

The Catholic University of America, Columbus School of Law

CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

1991

A Debtor's Right to Avoid Liens Against Exempt Property Under Section 522 of the Bankruptcy Code: Meaningless or Meaningful?

Veryl Victoria Miles

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Bankruptcy Law Commons](#)

Recommended Citation

Veryl Victoria Miles, A Debtor's Right to Avoid Liens Against Exempt Property Under Section 522 of the Bankruptcy Code: Meaningless or Meaningful?, 65 AM. BANKR. L.J. 117 (1991).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

A Debtor's Right to Avoid Liens Against Exempt Property Under Section 522 of the Bankruptcy Code: Meaningless or Meaningful?

by

*Veryl Victoria Miles**

As a law founded in equity, bankruptcy law serves a twofold purpose. It provides the debtor with a fresh start and the creditors with the right to share equitably in the assets of the estate.¹ However, before the creditors are allowed to participate in the distribution of the estate assets, certain properties of the estate are identified as necessary for the debtor's fresh start and classified as exempt property.² Because exempt property is essential to the lifeblood of bankruptcy's fresh start policy, it is not available to settle the claims of general unsecured creditors and will be relinquished to the debtor.³ Exempt property typically includes properties of necessity such as homesteads, household goods, clothing, wage earnings and a debtor's tools of trade.⁴ The exemptions may

*Associate Professor of Law, Columbus School of Law, The Catholic University of America.

¹The equitable nature of bankruptcy law has been consistent throughout the evolution of bankruptcy law. In *Burlingham v. Crouse*, 228 U.S. 459 (1913), the United States Supreme Court described the purpose of the Bankruptcy Act of 1898 as follows: "It is the twofold purpose of the bankruptcy act to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched." *Id.* at 473. This twofold purpose was brought forward in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 [hereinafter referred to as the "Bankruptcy Code"]. In its statement of purpose accompanying the Bankruptcy Code, Congress stated that "[t]he major purpose of the [Reform Act] is the modernization of the bankruptcy laws. . . . the substantive law of bankruptcy and current bankruptcy system were designed in [the Bankruptcy Act of] 1898." S. REP. NO. 95-989, 95th Cong., 2d Sess. 2, *reprinted in*, 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5788.

²The "fresh start" policy embodied in our bankruptcy laws, and the significance of exempt property in its implementation, were described by the Supreme Court in *Chicago, B. & Q. R.R. Co. v. Hall*, 229 U.S. 511 (1913): "[T]he general policy of the [Bankruptcy] act . . . was intended not only to secure equity among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt." *Id.* at 515.

³*Id.*

⁴For a description of exempt property under the Bankruptcy Code, see 11 U.S.C.A. § 522(d) (West 1979 & Supp. 1990). See also 7 W. COLLIER, COLLIER ON BANKRUPTCY (15th ed. 1979) (a complete statutory

be limited to dollar value amounts that are presumed to be sufficient to help facilitate the debtor's fresh start.⁵

Section 522(b) of the Bankruptcy Code⁶ provides these rules governing exempt property under current bankruptcy law:

Such property is—

(1) property that is specified under subsection (d) of this section unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180 day period than in any other place. . . .⁷

Under this provision, the debtor may choose either to exempt from the bankruptcy estate properties which are defined as exempt in section 522(d) of the Code⁸ or to exempt properties defined as exempt by his or her state exemption law, whichever is more beneficial.⁹ In some cases, however, the debtor may be denied the right to choose between federal and state exemptions if the debtor resides in a state which has elected to exercise its right under the section to "opt out" of the federal exemptions by limiting its residents who file for bankruptcy to the state exemptions only.¹⁰

To ensure the debtor's enjoyment of exempt property, the Code also authorizes the debtor to avoid certain liens that secured creditors may have against exempt property, pursuant to section 522(f).¹¹ The liens that are avoidable under

compilation of state exemption laws in the United States). For a description of the historical evolution of exemption laws throughout the United States, their purpose and the types of properties generally provided to debtors as exempt under state exemption laws, see Resnick, *Planning or Fraudulent Transfer?: The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 *RUTGERS L. REV.* 615, 620-27 (1978); and Vukowich, *Purposes and Effects of the Exemption Laws*, 62 *Geo. L.J.* 779, 797-832 (1974).

⁵See 11 U.S.C.A. § 522(d) (West 1979); 7 *W. COLLIER*, *supra* note 4; Resnick, *supra* note 4, at 627-29; and Vukowich, *supra* note 4, at 829-32.

⁶11 U.S.C.A. § 522(b) (West 1979).

⁷*Id.*

⁸11 U.S.C.A. § 522(d) (West 1979).

⁹See D. COWANS, *BANKRUPTCY LAW AND PRACTICE* § 8.3, at 22 (1989); and B. WEINTRAUB & A. RESNICK, *BANKRUPTCY LAW MANUAL* ¶ 4.07, at 4-32 (1986).

¹⁰See sources cited *supra* note 9.

¹¹Section 522(f) provides:

Notwithstanding any waiver of exemptions, the debtor may 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 subsection (b) of this

section 522(f) are limited to "judicial liens" against any exempt personal or real property, and "nonpossessory, nonpurchase money security interests" in certain personal property of the debtor, including the debtor's household goods, tools of trade and professionally prescribed health aid products.¹² This lien avoidance power enhances bankruptcy's fresh start policy by preventing a creditor's lien against exempt property from impairing the debtor's right to retain that property as exempt property.

An interpretive question has surfaced concerning whether section 522(b) permits states that have elected to opt out of the federal exemptions under section 522(d) also to opt out of the lien avoidance powers granted to the debtor under section 522(f). The answer to this question is extremely important because it determines how meaningful the debtor's right to exempt property will be in bankruptcy. If a state is permitted to opt out of the lien avoidance provision as well as the federal exemptions, the debtor's enjoyment of exempt property may be significantly diminished where the qualifying exempt property is heavily encumbered. The courts are divided on whether the states' right to opt out under section 522(b) is limited to the federal exemptions, or whether it extends to the lien avoidance provision.¹³ This division has found its way

section if such lien is—

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any—

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

11 U.S.C.A. § 522(f) (West 1979).

¹²*Id.*

¹³Cases that interpret section 522(b) to permit states to opt out of the lien avoidance provision under section 522(f) include: *Owen v. Owen*, 877 F.2d 44 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2166 (1990); *Allen v. Hale County State Bank* (*In re Allen*), 725 F.2d 290 (5th Cir. 1984); *Spears v. Thorp Credit, Inc.* (*In re Spears*), 744 F.2d 1225 (6th Cir. 1984); *Giles v. Credithrift of America, Inc.* (*In re Pine*), 717 F.2d 281 (6th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *McManus v. Avco Fin. Serv.* (*In re McManus*), 681 F.2d 353 (5th Cir. 1982); *In re Estep*, 96 B.R. 87 (Bankr. E.D. Ky. 1988); *Bessent v. United States* (*In re Bessent*), 74 B.R. 436 (N.D. Tex.), *aff'd*, 817 F.2d 82 (5th Cir. 1987); *Commercial Credit Corp. v. Brooks* (*In re Brooks*), 71 B.R. 6 (W.D. Ky. 1986), *aff'd*, 817 F.2d 104 (6th Cir. 1987); *In re Ellingson*, 82 B.R. 88 (N.D. Iowa 1986); and *In re Panesky*, 5 B.R. 201 (Bankr. N.D. Ohio 1980). Cases interpreting section 522(b) as limiting the states' opt-out rights to the federal exemptions include: *Aetna Fin. Co. v. Leonard* (*In re Leonard*), 866 F.2d 335 (10th Cir. 1989); *Dominion Bank of Cumberland, NA v. Nuckolls*, 780 F.2d 408 (4th Cir. 1985); *Hall v. Finance One* (*In re Hall*), 752 F.2d 582 (11th Cir. 1985); *In re Thompson*, 750 F.2d 628 (8th Cir. 1984); *Maddox v. Southern Discount Co.* (*In re Maddox*), 713 F.2d 1526 (11th Cir. 1983); *In re Cooley*, 72 B.R. 54 (N.D. Ala. 1987); *In re Pelter*, 64 B.R. 492 (Bankr. W.D. Okla. 1986); *In re Thompson*, 59 B.R. 690 (Bankr. W.D. Tex. 1986); *In re Jackson*, 55 B.R. 343 (Bankr. M.D.N.C. 1985); and *In re Lawson*, 42 B.R. 206 (Bankr. E.D. Ky. 1984).

into the decisions of the federal circuit courts of appeals, and the question is pending before the Supreme Court in the case of *Owen v. Owen*.¹⁴

This article reviews the conflict as it has taken form in the courts of appeal of several circuits. The first section of the article briefly discusses the legislative history of section 522, and the purpose of Congress in providing the debtor with both exemptions and lien avoidance powers under the Code. It next reviews the decisions of courts of appeal that have interpreted the extent of the "opt-out" powers granted to the states under section 522(b). The third and final section analyzes the two views on the question, and concludes that the better interpretation is that the states are not permitted to opt out of the lien avoidance provision of section 522(f) and are only permitted to opt out of the federal exemptions under section 522(d).

I. THE LEGISLATIVE HISTORY OF SECTION 522

Allowance for the exemption of property has always been present in our federal bankruptcy laws.¹⁵ Prior to the enactment of the Bankruptcy Code, the determination of what property was exempt in bankruptcy was reserved for the several states.¹⁶ Accordingly, there was no uniformity in determining what properties would be exempt. It has been suggested that the primary reason for Congress' failure to provide for federal exemptions under the former Bankruptcy Act was a sensitivity to states' rights.¹⁷

¹⁴877 F.2d 44 (11th Cir. 1989), cert. granted, 110 S. Ct. 2166 (1990).

¹⁵See Resnick, *supra* note 4, at 620-22; Vukowich, *supra* note 4, at 782-83; and Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1459-63 (1959).

¹⁶The exemptions provided under section 6 of the Bankruptcy Act of 1898 were defined by state exemption laws and federal nonbankruptcy exemption law:

This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: Provided, however, that no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this title for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess.

11 U.S.C.A. § 24 (West 1970).

¹⁷Cowans states:

It was within the province of Congress to enact a federal law of exemptions but in the past the failure to do so seems to have been a matter of policy. Quite possibly states' rights provided the basis for lack of federal legislation. It is believed that Congressional leaders drafting an updated bankruptcy law wanted a uniform national exemption law. They took a considerable step in that direction in the new law but were sufficiently sensitive to the predicted opposition to have offered some outs.

D. COWANS, *supra* note 9, at § 8.2, at 18.

With the comprehensive revision of federal bankruptcy law under the Bankruptcy Code,¹⁸ and its inclusion of federal exemptions under section 522(d), there was some movement toward uniformity. However, the extent of this movement was tenuous, because Congress continued to defer to the states by allowing them to opt out of the federal exemptions and to restrict their residents to the exemptions prescribed under their own exemption laws.¹⁹

The granting of federal exemptions and permission to the states to opt out of them is the result of a compromise between the House and Senate. The House version of the bill provided the debtor with a choice between the federal exemptions that were "specified" in the bill or state defined exemptions.²⁰ This addition of federally defined exemptions was designed to bring some sense of uniformity under the revised bankruptcy exemption law. The Senate version of the bill, however, tracked the pre-Code practice of leaving the sole determination of exempt property to the states.²¹

Unfortunately, section 522, as it was compromised and enacted, has perpetuated disparity among the states concerning what properties will be exempt.²² A large number of states have elected to opt out of the federal exemptions.²³ The reasons given for this popular election include "a belief that a federal law would give the debtors too much" and that "there should be as little federal law as possible" in such matters.²⁴

There have been numerous legal challenges to the state statutes enacted

¹⁸The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 3549.

¹⁹See *supra* note 17.

²⁰Section 522(b) of the House Bill provided that:

[A]n individual debtor may exempt from property of the estate either—
(1) property that is specified under subsection (d) [federal exemptions] of this section; or in the alternative,
(2)(A) any property that is exempt under Federal [non-bankruptcy law exemptions], State, or local law, other than subsection (d) of this section [federal exemptions], that is applicable on the date of the filing of the petition in which the debtor's domicile has been located. . . .

H.R. 8200, 95th Cong., 1st Sess. (1977), reprinted in APP. 3, W. COLLIER, COLLIER ON BANKRUPTCY 394-95 (15th ed. 1983) (emphasis added).

²¹Section 522 of the Senate Bill provided that: "[A]n individual debtor may exempt from property of the estate: (1) any property that is exempt under Federal [non-bankruptcy law exemptions], State, or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located. . . ." S. 2266, 95th Cong., 2d Sess. (1978), reprinted in APP. 3, W. COLLIER, COLLIER ON BANKRUPTCY 409 (15th ed. 1983).

²²For a detailed and critical analysis of the effects of the compromise legislation in granting the states the right to opt out of the federal exemptions, see Haines, *Section 522's Opt-Out Clause: Debtors Bankruptcy Exemption in a Sorry State*, 1983 ARIZ. ST. L.J. 1. See also Rendleman, *Liquidation Bankruptcy Under the 1978 Code*, 21 WM. & MARY L. REV. 575 (1980); and Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C.L. REV. 771 (1980).

²³See 7 W. COLLIER, *supra* note 4, at 1 n.6; D. COWANS, *supra* note 9, at § 8.2, at 19; B. WEINTRAUB & A. RESNICK, *supra* note 9, at ¶ 4.07, at 4-32.

²⁴See D. COWANS, *supra* note 9, at § 8.2, at 18-19.

to opt out of the federal exemptions. The challenges include the assertion that these statutes are unconstitutional because Congress was required to provide uniform bankruptcy laws pursuant Article I, section 8, of the United States Constitution.²⁵ Another argument against the constitutionality of such statutes was that Congress cannot delegate its power to provide for uniform laws by permitting states to opt out of the federal exemptions.²⁶ These challenges have failed on the grounds that the Constitution only requires "geographical uniformity" versus "true uniformity" on the subject of bankruptcy, which is found in the uniform allowance of exemptions to debtors, and that the "states retain power to enact bankruptcy laws so long as they do not conflict with federal bankruptcy legislation."²⁷ Accordingly, the law is quite settled that section 522(b) permits the individual states to opt out of the federal exemptions and to restrict their residents at bankruptcy to the state-defined exemptions.²⁸

Congress also empowered the debtor to avoid certain liens against exempt property that would "impair" his or her right to enjoy the exemption if they were not avoided. This power of avoidance is provided for under subsection (f) of section 522 of the Code. Section 522(f) provides that:

Notwithstanding any waiver of exemptions, the debtor may 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 subsection (b) of this section if such lien is—

- (1) a judicial lien; or
- (2) a nonpossessory, nonpurchase-money security interest in any—

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.²⁹

²⁵See *Rhodes v. Stewart*, 705 F.2d 159 (6th Cir. 1983); *In re Sullivan*, 680 F.2d 11331 (7th Cir. 1982), cert. denied, 459 U.S. 992 (1982); *In re Lausch*, 16 B.R. 162 (M.D. Fla. 1981); and *In re Vasko*, 6 B.R. 317 (Bankr. N.D. Ohio 1980).

²⁶See cases cited *supra* note 25.

²⁷*In re Sullivan*, 680 F.2d at 1134-35, 1137.

²⁸11 U.S.C. § 522(b) (West 1979).

²⁹11 U.S.C. § 522(f). (West 1979).

The House and Senate were in agreement in providing the debtor with the lien avoidance power under subsection (f).³⁰ The House and Senate versions of the lien avoidance provision were virtually identical.³¹ It is the debtor's ability to avoid such liens in bankruptcy that makes exemptions meaningful. If the avoidance of liens on exempt property were not available, the property would be subject to the claims of the lienholders and secured creditors. Ultimately, the lienholders and secured creditors would be able either (1) to exercise their right to foreclose against such property, and thus deprive the debtor of his or her right to enjoy the property as exempt property; or (2) to place the debtor in the unfortunate position of having to reaffirm the debt with the creditor to prevent the foreclosure, and thus force the debtor to forfeit the ben-

³⁰See H.R. REP. NO. 595, 95th Cong., 1st Sess. 362, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6318; and S. REP. NO. 989, 95th Cong., 2d Sess. 76, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5862.

³¹The House Bill version of the lien avoidance provision was as follows:

The debtor may 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, notwithstanding any waiver of exemptions, would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien; or

(2) a nonpurchase-money security interest in any

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

H.R. 8200, 95th Cong., 1st Sess. (1977), *reprinted in* APP. 3, W. COLLIER, COLLIER ON BANKRUPTCY 400 (15th ed. 1983).

The Senate Bill version of the lien avoidance provision similarly provided:

Notwithstanding any waiver of exemptions, the debtor may 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 subsection (b) of this section, if such lien is—

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any—

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

S. 2266, 95th Cong., 2d Sess. (1978), *reprinted in* APP. 3, W. COLLIER, COLLIER ON BANKRUPTCY 410 (15th ed. 1983).

efits of a bankruptcy discharge for the debt in question.³²

The interpretive question that remains unsettled concerning section 522(b) is whether it authorizes the states to opt out of the debtor's right to avoid liens against exempt property in addition to opting out of the federal exemptions. States that have attempted to opt out of the lien avoidance provision of section 522(f) typically have done so by defining "exempt property" as only including property owned by the debtor that is unencumbered.³³ Creditors consequently argue that encumbered property cannot be subject to the lien avoidance provision of section 522(f) because section 522(f) only applies to property that is defined as exempt.³⁴ The effect of this line of reasoning is to make section 522(f) meaningless, since its sole purpose is to allow the debtor to retain certain properties that are essential to the fresh start, *regardless* of the judgment liens or the non-purchase money security interests that may be held against such property by creditors.

II. OPTING OUT UNDER SECTION 522(b): AS INTERPRETED BY THE COURTS OF APPEAL

As noted above, the courts, including federal courts of appeal, are divided on whether the individual states that elect to opt out of the federal exemptions under section 522(b) may also opt out of the lien avoidance powers granted to debtors under section 522(f).³⁵ Some courts have held that the states may not only opt out of the federal exemptions provided under section 522(d), but that they may also opt out of the debtor's right to avoid liens against exempt property under section 522(f).³⁶ Other courts have said that the states are not permitted to opt out of the lien avoidance powers provided under section 522(f), based on the plain language of section 522(b) and the congressional intent behind section 522(f).³⁷

One of the most recent courts of appeal to address this issue is the Court of Appeals for the Eleventh Circuit. In *Owen v. Owen*,³⁸ the court was asked to determine whether section 522(f) of the Code permitted the debtor to avoid a judicial lien against homestead property, where the Florida law creating an

³²Congress was well aware of the debtor's plight. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 127 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6087-88.

³³For examples of such statutes that allow states to opt out of the lien avoidance provision of section (f), see the state statutes considered in the relevant cases cited *supra* note 13. In *Owen v. Owen*, 877 F.2d 44 (11th Cir. 1989), cert. granted, 110 S. Ct. 2166 (1990), state exemption law excluded encumbered homestead property from its homestead exemption if the property had not qualified as homestead property at the time the judicial lien attached to the property.

³⁴See relevant cases cited *supra* note 13.

³⁵See cases cited *supra* note 13.

³⁶See relevant cases cited *supra* note 13.

³⁷*Id.*

³⁸877 F.2d 44 (11th Cir. 1989), cert. granted, 110 S. Ct. 2166 (1990).

exemption in homestead property also permitted the enforcement of a judicial lien against the homestead property in question. Florida is a state that has elected to opt out of the federal exemptions and requires that its residents in bankruptcy use the state defined exemptions only.

The debtor argued that under section 522(f) he was authorized to avoid a judgment lien against exempt property, so that he should be able to claim his homestead property free of the outstanding judgment lien. At the time the judgment lien attached to the property, however, it did not qualify as exempt property under Florida law, and thus, the lien against the property was enforceable at that time.³⁹ Even though state law was amended subsequently, bringing the property into exempt status at the time the debtor's bankruptcy petition was filed, the court ruled that the lien could not be avoided under section 522(f), because the property did not qualify as exempt property under Florida state law at the time of the attachment of the judgment lien.⁴⁰

The court construed section 522(f) to permit only the avoidance of liens against exempt property and not expand the power of avoidance to properties that were not exempt under state law.⁴¹ It concluded that, "[u]nder [Florida] state law, the homestead exemption precludes attachment of a judgment lien except where the lien came into existence prior to the property attaining homestead status."⁴² Because the lien in question had attached to the homestead property before it acquired exempt status under state law, the court ruled that it was not the type of judicial lien intended for avoidance under section 522(f).⁴³ The court referred to the legislative history of section 522 to support this argument, stating:

The legislative history of section 522(f) indicates that Congress sought to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy. That is, when it appears that a debtor is having trouble meeting his obligations, creditors rush to reduce their interests to judgment, attaching all of the debtor's property, including that which would otherwise be exempt. . . . This is not the case here. The debtor never held this property exempt from this judgment lien.⁴⁴

As a result of the court's decision, the debtor was denied the right to avoid the judgment lien against the exempt homestead property, as it existed at the

³⁹*Id.* at 45.

⁴⁰*Id.* at 46-47

⁴¹*Id.*

⁴²*Id.* at 46.

⁴³*Id.* at 47.

⁴⁴*Id.*

time that the debtor filed his petition in bankruptcy. By failing to recognize the status of the property as exempt at the time of the bankruptcy, the state exemption law had effectively opted out of the debtor's lien avoidance power under section 522(f) through its enforcement of the judgment lien based on the status of the property as nonexempt at the time that the lien attached to it.

The critical question in this case and cases of similar import is whether section 522(b) authorizes the states electing to opt out of the federal exemptions also to opt out of the bankrupt debtor's right to avoid liens against exempt property under section 522(f). Contrary to the position taken by the court in *Owen v. Owen* and the other courts that uphold state exemption laws that deny the debtor the lien avoidance power granted under section 522(f), there is no statutory or legislative support for this overly expansive interpretation of the "opt-out" rights granted to the states under section 522(b).

The Fifth and Sixth Circuit Courts of Appeals are the other courts in accord with *Owen v. Owen*, and uphold state statutes that effectively deny the debtor a right to exercise the lien avoidance powers granted under section 522(f). In *In re McManus*,⁴⁵ the Court of Appeals for the Fifth Circuit held that, because Louisiana's exemption statute excluded "household goods and furnishings subject to a chattle mortgage" from exempt status, such property was not subject to the lien avoidance provision of section 522(f).⁴⁶ The court stated that section 522(f) "provides only a limited mechanism for avoiding liens, since the only liens that may be avoided are those impairing an exemption the debtor would have been entitled to under section 522(b)."⁴⁷ Thus, the court interpreted section 522(f) as dependent upon whether the debtor is entitled to exempt the property under section 522(b).⁴⁸ The court further held that, because section 522(b) permits the states exclusively to define what property may be exempt in bankruptcy, and that the encumbered household goods and furnishings held by the debtors were not exempt under the Louisiana statute, the security interest against the property was not avoidable under section 522(f).⁴⁹

The debtors in this case argued that the rehabilitative policy of section 522(f), which allows a debtor to avoid liens against exempt properties, should override any individual state policy to preserve liens against such property, and that "a state cannot control, either directly or indirectly, the content of the policy of section 522(f)."⁵⁰ The court rejected this distinction between section 522(b) and 522(f), stating that:

⁴⁵681 F.2d 353 (5th Cir. 1982).

⁴⁶*Id.* at 357.

⁴⁷*Id.* at 355.

⁴⁸*Id.*

⁴⁹*Id.* at 357.

⁵⁰*Id.* at 357 n.7.

Section 522(f) is not a separate exemption statute. . . . Section 522(f) is not available if an individual state says a debtor is not entitled to a particular exemption. . . . If Congress had intended subsection (f) to be an overriding policy decision, it would not have made subsection (f) clearly dependent on the policy determinations by states under section 522(b).⁵¹

Judge Dyer in his dissent⁵² believed that section 522(f)'s avoidance power was available to the debtor in spite of the Louisiana statute excluding the encumbered household goods and furnishings from its definition of exempt property. He based this view on the language of section 522(f), which specifically provides that the lien avoidance powers are available to a debtor "notwithstanding any waiver of exemptions" by the debtor.⁵³ Judge Dyer concluded that the creation of a security interest against the encumbered property by the debtor for the benefit of the creditor was nothing less than a waiver of the exemption by the debtor, and thus, subject to avoidance under section 522(f).⁵⁴ Contrary to the majority opinion, he also concluded that the Code does not grant states the right to preempt section 522(f), saying:

Congress intended that even if a state opts out of the federal exemptions, the debtor's lien avoidance power under subsection 522(f) is not thereby affected. And under the supremacy clause, United States Constitution, art. VI, cl. 2, any conflict between the state lien conservation provision and the federal lien avoidance provision must be constitutionally resolved in favor of federal law. A state's policy determinations respecting the manner in which its exemptions may be waived should be given application in its own courts but when the forum is a federal bankruptcy court such state policy determinations are subject to congressional override.⁵⁵

In further support of his position, Judge Dyer cited the legislative history of section 522(f), which reflects Congressional opinion that because exemptions are essential to the debtor's rehabilitation the ability to avoid liens against such property is also essential "regardless of whether or not state law would permit their waiver or surrender."⁵⁶

⁵¹*Id.*

⁵²*Id.* at 357-59 (Dyer, J., dissenting).

⁵³*Id.* at 358 (quoting 11 U.S.C. § 522(f)).

⁵⁴*Id.*

⁵⁵*Id.* (citations omitted).

⁵⁶*Id.* The Fifth Circuit has been consistent in its interpretation of the relationship between subsections 522(b) and (f). In *Allen v. Hale County State Bank* (*In re Allen*), 725 F.2d 290 (5th Cir. 1984), the court held that Texas exemption law, which excluded all personal property subject to liens, was not preempted by the lien avoidance provision under section (f). See also *Bessent v. United States* (*In re Bessent*), 831 F.2d 82 (5th Cir. 1987).

The Sixth Circuit is the only other circuit to take the position that section 522(b) permits a state to opt out of the lien avoidance provision of section 522(f) as well as the federal exemptions under section 522(d). In consolidated appeals in *In re Pine*,⁵⁷ the court held that the federal lien avoidance rule under section 522(f) was not operative to avoid liens against the debtors' household goods under Georgia and Tennessee exemption laws, because encumbered property was specifically excluded from the exemption statutes. Tennessee law specifically limited exempt property to the debtor's "equity interest" in household goods.⁵⁸ Georgia law provided that only the "debtor's interest" in household goods was exempt property.⁵⁹ The court interpreted the term "debtor's interest" to include the debtor's equity in property only.⁶⁰ The court rejected the debtors' arguments that a state was limited to defining exempt property under section 522(b) and was not empowered to determine what types of property interests were exempt.

In its analysis of the states' power to opt out of the federal exemptions under section 522(b), the court noted that section 522(b) authorizes the states to determine what property would be exempt in bankruptcy.⁶¹ It stated that the term property as defined under the Code "is used to denote legal interests since the Act throughout characterizes property in terms of various security and other interests"; thus, it permits states to include only unencumbered property in the definition of exempt property.⁶² The court refused to read section 522(f) independently of section 522(b). It therefore concluded that if encumbered property is not included in the definition of exempt property under state law, the liens against such property cannot be avoided under section 522(f).⁶³

Although the court admitted that bankruptcy law's fresh start policy arguments regarding exempt property did not support this view, it relied upon what it regarded as the clear language of section 522(b), stating that "the clear language of the statute takes precedence over the more rehabilitative policies underlying the Act."⁶⁴ The court concluded that the states' authority to enact exclusive exemption plans included the option to exclude encumbered property under section 522(b).⁶⁵ Thus, it could not see how Congress could have intended section 522(f) to "limit the states in their choice of the types of property

⁵⁷717 F.2d 281 (6th Cir. 1983), cert. denied, 466 U.S. 928 (1984).

⁵⁸*Id.* at 283.

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.* at 282.

⁶²*Id.* at 283.

⁶³*Id.* at 284.

⁶⁴*Id.*

⁶⁵*Id.*

interests debtors could exempt" in bankruptcy.⁶⁶

In support of their expansive reading of section 522(b), the courts in both *In re Pine* and *In re McManus* therefore embraced the proposition that the lien avoidance power granted under subsection (f) is dependent upon whether the property on which the lien is to be avoided is exempt under subsection (b).⁶⁷ They believed that the "clear" language of subsection (b) permits a state which has opted out of the federal exemptions to exclude all of a debtor's encumbered property from its definition of exempt property, thus precluding avoidance of any liens under section 522(f).⁶⁸

Contrary to the position of these courts, the opt-out language of section 522(b) is more clearly limited to the states' rights to opt out of the federal exemptions provided under subsection (d); it does not include the lien avoidance powers under subsection (f) due to the lack of any reference to subsection (f) in section 522(b). This consideration and the rehabilitative policy behind section 522 support the opinions rendered by the Court of Appeals for the Fourth, Eighth, Tenth and Eleventh Circuits discussed below, which hold that section 522(b) does not permit states to opt out of the lien avoidance provision of section 522(f).

In *Dominion Bank v. Nuckolls*,⁶⁹ a case decided by the Court of Appeals for the Fourth Circuit, the debtor sought to exempt restaurant equipment under Virginia homestead exemption law and to avoid a lien against the property. One of the issues addressed by the court was whether the lien avoidance provision of section 522(f) applied in a case where the debtor had waived his right to the exemption prior to bankruptcy and the state exemption law provided for the enforcement of such waivers against debtors.

The court held that the waiver of the exemption was avoidable under section 522(f) of the Code regardless of the state exemption provision to enforce the waiver against the debtor.⁷⁰ It described the language of section 522(f) as "straight forward" in providing for the avoidance of liens notwithstanding any waiver.⁷¹ The court cited the legislative history of the provision to support this conclusion, saying:

The Senate Report, in describing the provision which became subsection (f), noted that it[:]

⁶⁶*Id.* The Sixth Circuit has followed its position on the states' right to opt out of the lien avoidance provision of section (f) in *Commercial Credit Corp. v. Brooks* (*In re Brooks*), 71 B.R. 6 (W.D. Ky. 1986), *aff'd*, 817 F.2d 104 (6th Cir. 1987); and *Spears v. Thorp. Credit, Inc.* (*In re Spears*), 744 F.2d 1225 (6th Cir. 1984).

⁶⁷*See* *Giles v. Credithrift of America, Inc.* (*In re Pine*), 717 F.2d 281, 284 (6th Cir. 1983); and *McManus v. Avco Fin. Serv.* (*In re McManus*), 681 F.2d 353, 355 (5th Cir. 1982).

⁶⁸*Id.*

⁶⁹780 F.2d 408 (4th Cir. 1985).

⁷⁰*Id.* at 412.

⁷¹*Id.*

protects the debtor's exemption, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien, and may similarly avoid a nonpurchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions.⁷²

The concurring opinion of Judge Hoffman provides a focused commentary on the law of exemptions under bankruptcy law, describing it as "imperfect."⁷³ He discussed the impact that section 522, as compromise legislation,⁷⁴ has had on the law of exemptions. Judge Hoffman pointed out that it is the compromise which creates the conflict, that while the right to opt out under section 522(b) reflects a Congressional desire to defer to the state exemption laws, the avoidance powers under 522(f) interfere with state exemption laws that enforce exemption waivers and exclude encumbered properties from the exemption.⁷⁵ Although Judge Hoffman did not disagree with Congressional power to override waivers and liens under the bankruptcy law, he noted that the authorization given to the states to opt out of the federal exemptions and to define exemptions themselves, coupled with the ability given to bankruptcy debtors to avoid exemption waivers and liens that may be enforceable under the state law, is "self-contradictory."⁷⁶

While the Eighth Circuit in *In re Thompson*⁷⁷ did not consider a state exemption law that was designed to opt out of the lien avoidance provision of section 522(f), the opinion does provide a view of the opt-out-rights of states under section 522(b). Presented was the question of whether a debtor could avoid liens against property claimed as exempt under Iowa law. Conceding that when the debtor makes this election state law controls what properties would be exempt in bankruptcy, the court held that "federal law determines the availability of lien avoidance."⁷⁸ It pointed out that Congress granted debtors lien avoidance powers to provide debtors with a way to "extricate themselves from 'adhesion contracts' impairing a 'fresh start' of the debtor"⁷⁹; and that the enact-

⁷²*Id.* at 413 (quoting S. REP. NO. 989, 95th Cong., 2d Sess. 76, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5862).

⁷³*Id.* at 414-18 (Hoffman, J., concurring).

⁷⁴See *supra* notes 16-24 and accompanying text.

⁷⁵780 F.2d at 418 (citing Haines, *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemption in a Sorry State*, 1983 ARIZ. ST. L.J. 1, 30.)

⁷⁶*Id.*

⁷⁷750 F.2d 628 (8th Cir. 1984).

⁷⁸*Id.* at 630.

⁷⁹*Id.*

ment of this provision reflected Congress' concern "with creditors who, in loaning money, took security interests in all of a debtor's personal belongings, and then threatened repossession as a means of coercing repayment from frightened debtors."⁸⁰ Noting that the lien avoidance powers under the provision were limited, the court quoted these statements of Justice Blackmun in *United States v. Security Industrial Park*:⁸¹

Section 522(f)(2) permits the debtor to "avoid the fixing" of a nonpossessory, nonpurchase-money security interest in certain property, but the subsection does not extend to all property otherwise exempt. . . . It is limited to certain personal items, such as household furnishings, wearing apparel, jewelry, tools of the debtor's trade, and professionally prescribed health aids.⁸²

Although the property that the debtor sought to exempt in this case was exempt under Iowa law, the liens were not in "the sort of low value personal goods" that are eligible for avoidance under section 522(f) of the Code.⁸³

In *In re Leonard*,⁸⁴ the Tenth Circuit also interpreted the relationship between a debtor's avoidance powers under section 522(f) and the opt-out rights given the states by section 522(b). Under the applicable Colorado exemption statute, the debtor was permitted to exempt household goods to the extent of \$1,500 in value. The debtor claimed the exemption and sought to avoid the nonpurchase money security interest encumbering the goods. The creditor relied upon the definition of "value" contained in the statute, which defined value as "the difference between the fair market value and the amount of the debt."⁸⁵ The creditor argued that such a definition has the effect of limiting the exempt property to unencumbered property held by the debtor, thus effectively excluding all of the debtor's encumbered property from exempt property status and preventing the liens against this property from being avoided under section 522(f).⁸⁶

The court declined to read the opt-out provision in section 522(b)(2) as giving states the authority to determine whether liens against such property would be subject to avoidance in bankruptcy.⁸⁷ In reaching its conclusion, the court focused on the "clear and plain language" of section 522(f) in these words:

⁸⁰*Id.*

⁸¹859 U.S. 70 (1982) (Blackmun, J., concurring).

⁸²*In re Thompson*, 750 F.2d at 631 (citing J. Blackmun's concurring opinion in *United States v. Security Indus. Park*, 459 U.S. 70, 83 (1982)).

⁸³*Id.*

⁸⁴866 F.2d 335 (10th Cir. 1989).

⁸⁵*Id.* at 336.

⁸⁶*Id.*

⁸⁷*Id.*

Section 522(b) permits a state to specify what property may be exempted in lieu of the property exempted by Congress under section 522(d). . . . However, a debtor may avoid a lien encumbering exempted property to the extent that the "lien impairs an exemption to which the debtor *would* have been entitled under subsection (b)" of this section. 11 U.S.C. section 522(f) (emphasis added). Subsection (b) refers to the property exempted by Congress or the states from the bankruptcy estate. The quoted language is the key to unlock the answer to the issue presented. . . . A debtor is entitled to avoid a lien to the extent the debtor would have been entitled to an exemption under either the federal or state exemption statutes. The debtor's right to claim avoidance of a lien on property under section 522(f) is determined by considering whether the property, if unencumbered, is exempted under the state statutory exemptions. If unencumbered property may be exempted under the state exemption, then any nonpossessory, nonpurchase money lien on that property could be avoided under section 522(f). Congress did not say a debtor is entitled to avoid a lien to the extent the debtor is entitled to an exemption. . . . The word "would" obviously has been used by Congress in an auxiliary function to express a possibility, i.e. if the debtor would have been entitled to an exemption, he is entitled to avoid the lien.⁸⁸

The court held that the Colorado exemption was one that the debtor "would" have enjoyed had there not been a lien against it; the lien was therefore one that could be avoided pursuant to section 522(f).⁸⁹ It also noted that "[i]f section 522(f) were to be read as allowing the debtor to avoid a lien only on the debtor's equity in the exempt property, to which the lien would not ultimately attach under any circumstances, it would totally disregard the lien avoidance language set forth in section 522(f)."⁹⁰ Moreover, such a construction of section 522(f) would mean that "as long as a security interest existed against such property, the debtor would never be able to avoid the lien," which the court stated "would make the language [of section 522(f)] meaningless and would lead to an absurd result."⁹¹ The court also looked to the legislative history of section 522, and cited the House and Senate reports on the necessity of the lien avoidance provision of section 522(f) to protect the debtor's enjoyment of exemptions in bankruptcy.⁹²

⁸⁸*Id.* at 336-37.

⁸⁹*Id.* at 336.

⁹⁰*Id.* at 337.

⁹¹*Id.*

⁹²*Id.*

The two remaining courts of appeal decisions interpreting the extent of the states' opt-out powers under section 522(b) are from the Eleventh Circuit. In *In re Hall*⁹³ and *In re Maddox*,⁹⁴ the Eleventh Circuit held that the states' opt-out powers under section 522(b) apply only to the federal exemptions under subsection (d) of section 522.

In *In re Hall*, the debtors wanted to avoid nonpossessory, nonpurchase money security interests against household property under section 522(f). Relying upon a Georgia exemption statute providing for an exemption only for unencumbered household goods, the creditors argued that the debtors were precluded from using the lien avoidance provision under section 522(f) of the Code.⁹⁵ The court viewed this as in conflict with section 522(f).⁹⁶ It stated:

[Section 522(f)] operates to permit a debtor to avoid the fixing of a lien on property if that avoidance would allow the debtor to enjoy an exemption. Thus, the very purpose of the statute is to permit debtors to claim, as exempt, property completely or partially secured by an otherwise valid lien. To permit states to inhibit the operation of the lien-avoidance provision simply by defining all lien-encumbered property as "not exempt" would render the statute useless, a result inconsistent with the well-established principle of statutory construction requiring that all parts of an act be given effect, if at all possible.⁹⁷

Conceding that states are not "prohibited from defining lien-encumbered property as not exempt," the court concluded that such a restriction would still be subject to the provision of section 522(f) permitting the avoidance of such liens in bankruptcy.⁹⁸ It found support in its reading of the statute in the legislative history of sections 522(b) and (f). It noted that both the Senate and House versions of these provisions had "considered the debtor's lien-avoidance power in conjunction with exemptions defined by state law," which it stated was evidence that the "debtor's lien-avoidance powers would not be eviscerated by state-defined exemptions."⁹⁹ It was also influenced by the Congressional intention that section 522(f) respond to "unconscionable creditor practices" of taking nonpossessory, nonpurchase money liens against a debtor's household property as leverage to coerce debtors to make loan payments in fear of losing

⁹³752 F.2d 582 (11th Cir. 1985).

⁹⁴713 F.2d 1526 (11th Cir. 1983).

⁹⁵752 F.2d at 584.

⁹⁶*Id.* at 586.

⁹⁷*Id.* (citations omitted).

⁹⁸*Id.*

⁹⁹*Id.* at 587.

such property.¹⁰⁰ By permitting the debtors to avoid such liens in bankruptcy under section 522(f), debtors would be protected from coercion and would be left with enough property to have a fresh start after bankruptcy.¹⁰¹ Accordingly, the court held that the Georgia exemption statute did not preclude debtors from seeking relief under section 522(f).

Again, in *In re Maddox*,¹⁰² the court was required to determine whether a nonpossessory, nonpurchase money security interest in household goods was avoidable under Georgia's exemption laws. It adopted the opinion of the district court, which focused on the language of the Georgia statute describing the exempt property as the "debtor's interest" in household goods.¹⁰³ The creditor in this case argued that the term "debtor's interest" was limited to a debtor's equity interest in the property; thus, encumbered household goods were excluded from the definition of exempt property, and therefore, were not avoidable under section 522(f).¹⁰⁴

The district court disagreed with the creditor's interpretation of the term "debtor's interest" and held that such an interpretation would make section 522 (f) "meaningless."¹⁰⁵ The court noted that the term "debtor's interest" was also used in the federal exemption provisions under section 522(d), and stated that Congress did not intend that the term be limited to a debtor's equity interest.¹⁰⁶ It also relied upon statements in legislative history:

[T]he bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property and nonpurchase money security interest in certain exempt property such as household goods.¹⁰⁷

The court also noted that the word "interest" as defined under the Code is broadly used to include all property interests that a debtor may have in property and is not limited to equity interests.¹⁰⁸ Moreover, the court added that if the Georgia statute had specifically excluded encumbered household goods from its exemption law, it would probably rule that such an attempt to circumvent section (f) would fail under the supremacy clause of article IV, clause 2 of the Constitution, and the conflict between the state exemption law and the federal lien avoidance law would be resolved in favor of the federal lien avoidance

¹⁰⁰*Id.* at 588.

¹⁰¹*Id.*

¹⁰²713 F.2d 1526 (11th Cir. 1983).

¹⁰³*Id.* at 1528.

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 1528-29.

¹⁰⁷*Id.* (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 127 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6087-88).

¹⁰⁸*Id.* at 1530.

rule of section (f).¹⁰⁹

III. OPTING OUT UNDER SECTION 522(b): COMMENTARY AND ANALYSIS

In the Court of Appeals decisions of *Dominion Bank*, *In re Thompson*, *In re Leonard*, *In re Hall* and *In re Maddox*, there is a uniform reliance on the legislative history to support the interpretation of section 522(b) as limiting the authority of the states to opt out of only the federal exemptions under subsection (d).¹¹⁰ As discussed above, exemptions have always been very important in implementing the fresh start policy of bankruptcy law and in initiating the debtor's financial rehabilitation. The House Report states:

The historical purpose of . . . exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. The purpose has not changed . . .

Though exemption laws have been considered within the province of State law under the current Bankruptcy Act, [the Reform Act] adopts the position that there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start.¹¹¹

Congress was particularly concerned that exemptions be provided to the bankrupt debtor. It fortified this concern by granting debtors the authority to avoid judicial liens on exempt personal and real property, and to avoid nonpossessory, nonpurchase money security interests in specific types of exempt personal property under subsection (f).¹¹²

As the legislative history of section 522 reveals, one of the reasons that Congress included the lien avoidance provision was to ensure the debtor's enjoyment of exempt property to assist in the debtor's fresh start. This would allow the debtor to avoid certain liens against the property that would otherwise impair his or her right to retain exempt property free of secured creditor claims. Another reason for including the lien avoidance provision was to put an end to the undesirable creditor practice of using security interests against exempt property as a means of forcing the bankrupt debtor to reaffirm a debt

¹⁰⁹*Id.*

¹¹⁰*See* *Aetna Fin. Co. v. Leonard* (*In re Leonard*), 866 F.2d 335, 336-37 (10th Cir. 1989); *Dominion Bank of Cumberland, N.A. v. Nuckolls*, 780 F.2d 408, 412-13 (4th Cir. 1985); *Hall v. Finance One* (*In re Hall*), 752 F.2d 582, 587-88 (11th Cir. 1985); *In re Thompson*, 750 F.2d 628, 630-31 (8th Cir. 1984) and *Maddox v. Southern Discount Co.* (*In re Maddox*), 713 F.2d 1526, 1529 (11th Cir. 1983).

¹¹¹H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 126 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6087-88.

¹¹²*See supra* notes 30-32 and accompanying text.

with a creditor, and thus result in the debtor's forfeiture of the full benefits of bankruptcy discharge. The House Report states:

[T]he bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions. The second right will be of more significance for the average consumer debtor. Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings, and obtains a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all of the debtor's household goods as a means of obtaining payment. . . . The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods. Such security interests have too often been used by over-reaching creditors. The bill eliminates any unfair advantage creditors have.¹¹³

The strength of the legislative history behind section 522 is a most compelling argument to support the interpretation that section 522(b) does not authorize the states to opt out of the lien avoidance provision of subsection (f).

In upholding a state exemption law that enforced judgment liens against exempt property based on the prior status of the property as nonexempt,¹¹⁴ the court in *Owen v. Owen* also made a reference to the legislative history of section 522(b). It noted that avoidance of judicial liens under section 522(f) was designed to preserve a debtor's right to exempt property in cases where creditors race to the courts to obtain judgment liens against exempt property

¹¹³H.R. REP. NO. 595, 95th Cong., 1st Sess. 126 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6087-88.

¹¹⁴See *supra* note 44 and accompanying text.

immediately before the debtor's bankruptcy petition is filed. The court then suggested that the judgment lien in question was not the type of lien subject to avoidance under subsection (f), because the creditor did not obtain it immediately before the debtor's bankruptcy.

While it is true that one of the reasons that Congress included the lien avoidance provision was to put an end to this creditor practice, it is not the only reason for the provision. In its selective and limited look at the legislative history of section 522, the court in *Owen v. Owen* ignored the fundamental and most significant purpose of the bankruptcy exemption, to ensure the debtor's fresh start after bankruptcy by providing him or her with the necessities of life identified as exempt property. Congress gave greater meaning to the overall concept of the bankruptcy exemption by enacting section 522(f) to provide the bankrupt debtor with the authority to avoid judgment liens against all property qualifying as exempt at the time of bankruptcy, without any distinction concerning the status of the property as exempt at the time that the lien may have attached to the property.

The courts in *In re Pine* and in *In re McManus* elected to dismiss the legislative history in holding that section 522(b) permits states to opt out of both the lien avoidance provision of subsection (f) as well as the federal exemptions under subsection (d).¹¹⁵ They read the language of section 522(b) to support the states' right to opt out of the lien avoidance provision under subsection (f). When considering the language of section 522(b), there is greater support for the argument made by the courts in *In re Leonard* and *Dominion Bank* that the language of section 522(b) is properly interpreted to limit the opt-out rights of the states to the list of federal exemptions under subsection (d), and to exclude any right to opt out of the lien avoidance provisions of subsection (f).¹¹⁶

The only reference to a state's right to opt out of any provision in section 522 is found in subsection (b). Subsection (b) makes no reference to a state's right to opt out of the lien avoidance provision of subsection (f); what it does refer to is the right of the states to opt out of the list of federal exemptions under subsection (d), stating:

[A]n individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative paragraph (2) of this subsection

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize;

. . .¹¹⁷

¹¹⁵E.g., *Giles v. Creditthrift of America, Inc. (In re Pine)*, 717 F.2d 281, 284 (6th Cir. 1983); and *McManus v. Avco Fin. Serv. (In re McManus)*, 681 F.2d 353, 357 n.7 (5th Cir. 1982).

¹¹⁶E.g., *Aetna Fin. Co. v. Leonard (In re Leonard)*, 866 F.2d 335, 336 (10th Cir. 1989); and *Dominion Bank of Cumberland, N.A. v. Nuckolls*, 780 F.2d 408, 412 (4th Cir. 1985).

¹¹⁷11 U.S.C.A. § 522(b) (West 1976) (emphasis added).

Section 522(b) is very clear in limiting the state's right to opt out of the list of federal exemptions under subsection (d). Because it only refers to subsection (d) of 522, it should not be read to expand the "opt-out" powers to include the lien avoidance provision of subsection (f).

However, because there is a division among the courts on whether the states may opt out of subsection (f) as well as subsection (d), it is more appropriate to recognize that there is an ambiguity in the language of section 522(b) regarding the extent of the opt-out rights of states under the provision. If this is conceded, then the rules of statutory construction require that the legislative history of section 522 and exemption law in bankruptcy be considered to clarify any ambiguity. Sutherland states:

A well-drafted statute should reduce the frequency of disputes about interpretation. Because all future circumstances cannot be anticipated by even the most far-sighted legislator, the necessity for judicial interpretation can never be completely eliminated. Before the true meaning of a statute can be determined where there is a genuine uncertainty concerning its application, consideration must be given to the problem in society to which the legislature addressed itself. Prior legislative consideration of the problem, the legislative history of the statute under litigation, and the operation and administration of the statute prior to litigation are of equal importance.¹¹⁸

Based on the legislative history of the provision, section 522(b) must be read to permit states only to opt out of the list of federal exemptions provided under subsection (d), and not the lien avoidance provision of subsection (f). The legislative history of section 522 would clearly preclude states from defining exempt property in a manner that would circumvent the lien avoidance power granted to debtors under subsection (f).¹¹⁹

Furthermore, if states are permitted to opt out of the lien avoidance powers granted under subsection (f), subsection (f) becomes a "meaningless" provision.¹²⁰ The court in *In re Hall* noted that such an interpretation of section 522(f) is "inconsistent with the well-established principle of statutory construction requiring that all parts of an act be given effect, if at all possible."¹²¹ One

¹¹⁸ 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.02 (4th ed. 1984 & Supp. 1989).

¹¹⁹ E.g., *Aetna Fin. Co. v. Leonard* (*In re Leonard*), 366 F.2d 335, 337 (10th Cir. 1989); *Dominion Bank of Cumberland, N.A. v. Nuckolls*, 780 F.2d 408, 412-13 (4th Cir. 1985); *In re Thompson*, 750 F.2d 628, 630-31 (8th Cir. 1984); *Giles v. Credithrift of America, Inc.* (*In re Pine*), 717 F.2d at 284; *Maddox v. Southern Discount Co.* (*In re Maddox*), 713 F.2d 1526, 1529 (11th Cir. 1983); and *McManus v. Avco Fin. Serv.* (*In re McManus*), 681 F.2d 353, 358-59 (5th Cir. 1982) (Dyer, J., dissenting).

¹²⁰ See *Aetna Fin. Co. v. Leonard* (*In re Leonard*), 366 F.2d 335, 337; and *Maddox v. Southern Discount Co.* (*In re Maddox*), 713 F.2d 1526, 1528-29.

¹²¹ 752 F.2d at 586.

authority on statutory construction has described the task of the courts in dealing with potentially conflicting provisions as follows:

[T]he court should seek to avoid any conflict in the provisions of the statute by endeavoring to harmonize and reconcile every part so that each shall be effective. It is not easy to draft a statute, or any other writing for that matter, which may not in some manner contain conflicting provisions. But what appears to the reader to be a conflict may not have seemed so to the drafter. Undoubtedly, each provision was inserted for a definite reason. Often by considering the enactment in its entirety, what appears to be on its face a conflict may be cleared up and the provisions reconciled. . . .

Consequently, that construction which will leave every word operative will be favored over one which leaves some word or provision meaningless because of inconsistency.¹²²

As stated in the legislative history of section 522, the primary purpose of subsection (f) is to enable the debtor to avoid liens against property that would be exempt but for the liens against it.¹²³ Accordingly, it does not seem logical that Congress would have intended to permit states to circumvent the lien avoidance provision of subsection (f) by defining exempt property in a manner that would render the provision meaningless.

Because of this conflict between section 522(f) and the state exemption laws, a constitutional issue arises under the supremacy clause of the Constitution. In *Butner v. The United States*,¹²⁴ the Supreme Court gives a description of the delicate balance between federal bankruptcy law and state laws that is relevant to the federal bankruptcy process:

The Federal Constitution, Article I, section 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.¹²⁵

¹²²E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 165 (1940).

¹²³*Supra* notes 110-13 and accompanying text.

¹²⁴440 U.S. 48 (1979).

¹²⁵*Id.* at 54 n.9 (quoting *Stellwagen v. Clum*, 245 U.S. 605 (1918)).

The state exemption laws considered in the cases that permit states to opt out of the lien avoidance provisions of section 522(f) effectively circumvent the lien avoidance provision of section 522(f). Consequently, the state laws would have to fail under the supremacy clause of the Constitution, to the extent that they are in conflict with the objective of federal bankruptcy law to facilitate the debtor's full benefit of exemptions through the avoidance of judicial liens and nonpurchase money security interests against qualifying exempt property.¹²⁶

IV. CONCLUSION

Exempt property has always been a mainstay of federal bankruptcy law. The bankruptcy exemption laws were given additional force under the Bankruptcy Reform Act of 1978. Under the Reform Act, Congress granted the debtor the power to avoid liens against certain exempt property to ensure his or her enjoyment of exemptions in bankruptcy, and to put an end to overreaching by secured creditors who had made a practice of obtaining interests in exempt property as a means of forcing debtors to reaffirm their debts to avoid foreclosure against the property.

The interpretive question, which threatens the significance of the lien avoidance powers enjoyed by debtors under section 522 of the Code, is whether states that elect to opt out of the federal exemptions provided for under subsection (d) of section 522 may also opt out of the debtor's right to avoid liens under subsection (f). This debate has found its way into the federal circuit courts of appeal and has resulted in a division not only among the circuits but also within the Eleventh Circuit. Hopefully, the Supreme Court will resolve this debate when it renders its decision in *Owen v. Owen*.

After reviewing the statute, legislative history and case law on this question, it is the conclusion of this article that section 522(b) does not permit states to opt out of the lien avoidance provision of subsection (f). This interpretation of section 522(b) is in accord with the language of section 522(b), because the statute specifically gives to the states the right to opt out of the list of federal exemptions under subsection (d) of section 522, but it makes no reference to opting out of the lien avoidance powers of subsection (f).

An even more compelling argument is found in the legislative history of section 522, which indicates that the lien avoidance provision of section 522(f) was a crucial addition to the provision of exemptions to bankrupt debtors under the Code. Congress was concerned that exemptions in the past had been somewhat elusive for debtors under state law, and that creditors had quite often taken overreaching interests in such property as a means of exercising leverage over the debtor. Accordingly, the lien avoidance provision became impor-

¹²⁶E.g., *Hall v. Finance One (In re Hall)*, 752 F.2d 582, 586 (11th Cir. 1985); and *Maddox v. Southern Discount Co. (In re Maddox)*, 713 F.2d 1526, 1530 (11th Cir. 1983).

tant in preserving the debtor's enjoyment of exemptions at bankruptcy and in perpetuating the fresh start policy of bankruptcy law. Thus, state statutes that define exempt property in a manner that effectively opts out of the lien avoidance provision of section 522(f) must fail because they are in direct conflict with federal bankruptcy law and policy, and are superseded by the lien avoidance provision of section 522(f).
