[126] Id. at 679 n.9 (alluding to § 523(a)(5)); Davis v. Davis (In re Davis), 170 F.3d 475, 483 (5th Cir. 1999); see supra notes 71 and 105 and accompanying text. Back To Text

[127] See Bruin Portfolio, LLC v. Leicht (In re Leicht), 222 B.R. 670, 680 (B.A.P. 1st Cir. 1998). Back To Text

[128] See id. at 671, 681. Back To Text

[129] See Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 680−81 (1st Cir. 1999). At the time Patriot Portfolio was decided, the Massachusetts Homestead Act exempted from all process up to one hundred thousand dollars of the value in a debtor's principal residence, except for debts contracted prior to the acquisition of the homestead estate, and mortgages, liens, or other encumbrances already lodged against the property prior to the declaration of homestead. See Mass. Gen. Laws ch. 188, § 1(2) (1991 & Supp. 2000) (the prehomestead−debt exception), 1(5) (the prehomestead−lien exception), quoted in Patriot Portfolio, 164 F.3d at 680. Section 1(2) was amended on August 4, 2000 to increase the homestead exemption to three hundred thousand dollars.

Note that the statute does not prescribe that the homestead exemption only extends to the debtor's equity in the property. While this had long been the rule in bankruptcy, e.g., In re Giarrizzo, 128 B.R. 321, 322 (Bankr. D. Mass. 1991) (Queenan Jr., C.J.); see generally Michael J. Herbert, Understanding Bankruptcy § 11.07[B], at 195 (Matthew Bender, 1995), one must keep in mind that judicial liens may be avoided, under § 522(f)(1) and the hypothetical test in Owen, to the extent they impair an exemption to which the debtor would have been entitled but for the liens.

The new formula for quantifying impairment and lien−avoidance prescribed by the 1994 bankruptcy amendments defines impairment to the extent that the sum of the lien sought to be avoided, all other liens on the property, and the amount of the exemption the debtor could claim if there were no liens on the property exceeds the value the debtor's interest in the property would have if there were no liens. See 11 U.S.C. § 522(f)(2)(A). This formula by its terms excludes liens as they are avoided from inclusion in a subsequent lien−avoidance calculation, 11 U.S.C. § 522(f)(2)(B), and does not apply to judgments arising out of mortgage foreclosure, 11 U.S.C. § 522(f)(2)(C). The subsection is to be employed (1) where the debtor's property is fully encumbered by consensual mortgages; (2) where the judicial lien the debtor seeks to avoid is only partially secured; (3) where a judicial lien is senior to a consensual mortgage and the lien plus mortgage exceeds the value of the property; and (4) where state−law exemptions contain built−in exceptions. Coats v. Ogg (In re Coats), 232 B.R. 209, 213−14 n.7 (B.A.P. 10th Cir. 1999) (quoting apposite legislative history) (citation omitted).

Notwithstanding the abundantly clear language of the formula, its reach has been mysteriously resected by the First Circuit, which allows for impairment and lien−avoidance under § 522(f)(1) only up to the dollar amount of an exemption. See Nelson v. Scala, 192 F.3d 32, 34−35 (1st Cir. 1999) (Boudin, J.). The First Circuit's judicial amendment of § 522(f)(1) is not only contrary to the "plain meaning" rule of Bankruptcy Code construction laid down by the Supreme Court, e.g., United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989), but is inconsistent with the First Circuit's expansion of the scope of homestead exemptions via the preemption of state−law preexisting−debt exceptions under § 522(c). See Patriot Portfolio, 164 F.3d at 683. Obviously, if a debtor may claim a state−law homestead exemption free from prior−contracted debts, then the scope of lien avoidance is potentially expanded even under the First Circuit's revised impairment and lien−avoidance formula in Nelson. Back To Text

[130] Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, sitting by designation. Back To Text

[131] See Patriot Portfolio, 164 F.3d at 681. Back To Text

[132] See id. at 683. Back To Text

[133] See id. at 684; see supra notes 26, 39 – 41 and accompanying text. Back To Text

[134] See id. at 683. Back To Text

[135] See Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 683 (1st Cir. 1999) (citing Owen v. Owen, 500 U.S. 305, 313, 111 S. Ct. 1833, 1838 (1991)). Back To Text

[136] Id. at 682. Back To Text

[137] See id. at 683 (quoting In re Whalen−Griffin, 206 B.R. at 291−92). Back To Text

[138] See Davis v. Davis (In re Davis), 170 F.3d 475, 479 (5th Cir. 1999). Back To Text

[139] See id.at 481 n.5. Back To Text

[140] See id. at 482−83. Back To Text

[141] See id. at 477, 478−80. Back To Text

[142] See id. at 482−83. Back To Text

[143] Id. at 478. Back To Text

[144] Davis v. Davis (In re Davis), 170 F.3d 475, 478 (5th Cir. 1999). In this connection, it should be noted that concerns about the abuse of homestead exemptions abound in Texas and Florida, where homeowners enjoy virtually unlimited homestead−exemption protection. Back To Text

[145] Id. at 479 n.2 (citing Patriot Portfolio, LLC v. Weinstein (In re Weinstein), 164 F.3d 677, 679−80 (1st Cir. 1999). Back To Text

[146] See id. Back To Text

[147] Id. at 479 (quoting Davis v. Davis (In re Davis)), 170 B.R. 892, 898 (Bankr. N.D. Tex. 1994)). Back To Text

[148] 11 U.S.C. § 522(c)(1) (emphasis added). The logical contrapositive of this language in § 522(c) is that if a debt is a debt specified in § 523(a)(5), then exempted property is liable for such debt. Back To Text

[149] See 11 U.S.C. § 522(f)(1)(A)(i), (ii). Back To Text

[150] See 11 U.S.C. § 522(c)(2)(A)(i) (incorporating by reference the lien−preservation provision of § 522(f)(1)(A)(i), (ii)); Davis v. Davis (In re Davis), 170 F.3d 475, 480−81 (5th Cir. 1999). Back To Text

[151] In re Davis, 170 F.3d at 481. Back To Text

[152] See id. at 482−83. Back To Text

[153] See id. at 482. Back To Text

[154] See id. at 473. Back To Text

[155] See id. at 484 (Dennis, J., with whom Politz and Parker, JJ., joined, dissenting). Back To Text

[156] See Davis v. Davis (In re Davis), 170 F.3d 475, 485 (5th Cir. 1999). Back To Text

[157] See id. at 486. Back To Text

[158] Id. at 488. Back To Text

[159] See id. at 487. Back To Text

[160] Id. at 488. Back To Text

[161] See 11 U.S.C. § 522(c)(2). Back To Text

[162] Note that Congress amended § 522(f)(1) in 1994, and banned the avoidance of judicial liens securing § 523(a)(5) debts, in order to supplement the reach of Farrey. Back To Text

[163] See Davis v. Davis (In re Davis), 170 F.3d 475, 488−89 (5th Cir. 1999). Back To Text

[164] Id. at 489. Back To Text

[165] Id. at 490. Back To Text

[166] Fed. R. Civ. P. 69(a) (emphasis added), quoted in part in In re Davis, 170 F.3d at 483 (Jones, J.). This rule is operative in adversary proceedings in bankruptcy pursuant to Federal Rules of Bankruptcy Procedure 7001 and 7069, and in contested matters in bankruptcy pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7069. A proceeding on an objection to a debtor's claim of exemptions is a contested matter, Fed. R. Bankr. P. 4003(b), as is a judicial−lien−avoidance proceeding, Fed. R. Bankr. P. 4003(d). Back To Text

[167] In re Davis, 170 F.3d at 483. Back To Text

[168] Federal rules of procedure do not give the federal courts "authority . . . to enlarge or diminish the jurisdiction of federal courts." United States v. Sherwood, 312 U.S. 584, 590, 61 S. Ct. 767, 771, 85 L. Ed. 1058 (1941). See 28 U.S.C. § 2072(b) (1988, as amended) (commonly known as the Rules Enabling Act) (prescribing that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"); 28 U.S.C. § 2075 (commonly known as the Bankruptcy Rules Enabling Act) (prescribing that the Federal Rules of Bankruptcy Procedure "shall not abridge, enlarge, or modify any substantive right"); Fed. R. Civ. P. 82 (1937, as amended) ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."); Fed. R. Bankr. P. 9030 ("These rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein."); Port Drum Co. v. Umphrey, 852 F.2d 148, 150 (5th Cir. 1988) (following Sherwood and applying § 2072(b) and Rule 82). Back To Text

[169] Davis v. Davis (In re Davis), 170 F.3d 475, 491 (5th Cir. 1999) (Dennis, J., with whom Politz and Parker, JJ., joined, dissenting) (citing Owen v. Owen, 500 U.S. 305, 313, 111 S. Ct. 1833, 1833 (1991)). Back To Text

[170] See id. at 481 (Jones, J.). Back To Text

[171] 11 U.S.C. § 727(b) (excluding § 523(a) debts from the scope of the debtor's discharge in a chapter 7 case). Back To Text

[172] In re Davis, 170 F.3d at 488 (Dennis, J., with whom Politz and Parker, JJ., joined, dissenting); see supra note 159 and accompanying text. Back To Text

[173] E.g. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186, 22 S. Ct. 857, 859 (1902) (citation omitted) (cited supra note 14). Back To Text

[174] E.g. Butner v. United States, 440 U.S. 48, 54, 99 S. Ct. 914, 917 (1979) (stating that the Bankruptcy Clause "would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankruptcy estate"); 11 U.S.C. § 552(b) (as amended 1994) (enouncing such rules defining the post−petition effect of a security interest in, inter alia, proceeds of property and rents from such property). Back To Text

[175] See Johnson v. Home State Bank, 501 U.S. 78, 83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66 (1991);

Long v. Bullard, 117 U.S. 617, 6 S. Ct.. 917, 29 L. Ed. 1004 (1886). Back To Text

[176] 241 B.R. 568 (Bankr. N.D. Ill. 1999). Back To Text

[177] In re Fishman, 241 B.R. at 570. Back To Text

[178] See id. Back To Text

[179] See id. Back To Text

[180] 735 Ill. Comp. Stat. 5/12−1004 (West 2000), cited in id. at 572. Back To Text

[181] See In re Fishman, 241 B.R. at 572. Back To Text

[182] 846 F.2d 33 (7th Cir. 1988), cited in id. at 572. Back To Text

[183] See In re Fishman, 241 B.R. 568, 573 (Bankr. N.D. Ill. 1999). Back To Text

[184] Id. Back To Text

[185] See Scarlett v. Barnes, 121 B.R. 578, 579−80 (W.D. Mo. 1990); see also supra notes 9 and 113 and accompanying text. Back To Text

[186] Owen v. Owen, 500 U.S. 305, 308, 111 S. Ct. 1833, 1835 (1991), quoted in part in In re Fishman, 241 B.R. at 573 n.1. Back To Text

[187] Owen, 500 U.S. at 313, 111 S. Ct. at 1838. Back To Text

[188] Under McKane v. Durston, 153 U.S. 684, 687−88, 14 S. Ct. 913, 914−15, 38 L. Ed. 867 (1894), a state need not provide a criminal appeal as of right; this is not required by the Due Process Clause of the Fourteenth Amendment. However, if a state does grant appellate review, then, under Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956), the state cannot discriminate against convicted defendants on account of their poverty; the Due Process and Equal Protection Clauses protect criminal appellants from invidious discriminations. Back To Text

[189] In re Fishman, 241 B.R. 568, 574 (Bankr. N.D. Ill. 1999). Back To Text

[190] Id. (emphasis added). Back To Text

[191] See supra note 174. Back To Text

[192] E.g. Pawtucket Inst. for Sav. v. Gagnon, 475 A.2d 1028, 1030 (R.I. 1984) (reciting the rule that "there must be an underlying obligation which the mortgage secures" for the mortgage to be enforceable). Back To Text

[193] But cf., e.g., 11 U.S.C. § 523(a)(2). Back To Text

[194] Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609, 81 S. Ct. 347, 350, 5 L. Ed. 2d 323 (1961), quoted in Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 918 (1979). Back To Text

[195] See Butner, 440 U.S. at 55, 99 S. Ct. at 918. Back To Text

[196] Owen v. Owen, 500 U.S. 305, 313−14, 111 S. Ct. 1833, 1838 (1991). Back To Text