UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:	Case No. A-B-89-10469
	Chapter 7
RACHEL W. OPPERMAN,	NOV 17 1989
	JUDGMENT ENTERED ON _____
Debtor.	

MEMORANDUM OPINION AND ORDER

This matter is before the court on the debtor's motion pursuant to § 522(f)(1) to avoid the judicial lien of Wachovia Bank and Trust Company (Wachovia) attached to real property of the debtor used as her residence; Wachovia opposed the debtor's motion. The court has determined that the debtor's motion should be granted, avoiding Wachovia's lien in its entirety.

Findings of Fact

On May 31, 1988, Rachel W. Opperman executed a promissory note in the amount of $44,000.00 and deed of trust for the purchase of a residence in Hendersonville, North Carolina. In August of 1988, Opperman executed a second deed of trust on the residence in the amount of $2,700.

Prior to her bankruptcy, Wachovia brought suit against Opperman on another debt and obtained a judgment in the amount of $3,721.74. That judgment subsequently attached to Opperman's residence. On August 4, 1989, Opperman filed a petition under Chapter 7 of the Bankruptcy Code. Her residence was listed as an asset, and the value of the property was placed at $45,000 on the debtor's schedules. At the time the petition was filed, the

balance of the first mortgage had been reduced to $40,274.84 while the balance of the second mortgage had been reduced to $2,262.50. This left equity in the residence of $2,462.66 which the debtor claimed as exempt pursuant to N.C. Gen. Stat. § 1C-1601(a)(1).

The debtor has now moved to avoid Wachovia's judgment lien pursuant to 11 U.S.C. § 522(f)(1). The debtor claims that Wachovia's lien impairs her § 522 exemption and is void in its entirety. Wachovia argues that such a result is improper; since North Carolina's exemption statute is contingent on the debtor's continued ownership and use of the property, the lien must survive bankruptcy to be enforceable if the debtor should ever cease to so use or own her residence; and that, in any event, the lien is only void to the extent the debtor's exemption is impaired.

Conclusions of Law

I. A judicial lien which impairs a debtor's exemption asserted pursuant to N.C. Gen. Stat. § 1C-1601(a)(1) is void in its entirety under the provisions of Bankruptcy Code § 522(f)(1).

At the outset, it should be noted that this case is not one in which the debtor has no equity to claim as exempt. It is well-settled that in such a case § 522(f) would have no application. See Simonson v. First Bank of Greater Pittston (In re Simonson), 758 F.2d 103 (3rd Cir. 1985); Alu v. New York Dept. of Taxation and Fin., 41 B.R. 955 (E.D.N.Y. 1984); In re Luby, 89 B.R. 120 (Bankr. D. Or. 1988); In re Redin, 14 B.R. 727 (Bankr.

D. Colo. 1981); In re Canady, 9 B.R. 428 (Bankr. D. Conn. 1981); In re Miller, 8 B.R. 43 (Bankr. W.D. Mo. 1980); In re Boteler, 5 B.R. 408 (Bankr. S.D. Ala. 1980). Here, the debtor offered credible testimony that her residence was worth no more than $45,000.00 at the time of the petition. The proper value to affix to the debtor's residence is its value on the date the petition was filed. Windfelder v. Rosen (In re Windfelder), 82 B.R. 367 (Bankr. E.D. Pa. 1988); In re Waldman, 81 B.R. 313 (Bankr. E.D. Pa. 1987); Salamore v. Bank of Commerce (In re Salamore), 46 B.R. 19 (Bankr. W.D.N.Y. 1984). That is the value which must be used to determine the debtor's equity. So, since the total remaining indebtedness on the debtor's residence was $42,537.34, over $2,400.00 in equity remained to be protected by her exemption. See N.C. Gen. Stat. § 1C-1601(a)(1). This equity is the amount claimed by Wachovia to be subject to its judicial lien.

Bankruptcy Code § 522(f)(1) provides for the avoidance of the fixing of a judicial 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...." While an initial reading of this language seems to indicate a simple, straightforward rule for the application of § 522(f), the case law has resulted in a split of authority among bankruptcy courts.

One group of courts has held that

> [w]hen the debtor avoids the fixing of a lien pursuant to § 522(f)...the lien is avoided only to the extent of the exemption, and the value of the lien that exceeds

the amount that is exempted may still be enforced by the creditor.

Butler v. Gen. Elec. Credit Corp. (In re Butler), 5 B.R. 360, 363 (Bankr. D. Md. 1980). See generally, West v. West, (In re West), 68 B.R. 647 (Bankr. C.D. Cal. 1986); In re Allred, 45 B.R. 676 (Bankr. E.D.N.C. 1985); In re Love, 42 B.R. 317 (Bankr. E.D.N.C. 1985); aff'd., 54 B.R. 947 (E.D.N.C. 1985); Larue v. Lake View Trust and Sav. Bank (Matter of Larue), 13 B.R. 846 (Bankr. N.D. Ill. 1981); Jordan v. Borda (Matter of Jordan), 5 B.R. 59 (Bankr. D.N.J. 1980). All of these courts read the language of § 522(f)(1) in a manner that limits the debtor's avoiding rights to the amount of his exemptible interest as of the date of bankruptcy. To use an illustration, if the debtor's equity or exemptible interest is $2,500, then the order avoiding any judicial lien would entitle the debtor to avoid the lien only to that amount. If the amount of the judicial lien is greater than $2,500, then to that extent it survives avoidance and remains enforceable by the creditor.

In contrast, a majority of courts interpret § 522(f)(1) as voiding in its entirety any judicial lien which impairs a debtor's exemption.[1] Duden v. Rosenthal (In re Duden), 102 B.R. 797 (D. Colo. 1989); Packer v. Gen. Motors Acceptance Corp. (In re

[1] Early cases in this group combined §§ 522(f) and 506 or 524 to avoid judicial liens, utilizing § 522(f) for partial avoidance and voiding the remainder of the lien under § 506 or § 524. See Rappaport v. Commercial Banking Corp. (In re Rappaport), 19 B.R. 971 (Bankr. E.D. Pa. 1982); Green v. United States (In re Green), 12 B.R. 594 (Bankr. D.N.M. 1981). More recent cases simply void the entire lien under § 522(f).

Packer), 101 B.R. 651 (Bankr. D. Colo. 1989); In re Magosin, 75 B.R. 545 (Bankr. E.D. Pa. 1987); In re Braddon, 57 B.R. 677 (Bankr. W.D.N.Y. 1986); In re McMaster, 55 B.R. 379 (Bankr. W.D. Pa. 1985); In re Jackson, 55 B.R. 343 (Bankr. M.D.N.C. 1985); Matter of Grube, 54 B.R. 655 (Bankr. D.N.J. 1985); In re Berrong, 53 B.R. 640 (Bankr. D. Colo. 1985); Morelock v. All Phase Elec. Supply Co., (In re Morelock), 47 B.R. 533 (Bankr. N.D. Ohio 1985); Clifton v. Tavares (Matter of Clifton), 35 B.R. 785 (Bankr. D.N.J. 1983); Rappaport v. Commercial Banking Corp. (In re Rappaport), 19 B.R. 971 (Bankr. E.D. Pa. 1982); Green v. United States (In re Green), 12 B.R. 594 (Bankr. D.N.M. 1981). Under such a view § 522(f)(1) "deprive[s]...creditors of any right to execute on the debtor's property or to obtain proceeds from its sale." Clifton, 35 B.R. at 787. Most of these courts base their view on the belief that "Congress, in enacting § 522(f)(1) meant to maximize the 'fresh start' principle...." Magosin, 75 B.R. at 550 n.2. "Congress determined that the importance of granting a debtor a fresh start outweighed the creditor's rights under a judicial lien." Clifton, 35 B.R. at 787.

Because of the nature of North Carolina's state exemption statute, the present case cannot be resolved by merely choosing to apply one of the above rules. Under the exemption scheme of § 522, states are given the authority to "opt-out" and create individual exemption rules. North Carolina has chosen to avail

itself of this "opt-out" provision, and it must be determined whether this fact affects a debtor's avoidance powers under § 522(f).

North Carolina's residential exemption provides in pertinent part:

> Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of his creditors: [t]he debtor's aggregate interest, not to exceed seven thousand five hundred dollars ($7,500) in value in real property or personal property that the debtor or the dependent of the debtor uses as a residence....

N.C. Gen. Stat. § 1C-1601(a)(1) (emphasis added). The emphasized language clearly makes § 1C-1601(a)(1) conditional. Only if the debtor uses the property as a residence may she claim it as exempt. Section 1C-1601(a)(1) is further conditioned upon the debtor's continued ownership of the property. N.C. Gen. Stat. § 1C-1604(a) provides that:

> [p]roperty allocated to the debtor as exempt is free from the enforcement of the claims of creditors for indebtedness incurred before or after the exempt property is set aside...for so long as the debtor owns it. When the property is conveyed to another, the exemption ceases as to liens attaching prior to the conveyance....

(Emphasis added).

Wachovia's primary argument is that the North Carolina exemption scheme prevents a judicial lien from being cancelled of record. Instead of cancellation, Wachovia contends that the lien survives avoidance and may be enforced if the debtor ever ceases to own the property or use it as a residence. In support of its position, the bank relies primarily upon In re Love, 42 B.R. at

317, decided in the Eastern District of North Carolina. This court disagrees with Wachovia's argument and declines to follow its authorities.

The court recognizes that "in determining the scope of a state created exemption, the bankruptcy court must look to state law." In re Love, 42 B.R. at 319 (citations omitted). Nevertheless, while a state may choose to "opt-out" of the federal exemption scheme, as did North Carolina, it may not "opt-out" of the operation of § 522(f). Hall v. Finance One, Inc. (In re Hall), 752 F.2d 582 (11th Cir. 1985); Matter of Spurlock, 72 B.R. 392 (S.D. W.Va. 1987); Green v. Snow, (In re Snow), 71 B.R. 186 (Bankr. W.D. Va. 1987); In re Jackson, 55 B.R. at 345.[2] This court certainly does not deny the authority of a state to establish its own exemptions, but that authority does not allow a state to enact exemption statutes which would frustrate the

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[2] The law on this point is somewhat unsettled. At least two Courts of Appeals have held that states may in fact "opt-out" of § 522(f). See Giles v. Credithrift of Am., Inc. (In re Pine), 717 F.2d 281 (6th Cir. 1983), cert. denied, 466 U.S. 928 (1984); McManus v. Avco Fin. Servs. of Louisiana, Inc. (Matter of McManus), 681 F.2d 353 (5th Cir. 1982). The Fourth Circuit has yet to speak directly to this issue. In Dominion Bank of Cumberlands v. Nuckolls, 780 F.2d 408 (4th Cir. 1985), the court gave some indication that it favored the Hall approach. In a recent unpublished opinion, however, the court hinted toward a contrary view. In re Love, No. 86-3008 (4th Cir. Sept. 17, 1987). Given this uncertainty and the Fourth Circuit's own admonition against reliance on unpublished opinions, see Fourth Circuit Internal Operating Procedure, I.O.P. - 36.4 (July 1, 1986), this court will follow what seems to be the current majority of the cases decided in the Fourth Circuit and adopts the reasoning of the court in Hall.

federal fresh start policy of the Bankruptcy Code.[3] Sturges v. Crowninshield, 17 U.S. 122 (1819) (states retain power to enact bankruptcy laws so long as they do not conflict with federal bankruptcy legislation). Therefore, to the extent that N.C. Gen. Stat. § 1C-1601(a)(1) interferes with the operation of Code § 522(f)(1) it should not be given effect.

To adopt Wachovia's argument would be to allow its lien to linger in some sort of legal limbo until such time, if ever, that the debtor ceased to use her property as a residence or decided to sell the property. Such a rule only serves to create uncertainty for the debtor and for people interested in the certainty of title in general. As stated by the court in In re Morelock:

> a debtor is entitled to a degree of finality as to what debts will and will not be discharged. With few exceptions, the Bankruptcy Code fixes the rights of the debtor and his creditors as of the time the petition is filed. This policy is intended to promote the purpose of a fresh start by allowing the debtor to go forward without the burdens of the past and with the knowledge of what obligations are still owed.

Morelock, 47 B.R. at 535. It is possible that the debtor here may never choose to sell her home, or she may not sell it for a significant amount of time.

> This uncertainty [created by allowing the lien to linger indeterminately] would frustrate the purpose of fresh start by not providing the [debtor] with an accurate determination as to the finality of [her]

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[3] Some courts have suggested that the U.S. Constitution's supremacy clause will work to invalidate state exemption statutes if such statutes operate to frustrate the fresh start policy. See In re McKeag, 104 B.R. 160 (Bankr. D. Minn. 1989); In re Parrish, 19 B.R. 331, 335 (Bankr. D. Colo. 1982); In re Vasko, 6 B.R. 317, 322 (Bankr. N.D. Ohio 1980).

> debts and would hinder the debtor['s] ability to amass future equity.

Braddon, 57 B.R. at 679. Only by avoiding Wachovia's lien in its entirety can the full purpose of the fresh start principle of the Bankruptcy Code be served[4].

Wachovia has argued alternatively that if its lien is to be avoided, the language "to the extent that" found in § 522(f)(1) should be interpreted to limit avoidance to the amount of the debtor's equity on the date of the petition, which was calculated to be $2,462.66. Avoidance in such a manner would leave Wachovia with a lien of $1,259.08 to enforce against any future equity the debtor might acquire in the residence[5]. This argument is without merit and misconstrues the purpose of § 522(f). It is not only the first $2,462.66 of Wachovia's lien that impairs Opperman's exemption, but also the very last dollar of the lien. As long as Wachovia has one remaining unavoided dollar of its lien, the debtor's exemption is impaired. The language "to the extent that" was included in § 522(f) to ensure that in cases where a debtor has equity above his exemption, that equity would be preserved for the judgment lien holder. The language could not

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[4] It is well settled that a major purpose of the Bankruptcy Code and especially § 522(f) is to promote a debtor's fresh start. See S. Rep. No. 989, 95th Cong., 2d Sess. 76, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5862. See generally, Jackson, the Logic and Limits of Bankruptcy Law, pp. 225-52 (1986).

[5] This figure was computed as follows:

$ 3,721.74	Wachovia's total lien
- 2,462.66	LESS Debtor's equity
$ 1,259.08	Remaining enforceable lien

have been intended by Congress to allow a portion of a creditor's lien to continue indefinitely and impinge upon a debtor's fresh start. Where the debtor's exemption is greater than the amount of her equity in the property, the only way to give effect to § 522(f)(1) is to avoid any lien which impairs that exemption in its entirety.

This court concludes that a debtor who has no equity in property which exceeds the amount of her exemption under N.C. Gen. Stat. § 1C-1601(a)(1), and moves to avoid a judicial lien which has attached to that property, is entitled to avoid such lien in its entirety under § 522(f)(1) of the Bankruptcy Code. To the extent that the North Carolina exemption statute interferes with the operation of § 522(f), that exemption should not be given effect.

It is therefore **ORDERED:**

1. That the debtor's motion is granted; and

2. That the judicial lien of Wachovia Bank and Trust in the amount of $3,721.74 (plus associated interest and costs) be avoided in its entirety pursuant to Code § 522(f) and hereafter given no force or effect.

This the 17th day of November, 1989.

George R. Hodges
United States Bankruptcy Judge