SAVING HOMES AND STRIPPING LIENS:

RECENT EXEMPTION DEVELOPMENTS

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Surcharge

The Supreme Court has granted *certiorari*, at 133 S. Ct. 2824, 81 USLW 3685, 81 USLW 3689 (June 17, 2013), from the Ninth Circuit's decision affirming the Chapter 7 trustee's surcharge of the debtor's homestead. The circuit had approved the remedy "because the surcharge was calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct, and was warranted to protect the integrity of the bankruptcy process." *Law v. Siegel (In re Law),* 435 Fed. Appx. 697 (9th Cir. 2011). The Ninth Circuit's brief *Law* decision had cited its prior opinion in *Latman v. Burdette,* 366 F.3d 774 (9th Cir. 2004). *See* Brown and Ahern, Supreme Court Grants Certiorari on Exemption Surcharge, Norton Bankruptcy Law Adviser (June 2013). *See also Malley v. Agin,* 693 F.3d 28 (1st Cir. 2012). The First Circuit approved use of § 105(a) by the bankruptcy court in surcharging exempt assets, when the debtor had concealed non-exempt assets from the trustee. Allowing the surcharge for the trustee's expenses was necessary when the debtor acted fraudulently in concealing assets, "both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than . . .the Bankruptcy Code permits." In so holding, the First Circuit agreed with the Ninth, *Latman v. Burdette,* 366 F.3d 774 (9th Cir. 2004), that an equitable remedy was appropriate, but the Tenth Circuit held in *In re Scrivner,* 535 F.3d 1258 (10th Cir. 2008), *cert. denied,* 556 U.S. 1126 (2009), that a surcharge was inconsistent with the Code's exemption provisions and beyond the bankruptcy court's equitable authority.

DOMA

Effect of DOMA unconstitutionality on § 522(f) avoidance. Section 522(f)(1)(A) is itself limited by restriction to a "spouse, former spouse," etc., in the definition of domestic support obligations in section 101(14A). At least one court has found that a debtor's former domestic partner was not a former spouse; thus, the judicial lien at issue was avoidable. *In re Goodale*, 298 B.R. 886 (Bankr. W.D. Wash. 2003). However, on June 26, 2013, the United States Supreme Court handed down its decision in *U.S. v. Windsor*, __ U.S. __, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013), dealing with same-sex marriage and the definition of "marriage" and "spouse" provided by the Defense of Marriage Act (DOMA), 110 Stat. 2419, the probable effect of which will be to to extend the benefits of federal laws (including bankruptcy) to same-sex spouses married in states recognizing such marriages.

Inherited IRA

Inherited IRA could be exempt under Bankruptcy Code, but Supreme Court has granted certiorari. The Supreme Court has agreed to address the issue of inherited IRAs. In order for an IRA to be exempt, it must have received favorable determination

under, or be in substantial compliance with, Internal Revenue Code. Discussing the split of authority on exemption of an inherited IRA, the court in *Diamond v. Trawick (In re Trawick),* 497 B.R. 572 (Bankr. C.D. Cal. 2013), found the Seventh Circuit's "restrictive approach," in *In re Clark,* 714 F.3d 559 (7th Cir. 2013) cert. granted (Nov. 27, 2013), not to be based on plain statutory language in § 522(b)(3)(C), and agreed with the majority view that the plain language contained no restriction of the exemption to the original owner. Assuming the funds were proven to be tax exempt, the IRA could be exempt under § 522(b)(3)(C), but an inherited IRA was not exempt under § 522(d)(12), since it was not a "similar plan or contract on account of illness, disability, death, age, or length of service" under California Code of Civil Procedure § 703.140(b)(10)(E).

In *Clark*, a case addressing whether an inherited individual retirement account (IRA) is exempt under section 522(b)(3)(C) and (d)(12), a Chapter 7 trustee and a creditor objected to the exemption claimed by the debtors in the debtor-wife's inherited IRA. The bankruptcy court upheld the objection. The district court reversed, but on appeal by the trustee and creditor, the Court of Appeals reversed again, holding that funds in a non-spousal inherited IRA were not "retirement funds." The court agreed with the bankruptcy court that "money counts as 'retirement funds' (a term that the Bankruptcy Code does not define) only when held for the owner's retirement, while an inherited IRA must be distributed earlier" and rejected the district court's (and other circuits') view that any money representing "retirement funds" in the decedent's hands must be treated the same way in successors' hands.

The Seventh Circuit thus created a circuit split on the effect on exemption when the debtor inherits an IRA from someone other than a spouse. For spousal inheritances, the court acknowledged that the Internal Revenue Code continues to treat IRAs as tax exempt, with the inherited funds continuing to be treated as "retirement funds," and with the same restrictions against withdrawal before age 59 ½. But, the court identified different tax rules for an IRA inherited from someone other than a spouse, with the fund protected from taxation for a limited time and the beneficiary required to begin withdrawals within one year of the original owner's death and complete withdrawals within five years for most accounts. See 26 U.S.C. § 402(c)(11). Here, the debtor inherited a $300,000 IRA from her mother, and she claimed it as exempt. For purposes of §§ 522(b)(3)(C) or (d)(12) exemptions, the court concluded that the inheritance was no longer a "retirement fund," lacking the "economic attributes of a retirement vehicle, because the money cannot be held in the account until the current owner's retirement." The *Clark* court disagreed with *In re Chilton,* 674 F.3d 486 (5th Cir. 2012), and *In re Nessa*, 426 B.R. 312 (BAP 8th Cir. 2010), which held that an IRA the debtor inherited was exempt under § 522(d)(12), concluding that the IRA was still a "retirement fund" notwithstanding that it was not directly the debtor's retirement to which it was tied. The majority of other courts have held that it is not necessary that the IRA be retirement

funds belonging to the debtor. The statute is referring to funds that have been set aside for retirement, and an inherited IRA is still exempt from taxation under 26 U.S.C.A. § 408(e), which exempts any individual retirement account. Section 408 is one of the sections referred to in § 522(d)(12). *Chilton v. Moser (In re Chilton),* 674 F.3d 468 (5th Cir. 2012).

See also Mullen v. Hamlin (In re Hamlin), 465 B.R. 863 (BAP 9th Cir. 2012), allowing exemption in an IRA inherited from the debtor's grandmother under § 522(b)(3)(C), which contained the same language as § 522(d)(12). Hamlin had claimed exemption under Arizona statutes, and Arizona had opted out of the § 522(d) exemptions. Section 522(b)(3)(C) has only two requirements: the amount must be retirement funds, and the funds must be in an account that is exempt from taxation under one of the Internal Revenue Code sections specified in § 522(b)(3)(C). The court found support for its conclusion in § 522(b)(4)(C)'s provision that direct transfer of retirement funds from one account to another does not end qualification for exemption. See also *In re Seeling,* 471 B.R. 320 (Bankr. D. Mass. 2012). The Chapter 7 debtor had inherited an IRA, which was established by a relative, and the bankruptcy court agreed with the emerging consensus, including the Fifth Circuit's *In re Chilton,* 674 F.3d 486 (5th Cir. 2012), holding that an inherited IRA that was tax exempt under 26 U.S.C. § 408, was exempt under § 522(d)(12). "The Bankruptcy Code requires no forensic analysis in order to determine from where those funds arose. All that the Bankruptcy Code requires is that the funds sought to be invested have been placed in a particular form of a retirement investment vehicle in order to be exempt from taxation."

See also *In re Reinhart,* 267 P.3d 895 (Utah 2011) (On certification from the Tenth Circuit, the Utah Supreme Court held that strict compliance with IRC qualification of retirement plans was not required for exemption; rather, a retirement plan (here a Keogh) qualified as exempt under state law so long as it substantially complied with IRC requirements.).

Other Tax-Advantaged Funds

Boilerplate lien required to open IRA account did not destroy exemption. Reversing lower courts, the Sixth Circuit concluded that the Chapter 7 debtor had not lost exemption of his $66,000 IRA under § 522(b)(3)(C) when he executed a Client Relationship Agreement with Merrill Lynch, which contained a boilerplate provision that Merrill Lynch would have a lien on the IRA for any debt owed to the brokerage firm. The trustee argued that this lien triggered 26 U.S.C. § 4975(c), which destroyed tax exempt status of an IRA for "any direct or indirect. . .lending of money or other extension of credit." The Circuit Court found that the debtor never opened any other account with Merrill Lynch and was not a debtor to the brokerage firm; therefore, the tax exempt status was not destroyed by a lien that never came into existence. The opening of the

IRA was not an extension of credit. Moreover, IRS had announced in 2011 that such lien provisions in themselves would not destroy tax exempt status, citing IRS Announcement 2011-81, 2011-52 I.R.B. 1052. *Daley v. Mostoller (In re Daley)*, 717 F.3d 506 (6th Cir. 2013).

Health Saving Account not exempt, unless under wildcard. The Chapter 7 debtor's health savings account (HSA) was not excluded from the bankruptcy estate under § 541(b)(7); the debtor had unrestricted access to the HSA's funds and the debtor did not prove that the HSA constituted a health insurance plan regulated by state law for purposes of § 541(b)(7). Moreover, the HSA was not exempt under §§ 522(d)(10)(C) or (D) as the right to receive a disability, illness or unemployment benefit or a payment on account of a personal bodily injury. The HSA funds could be used by the debtor for purposes other than those found in these exemption statutes. *Leitch v. Christians (In re Leitch),* 494 B.R. 918 (BAP 8th Cir. 2013).

Annuity purchased through rollover from tax-exempt IRA remained exempt. The Chapter 7 debtor had purchased an IRA annuity, with the entire purchase amount of $267,319.48 coming from a rollover of a previously owned tax-exempt IRA, and the trustee objected to the annuity being exempt under § 522(b)(3)(C) because the purchase price exceeded the annual limits imposed for an IRA by the IRS. The court concluded, in construing § 508 of the Internal Revenue Code, that annual purchase limitations did not apply to a rollover. *Running v. Miller (In re Miller),* 500 B.R. 578 (BAP 8th Cir. 2013).

Debtors not entitled to exempt portion of federal child tax credit. Construing the Colorado exemption for "the full amount of any federal or state income tax refund attributed to an earned income tax credit or child tax credit," the Tenth Circuit reversed its BAP, holding that the state exemption applied only to "refunds" and not to a nonrefundable portion of the child tax credit. The nonrefundable portion of the credit on tax form 1040 never gave rise to a refund. Only items treated as a payment, including the earned income tax credit, produced a refund, to the extent they exceeded tax liability. Since no refund was triggered by the child tax credit, there was no exemption under the state law. *Cohen v. Borgman (In re Borgman),* 698 F.3d 1255 (10th Cir. 2012).

Retirement account not exempt under California exemption. The Chapter 7 debtor claimed exemption in a Met-Life Non-qualified Retirement Account that she had received as a part of the marital settlement agreement with her former spouse, claiming the exemption under California's exemption for alimony, support or maintenance to the extent reasonably necessary. The trustee objected to the exemption, and the disallowance of the exemption was affirmed, without deciding whether the § 523(a)(5) criteria should be applied to the exemption analysis. Instead, the panel found the

marital settlement agreement's language to be clear and that the retirement account was intended to be a part of property division, rather than for support. *Diener v. McBeth (In re Diener),* 483 B.R. 196 (BAP 9th Cir. 2012).

Debtors entitled to exemptions in cash surrender values of life insurance and annuity contracts under Arizona law. Reversing its Bankruptcy Appellate Panel, at 440 B.R. 814, and agreeing with the bankruptcy court, Chapter 7 debtors were entitled to Arizona's exemptions in cash surrender value of life insurance policies and proceeds of annuity contracts. The court construed the Arizona statute to allow exemption by the debtors under the statutory language that the contracts either named as beneficiary the debtor's surviving spouse, child, parent, brother or sister, or "any other dependent family member." The word "other" was construed to be a "word of differentiation, establishing that a beneficiary can be either a listed beneficiary or some 'other' family member who is dependent." Both debtors involved in the appeals had a life insurance policy or annuity naming an adult, non-dependent child as beneficiary, and under the court's construction of the statute, a debtor's child did not need to be dependent to be a beneficiary. The cash values were exempt. *Tober v. Lang, et al. (In re Tober),* 688 F.3d 1160 (9th Cir. 2012).

Lien Stripping

Court could not strip lien on tenancy by entirety. In Chapter 13 filed by only one spouse, the debtor could not strip off lien with no value, on property owned as tenants by entirety. The bankruptcy court lacked jurisdiction to modify a lienholder's rights as to the non-debtor's property interest. *Alvarez v. Grigsby (In re Alvarez),* 733 F.3d 136 (4th Cir. 2013).

Debtor ineligible for discharge could strip lien. In the first circuit court opinion to directly address the issues, a Chapter 20 debtor ineligible for discharge, because of section 1328(f), could strip off valueless liens pursuant to § 1322(b)(2); lien stripping affects *in rem* liability while discharge addresses *in personam* liability. *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013). *Compare Colbourne v. Ocwen (In re Colbourne),* ___ Fed. Appx. ___, 2013 WL 5789159 (11th Cir. 2013) (unpublished). Distinguishing decisions in which Chapter 13 debtors ineligible for discharge could strip off wholly unsecured junior liens, debtor who was ineligible for Chapter 13 discharge could not strip down undersecured first-priority liens. *See also In re Wapshare,* 492 B.R. 211 (Bankr. S.D. N.Y. 2013) (Debtor ineligible for discharge can strip wholly unsecured lien, with § 1325(a)(5)(B) inapplicable.).

Untimely proof of claim did not void lien. Secured creditor's lien was not void solely because creditor filed untimely proof of claim in Chapter 13 case. Debtors had not

challenged substantive validity of lien, relying solely on section 506(d). *Shelton v. Citimortgage, Inc. (In re Shelton),* ___ F.3d ___, 2013 WL 5878438 (8th Cir. 2013).

Chapter 7 debtors could not strip off second mortgage lien. In a no-asset Chapter 7 case, the junior lienholder did not file a proof of claim and the debtors were unable to strip off the lien, applying *Dewsnup v. Timm,* 502 U.S. 410 (1992). The debtors' argument that lien stripping is available in Chapter 13 carried no weight, since if they wanted that relief they should have filed under Chapter 13. *Palomar v. First American Bank,* 722 F.3d 992 (7th Cir. 2013).

Section 506(d) applies in Chapter 13. Agreeing with *In re Woolsey,* 696 F.3d 1266 (10th Cir. 2012), the Seventh Circuit held that § 506(d) applies in Chapter 13, and *Dewsnup v. Timm,* 502 U.S. 410 (1992), did not distinguish between Chapter 7 and 13 cases, preventing the debtor from using § 506(d) as a means to void a partially secured IRS tax lien. The court noted that Chapter 13 provides alternative means of avoiding liens. *Ryan v. United States (In re Ryan),* 725 F.3d 623 (7th Cir. 2013). *See also Briseno v. Mutual Federal Savings and Loan Assoc. (In re Briseno),* 496 B.R. 509 (Bankr. N.D. Ill. 2013) (When debtors did not object to claim of junior lienholder, the claim was allowed and § 506(d) did not provide basis to strip down the lien to value of the property; however, the lien on multi-use property was not protected from modification by § 1322(b)(2), provided that the plan was otherwise confirmable.).

Bank bound by plan's mortgage strip. Under prior circuit authority, *In re Fesq,* 153 F.3d 113 (3d Cir. 1998), fraud is the only ground in § 1330 for revocation of confirmation orders, and the bank could not use Rule 60 to challenge the plan's lien strip. The bank argued that a "computer glitch" prevented the trustee from knowing about its objection to confirmation, and the bank's attorney inadvertently failed to attend the confirmation hearing. *Espinosa* did not limit the *Fesq* holding, and granting the bank Rule 60 relief would have impermissibly disturbed the confirmation order. "TD Bank could have attended the [confirmation] hearing, at which point, computer glitch or not, it could have raised its objection and provided proof that it had in fact objected previously." *In re Rodriquez,* 2013 WL 1716110 (3d Cir. Apr. 22, 2013), slip copy.

Hybrid plan not confirmable. Section 1322(b)(2) must be read in conjunction with other Code sections, and § 1325(a) "imposes requirements for treatment of secured claims as conditions for confirmation." The debtor's plan proposed to bifurcate the bank's secured claim, paying the secured portion on terms extending beyond the plan's life—a so-called "hybrid" plan. Absent the creditor's consent, the five-year limit imposed by § 1322(d)(1) applies to maintenance payments. "In effect, § 1325(a)(1) establishes that as long as a plan employs § 1322(b)(5), it can *only* be confirmed over the creditor's objection via § 1325(a)(5)(B)(i)(I)(aa). And, since that section states the debt, *as determined by nonbankruptcy law,* must be paid, a debtor may not use it *and* bifurcate

the applicable claim via § 506(a). To do so would render § 1325(a)(5)(B)(i)(I) ineffective." *Bullard v. Hyde Park Savings Bank (In re Bullard),* 494 B.R. 92 (BAP 1st Cir. 2013). See also *In Hurd,* 494 B.R. 189 (Bankr. W.D. N.Y. 2013) (Hybrid plan proposing to surrender one parcel and pay value of remaining parcel over time could not be confirmed, absent creditor's consent.).

Section 1322(b)(2) did not prevent interest modification on loans covered by § 1322(c)(2). Section 1322(c)(2) carves out exception to the antimodification protection; for mortgage loans with the last payment contractually due before the last plan payment, the interest rate may be modified, provided that § 1325(a)(5) is satisfied. *Witt v. United Companies Lending Corp. (In re Witt),* 113 F.3d 508 (4th Cir. 1997), established that § 1322(c)(2) was not a means to bifurcate an undersecured claim into secured and unsecured components, but *Witt* does not prevent modification of interest rate or other terms of the short-term mortgages covered by § 1322(c)(2). *In re Hubbell,* 496 B.R. 784 (Bankr. E.D. N.C. 2013).

Although stripping available in no-discharge case, under-secured mortgage could not be stripped. Although the mortgage was on multiple-residential property, the debtor did not argue that § 1322(b)(2)'s protection was lost because of that fact; rather, the mortgage was partially secured and thus protected from modification by the holding of *Nobelman v. American Savings Bank.* The district court commented that a debtor's inability to obtain a discharge did not *per se* prevent lien stripping. *Rogers v. Eastern Savings Bank (In re Rogers),* 489 B.R. 327 (D. Conn. 2013).

Bankruptcy-Specific Exemptions

Michigan's bankruptcy-specific exemptions are constitutional. Reversing its Bankruptcy Appellate Panel, 455 B.R. 590 (BAP 6th Cir. 2011), the Sixth Circuit panel agreed with the bankruptcy court that Michigan's law was constitutional, in permitting debtors to choose between the § 522(d) exemptions and state exemptions that were available only to debtors in bankruptcy. The bankruptcy-specific homestead exemption, for example, is more generous than § 522(d)(1) and the state's non-bankruptcy homestead, so it was the trustee who objected to the debtor's choice of the more generous exemption. Under the Uniformity Clause of the Constitution, § 522 and the Michigan statute operated uniformly, with "Michigan's decision to distinguish between debtors in bankruptcy and those outside of bankruptcy mak[ing] sense." *Richardson v. Schafer (In re Schafer),* 689 F.3d 601 (6th Cir. 2012). *Accord Williamson v. Westby (In re Westby),* 2013 WL 415599 (BAP 10th Cir. Feb. 4, 2012) (Kansas' bankruptcy-only exemption for tax refunds attributable to earned income credit was constitutional.).

Progeny of *Schwab v. Reilly*

Trustee, not debtor, entitled to appreciation of oil and gas royalty value. Applying *Schwab v. Reilly,* 130 S.Ct. 2652 (2010), the Chapter 7 debtor was not entitled to the appreciated value of oil and gas lease royalties, after the debtor claimed on Schedule C specific dollar amounts under the § 522(d)(5) wildcard, under which exemptions are for a debtor's interest in assets, rather than the assets. The claimed exemption was below § 522(d)(5)'s dollar cap, and the debtor did not claim "full" or "100%" interest, only the same dollar amount shown on Schedule B for the asset's value, with the court noting that *Schwab's* reference to "FMV" in claiming exemptions was dicta. Here, the debtor's dollar amount exemption did not give notice to the Chapter 7 trustee that the debtor was attempting to exempt the entire royalty interest, and the "trustee need not have objected to Orton's exemptions to retain the ability to except the lease from abandonment," with the trustee entitled to appreciated value of the lease royalties. *In re Orton,* 687 F.3d 612 (3d Cir. 2012).

Exemption claim of full fair market value invalid. The First Circuit BAP joined other courts in holding that the debtors' claims of exemptions under § 522(d) for full market value (FMV), without specifying a dollar amount under statutes with monetary caps, were invalid on their face. The trustee's objections were sustained. The debtors misread *Schwab v. Reilly*, 130 S.Ct. 2652 (2010), which held that if the exemption claim is valid on its face, the trustee would not have to object, so long as the exemption claim was within the statutory cap amount, but the asset itself remained in the estate, subject to sale and paying the debtor's exemption. No court had construed *Schwab* as allowing the debtor "unfettered authorization. . . to exempt assets in-kind." *Massey v. Pappalardo (In re Massey)*, 465 B.R. 720 (BAP 1st Cir. 2012). The *Massey* court commented that the proposed amendment to Schedule C is consistent with its opinion.

Claim of exemption in specific amount did not trigger trustee's need to object. On schedule C, the Chapter 7 debtors claimed $18,000 exemption in a prepetition personal injury and in Column's 1's description of the property, they stated estimate of value "$1.00 - $300,000.00, FULL MARKET VALUE (FMV) exempted." Applying *Schwab v. Reilly,* the court found that the debtor's Schedule C claimed an exempt amount within § 522(d)(5)'s applicable statutory limit and the reference in column 1 of Schedule C to "full market value" was "buried" and not repeated in column 3's exemption claim. Nothing in column 3 indicated anything other than $18,000 exemption claimed; any ambiguity is construed against the debtors. The trustee's lack of objection did not prevent the trustee's recovery of the personal injury claim. *Williams v. Biesiada,* 498 B.R. 746 (S.D. Tex. 2013).

Claim of 100% equity doesn't survive trustee objection. Joining other courts, the bankruptcy court held that the debtors' claim of exemption in "100% of equity" or "100%

of FMV" in their residence under § 522(d)(1) did not survive the trustee's objection; "by claiming a *percentage* of value as exempt, as opposed to an actual dollar figure, [the debtors] were essentially saying 'Trustee, you figure out what [the dollar amount of the exemption] is supposed to be.'" To satisfy the best interests of creditors test, the trustee must be able to calculate the value of assets, less any exemption. Limited asset exemptions, such as § 522(d)(1), permit an exemption only in the debtor's "interest" in the asset, up to a dollar limitation. "As the *Schwab* court explained, and repeatedly emphasized, where the exemption statute provides a limited-interest exemption, only a defined monetary interest in the property is removed from the bankruptcy estate—not necessarily the value of the entire property." For the § 522(d)(1) exemption, a claim of "100% of equity" or "100% of FMV" does not adequately describe the allowed exemption. "At is core, *Schwab* was not about the validity of any particular exemption claim, . . .but about *notice* to interested parties as to what exemption in particular property the debtor had actually claimed, and, consequently, whether it 'constitute[d] a claim of exemption to which an interested party must object under § 522(l).'" The *Schwab* Court's example of "100% of FMV. . .has nothing to do with the 'proper' way to claim a particular exemption under a particular exemption statute. The Court was merely demonstrating the type of language that may be used to show the world that the debtor is attempting to exempt an asset in its entirely, regardless of its actual value. . . .The *Schwab* Court was *not,* as the Debtors have argued, outlining a procedure by which an exemption claimed under a limited-interest exemption statute could be legitimately converted into an exemption in-kind. Thus, to require the Debtors here to amend Schedule C to state a specific dollar value for their claimed (d)(1) exemption does not 'eviscerate' any 'rights' established under *Schwab* and does not prevent the Debtors from 'employing' any legitimate 'strategy' suggested by the Supreme Court." In footnote 14, the court discusses the preliminary draft of the proposed amended Schedule C, and finds it consistent with its opinion. *In re Luckham,* 464 B.R. 67 (Bankr. D. Mass. 2012).

Cap under state statute prevents exemption for more. The debtor's reliance on *Schwab* was misplaced when she claimed 100% fair market value of her vehicle, $12,000, as exempt, but the applicable Arizona statute had a cap of $5,000. *Schwab's* suggestion of claiming 100% FMV did not mean that such an exemption would be valid if the applicable statute had a cap and fair market value exceeded that cap. Also, the debtor's claim that an annuity was excluded from the estate under § 541(c)(2) was invalid, when there was no support in the annuity documents that it was a trust under applicable Arizona law. *Messer v. Maney (In re Messer),* 2012 WL 762828 (BAP 9th Cir. Mar. 9, 2012), slip copy.

Trustee's avoidance of second mortgage prevailed over exemption claim. At the petition date, the debtors had no equity in their home, because of two mortgages, but

they scheduled the second mortgage as unsecured and notified the trustee of a defect in its acknowledgement. The Chapter 7 trustee did not object to the exemption claims on the residence, under §§ 522(d)(1) and (5), but the trustee was successful in avoiding the second lien against the home, then moving to value the exemptions on the home at zero, since the avoided lien was for the benefit of the estate under § 551. The property had been sold by the trustee, with some proceeds left after paying the first mortgage. Under *Schwab v. Reilly,* 130 S.Ct. 2652 (2010), the trustee was not required to object to the exemptions, when the debtors had no equity at the time of filing their petition. The debtors' interests were determined as of the filing date, because at that point the second mortgage had not been avoided, and the debtors were not entitled to benefit from the trustee's avoidance. The avoidance recovery was a separate asset from the home, in which the debtors had claimed exemption. *In re Messina,* 687 F.3d 74 (3d Cir. 2012).

Section 522(o)

Section 522(o) applied to lien. Chapter 7 debtor claimed homestead under Texas law, but owned residential property in Texas and Missouri. Applying law-of-case doctrine (see *In re Cipolla I),* 476 Fed. Appx. 301 (5th Cir. 2012)), the debtor transferred property within meaning of Texas Uniform Fraudulent Transfer Act and disposed of property within meaning of section 522(o) when he created lien on Missouri property, obtaining loan to purchase Texas property. There was sufficient evidence that debtor acted with intent to defraud. *Cipolla v. Roberts (In re Cipolla),* ___ Fed. Appx. ____, 2013 WL 5596848 (5th Cir. 2013) (unpublished).

Section 522(o)'s term "interest" refers to equity. The phrase in § 522(o) "value of an interest. . .in real property" refers to any increase in monetary value of the real property claimed as the homestead, rather than to a title interpretation of "interest." The Chapter 7 trustee argued that even when there was no equity in the homestead property, the trustee was entitled to an equitable lien, but the BAP affirmed the bankruptcy court's interpretation, holding that § 522(o) was added by BAPCPA "to prevent the fraudulent attempt to build up equity in a homestead." If there is no equity in the property, "there is no value subject to reduction." *In re Willcut,* 472 B.R. 88 (BAP 10th Cir. 2012).

Section 522(p)

Section 522(p) applied to interest re-conveyed within 1215 days. The Chapter 7 debtor had acquired an interest in his residence, when the trust over which debtor acted as trustee re-conveyed residential property to the debtor within the 1215 days before bankruptcy filing. The debtor had previously conveyed the property to the trust to protect it from creditors and for the benefit of his sons. Although during the trust's

recorded ownership of the property the debtor acted as if he owned the property, paying all expenses, mortgage and taxes from a personal account, the debtor had acquired an interest in the property upon its re-conveyance to him within the 1215 days, for purposes of § 522(p)'s cap on the homestead exemption. *In re Stella,* 470 B.R. 1 (Bankr. D. Mass. 2012).

Transfer of homestead between debtors within 1215 days triggered cap. When the Chapter 7 debtors had transferred their homestead property between themselves within the 1215 days before filing, the exemption was subject to § 522(p)'s cap, but each debtor was entitled to the capped exemption under § 522(m). The fact that the debtors had continually resided in the residence as their homestead did not overcome the effect of the transfer between spouses. After transfer to the wife, the property had been transferred back as tenants by entirety. *In re Gentile,* 483 B.R. 50 (Bankr. D. Mass. 2012).

Kansas law permitted homestead exemption after transfer to self-settled trust, and § 522(p) was not triggered. Under Kansas law, a debtor may claim residential exemption in an equitable interest in land, after transfer of the legal title to a self-settled, living, revocable trust. Here, the trust had transferred legal title back to the debtor within 1215 days, to enable the debtor to mortgage the property. When the trust deeded the property back, the debtor acquired no equity value that he did not already have under his equitable interest; therefore, § 522(p)'s cap was not triggered. The court distinguished a First Circuit opinion, *Aroesty v. Bankowski (In re Aroesty),* 385 B.R. (BAP 1st Cir. 2008), on the basis of difference in Massachusetts and Kansas homestead law. *In re Peake,* 480 B.R. 367 (Bankr. D. Kan. 2012).

Issue Preclusion

Judicial estoppel blocked debtor's, but not trustee's, cause of action. Chapter 13 debtors have continuing obligation to disclose postpetition causes of action. Debtor is judicially estopped from pursuing a claim she failed to disclose to the bankruptcy court but judicial estoppel does not prevent the bankruptcy trustee from pursuing the claim without limitation on the potential recovery. *Flugence v. Axis Surplus Ins. Co. (In re Flugence),* 732 F.3d 428 (5th Cir. 2013).

Debtor had standing but judicial estoppel barred claim. Former Chapter 7 debtor had standing to bring slip and fall claim, because it was claimed as exempt and no one objected, even though the exemption was invalid under applicable Mississippi law, but the cause of action was scheduled as valueless and the debtor had knowledge that it had value during the bankruptcy proceedings. Although debtor did not conceal the fact that she had a cause of action, the scheduling of the claim as having no value was in bad faith, and the debtor had an ongoing duty to disclose the known value. Judicial

estoppel barred her pursuit of the cause of action in federal court. *Bone v. Taco Bell of America, LLC,* ___ F.Supp.2d ____, 2013 WL 3848755 (W.D. Tenn. July 24, 2013).

Res judicata effect of first order barred exemption. The debtor claimed exemption in an annuity under various Missouri statutes and the bankruptcy court sustained the Chapter 7 trustee's objection; rather than appeal, the debtor amended Schedule C again, claiming exemption in the same annuity under other state statutes. The BAP held that the debtor should have litigated issues about her exemptions under all of the state statutes before allowing a final order to go down. Despite the amended Schedule C, "these claims share a common nucleus of operative fact in that they involve an interpretation of the Annuity and the Debtor's rights thereunder." The annuity had not changed, and the same parties were involved in both hearings. Even if res judicata had not applied, the BAP held the insurance statutes the debtor tried to use for exemption did not apply to the annuity. *Bryan v. Staton (In re Bryan),* 466 B.R. 460 (BAP 8th Cir. 2012).

Lien Avoidance Under § 522(f) Et Seq.

State exception to homestead did not prevent § 522(f) lien avoidance. Applying *Owen v. Owen,* 500 U.S. 305 (1991), the fact that Missouri's homestead exemption had an exception that the homestead was subject to attachment and levy of execution for causes of action existing at time of acquiring the homestead did not deprive the Chapter 13 debtor of using § 522(f) to avoid a judgment lien. The First Circuit was cited as the only court of appeals to directly address the issue, under Massachusetts' statutory exception to its homestead for liens attaching prior to acquisition, *In re Weinstein,* 164 F.3d 677 (1st Cir. 1999). Section 522(c) protects certain debts from the effect of exemption in bankruptcy, but that statute preempts state law, which cannot interfere with the use of § 522(f), citing other cases so holding. The opt out by Missouri does not change the conclusion. *J & M Securities, LLC v. Moore (In re Moore),* 495 B.R. 1 (BAP 8th Cir. 2013).

Chapter 7 trustee's abandonment did not deprive court of jurisdiction to hear debtor's § 522(f) lien avoidance. The bankruptcy court retained authority under § 522(f) to hear the Chapter 7 debtor's motion to avoid judicial lien, notwithstanding the trustee's prior abandonment of the cause of action. Under 28 U.S.C.A. § 1334(e)(1), the court had jurisdiction over property of the estate and of the debtor. *Ramos v. Negron (In re Ramos),* 498 B.R. 1 (BAP 1st Cir. 2013).

§ 522(f) lien avoidance opportunity ended when redemption period ceased on pawned vehicle. When the Chapter 7 debtor did not redeem a pawned vehicle within the time allowed under Georgia law, as extended by § 108, title to the vehicle vested in Titlemax, and § 522(f) was not available to avoid the lien, assuming that the pawn

transaction in fact created a lien rather than transferring title. *In re Chastagner,* 498 B.R. 376 (Bankr. S.D. Ga. 2013).

Petition date controlling for § 522(f) determinations. In *In re Wilding*, 475 F.3d 428, Bankr. L. Rep. (CCH) P 80841 (1st Cir. 2007), the court allowed a case to be reopened by tying avoidance to the time of the bankruptcy filing, even though the judicial lien had been satisfied after the bankruptcy case was closed. The determinative time for avoidability, according to the Court of Appeals, is the petition date, when the lien was in existence and impaired the debtor's exemption. Section 522(f) uses the present tense "impairs," which must be tied to the petition date; thus the lien remained avoidable throughout the case and even after closing and reopening. See also *In re Young*, 471 B.R. 715 (Bankr. E.D. Tenn. 2012) (citing other authority and holding that petition date is controlling for all section 522(f) determinations). In this view, if the court looks to the date of filing of the case for valuing the property, as well as the other elements of section 522(f) avoidance, there is no prejudice to the creditor in permitting the debtor to reopen a closed case and avoid a lien that would have been avoidable earlier. See also, *In re Hall*, 327 B.R. 424, 14 A.L.R. Fed. 2d 867 (Bankr. W.D. Mo. 2005).

Debtor must have valid exemption that could be asserted in absence of avoided lien under § 522(f). Section 522(f) may not be used to avoid either a judgment lien or a security interest unless the underlying property would have been exempt. See *In re Anderson*, 2012 WL 1110056 (Bankr. D. Mont. 2012), citing *In re Morgan*, 149 B.R. 147, 151, Bankr. L. Rep. (CCH) P 75092 (B.A.P. 9th Cir. 1993) (requiring that "there must be an exemption to which the debtor 'would have been entitled' under subsection (b) of § 522").

Application of § 522(f) to the property that is not overencumbered. "[W]hen the market value of the property exceeds the sum of (1) all consensual (non-judicial) liens on the property and (2) the amount of the debtor's exempt interest under 11 U.S.C.A. § 522(d)," then "section 522(f)(1) permits the avoidance of the targeted judicial lien only in part, not in its entirety." *In re Silveira*, 141 F.3d 34, 35, Bankr. L. Rep. (CCH) P 77673 (1st Cir. 1998); see also *In re Young*, 471 B.R. 715 (Bankr. E.D. Tenn. 2012), citing *In re Falvo*, 227 B.R. 662, 666, Bankr. L. Rep. (CCH) P 77857, 1998 Fed. App. 0021P (B.A.P. 6th Cir. 1998) (holding that partial lien avoidance is appropriate).

Judicial lien voidable under § 522(f) in separate cases filed by former husband and wife. In *White v. Commercial Bank and Trust Co. (In re White)*, 470 Fed. App. 538, 2012 WL 1957864 (8th Cir. 2012), the Court of Appeals ruled that a judicial lien, securing a deficiency judgment, was voidable in separate Chapter 7 cases filed by a former husband and wife. The 80-acre parcels that each debtor owned as his or her rural homestead would be totally exempt in absence of the judgment lien, so the lien impaired the debtors' exemptions, assuming that the lien had not attached prior to

debtors' acquisition of interest in parcels. The court concluded that dissolution of the entireties interest that the debtor-spouses possessed in the property, which they acquired more than a decade prior to entry of the deficiency judgment, and to lender's recording of its judgment, did not create a "break in the chain of title." The fact that they had subsequently divorced, with the tenancy converted to one in common, did not alter the fact that they had ownership interests before the lien attached. On the other hand, in *McCoy v. Kuiken (In re Kuiken)*, 484 B.R. 766, Bankr. L. Rep. P 82,365 (B.A.P. 9th Cir. 2013), the creditor recorded a judgment lien against real property owned by the debtor in 2009. On July 5, 2011, the debtor executed a deed, recorded on July 15, conveying fee title to an entity called Bayview for valuable consideration. Less than a month before the October 24, 2011, chapter 7 bankruptcy filing, Bayview executed a deed conveying title back to the debtor as a gift, recorded on October 11. The debtor claimed the property as exempt under California law. Reversing the bankruptcy court, the panel held that the debtor was not entitled to avoid the judicial lien under section 522(f)(1), because the debtor had not maintained a continuous interest in the property from the time the lien attached through the date of the filing of his bankruptcy petition. "When the interest once held is entirely extinguished by transfer, voluntary or, as a matter of law, a judicial lien which attached when a debtor had that interest cannot be avoided when the debtor acquires a new interest." 484 B.R. at 772.

Judgment lien creditor required under § 522 (g) to return exempt social security benefits levied upon pre-petition. In *Collect Access LLC v. Hernandez (In re Hernandez)*, 483 B.R. 713 (B.A.P. 9th Cir. 2012), the debtor filed a motion requesting, pursuant to section 542, an order requiring the judgment lien creditor to return exempt Social Security benefits levied upon pre-petition. The creditor resisted on the basis that the debtor's interest in the funds was terminated (pre-petition), when the funds were transferred to the levying officer. The bankruptcy court granted the debtor's motion, and the BAP affirmed, noting that the benefits are exempt under state law and therefore not subject to collection efforts, so no transfer of ownership in the funds was effected by the levy, and concluding that the judgment lien creditor merely had a lien on the levied funds, that the debtor maintained an interest in the funds at the time the petition was filed, that the funds constituted property of the debtor's estate, under section 541, and that the debtor could preserve his exemption in the levied funds by invoking section 522(g) and/or (h).

§ 522(h) is more limited than § 522 (g) because it excludes some of the avoidance power listed in subsection (g):

§ 510(c)(2)	recovery of subordinated liens
§ 542	turnover of property of the estate

§ 543 turnover of property by a custodian

§ 551 automatic preservation of avoided transfers

None of these avoidance and other powers may be exercised by the debtor under section 522(h), but if such transfers are avoided by the trustee, they may be reached by the debtor under subsection (g). See, e.g., *Collect Access LLC v. Hernandez (In re Hernandez)*, 483 B.R. 713 (B.A.P. 9th Cir. 2012), discussed above.

Chapter 13 debtor had standing under § 522(h) for strong-arm avoidance of statutory attorney's lien on homestead. When the debtor had claimed homestead exemption within the statutory limits, the debtor had standing to bring an adversary proceeding under § 522(h) to avoid the fixing of an attorney's lien on the property that would be otherwise exempt. *McCarthy v. Law (In re McCarthy),* ___ B.R. ___, 2013 WL 5778955 (BAP 8th Cir. Oct. 28, 2013).

When debtor seeks avoidance under section 522(h), defenses available against trustee are triggered. The debtor is essentially stepping into the trustee's underlying statutory authority. An adversary proceeding commenced by complaint is required, rather than merely a motion. *In re Canelos*, 212 B.R. 249, 254 (Bankr. D. Md. 1997), amended, 216 B.R. 159 (Bankr. D. Md. 1997). For the same reason, the defenses available against a trustee are triggered. *In re Sandoval*, 470 B.R. 195 (Bankr. D.N.M. 2012). In *In re Maus*, 282 B.R. 836 (Bankr. N.D. Ohio 2002), for example, the debtor brought a preference avoidance action to recover garnishments and was required to show that the garnishments exceeded the $600 limit in section 547(c)(8).

Other Recent Exemption Caselaw

More time to amend exemptions properly disallowed. The bankruptcy court did not abuse its discretion in denying debtor's motion for more time to amend exemptions, when the debtor had two years already to amend to claim exemption in a large settlement. *In re Hecker*, 703 F.3d 1112 (8th Cir. 2013).

Opt out did not create new state-law exemption. The applicable Missouri exemption statutes did not permit exemption of unliquidated personal injury claims, and Missouri's opt out did not create an exemption separate from specific state exemption statutes; the court's prior decision, *In re Benn,* 491 F.3d 811 (8th Cir. 2007), was binding precedent. *Abdul-Rahim v. LaBarge (In re Abdul-Rahim),* 720 F.3d 710 (8th Cir. 2013).

Based on debtors' credibility, homestead exemption was properly denied. The bankruptcy court made a factual determination that the debtors did not intend to reside at a specific property, and the Bankruptcy Appellate Panel deferred to that finding,

which was based on credibility of the debtors. *Banks v. Washington Trust Bank, et al. (In re Banks),* 2012 WL 3205169 (BAP 9th Cir. July 31, 2012), slip copy.

Under Nevada law, mobile kitchen was a vehicle. The Chapter 13 debtors' mobile kitchen, which was used in their barbeque business, was registered with the Nevada Department of Motor Vehicles and had a vehicle identification number, and the bankruptcy court did not err in allowing the vehicle exemption, over the trustee's objection. Nevada is an opt out state, with an exemption for one "vehicle," a term that was distinct from "motor vehicle." *Leavitt v. Alexander (In re Alexander),* 472 B.R. 815 (BAP 9th Cir. 2012).

Debtors entitled to homestead in residence previously rented. Applying Tennessee law, debtors were entitled to homestead in the residence that they had previously rented but the tenant had moved out, since the law does not require actual residence, only the right to present occupancy. This was the only property to which the Chapter 7 debtors had such a present right of occupancy. *In re Patterson,* 487 B.R. 485 (Bankr. W.D. Tenn. 2013).

Debtor ineligible for state exemptions may claim under § 522(d) and federal law did not preempt state exemption law. The debtor filing in Kansas was not eligible for Kansas exemptions because she had not lived there the required 730 days, and she was not eligible for Nebraska exemptions, which were restricted to use by its residents. The trustee objected to use of the more generous § 522(d) exemptions, asserting that federal law preempted Nebraska's territorial limitation, but the court could not "conclude that Congress intended to preempt state exemption law when it enacted a statute that expressly provides for state law to apply when the debtor chooses, and, indeed, to apply exclusively when the state opts out of the federal exemption scheme. That is the antithesis of preemption." Since both Kansas and Nebraska exemptions were unavailable, the debtor could use the § 522(d) exemptions, under § 522(b)'s hanging paragraph. *In re Long,* 470 B.R. 186 (Bankr. D. Kan. 2012).

Exemption in homestead short-sale was denied. The Chapter 7 debtor claimed an exemption under California law in her "right" to negotiate with the lender for a short sale and carve-out the exemption from sale proceeds. The opinion notes that trustees have begun to work with underwater lenders to achieve short sales, with the trustees receiving an incentive payment from the sale proceeds. Here, the debtor was attempting to obtain the incentive payment as exempt property, but the right to control the property passed to the trustee, and the debtor cannot claim an exemption in the trustee's sale results. Only if the trustee abandons the property can the debtor negotiate with the lender. *In re Bunn-Rodemann,* 491 B.R. 132 (Bankr. E.D. Cal. 2013).

Dollar amount increases April 1, 2013. Along with other dollar amounts subject to automatic adjustment every three years, the various exemption amounts under § 522 increased on April 1, 2013.

Code Section Number	Former (2010) Dollar Amount	Adjusted (2013) Dollar Amount
11 U.S.C.A. § 522(d)(1) homestead exemption	**$21,625**	**$22,975**
11 U.S.C.A. § 522(d)(2) vehicle exemption	**$3,450**	**$3,675**
11 U.S.C.A. § 522(d)(3) personal property exemption	**$550** **$11,525**	**$575** **$12,250**
11 U.S.C.A. § 522(d)(4) jewelry exemption	**$1,450**	**$1,550**
11 U.S.C.A. § 522(d)(5) wildcard exemption	**$1,150** **$10,825**	**$1,225** **$11,500**
11 U.S.C.A. § 522(d)(6) tools of trade exemption	**$2,175**	**$2,300**
11 U.S.C.A. § 522(d)(8) life insurance exemption	**$11,525**	**$12,250**
11 U.S.C.A. § 522(d)(11)(D) personal injury exemption	**$21,625**	**$22,975**
11 U.S.C.A. § 522(f)(3)(B) lien avoidance cap	**$5,850**	**$6,225**
11 U.S.C.A. § 522(f)(4)(B) household goods cap	**$600** **(each time it appears)**	**$650** **(each time it appears)**

Code Section Number	Former (2010) Dollar Amount	Adjusted (2013) Dollar Amount
11 U.S.C.A. § 522(n) IRA cap	**$1,171,650**	**$1,245.475**
11 U.S.C.A. § 522(p)(1) homestead exemption cap	**$146,450**	**$155,675**
11 U.S.C.A. § 522(q)(1) homestead exemption cap	**$146,450**	**$155,675**