

CASE NO. : 98-1365

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: HARRY W. WEINSTEIN

Debtor.

PATRIOT PORTFOLIO, LLC

Appellant.

v.

HARRY W. WEINSTEIN

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the District of Massachusetts
No. CIV. A. 97-11470-EFH

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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**STATEMENT OF INTEREST OF NACBA
AS AMICUS CURIAE**

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a nonprofit organization of more than 1,200 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 150,000 bankruptcy cases filed each year. First Circuit NACBA members file many thousands of bankruptcy cases per year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which can not adequately be addressed by individual member attorneys. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low and moderate-income wage-earners. Such wage-earners generally need to retain important assets such as homes, automobiles, and household goods in order to obtain a fresh start. Uniform federal bankruptcy standards controlling the application of exemptions, whether state or federal, and the related lien avoidance procedures, are necessary to ensure that the Bankruptcy Code's goals are met. Accordingly, affirmance of the decisions

below is critical to individual debtors in Massachusetts, and in other states in this Circuit having similar exemption schemes, who wish to retain their homes and household goods so as to get a true fresh start.

Additionally, NACBA membership is concerned that a reversal of the decisions below will encourage states to adopt further exceptions to exemption rights based on the type of debt, which if permitted to apply to otherwise exempt property, will act as exceptions to discharge. *Amicus* urges this Court to affirm the principle set forth in the decisions below that only Congress should have the authority under a uniform federal bankruptcy scheme to determine which debts are excepted from discharge.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The statement of subject matter and appellate jurisdiction contained in the appellant's brief is complete and correct.

STATEMENT OF ISSUES PRESENTED

Amicus accepts the statement of the issues presented as contained in the brief of the appellee, Harry W. Weinstein.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the statement of the case and facts as contained in the brief of the appellee, Harry W. Weinstein.

SUMMARY OF ARGUMENT

Based on the plain language of the Code, the Supreme Court in Owen v. Owen held that § 522(f) permits a debtor to avoid a judicial lien in any property that the debtor could have otherwise exempted but for the lien. Even a preexisting judicial lien which would not be subject to a state exemption in a non-bankruptcy setting may be avoided to the extent that the state exemption, which the debtor is entitled to claim as of the date of the bankruptcy petition, is impaired by the lien. Applying Owen to the facts of this case, the courts below, as well as three Massachusetts bankruptcy judges in similar cases, have properly concluded that a prehomestead lien may be avoided.

Moreover, when § 522(f) is read in conjunction with other subsections of the statute, it is abundantly clear that the decisions below were correctly decided. In enacting § 522(c), Congress expressly spoke as to the types of claims that can be enforced against exempt property. This was a proper exercise of Congress' preemptive constitutional authority to establish uniform bankruptcy laws. Thus, the claim of Patriot based on a mortgage deficiency is not one of the types of claims enumerated in § 522(c) as enforceable on exempt property or in § 523 as excepted from discharge, and is therefore subject to lien avoidance.

Attempting to avoid the plainly obvious meaning of the statutory language and the Supreme Court's interpretation of it,

Patriot attempts to fashion an argument based on an abstract notion of state property law; that the Massachusetts exemption statute creates two distinct property interests, one in the real estate itself and another in the homestead "Estate." From this, Patriot argues that its lien existed prior to the creation of the "Estate," and therefore could not have "fixed" upon the "Estate" and may not be avoided. Patriot's argument is based on a distinction which is irrelevant under the lien avoidance analysis compelled by federal bankruptcy law and should be rejected by this Court based on the Supreme Court ruling in Farrey v. Sanderfoot.

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE PERMITS A DEBTOR TO VOID LIENS ON EXEMPT PROPERTY TO THE EXTENT THAT THE EXEMPTION IS IMPAIRED.

A. This Court's Inquiry Need Go No Further Than An Examination Of The Plain Language Of The Code.

As in all cases of statutory construction, the starting point in this case must be the statutory language. Toibb v. Radloff, 501 U.S. 157, 111 S.Ct. 2197, 115 L.Ed. 2d 145 (1991); Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S.Ct. 2126, 2130, 109 L.Ed. 2d 588 (1990); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at

odds with the intention of the drafters." Ron Pair, 109 S.Ct. at 1031 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

Applying these principles of statutory construction, the Supreme Court in Owen v. Owen, 500 U.S. 305, 114 L.Ed 2d 350, 111 S.Ct. 1833 (1991) sought to determine whether "built-in limitations" on state exemptions may stand in light of the statutory language contained in § 522(f). In Owen, the debtor attempted to invoke in his bankruptcy case a homestead exemption for condominium property which had not been enacted by the Florida legislature until one year after he purchased the property in question. The Supreme Court rejected the creditor's argument that the only relevant question is "whether the judicial lien impairs the exemption" the debtor was entitled to at the time it became available to him. The answer to this question, the Court readily conceded, would have been that the lien did not impair the exemption since the Florida exemption did not apply to pre-existing judicial liens. Owen, 500 U.S. at 309.

The more pertinent question, according to the Owen court, is not "whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he *would have been* entitled but for the lien itself." Owen, 500 U.S. at 310-11 (*emphasis in original*). This construction, added the Court, was more in keeping with the statutory language:
The latter phrase denotes a state of affairs that is conceived or hypothetical, rather than actual, and requires the reader to

disregard some element of reality. 'Would have been' *but for what?* The answer given, with respect to the federal exemptions, has been *but for the lien at issue*, and that seems correct to us.

Owen, 500 U.S. at 311 (*emphasis in original*).

Finding the statutory language to be unambiguous, the Court in Owen did not feel obliged to review the legislative history of § 522(f). Other courts, however, have noted that Owen's expansive interpretation of § 522(f) is consistent with the legislative history.¹ In re Kelly, 133 B.R. 811, 813 (Bankr.W.D.Tex. 1991), *citing In re Leonard*, 866 F.2d 335, 337 (10th Cir. 1989) (Both House and Senate Judiciary Committee Reports state that "subsection (f) protects the debtor's exemptions and his fresh start by permitting him to avoid liens on exempt property to the extent that property could have been exempted *in the absence of the lien*," *citing* H.Rep. No. 595, 95th Cong. 1st Sess. 362, at pp. 5787, 6318 (1978); S.Rep. No. 989, 95th Cong., 2d Sess. 76, at pp. 5787, 5862 (1978) *emphasis*

¹ If there was any question that the holding in Owen was not in keeping with the intent of Congress, it is likely that Congress would have legislatively overruled Owen in its amendments to § 522(f) contained in the Bankruptcy Reform Act of 1994. In fact, the actual amendments to § 522(f) are wholly consistent with Owen and the legislative history accompanying the 1994 amendments suggests that Congress intended to overrule several cases which failed to follow the holding in Owen, such as the Sixth Circuit cases, In re Moreland, 21 F.3d 102 (6th Cir. 1994) and In re Dixon, 885 F.2d 327 (6th Cir. 1989). See In re Jakubowski, 198 B.R. 262 (Bankr.N.D.Ohio 1996), *citing* H.R.Rep. 103-834, 103rd Cong., 2nd Sess 41-42; 140 Cong.Rec. H10770 (Oct. 4, 1884).

in original)); see also In re Hastings, 185 B.R. 811, 814, f.n. 4 (9th Cir. BAP 1995).

Since the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." Ron Pair, 109 S.Ct. at 1030 (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917)). The courts below were correct in their application of the plain meaning of § 522(f).

B. The Outcome Of This Case Is Controlled By Owen.

Since Owen, the vast majority of courts have held that federal law preempts state exemption laws which deny debtors homestead protection from pre-existing liens, or which impose other "built-in limitations" on their application in bankruptcy.²

See, e.g. Matter of Maddox, 15 F.3d 1347 (5th Cir. 1994); In re Hastings, 185 B.R. 811 (9th Cir. BAP 1995); In re Scott, 199 B.R. 586 (Bankr.E.D.Va. 1996); In re Johnson, 184 B.R. 141 (Bankr.D.Wyo. 1995); In re Kelly, 133 B.R. 811 (Bankr.W.D.Tex. 1991); In re Conyers, 129 B.R. 470 (Bankr.E.D.Ky. 1991); but see In re Moreland, 21 F.3d 102 (6th Cir. 1994).

² Even prior to the Supreme Court's decision in Owen, the majority of courts had concluded that federal law controls the availability of lien avoidance under § 522(f). See In re Brown, 734 F.2d 119 (2nd Cir. 1984); In re Thompson, 750 F.2d 628 (8th Cir. 1984); Dominion Bank of Cumberland, NA v. Nuckolls, 4th Cir. 1985 (lien against homestead property may be avoided even though underlying debt included a homestead exemption waiver valid under Virginia law); In re Leonard, 866 F.2d 335 (10th Cir. 1989). The Fifth Circuit has acknowledged that its pre-Owen minority view, as expressed in Matter of McManus, 681 F.2d 353 (5th Cir. 1982) and subsequent decisions, has been overruled to the extent that "those cases held lien-avoidance under § 522(f) to be limited by state exemptions." Matter of Maddox, 15 F.3d 1347, 1351 (5th Cir. 1994).

As to the specific limitation applicable in this case the exception to the Massachusetts homestead exemption for pre homestead debt, four of the Massachusetts bankruptcy court judges have ruled that the exception is preempted by provisions of the Bankruptcy Code. See In re Mills, 211 B.R. 1 (Bankr.D.Mass. 1997); In re Whalen-Griffin, 206 B.R. 277 (Bankr.D.Mass. 1997); In re Boucher, 203 B.R. 10 (Bankr.D.Mass. 1996). Only one judge, Judge Boroff, has ruled to the contrary. In re Fracasso, 210 B.R. 221 (Bankr.D.Mass. 1997).

Applying Owen to the facts of this case, the result is simple and compels affirmance of the decisions below. It is clear that the debtor would be entitled to an exemption under Massachusetts law "but for the lien itself." The debtor owned the property prior to the recording of Patriots' lien, and the lien fixed on "an interest of the debtor in property." If Patriot's lien had not been fixed on the property on the date that the homestead declaration was recorded, the debtor would have been able to claim the full amount of the homestead exemption. Patriot's lien therefore impairs the debtor's exemption and may be avoided.

C. As The Debtor Clearly Held The Property Interest To Which Patriot's Lien Fixed, Before It Fixed, The Lien May Be Avoided.

Patriot dedicates a substantial portion of its brief to a review of state law and from this sets forth this basic premise:

that the Massachusetts exemption statute creates "two distinct property interests", one in the real estate itself and another in the homestead "Estate." (Patriot's Brief at 11). From this, Patriot argues that since its lien existed prior to the creation of the "Estate," it could not have "fixed" upon the "Estate" and therefore may not be avoided. (Patriot's Brief at 16). *Amicus* contends that the abstract state property distinctions Patriot relies upon are irrelevant under the federal lien avoidance scheme and that Patriot grossly misapplies the Supreme Court's decision in Farrey v. Sanderfoot, 500 U.S. 291, 114 L.Ed. 2d 337, 111 S.Ct. 1825 (1991).

In Farrey, the Supreme Court construed the language in § 522(f) which provides that the "debtor may avoid the fixing of a lien on an interest ... in property." The Court's particular focus was on the word "fixing," suggesting that Congress intended this to refer to a "temporal event:"

That event--the fastening of liability--presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as an 'interest of the debtor in property.' Therefore, unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of 522(f)(1).

Farrey, 500 U.S. at 296.

Based on this analysis, the Supreme Court in Farrey examined

the effect of a state court divorce decree which had extinguished all previous interests the parties had in their marital property and which granted the debtor Sanderfoot sole title to certain real estate subject to a lien in favor of Farrey for the amount she was due under the court imposed property division. The Court concluded that the debtor "took the interest in the property and the lien together, as if he had purchased an already encumbered estate from a third party." Farrey, 500 U.S. at 300. Since the debtor never acquired his "new fee simple" interest in the property before the lien became "fixed," the Court found that the lien could not be avoided under § 522(f)(1).

Despite Patriot's suggestions to the contrary, the facts of this case differ considerably from that of Farrey. In this case, the debtor's fee simple ownership interest in his home was acquired approximately 16 years before Patriot recorded its judicial lien on the property. There can be no question that at the time the lien fixed on the debtor's interest in his residence, his property interest had been well established.

Patriot attempts to distance itself from the facts of this case by claiming that the true focus under § 522(f) is the fixing of the lien on the debtor's interest in the exemption (the

³ In support of its position, Patriot cites to the decision of the Eleventh Circuit in Owen on remand from the Supreme Court. Owen v. Owen, 961 F.2d 170, 172 (11th Cir. 1992), *cert. denied*, 506 U.S. 1022, 113 S.Ct. 659 (1992). Following Farrey, the Eleventh Circuit simply concluded the debtor had no property interest before the fixing of the lien since the debtor's interest in his homestead and the judgment lien "fixed simultaneously." Once again, this is not the factual setting for this case.

"Estate") rather than the underlying property. According to Patriot, since its lien existed before the debtor asserted his exemption in the property, it could not have "fixed" on the debtor's exemptible interest in the "Estate."

Patriot's reading of § 522(f), however, belies the plain language of the statute which refers simply to "the fixing of a lien on *an interest* of the debtor in property." If Congress wished to restrict the availability of § 522(f) in the manner Patriot describes, Congress surely would have drafted more limiting language, such as "the fixing of a lien on the debtor's *exempt interest* in property." Patriot has thus read into the statute a restriction which Congress elected not to include.

This argument by Patriot was squarely rejected by the Fifth Circuit when presented by a lien creditor in Maddox, 15 F.3d at 1347. Applying the Supreme Court's decisions in Owen and Farrey, the Fifth Circuit concluded:

Nonetheless, Tower Loan makes the impermissible leap of logic when it concludes that the debtor's failure to select the property before the lien attaches means that the lien does not attach to 'an interest of the debtor.' Tower Loan is reading this to mean 'an *exemptible* interest of the debtor,' but the statute merely states 'an interest of the debtor *in property*.' Nothing in the statute specifies the need for attachment to an exemptible interest of the debtor in property; at a minimum, the Debtor's ownership interest in the property at issue here suffices.

Maddox, 15 F.3d at 1351-52 (*emphasis in original*).

In In re Johnson, 184 B.R. 141 (Bankr.D.Wyo. 1995), judgement lien creditors also made this same argument claiming that their liens fixed on the debtor's property before he had a right to claim the state homestead exemption. Rejecting this argument, the bankruptcy court found that the relevant property interest is the debtor's "ownership interest rather than the right to a homestead exemption." Johnson, 184 B.R. at 142. Following Owen, the court further concluded that it is immaterial whether the exemption existed at the time the lien became fixed, as exemptions are determined on the bankruptcy filing date.⁴

Even if Patriot's abstract notion that the state exemption statute creates a separate property interest which only comes into existence upon recordation of the declaration Owen clearly instructs that the impairment question for purposes of § 522(f) turns not on an exemption which the debtor "is entitled," but rather on an exemption which the debtor "would have been entitled" but for the judicial lien. Owen, 500 U.S. 312; see

⁴ This point was made clear by the Supreme Court in Owen in responding to an argument made by the dissent:

In the dissent's view, the question is whether the lien impairs an `exemption to which the debtor would have been entitled at the time the lien `fixed.' Under the Code, however, the question is whether the lien impairs an `exemption to which the debtor would have been entitled under subsection (b),' and under subsection (b), exempt property is determined `on the date of the filing of the petition,' not when the lien fixed. We follow the language of the Code.

Owen, 500 U.S. 314, f.n. 6 (*citations omitted*).

also In re Conyers, 129 B.R. 470, 472 (Bankr.E.D.Ky. 1991).

D. The Courts Below Were Correct In Invalidating The Exception To The Homestead Exemption Based On § 522(c).

The decisions below rely heavily upon the reasoning adopted by the bankruptcy courts in Boucher and Whalen-Griffin concerning the application of § 522(c). In both of these cases, the courts concluded that the state exception to the homestead exemption has been preempted by § 522(c).

In Boucher, Judge Queenan found that the language in § 522(c) undeniably establishes that Congress intended to exercise its preemptive power in this area, under its constitutional authority to establish uniform bankruptcy laws. While Congress provided states with some latitude in the use of state exemptions, this grant to the states, according to Judge Queenan, was by no means absolute and "cannot be taken to extend to exemptions that protect debts left unprotected by section 522(c)." Boucher, 203 B.R. at 13. The Boucher court reasoned further that just as waivers of state exemptions must be struck down under § 522(e), so too must the Massachusetts exception for pre-homestead debts under § 522(c).

In Whalen-Griffin, Judge Feeney observed that if the court were to disallow the debtor's homestead exemption in the amount of the pre-homestead debt, it would "in effect, be making exempt property liable for debts that are not listed in § 522(c)(1)

(3)." Whalen-Griffin, 206 B.R. at 292. Moreover, the court in Whalen-Griffin found no sound reason for distinguishing between state or federal exemptions when applying § 522(c), noting a similar conclusion reached by the Supreme Court in Owen on the general application of § 522(f). See also Scott, 199 B.R. at 594, f.n. 14 ("nothing in [§ 522(c)] remotely suggests that Congress intended that it would apply differently to state than to Federal exemptions"). Thus, Judge Feeney concluded that exempt property, whether exempted under federal or state law, "can only be liable for the types of debts set forth in § 522(c)." Id. at 292. The state exception for prehomestead debts thus creates an impermissible conflict with § 522(c).

In Owen, the Supreme Court did not engage in a specific analysis of the preemption issue under § 522(c) as did the courts in Boucher and Whalen-Griffin. Nonetheless, in discussing the Code's exemption opt-out policy, the Supreme Court made clear that while states may elect to determine the type of property which may be exempted under state law, it is federal law which controls the availability of lien avoidance. In re Kelly, 133 B.R. 811, 813 (Bankr.W.D.Tex. 1991) (finding this proposition to be "central to Owen's analysis"); see also In re Thompson, 750 F.2d 628, 630 (8th Cir. 1984). In this regard, the Court made the following observation:

Respondent asserts that it is inconsistent with the Bankruptcy Code's 'optout' policy, whereby the States may define their own

exemptions, to refuse to take those exemptions with all their built-in limitations. That is plainly not true, however, since there is no doubt that a state exemption which purports to be available 'unless waived' will be given full effect, *even if it has been waived*, for purposes of § 522(f).... Just as it is not inconsistent with the policy disfavoring waiver of exemptions, whether federal or state-created; so also it is not inconsistent to have a policy disfavoring the impingement of certain types of liens upon exemptions, whether federal- or state-created. We have no basis for pronouncing the optout policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains.

Owen, 500 U.S. at 313 (*emphasis in original*).

Finally, in Fracasso, Judge Boroff rejected the preemption argument finding that the Boucher and Whalen-Griffin courts ignored the legislative history of § 522(c). *Amicus* urges this Court to follow Chief Judge Kenner's analysis in Mills, 211 B.R. at 2, questioning Judge Boroff's reliance on selected portions of the legislative history of § 522(c) which "focus on state rights." In her view, these expressions do not "lead to the inevitable conclusion that states should have free reign over every aspect of exemptions in bankruptcy, regardless of conflicts with state law," noting that other portions of the legislative history support a different view. Mills, 211 B.R. at 2 ("...as one House bill explained, 'there is a federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start,' " *quoting*

H.R.Rep.No. 95-595 at 122 (1977)).

II. THE BANKRUPTCY CODES PURPOSES AND POLICIES ARE EFFECTUATED BY APPLYING THE PLAIN MEANING OF § 522(f) AND § 522(c).

A. The Decisions Below Are Consistent With The Code's Goal Of Affording Debtors A Fresh Start.

The lien avoidance procedures found in § 522(f), which were enacted as part of the Bankruptcy Reform Act of 1978, marked a significant departure from prior bankruptcy law. Historically, liens which were validly obtained prior to bankruptcy generally passed through the bankruptcy unaffected and were enforceable against exempt property, even exempt homestead property. See Long v. Bullard, 117 U.S. 617, 620-21, 29 L.Ed. 1004, 55 S.Ct. 917 (1886). With the substantial revisions to bankruptcy law adopted by Congress in 1978, debtors were afforded the right to avoid certain liens on exempt property, including nonconsensual, judicial liens and nonpurchase money security interests in household goods.

The legislative history reveals that Congress was concerned that judicial liens were a "device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts." Farrey v. Sanderfoot, 500 U.S. at 297. This concern that such liens could defeat a debtor's fresh start is apparent from the following House Report noted in Farrey:

The first right [§ 522(f)(1)] 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.

Farrey, 500 U.S. 297-98, citing HR Rep No. 95-595, pp 126-127 (1977).⁵

The lower court's decisions in this case are consistent with the legislative history of § 522(f) in that they do not condition the availability of a debtor's federal lien avoidance rights on the timing of certain events such as the entry of state court judgments, or the recordation of creditors' liens and debtors' homestead declarations. Patriot's position, on the other hand, will encourage the kind of race to the courthouse (or land records office) which Congress intended to discourage. Low and moderate-income debtors having financial difficulties often lack the means to adequately respond to creditor collection actions and are generally least able to beat their creditors in such a race. Such debtors' ability to gain a fresh start should not turn on the speed (or lack thereof) with which they assert their state exemption rights prebankruptcy, or the adequacy of the legal advice they receive concerning their exemption rights.

⁵ The Eighth Circuit in In re Thompson also noted that the lien avoidance provisions under § 522(f) have a different purpose than the exemption provisions, as they are directed at creditor abuse of the reaffirmation process. In re Thompson, 750 F.2d 628, 631 (8th Cir. 1984) ("Although Congress was interested in seeing that debtors achieve a fresh start, the primary goal of the lien avoidance statute was to prevent creditors from forcing debtors in bankruptcy to reaffirm consumer debts.").

B. Concerns About The Impact Of the Decisions Below Are Groundless.

In Fracasso, Judge Boroff expressed several concerns about the impact of the Boucher and Whalen-Griffin decisions. These claims are either unsubstantiated or fail to give proper consideration to the role of the federal government in establishing uniform bankruptcy laws.

As a general concern, Judge Boroff stated in Fracasso that the Boucher and Whalen-Griffin decisions would effectively create two different sets of homestead rights for Massachusetts debtors, those established before a bankruptcy is filed and another thereafter. Fracasso, 210 B.R. at 227. According to the Fracasso court, this amounts to an improper infringement upon state created property rights.

Judge Boroff seems to ignore, however, that bankruptcy laws frequently alter creditors' prebankruptcy contractual rights. A prime example of this relates to the ability of a debtor to deaccelerate and cure a prepetition mortgage default or otherwise modify the rights of secured creditors in a Chapter 13 plan pursuant 11 U.S.C. § 1322(b). This reordering of debtor/creditor relations is a fundamental underpinning of bankruptcy policy.

Moreover, the better view on this issue is set forth by Judge Queenan in Boucher where he observes that state homestead

exemptions serve a very different role in the bankruptcy context than outside of bankruptcy. Boucher, 203 B.R. at 10. In the normal debtor/creditor relationship outside of bankruptcy, the Massachusetts homestead exemption focuses on protections from individual creditor actions. In bankruptcy, the function of the exemption is to remove certain property "from property of the estate." See 11 U.S.C. § 522(b). According to Judge Queenan, this distinction must not be overlooked:

This is because bankruptcy is a collective proceeding designed for the benefit of all creditors. The Bankruptcy Code focuses on individual creditor rights only in its scheme of priority and nondischargeability.

Boucher, 203 B.R. at 10.

A similar view was presented in In re Scott where the bankruptcy court found that in permitting states to decide the "kind and amount" of exemptions by opting out of § 522(d), Congress did not intend that the remaining sections of § 522 would be rendered unenforceable⁶. Scott, 199 B.R. at 593. This construction of the statutory scheme, the Scott court concluded, furthers the policy goals of the Bankruptcy Code in "ensuring uniformity under a federal distribution scheme, providing a debtor with a fresh start, and treating classes of creditors

⁶ The Fourth Circuit has noted that a policy consideration behind the opt-out provisions was Congress' recognition that states may elect to set exemption amounts that are "at a level commensurate with the standard of living in various parts of the country." In re Cheeseman, 656 F.2d 60, 64 (4th Cir. 1981).

equally." Id. at 593.

Judge Boroff in Fracasso also raised the concern that the Boucher and Whalen-Griffin decisions might have a negative impact on the availability of credit to residents of Massachusetts. Specifically, Judge Boroff predicted that creditors would react to a broad reading of § 522(c) by limiting access to unsecured credit and replacing it with "consumer secured credit." Fracasso, 210 B.R. at 228.

In today's consumer credit markets, with an overabundance of credit card debt and fierce competition among banks to gain new customers, it is hard to imagine that affirmance of the decisions below will have any impact on Massachusetts debtors access to unsecured credit. In those states with even more expansive homestead and other personal property exemptions than Massachusetts, such as Florida and Texas (including its ban on wage garnishments), *amicus* is not aware of any evidence that residents of those states have been deprived of unsecured consumer credit. Quite simply, Judge Boroff cites no authorities to substantiate this speculation and the realities of current credit markets suggest that this is not a matter which should concern this Court.⁷

⁷ It is worth noting that in this case, Patriot's judgment lien did not originate as an unsecured loan but rather stemmed from a deficiency on a secured mortgage loan that Patriot's predecessor made on real estate other than the debtor's homestead. While the factors which were considered by Patriot's predecessor in extending credit to the debtor are not known, it would seem that the bank felt that its loan was secure by the collateral as it did not obtain a mortgage on the debtor's homestead.

III. PATRIOT'S ARGUMENTS FOR EVISCERATING THE CODE'S LIEN

AVOIDANCE PROCEDURES AND IGNORING THE PREEMPTIVE MANDATE OF § 522(c) ARE WRONG AND LEAD TO ABSURD RESULTS.

As mentioned earlier, Patriot attempts to carve out of the federal exemption scheme an indefensible distinction between the state "Exemption" estate and the federal bankruptcy estate. Patriot's position, when applied in the context of a bankruptcy proceeding, produces absurd results which neither further the state's implicit goal of protecting prehomestead creditors nor the Code's purpose of providing debtors with a fresh start.

This is best illustrated by the not uncommon factual situation presented in In re Boucher. The debtor had listed in his Chapter 7 bankruptcy schedules approximately \$60,000 in unsecured debt owed to thirty separate creditors. After the bankruptcy was filed, the debtor's counsel wrote to each creditor attempting to ascertain which debts were contracted prior to the filing of the debtor's homestead exemption. Only seven of the creditors responded, and their claims totaled less than \$8,000.

Under Patriot's analysis, the debtor in Boucher would have been precluded from asserting his homestead exemption against the pre-homestead creditors and therefore the Trustee would have been required to liquidate the property to realize a mere \$8,000 in non-exempt property of the estate. Since Patriot has not questioned the holding in In re Rye, 179 B.R. 375, 378-79

(Bankr.D.Mass. 1995)⁸, this would mean that the Trustee in Boucher would have been required to distribute the \$8,000 on a pro-rata basis to the thirty creditors, not simply the seven pre homestead creditors. Following this to its logical conclusion, since the claims of the seven prehomestead creditors represented only 13.3% of the total debt, they would have shared amongst themselves only \$1,064. Assuming their claims were roughly equivalent in size, they would have received an average distribution of approximately \$152 each.

This highlights how Patriot's highly theoretical argument must not be viewed apart from the practical realities of bankruptcy case administration. It must be assumed that the pertinent exception in the Massachusetts homestead exemption statute was intended to fully immunize creditor claims contracted before a homestead declaration. Given the Code's distribution scheme as set forth in Rye, which clearly preempts state law to the contrary, the Massachusetts goal of protecting prehomestead creditors is not furthered even if Patriot's position is adopted (unless of course the prehomestead debt is reduced to a judgment lien).⁹ In fact, since distributions are made on a pro-rata basis, a post-homestead creditor could likely receive an even

⁸ It is unlikely that Patriot would challenge the reasoning in Rye since it provided the foundation for Judge Boroff's decision in In re Fracasso.

⁹ While Patriot's argument focuses on the rights of lienholders under the Massachusetts exemption statute, this Court should not ignore the effect of a decision overruling the courts below on the vast majority of consumer cases in which unsecured debts far exceed debts secured by judgment liens.

greater dividend than a prehomestead creditor, a result clearly at odds with the purpose of the Massachusetts exemption statute.

In addition, the adoption of Patriot's position in this case will inevitably place undue administrative burdens on bankruptcy courts, with the parties in interest engaging in contested disputes as to whether debt is in fact prehomestead. In many consumer bankruptcy cases, the majority of debts involve revolving charge accounts. Although a credit card account may have been opened prior to the homestead declaration, all pre homestead account balances may have been paid by the debtor at the time of declaration. In other cases, only a portion of the account balance at the time of bankruptcy filing may have been incurred prior to the homestead declaration. Other factual disputes may involve account balances which have been transferred by the creditor to new accounts after the homestead declaration.

In an attempt to resolve these factual issues, ~~the~~ court in Whalen-Griffin was compelled to establish six different categories of creditor claims. A reversal of the decisions below will require bankruptcy courts to make such factual determinations on a regular basis, even in situations where reliable credit account information may not be available. Such hearings (or the threat of contested proceedings) will either drive up the costs of bankruptcy filings or result in debtors who cannot afford to challenge creditor claims entering into reaffirmation agreements for improper reasons.

Additionally, by declaring that exempt property should not be "liable ... for any debt" that arose before the bankruptcy filing, Congress sought to ensure that states may determine the "kind and amount" of exempt property, ~~but~~ should not be able to dictate which debts the exemptions should be ineffective against. Scott, 199 B.R. at 592 ("intentional tort" exclusion in Virginia homestead exemption statute conflicts with Bankruptcy Code). If § 522(c) is not given the preemptive effect as intended, states could effectively override other dischargeability provisions of the Code, such as § 523 dealing with exceptions to discharge, thereby undermining the uniformity of bankruptcy administration.

In this regard, Patriot fails to discuss the application of other exceptions to the Massachusetts homestead exemption also based on certain categories of debts, even those which might arise after a debtor's homestead declaration. For example, under Mass.Gen.L. c. 188, §5, an "execution issued from a court of competent jurisdiction to enforce its judgment based on fraud, mistake, duress, undue influence or lack of capacity" is excepted from the homestead exemption. Thus, if Patriot's lien in this case had been based on a judgment grounded in any of these legal theories, under Patriot's argument that the state can define the types of debts that the exemption applies to, the lien would not be subject to lien avoidance under § 522(f).

This would mean that a lien based on a judgment involving mistake or undue influence could be satisfied through levy on the

debtor's homestead despite the debtor's discharge in bankruptcy.

For such judgment liens, the state law exception from exemption would be tantamount to an exception to discharge. Even cursory review of § 523 reveals that the types of debts excepted from the application of the Massachusetts homestead exemption are far more expansive than those excepted from discharge under § 523, or which would survive discharge under § 522(c). See Whalen-Griffin, 206 B.R. at 290 ("the exceptions to the state homestead exemption are considerably broader, involving debts that may not be excepted from discharge under 11 U.S.C. § 523(a) and for which exempt property under federal law would not be liable...").¹⁰

While § 522 admittedly deals with debtors' exemptions in property of the estate and not dischargeability, it is apparent that § 522(c) prohibits states from defining exempt property in a manner that conflicts with the provisions of § 523. Section 522(c) specifies certain limited types of debts that "exempted property" will still be liable for even after discharge, referencing selected provisions in § 523(a). Other than the lien avoidance provisions recited in § 522(c)(2), the remaining subsections 522(c)(1) and (c)(3) list certain tax debts, debts

¹⁰ A well-established doctrine in bankruptcy law provides that exceptions to discharge should be narrowly construed. Kawaauhau v. Geiger, 118 S.Ct. 974 (1998); Gleason v. Thaw, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be construed to those plainly expressed...."); see also In re Klein, 65 F.3d 749 (8th Cir. 1995); In re Walker, 48 F.3d 1161 (11th Cir. 1995); In re Ward, 857 F.2d 1082 (6th Cir. 1988); In re Black, 787 F.2d 503 (10th Cir. 1986). There is no sound reason why this guiding principal should not be followed in this case.

relating to alimony and support, and certain debts for fraud and willful and malicious injury (involving a federal depository institution) as the *only* debts that may be enforced against otherwise exempt property. Congress has clearly spoken on this issue and there is "no room for the states to supplement it." Greenwood Trust Co. v. Com. of Mass, 971 F.2d 818, 823 (1st Cir. 1992), *quoting* Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); *see also* In re Scott, 199 B.R. 586, 593 (Bankr.E.D.Va. 1996) ("Where Congress acting in an area where it has paramount jurisdiction has spoken clearly and without qualification as to the type of debts that can be enforced 'during or after' bankruptcy against exempt property, a compelling argument can be made that it has preempted the field."). Just like debts resulting from mistake or undue influence must give way to the mandate in § 522(c) and thereby be made subject to the state homestead exemption, so must debts contracted for before the homestead declaration.

If the authority given to states under § 522(b) to opt out of the federal exemption scheme or to allow debtors to choose state exemptions were to be extended to allowing ~~st~~ states to control which claims may or may not be enforced against exempt property, irrespective of § 523(c) and the discharge provisions of § 523, this could lead to unwarranted consequences. As the court in In re Conyers, 129 B.R. 470, 472 (Bankr.E.D.Ky. 1991) noted, what would prevent a state from prohibiting collection

upon exempt property after bankruptcy for non-dischargeable debts such as taxes or for alimony and support even though § 522(c) would permit collection of such debts?

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm the decisions below.

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