BANKRUPTCY LAW—AVOIDANCE OF DIVORCE LIENS UNDER SECTION 522(f)(1) OF THE BANKRUPTCY CODE: ALL’S FAIR IN LOVE AND DIVORCE

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INTRODUCTION

Section 522(b) of the Bankruptcy Code1 ("Code") allows a debtor to exempt certain property, real and personal, from the debtor's bankruptcy estate.2 The Code provides these exemptions in order to protect the debtor from his or her creditors and to provide a "fresh start" for the debtor with at least the "basic necessities of life."3 Section 522(f)(1) of the Code allows a debtor to avoid judicial liens that are viewed as impairing these exemptions. To avoid a lien under this section, a debtor must satisfy three requirements: (1) the lien must be a judicial lien; (2) the lien must impair an exemption to which the debtor is entitled; and (3) the debtor must possess the property interest to which the lien fixed, prior to the fixing of the lien on that prop-

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2. 11 U.S.C. § 522(b) (1988) provides in relevant part:
   an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . .
   Such property is—
   (1) property that is specified under subsection (d) of this section . . . ; or, in the alternative,
   (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition . . . .

Id.

The following property may be exempted under subsection (b)(1) of this section:
(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property . . . .

Id.

11 U.S.C. § 541(a) (1988) provides:
(a) The commencement of a case under . . . this title creates an estate. Such estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

Id.


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One type of lien that has been the recent focus of decisions involving section 522(f)(1) is the "divorce lien." The divorce lien, which is generally created during the division of the marital assets in a divorce proceeding, is commonly utilized in divorce law to secure an equitable distribution of the marital property. For example, one spouse may be granted a lien on the marital home, while title to the home is granted to the other spouse. When the spouse with title to the home enters into bankruptcy, claims a homestead exemption, and then attempts to avoid his or her former spouse's lien on the marital property by claiming that the lien impairs that exemption, a conflict arises between bankruptcy law's "fresh start" policy and divorce law's doctrine of equitable distribution.

After the passage of the Bankruptcy Reform Act of 1978 and prior to the recent United States Supreme Court decision in Farrey v. Sanderfoot, four federal courts of appeals, as well as many bankruptcy and district courts, considered the ability of a debtor spouse to avoid a divorce lien under section 522(f)(1) of the Code. These courts reached different results. Some courts decided that the divorce lien could not be avoided as the lien did not attach to the debtor spouse's interest in the property (as required by section 522(f)(1)), but rather attached to the creditor spouse's pre-existing interest in the property. Other courts allowed the debtor spouse to avoid the lien on the theory that...
that the divorce decree extinguished any pre-existing interest the cred­itor spouse may have had and gave sole interest in the marital property to the debtor spouse. Consequently, the lien could only have attached to the debtor’s interest and, thus, could be avoided under section 522(f)(1).

The Supreme Court in *Farrey* determined that the divorce lien held by the ex-wife could not be avoided. The Court held that the debtor (Sanderfoot) did not meet the third requirement of section 522(f)(1) in that Sanderfoot did not possess the specific interest to which the lien fixed, before the lien fixed. In *Farrey*, the divorce decree granted to the husband (Sanderfoot) sole ownership of the marital home, which had been held by Sanderfoot and his wife (Farrey) as joint tenants during their marriage. Farrey was awarded a lien on the house to secure her share of the marital assets. The Court found that under Wisconsin law the Sanderfoot-Farrey divorce decree extinguished both Sanderfoot’s and Farrey’s pre-existing interests in the marital property and created new ones. Sanderfoot acquired his new interest in the property (a fee simple) with Farrey’s lien already attached. Since he never possessed the fee simple interest to which Farrey’s lien attached, before the lien attached, he could not avoid it.

Although the Supreme Court’s decision in *Farrey* clarifies the application of section 522(f)(1) to divorce liens, to a certain extent, the opportunity for a debtor spouse to employ section 522(f)(1) as a strategic tool to wipe out his or her debt to the former spouse still remains. The Supreme Court’s decision turned on when the lien was “fixed” and on the form of ownership in which the couple had held the property prior to their divorce. Instead of producing a bright line rule that would end the manipulation of the Code by crafty debtor spouses, the Supreme Court’s decision left the answer to the question of avoidance dependent upon several variables. These variables include the form of ownership in which the spouses had held the property prior to divorce,
how the applicable state law views marital property at the time of divorce, and a court's interpretation of when the lien “fixed.” Congress should amend section 522(f)(1) of the Code to except from avoidance under it, liens on the marital home that are granted to a former spouse in a divorce proceeding to secure an equitable distribution of the marital property. Otherwise, a divorcing spouse who accepts such a lien as security for a later division of the marital property, will still be left vulnerable to losing his or her share of the marital property under section 522(f)(1) if the debtor spouse enters bankruptcy. The debtor spouse in this situation is unjustly enriched by his or her share of the acquisition of the former spouse’s share of the dissolved marriage while the former spouse must struggle to achieve his or her new start after the lien is avoided.

Section I of this Note describes the general history and purpose of The Bankruptcy Reform Act of 1978, with a specific focus on the statutory language, purpose, and legislative history of section 522(f). Section I also briefly describes the purpose and practices of divorce law in the division and settlement of the marital property. Section II reviews the conflicting interpretations as to whether section 522(f)(1) empowers the possessory debtor spouse to avoid a lien given to the nonpossessory creditor spouse in a divorce settlement. This Section first focuses on the conflicting rationales of the Courts of Appeals for the Eighth and the Seventh Circuits in the cases of Boyd v. Robinson and In re Sanderfoot, respectively. Section II then discusses the decision of the Supreme Court in Farrey v. Sanderfoot. Section III demonstrates the impact of the Farrey decision on future divorce liens by applying the Farrey analysis to the four federal courts of appeals' cases that were decided prior to Farrey. This Section separates the cases into two categories: marital property held in joint tenancy and marital property held in only one spouse's name. This Section demonstrates the problem areas left open by the Farrey decision. Finally, Section IV proposes a solution to the conflict and confusion. Section 522(f)(1) should be amended so that liens on the marital home that are granted to a former spouse in a divorce proceeding to secure an equitable distribution of the marital property cannot be avoided in bankruptcy.

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20. 741 F.2d 1112 (8th Cir. 1984); see infra notes 86-113 and accompanying text.
21. 899 F.2d 598 (7th Cir. 1990), rev'd, 111 S. Ct. 1825 (1991); see infra notes 114-39 and accompanying text.
I. BACKGROUND

In the area of divorce liens, bankruptcy law and divorce law presently conflict. A general look at these two areas of law better illustrates this conflict. This Section first discusses the general history and purpose of the Bankruptcy Reform Act of 1978, specifically focusing on the purpose and legislative history of section 522(f)(1). Then it discusses how the division and settlement of marital property is generally achieved in divorce, specifically focusing on the doctrine of equitable distribution and the use of divorce liens to achieve such a distribution.

A. The Bankruptcy Reform Act of 1978 and Section 522(f)

The Bankruptcy Reform Act of 1978 replaced the National Bankruptcy Act of 1898 ("1898 Act"). The 1898 Act, which had been frequently amended and modified over the years, "became much too inflexible and antiquated to deal with consumer and business financial failures in modern society." As a result, a comprehensive modernization of the nation's bankruptcy laws was undertaken. After several years of study and numerous congressional hearings and debates, Congress passed the Bankruptcy Reform Act of 1978, which became effective October 1, 1979. The purpose of the Act was...

24. Id.
26. Id.


29. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). Overall, the Code has simplified and streamlined the bankruptcy system. Specifically in the area of exemptions, the debtor was given increased exemptions, as well as other protections from creditors, and the classes of creditors and their rights were more clearly defined. Bland, supra note 28, at 8.

The report of the House Judiciary Committee stated: "This bill is not primarily a debtor's bill, however. The bill codifies creditors' rights more clearly than the case law, which is in many ways just developing. It defines protections to which a secured creditor is
to create an efficient bankruptcy system where the primary focus was to provide the debtor with a "fresh start, free from creditor harassment and free from the worries and pressures of too much debt."\(^{30}\)

When a petition for bankruptcy is filed under Chapter 7,\(^ {31}\) either by the debtor (a voluntary bankruptcy) or by the creditors of the debtor (an involuntary bankruptcy), an estate of the debtor is created.\(^ {32}\) This estate is comprised of all of the debtor's legal and equitable interest in his or her property, wherever located, as of the commencement of the case.\(^ {33}\) The estate is then liquidated and the proceeds distributed among the debtor's creditors.\(^ {34}\) However, a debtor is permitted to exempt certain property from the estate.\(^ {35}\) This exempted property is not made available to creditors for any unpaid debt that remains after the estate has been fully administered. Instead, this property remains with the debtor, thereby providing the debtor with a basis for a fresh start.\(^ {36}\)

Under the 1898 Act, as amended, the debtor had to declare his or her exemptions according to the law of the state in which he or she resided, as there was no uniform federal exemption policy.\(^ {37}\) This led to a "denial or loss of exemptions [to debtors] as a result of inequitable provisions of state law" regarding exemptions and waivers.\(^ {38}\) In addition, most states had not raised the dollar level of their exemptions since their creation, which, in practice, attenuated the ameliorative effect of exemptions.\(^ {39}\) The Code provides a federal list of exemptions.\(^ {40}\)
In addition, the congressional committee and conference reports noted that unsecured consumer and commercial creditors, sensing a debtor's imminent bankruptcy, often rushed into court to obtain liens on exempt property prior to the debtor's entry into bankruptcy. Because the 1898 Act did not provide "certain rights . . . with respect to exempt property," one of which was the right to "void any judicial lien on exempt property," a debtor usually could not avoid these liens and creditors were able to defeat the debtor's exemptions. This frustrated the purpose of exemptions, which is to provide the debtor with the "basic necessities of life" so as to prevent the debtor from rural times, and hopelessly inadequate to . . . provide a fresh start for modern urban debtors." H.R. Rep. No. 595, supra note 3, at 126, reprinted in 1978 U.S.C.C.A.N. at 6087. 40. 11 U.S.C. § 522(d) (1988). See generally 7 COLLIERS ON BANKRUPTCY (15th ed. 1991).

The commission recommended that there be a federal list of exemptions and that the then current state and federal laws governing exemptions be superseded. H.R. Doc. No. 137, supra note 28, pt. I, at 170. After changes by both the House and the Senate, the provision ultimately adopted in the Code allows the debtor to choose between the federal exemptions or state exemptions. Parkinson, supra note 36, at 323. However, the state has the right to "opt-out" of the federal list in § 522(d). 11 U.S.C. § 522(b), (d) (1988). Presently, a majority of states have "opted-out." Robert H. Bowmar, Avoidance Of Judicial Liens That Impair Exemptions In Bankruptcy: The Workings Of 11 U.S.C. § 522(f)(1), 63 AM. BANKR. L.J. 375, 383 (1989). A state that "opts-out" of the federal list of exemptions is not held to have "opted-out" of § 522(f) (lien avoidance). Id. at 385.

The federal homestead exemption in § 522(d) for the debtor's aggregate interest in real property is $7500. 11 U.S.C. § 522(d). The state exemptions vary extensively. See, e.g., ARK. CODE ANN. § 16-66-218 (Michie 1987) (allowing a debtor to exempt $800 for unmarried debtors or $1250 for married debtors in a residence); MASS. GEN. L. ch. 188, § 1 (1990) (allowing a debtor to exempt $100,000 in principal family residence).


41. H.R. Rep. No. 595, supra note 3, at 126, reprinted in 1978 U.S.C.C.A.N. at 6087. An "unsecured creditor" is generally one who has no security interest such as a mortgage, a lien, or some sort of collateral, in the property of the debtor. KING & COOK, supra note 31, § 1.07, at 5 (2d ed. 1989).


A "lien" is an interest in property to secure payment of a debt. See 11 U.S.C. § 101(33) (1988). By obtaining a lien on the property, the creditor can proceed against that property to enforce the claim. KING & COOK, supra note 31, § 3.07, at 120. When a lien is avoided, the creditor no longer has a right to enforce the underlying debt against the property that was subject to the lien.

43. Parkinson, supra note 36, at 324.
being left "destitute and a public charge."\textsuperscript{44}

Section 522 of the Code was enacted to rectify these deficiencies.\textsuperscript{45} Section 522 details what exemptions are available to the debtor and how the debtor can make use of these exemptions in bankruptcy. The various subsections of section 522 deal with basic definitions,\textsuperscript{46} what property may be exempted,\textsuperscript{47} amounts of exemptions,\textsuperscript{48} liability during and after the bankruptcy proceeding,\textsuperscript{49} waiver of exemptions,\textsuperscript{50} and several other aspects of exemptions not pertinent to this discussion.\textsuperscript{51}

Section 522(f) addresses the avoidance of liens on certain qualified exempt property to which a debtor has claimed an exemption, specifically addressing avoidance of judicial liens in section 522(f)(1).\textsuperscript{52} Section 522(f) passed through Congress without modification or debate, leaving little indication as to the intention of Congress in enacting it.\textsuperscript{53} However, the commission and committee reports contain a substantial amount of material regarding the purpose of section 522(f)(1).\textsuperscript{54} According to these reports, section 522(f)(1) allows a debtor to avoid certain types of liens encumbering specific qualified exempt property so that he or she may have a basis for rehabilitation.\textsuperscript{55} The ability to avoid judicial liens on exempt property permits "the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy."\textsuperscript{56} Thus, even if a

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\textsuperscript{45} Id. at 6087-88.


\textsuperscript{47} Id. § 522(b), (d) (allowing exemptions on certain real and personal property of the debtor).

\textsuperscript{48} Id. § 522(d) (allowing maximum of $7500 on real property).

\textsuperscript{49} Id. § 522(c) (indicating exempt property not liable for pre-petition claims except tax and alimony or support claims excepted from discharge, and unavoided liens).

\textsuperscript{50} Id. § 522(e) (indicating waivers of exemptions unenforceable).

\textsuperscript{51} Id. § 522(g)-(m).

\textsuperscript{52} See supra note 4 for text of 11 U.S.C. § 522(f)(1).

\textsuperscript{53} Parkinson, supra note 36, at 324.

\textsuperscript{54} Id.


\textsuperscript{56} H.R. REP. NO. 595, supra note 3, at 126, reprinted in 1978 U.S.C.C.A.N. at 6087. The provision also was enacted to counter the superior bargaining position of creditors who obtained blanket mortgages and waivers of exemptions from debtors. Id. A debtor who signed a blanket mortgage (a mortgage that covers more than one asset to secure the given debt) or a waiver of exemptions has allowed the creditor to repossess much, if not all, of the debtor's household goods if the debtor encounters trouble paying the creditor. Id. at 6088. The Code addresses this problem by allowing the debtor to invalidate nonpossessory, nonpurchase money security interests, such as blanket mortgages,
creditor beats a debtor into court, the debtor is still entitled to his or her exemptions and a fresh start.

When the lien is created through divorce, rather than a commercial transaction, avoiding it raises additional policy concerns. A nonpossessory spouse (creditor) who has relied on a divorce lien to secure his or her interest in the marital property against a spouse granted title to the home who later becomes insolvent, is not like a commercial creditor "beating" the debtor into court. Allowing a debtor spouse to avoid a divorce lien does not appear to address Congress' concerns, unless the divorce lien has been used by the nonpossessory spouse as an attempt to "lock up" the assets of the other spouse just prior to bankruptcy. Only in this, comparatively rare, circumstance are the congressional concerns underlying section 522(f)(1) implicated in divorce liens.

B. *Divorce Law and the Use of Divorce Liens*

As bankruptcy law has had to evolve in light of modern financial transactions, divorce law has also evolved in response to modern societal, cultural, and political changes. Before the 1970's, in most of the United States the marital home was held in one spouse's name. When a couple divorced, the marital home was automatically granted through the lien avoidance provision. 11 U.S.C. § 522(f)(2) (1988). Section 522(f)(2) states, in part:

> [A] debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is— . . .

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

> (A) household furnishings, household goods, . . . that are held primarily for the personal, family, or household use of the debtor . . . .

*Id.*


57. Even in the commercial transaction more than just economic interests are involved. As one commentator has expressed, "[m]ore realistically and profoundly, economic conflicts between participants of financial distress are occasions for the expression of their more fundamental moral, political, personal, and social values." Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 764-65 (1991). This article presents a value-based account of bankruptcy law, as an alternative to the economic account, in the context of corporate bankruptcy.

58. *See supra* notes 27-29 and accompanying text.

to the "owner" spouse solely on the basis of title;\textsuperscript{60} the other spouse might be awarded alimony or maintenance in an attempt to offset the grant of the home to the spouse with title.\textsuperscript{61} Today, marriage is viewed as a partnership with both spouses contributing to the well-being and success of the singular marital unit.\textsuperscript{62} When the marriage fails, courts now divide the marital property under the doctrine of equitable distribution.\textsuperscript{63}

Under this doctrine, the property of the marriage is allocated upon an equitable, although not necessarily equal, basis.\textsuperscript{64} The allocation is based upon several factors, including but not limited to the contributions of each spouse "whether directly by employment or indirectly by providing homemaker services,"\textsuperscript{65} upon each spouse's conduct during the marriage, and their anticipated needs at and after divorce.\textsuperscript{66} The purpose of equitable distribution is to treat both parties fairly and provide each with a basis for making a new beginning in their newly separate lives.

Although equitable distribution is now a national policy, the applicable statutes for carrying out the doctrine vary quite dramatically from one state to another.\textsuperscript{67} There is neither uniform state law nor

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  \item \textsuperscript{60} Id. Under the traditional common law approach, all rights to marital property arise solely from the title to the property and not through any tangible or non-tangible contributions to the property by the non-titled spouse during the marriage. This means that where one spouse has title to the property but the other does not, the titled spouse would get the property in a divorce proceeding no matter what contributions were made by the non-titled spouse. The non-titled spouse's only recourse was a discretionary award of alimony, support or maintenance. \textit{See id.} at 4-5.
  \item \textsuperscript{61} \textit{See id.} at 2, 5.
  \item \textsuperscript{63} \textit{Golden, supra note 59, at 1-3}.
  \item A community property state views property acquired during the marriage as joint or marital property, with a few exceptions that certain property (the primary home not included) be considered separate property. Title alone does not determine ownership. \textit{Golden, supra note 59, at 6}.
  \item \textsuperscript{64} \textit{Golden, supra note 59, § 8.05, at 240-42}.
  \item \textsuperscript{65} \textit{Id.} § 1.01, at 2.
  \item \textsuperscript{66} \textit{Id.} § 8.20, at 268.
  \item \textsuperscript{67} \textit{Id.} § 1.01, at 2-3.
\end{itemize}

The equitable distribution statutes detailing how a division is made vary greatly from state to state. These statutes range from those which are quite complex and detailed, providing lists of factors for consideration in making the final award, to those which are simple
federal law in the area of marriage and divorce. Nevertheless, one very common method of implementing an equitable distribution is the use of the "divorce lien." A court creating a divorce lien grants one spouse the marital home and grants the other spouse a lien against the home in the amount of his or her share of the marital property to secure later payment of that share. A divorce lien is often chosen, either by the parties or the courts, in order to avoid a forced sale of the home at the time of divorce while assuring the creditor spouse an eventual interest in the marital assets. Often the lien-holding spouse must wait until a specified number of years have passed, a specified event has occurred, or the property is sold to enforce the lien.

A conflict between bankruptcy law's "fresh start" policy and divorce law's doctrine of equitable distribution occurs when the spouse who was granted the marital home enters bankruptcy and attempts to avoid his or her former spouse's lien on the home under section 522(f)(1). Different interpretations of section 522(f)(1) by the lower courts have exacerbated this conflict and caused much confusion. Recently, the Supreme Court attempted to resolve the conflict and clarify the situation.

II. CONFLICTING INTERPRETATIONS OF SECTION 522(f)(1) AMONG THE LOWER COURTS AND THE SUPREME COURT RESPONSE

The lack of consensus among the courts in interpreting the statutory language of section 522(f)(1) reflects the difficulties presented by the divorce lien issue. Although the literal reading of the statutory words seems to require avoidance of the lien, this produces not only an unjust result, but apparently was not what Congress intended.

68. The Uniform Marriage and Divorce Act (UMDA), which is a recommendation for uniform state laws in this area, has been adopted in some form by only a few states. See National Conference of Commissioners on Uniform State Laws, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 1986 (1990); see also Jane Rutheford, Duty In Divorce: Shared Income As A Path To Equality, 58 Fordham L. Rev. 539, 547-48 n.46 (1990).


69. Arkison, supra note 6, at 6.

70. A forced sale is not looked on favorably primarily because a forced sale generally brings a price for the home at lower than fair market value.

71. Arkison, supra note 6, at 6.

72. See supra notes 54-56 for a discussion of Congress' intent in passing § 522(f)(1).
Under section 522(f)(1), a debtor must satisfy three requirements in order to avoid a lien: (1) the lien must be a judicial lien; (2) the lien must impair an exemption to which the debtor is entitled; and (3) the debtor must possess the property interest to which the lien fixed, before the lien was fixed on it. 73

Some courts have focused on whether the lien is a judicial lien, 74 or whether the lien impaired an exemption of the debtor, 75 two of the three prongs of section 522(f)(1). However, most courts, including the Supreme Court in its recent decision in Farrey v. Sanderfoot, 76 have focused on the third prong, which requires that the debtor possess the interest in the exempt property prior to the attachment of the lien. 77 Some of these courts have held that the specific divorce lien involved could not be avoided because the creditor spouse possessed an ownership interest, either legal or equitable, in the exempt property prior to the divorce, and that the attachment of the lien simultaneously with the transfer of the home essentially transformed the creditor spouse’s pre-existing ownership interest into that of a mortgage. 78 Other courts have held that the divorce lien involved could be avoided on the basis that the divorce decree extinguished any pre-existing interest of the non-debtor spouse. Consequently, the divorce lien attached only to the debtor’s interest in the property and not to any pre-existing interest of the non-debtor. 79 The Supreme Court granted certiorari in In re Sanderfoot to resolve the conflict in the lower courts.

74. For cases holding that a divorce lien is a judicial lien, see Stedman v. Pederson (In re Pederson), 875 F.2d 781 (9th Cir. 1989); Maus v. Maus, 837 F.2d 935 (10th Cir. 1988); In re Boggess, 105 B.R. 470 (Bankr. S.D. Ill. 1989); In re Brothers, 100 B.R. 565 (Bankr. N.D. Ala. 1989).
75. For cases holding that a divorce lien is not a judicial lien, see Borman v. Leiker (In re Borman), 886 F.2d 273 (10th Cir. 1989) (equitable lien); Parker v. Donahue (In re Donahue), 862 F.2d 259 (10th Cir. 1988) (same); Boyd v. Robinson, 741 F.2d 1112 (8th Cir. 1984) (mortgage); Wicks v. Wicks, 26 B.R. 769 (Bankr. D. Minn. 1982) (consensual lien).
77. For cases holding that a divorce lien is not a judicial lien, see Borman v. Leiker (In re Borman), 886 F.2d 273 (10th Cir. 1989); Boyd v. Robinson, 741 F.2d 1112 (8th Cir. 1984); see infra notes 86-113, 176-87 and accompanying text. 
79. Farrey v. Sanderfoot (In re Sanderfoot), 899 F.2d 598 (7th Cir. 1990), rev’d, 111 S. Ct. 1825 (1991); Stedman v. Pederson (In re Pederson), 875 F.2d 781 (9th Cir. 1989); Maus v. Maus, 837 F.2d 935 (10th Cir. 1988); see infra notes 114-39, 166-75, 207-20 and accompanying text.
regarding the interpretation and application of section 522(f)(1) to
liens on marital property created at the time of divorce.

A. Two Conflicting Interpretations of Section 522(f)(1) in the
Courts of Appeals: Boyd v. Robinson and In re Sandeifoot

The two major conflicting interpretations of section 522(f)(1) are
exemplified by Boyd v. Robinson and In re Sandeifoot. The Court
of Appeals for the Eighth Circuit, the first court of appeals to address
this issue, held in Boyd that the lien was not avoidable. In contrast,
in Sandeifoot, the Court of Appeals for the Seventh Circuit allowed
avoidance of the divorce lien.

1. Boyd v. Robinson

In Boyd, the former wife (Boyd) purchased the marital home
prior to the marriage and retained title in her name. In the divorce
proceeding, the court found that the home was "partially marital
property" and granted Boyd the home "subject to a lien for one-half
of the equity [acquired] by the parties together after marriage." The
amount of this lien was $7000. Shortly after the divorce decree,
Boyd filed for bankruptcy and sought to avoid her ex-husband's
(Robinson) lien under section 522(f)(1). The bankruptcy court, in

80. 741 F.2d 1112 (8th Cir. 1984).
81. 899 F.2d 598 (7th Cir. 1990), rev'd, 111 S. Ct. 1825 (1991).
82. 741 F.2d 1112 (8th Cir. 1984).

The issue of avoidance of a divorce lien was not addressed again by a federal court of
appeals until 1988. In Maus v. Maus, 837 F.2d 935 (10th Cir. 1988), the Court of Appeals
for the Tenth Circuit allowed a wife, in possession of the home free and clear of any and all
claims of the other spouse, to avoid the divorce lien held by her husband. Id. at 939. In
1989, both the Ninth and the Tenth Circuits addressed the issue. The Court of Appeals for
the Ninth Circuit, in Stedman v. Pederson (In re Pederson), 875 F.2d 781 (9th Cir. 1989),
allowed a husband to avoid a divorce lien held by his wife on the basis of the reasoning in
the dissent in Boyd. Id. at 783. The Tenth Circuit, in Borman v. Leiker (In re Borman),
886 F.2d 273 (10th Cir. 1989), severely limited its decision in Maus one year earlier when it
held the debtor-husband could not avoid his former wife's divorce lien. Id. at 274.

In 1990, the Court of Appeals for the Seventh Circuit addressed the issue in Farrey v.
Sanderfoot (In re Sanderfoot), 899 F.2d 598 (7th Cir. 1990), rev'd, 111 S. Ct. 1825 (1991).
83. 899 F.2d 598 (7th Cir. 1990), rev'd, 111 S. Ct. 1825 (1991).
84. Boyd, 741 F.2d at 1115.
85. Sandeifoot, 899 F.2d at 605.
86. 741 F.2d 1112 (8th Cir. 1984).
F.2d 1112 (8th Cir. 1984).
88. Boyd, 741 F.2d at 1113 (citing the Designated Record (D.R.) 27).
89. Id.
90. Id.
allowing Boyd to avoid the lien, held that the lien was a judicial lien\(^{91}\) and, therefore, subject to avoidance under section 522(f)(1).\(^{92}\) The district court reversed because it saw the lien not as a judicial lien but rather as an equitable mortgage,\(^{93}\) which did not impair Boyd’s interest in the home but instead represented Robinson’s pre-existing interest in the property under Minnesota statutory law.\(^{94}\) This decision was upheld on appeal.\(^{95}\)

The Court of Appeals for the Eighth Circuit held that section 522(f)(1) permits a debtor to avoid a lien if (1) the lien attaches to an interest of the debtor in exempt property; and (2) the lien is a judicial lien.\(^{96}\) As to the first requirement, the court held that Robinson (creditor) had a pre-existing interest in the homestead that was created under the Minnesota statutes and that antedated the divorce.\(^{97}\) Additionally, the court held that the divorce lien attached to this pre-existing interest, rather than to Boyd’s interest, which was created by the divorce. Therefore, that lien could not be avoided under section 522(f)(1).\(^{98}\)

The court gave three reasons supporting its determination that Robinson’s lien attached to his pre-existing interest in the home rather than to the debtor spouse’s interest. First, in order to convey a homestead in Minnesota, the signatures of both spouses are necessary on the deed even if title to the home is held only by one spouse. Accordingly, when he married Boyd, Robinson “acquired an interest in the homestead by which he could either approve or reject the conveyance of the

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91. 11 U.S.C. § 101(32) (1988) defines “judicial lien” as “a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” Id.

92. Boyd, 741 F.2d at 1113. Contra Wicks v. Wicks, 26 B.R. 769 (Bankr. D. Minn. 1982). Wicks was decided on the same day by the same bankruptcy court that decided Boyd. In Wicks, the court held the divorce lien was not avoidable under § 522(f)(1). Id. at 772. Wicks had the same basic fact pattern and issue as Boyd; the only difference was that in Wicks the divorce lien was agreed to by stipulation of the parties instead of ordered by the family court in a contested divorce. Id. at 771.

93. An “equitable mortgage” is “[a]ny agreement to post certain property as security before the security agreement is formalized.” BLACK’S LAW DICTIONARY 539 (6th ed. 1990). For the definition of “mortgage”, see infra note 112 and accompanying text.

94. Boyd v. Robinson (In re Boyd), 31 B.R. 591, 594-95 (D. Minn. 1983), aff’d, 741 F.2d 1112 (8th Cir. 1984). For applicable statutory language, see infra notes 103-04 and accompanying text.

95. Boyd, 741 F.2d at 1115.

96. Id. at 1112-13. The court did not specifically address the third element of § 522(f)(1), which is whether the lien impairs an exemption to which the debtor is entitled, although the district court did address the third element. Since the court of appeals decided that the lien did not attach to Boyd’s interest in the home, it follows that the lien could not have impaired Boyd’s homestead exemption.

97. Id. at 1114.

98. Id. at 1113-14.
homestead."  

Second, Robinson used his own nonmarital funds to construct a driveway and a garage during the marriage, thereby gaining a partial ownership interest. Finally, because Minnesota's divorce statutes require a "just and equitable division of the marital property," Robinson had an undivided [ownership] interest in [as much of] the equity of the homestead [as was] acquired through marital funds.

Since the court of appeals decided that the first requirement clearly was not met according to Minnesota statutory law, the court did not directly decide the second issue, which was whether this lien was a judicial lien. However, the court did refer to two state statutes that in essence equate a divorce lien with an equitable mortgage. One statute defines "mortgage" to include "a decree of marriage dissolution or an instrument made pursuant to it," and the other statute indicates that "a decree of marriage dissolution or an instrument made pursuant to it, relating to real estate shall be valid as security for any debt." The court stated that the purpose of the statutes was to provide spouses with greater protection for property rights "created during the marriage and determined [later] in a dissolution proceeding."

In dissent, Judge Ross maintained that the lien should have been avoided even though "permitting avoidance of this lien is a harsh result." Judge Ross first argued that under Minnesota law the divorce decree granted the property outright to Boyd, ending any interest Robinson had in the marital property. Therefore, the only interest to which the lien could attach was Boyd's. Robinson's interest in the marital home was dissolved by the divorce decree and became nothing more than collateral for Boyd's property settlement debt.

Furthermore, on the second issue, the dissent argued that Robinson's lien was a "judicial lien" as defined in the Code. The Code de-

99. *Id.* at 1114.
100. *Id.*
101. *Id.* (citing *MINN. STAT. ANN.* § 518.58 (West Supp. 1984)).
102. *Id.* at 1113-14. For a discussion of whether a divorce lien is an equitable lien or an equitable mortgage, see Parker v. Donahue (*In re Donahue*), 862 F.2d 259 (10th Cir. 1988).
103. *MINN. STAT. ANN.* § 287.01(3) (West 1991).
104. *Id.* § 287.03 (emphasis added).
105. *Boyd*, 741 F.2d at 1114.
106. *Id.* at 1116 (Ross, J., dissenting).
107. *Id.* at 1115.
108. *Id.*
fines "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation,"$^{109}$ and "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."$^{110}$ The dissent stated that Robinson's lien, an interest in property to secure a debt, was created by the judgment of the divorce court, not by agreement of the parties (a consensual security interest)$^{111}$ nor through a contract or conveyance (a mortgage).$^{112}$ Therefore, the dissent argued that Robinson's lien must have been a judicial lien.$^{113}$

2. *In re Sanderfoot* $^{114}$

*In re Sanderfoot* represents the most recent United States court of appeals decision on the issue of whether a debtor spouse can avoid a former spouse's divorce lien on the marital home pursuant to section 522(f)(1). In 1986, after twenty years of marriage Gerald Sanderfoot and Jeanne Farrey divorced. Pursuant to their divorce decree, the court assigned various assets and debts to the parties. The court awarded the marital home, which the couple had held as joint tenants, to the husband, Sanderfoot.$^{115}$ After these assignments were made, Mr. Sanderfoot had an estate of $59,508.79, while Ms. Farre had an estate worth $1091.90.$^{116}$ In order to secure a more equitable distribution of the marital property, as was required by state law,$^{117}$ the court ordered Mr. Sanderfoot to pay Ms. Farrey approximately $29,000, in two equal installments.$^{118}$ This debt was to be secured by a lien in

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$^{110}$ Id. § 101(32).
$^{111}$ A "consensual lien" is a secured claim that is created by the consent and agreement "between the debtor and the creditor and called a 'security interest' by the Code." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989).
$^{112}$ A "mortgage" is "an interest in land created by a written instrument providing security for . . . the payment of a debt." BLACK'S LAW DICTIONARY 1009 (6th ed. 1990).
$^{113}$ Boyd v. Robinson, 741 F.2d 1112, 1116 (8th Cir. 1984) (Ross, J., dissenting).
$^{114}$ 899 F.2d 598 (7th Cir. 1990), rev'd, 111 S. Ct. 1825 (1991).
$^{115}$ Id. at 599. Farrey was granted "half the refund and/or liability with respect to the couple's 1985 income taxes, certain personal property, and half the proceeds of items ordered sold at auction." Id.
$^{116}$ Id.
$^{118}$ Sanderfoot, 899 F.2d at 599.
favor of Ms. Farrey on the marital home.\textsuperscript{119}

Four months later Sanderfoot filed for bankruptcy and attempted to avoid his ex-wife's lien on the home by claiming that it impaired his homestead exemption.\textsuperscript{120} In denying Sanderfoot's motion to avoid, the bankruptcy court primarily relied on the language and legislative history of section 522(f)(1),\textsuperscript{121} and on Boyd, because it saw Wisconsin case law as similar to Minnesota statutory law.\textsuperscript{122}

On appeal, the district court reversed and allowed Sanderfoot to avoid the lien.\textsuperscript{123} The court stated, with little discussion, that the lien was a judicial lien that impaired Sanderfoot's homestead exemption, and that the divorce decree extinguished whatever pre-existing interests the parties had and created new ones.\textsuperscript{124} Therefore, Sanderfoot had met the three prongs of section 522(f)(1) and could avoid his wife's lien.\textsuperscript{125} The Court of Appeals for the Seventh Circuit affirmed the district court's decision.\textsuperscript{126}

The Court of Appeals for the Seventh Circuit based its decision on the district court's holding, but discussed each prong of section 522(f)(1) in greater detail. First, the court of appeals concluded that the lien attached to Sanderfoot's interest in the homestead property.\textsuperscript{127}

\textsuperscript{119} Id. The lien was to remain until the debt was paid in full. At the time Sanderfoot filed for bankruptcy, he had not paid anything to Farrey. Id.

\textsuperscript{120} Since Wisconsin did not "opt out" under § 522(b)(2)(A), Sanderfoot had the option of choosing either the federal homestead exemption or Wisconsin's homestead exemption. 11 U.S.C. § 522(b)(2)(A) (1988). See supra note 40. Sanderfoot chose his state homestead exemption (up to $40,000) instead of the federal homestead exemption (up to $7500). Sanderfoot, 899 F.2d at 599.

\textsuperscript{121} In re Sanderfoot, 83 B.R. 564, 567 (Bankr. E.D. Wis. 1988), rev'd, 92 B.R. 802 (E.D. Wis.), aff'd sub nom. Farrey v. Sanderfoot (In re Sanderfoot), 899 F.2d 598 (7th Cir. 1990), rev'd, 111 S. Ct. 1825 (1991). The court focused specifically on the phrase "fixing of a lien on an interest of the debtor." Id. The court held that because the statute used "fixing" instead of "fixed," and "interest" instead of "property" Congress intended that a debtor would be able to avoid "liens that became fixed after the debtor's acquisition of the interest in the property, not before." Id.

\textsuperscript{122} Id. at 568. The court stated that although "Wisconsin does not have a statute defining this type of lien as a mortgage, . . . state case law accomplishes the same result." Id.

\textsuperscript{123} Id. at 601-03. The court relied heavily on Maus v. Maus, 837 F.2d 935 (10th Cir. 1988), in determining that Farrey's pre-existing interest in the home was terminated before Farrey's lien was imposed on the property. For a discussion of Maus, see infra notes 166-75 and accompanying text.
Next, the court held that the lien impaired Sanderfoot's homestead exemption. Finally, the court held the lien was a judicial lien. In its conclusion, the court stated it recognized the policy arguments against avoidance, but claimed "clear legislative judgment" prohibited it from deciding otherwise.

Judge Posner dissented. Embracing the result in Boyd, he argued that while institutional considerations sometimes override the equities of justice, such considerations were not compelling in this case. In a scathing opinion, he asserted that section 522(f)(1) had become, in the divorce context, a "tool by which bounders defraud their spouses" and "a tactic designed to nullify (or perhaps to complete nullification of) the divorce decree and give the [debtor spouse] all rather than half the property." Stressing that the decision to avoid these liens was a result of "judicial misunderstanding" of the lien-avoidance provision, he referred to the history and purpose of lien avoidance in the Code.

He further stated that since the statute refers to "the fixing of" a lien on a debtor's interest in property, the statute requires that the debtor possess that interest before the court "fixes" the lien on it. Since Sanderfoot and Farrey had held the property as joint tenants prior to the divorce, at no time before the divorce (and attachment of the lien) did only one spouse have an interest in the property. Moreover, the divorce decree did not extinguish Farrey's pre-existing interest, but changed it to a different form of interest—a mortgage interest.

Judge Posner further declared, "I am at a loss to understand why we should strain the language and ignore the purpose of the lien-avoidance statute in order to achieve a result that does not promote, but instead denies, simple justice...." Upholding the lien would not create any tension "between legal justice and substantive justice";

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128. Since Ms. Farrey did not address this issue, the court determined she had waived any right to challenge it. Sanderfoot, 899 F.2d at 603.
129. Id. at 603-05. The court used the definitions of lien and judicial lien as found in the Code. Id. See also Stedman v. Pederson (In re Pederson), 875 F.2d 781 (9th Cir. 1989); Maus v. Maus, 837 F.2d 935 (10th Cir. 1988).
130. Sanderfoot, 899 F.2d at 605.
131. Id. at 606 (Posner, J., dissenting).
132. Id.
133. Id.
134. Id. Judge Posner agreed that the Farrey-Sanderfoot divorce lien was a judicial lien, but contended that divorce liens are generally created to protect a spouse's pre-existing property rights, not to defeat the debtor's homestead exemptions. Id.
135. Id. at 606.
136. Id.
137. Id. at 607.
instead, he argued, it would fulfill the purpose of Congress that is embodied in the lien-avoidance provision.\textsuperscript{138} He concluded that the result reached by the majority distorted the Code by allowing the debtor to make a "fresh start with someone else's property."\textsuperscript{139}

B. \textit{The Supreme Court Decision}

The Supreme Court granted certiorari in \textit{In re Sanderfoot}\textsuperscript{140} to resolve the conflict in the lower courts as to the interpretation and application of section 522(f)(1) to divorce liens. In a unanimous decision, the Court reversed the Court of Appeals for the Seventh Circuit and held that section 522(f)(1) "requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest."\textsuperscript{141} The Court ruled that Sanderfoot had never possessed his fee simple interest in the home prior to the fixing of Farrey's divorce lien.\textsuperscript{142} Consequently, Sanderfoot could not employ section 522(f)(1) to avoid his wife's lien.

To support its holding, the Court referred to the provision's language and legislative history. The Court began with an analysis of the language of section 522(f)(1), concentrating solely on its third prong.\textsuperscript{143} The Court maintained that the only question necessary to a decision was whether section 522(f)(1) permitted Sanderfoot to "avoid the fixing" of Farrey's lien on the property interest that Sanderfoot acquired in the divorce decree.\textsuperscript{144} Focusing specifically on the standard legal meaning of the verbs "avoid" and "fix," the Court stated that the use of "[t]he gerund 'fixing' [in the statute] refers to a temporal event. That event—the fastening of a liability—presupposes an object onto which the liability can fasten."\textsuperscript{145} The Court then concluded that unless a debtor had the specific property interest to which the lien attached prior to the lien's attachment, the debtor could not avoid the lien under section 522(f)(1).\textsuperscript{146}

The Court supported its interpretation of the provision by exam-
ining the provision’s purpose and legislative history. Acknowledging that the broad purpose of section 522(f) was to protect the debtor’s exempt property, the Court pointed out that when the provision was enacted “it was well settled . . . that valid liens obtained before bankruptcy could be enforced on exempt property.”147 Through the Bankruptcy Reform Act of 1978, Congress essentially preserved this principle. However, Congress also gave the debtor some relief by allowing him or her to avoid the fixing of certain liens—among them, judicial liens fixed on an interest of a debtor in exempt property.148

The Court reasoned that Congress had singled out judicial liens in order to protect debtors from unsecured creditors who rushed into court to obtain liens on debtor’s exempt property prior to the debtor’s entry into bankruptcy.149 The Court buttressed this theory by referring to the provision’s legislative history.150 However, the Court maintained that this is not what occurs in a divorce proceeding. Farrey obtained the lien not to “defeat Sanderfoot’s pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead” which was fully equal to that of Sanderfoot.151

Adopting Judge Posner’s analysis, the Court stated that “the critical inquiry [is] whether the debtor ever possessed the interest to which the lien fixed, before it fixed”152 and that this inquiry is a question of state law.153 Consequently, the Court found that under Wisconsin law the divorce decree extinguished both Mr. Sanderfoot’s and Ms. Farrey’s pre-existing undivided half interests and granted the property to Sanderfoot “‘free and clear’ of any claim ‘except as expressly provided in this [divorce decree].’”154 Sanderfoot received his new interest and the lien simultaneously, “as if he had purchased an already encumbered estate from a third party.”155 Therefore, Sanderfoot never pos-

147. _Id._ (citations omitted).
148. _Id._
149. _Id._
151. _Farrey_, 111 S. Ct. at 1831.
152. _Id._ at 1830.
153. _Id._
154. _Id._ (citing App. to Pet. for Cert. 58a, Farrey v. Sanderfoot (In re Sanderfoot), 899 F.2d 598 (7th Cir. 1990) (No. 90-350), rev’d, 111 S. Ct. 1825 (1991)).
155. _Id._ at 1830-31. The Court found that Mr. Sanderfoot could not avoid the lien even if the divorce decree had not extinguished the couple’s pre-existing interests, but merely reordered them, i.e., adding Ms. Farrey’s pre-existing interest to that of Mr. Sanderfoot. _Id._ at 1831. Since the lien attached to Ms. Farrey’s pre-existing interest, when Mr. Sanderfoot received that interest, it was already with the lien in place. He “would
sessed his new fee simple interest before Farrey’s lien was fixed on it.\footnote{156}

In his concurring opinion, Justice Kennedy contended that the Court’s holding left open the possibility that future cases could produce a different result because much “depend[s] upon the relevant state laws defining the estate owned by a spouse who had a pre-existing interest in marital property and upon state laws governing awards of property under a decree settling marital rights.”\footnote{157} According to Wisconsin state law, all property of spouses is presumed to be marital property and each spouse possesses a present undivided one-half interest in the marital property.\footnote{158} Justice Kennedy interpreted Wisconsin law as reordering, rather than extinguishing, the spouses’ pre-existing interests. Consequently, according to Justice Kennedy, but for Mr. Sanderfoot’s concession that the divorce decree extinguished these interests, the debtor would have both retained his pre-existing interest and received his wife’s pre-existing interest at the divorce, whereupon these two interests would have merged into one estate.\footnote{159} Therefore, “as a matter of state law the judicial lien could ... attach to [Sanderfoot’s] predecree interest ... in the marital property” and be at least partially avoided under section 522(f).\footnote{160}

Justice Kennedy therefore concluded that the possibility still exists that the Code could be misused to avoid otherwise valid obligations under a divorce court decree. He warned,

[although] adept drafting of property decrees or the use of court orders directing conveyances in a certain sequence might resolve the problem, ... congressional action may be necessary to avoid in some future case the ... unjust result the Court today avoids having to consider only because of the fortuity of [Mr. Sanderfoot’s] concession.\footnote{161}

Although the Court unanimously held that Mr. Sanderfoot could not avoid his former wife’s lien, the decision is narrow. First, the Court only addressed one of the three elements that section 522(f)(1) requires a debtor to meet in order to avoid a lien.\footnote{162} Second, in reach-\footnote{156. Id. at 1830-31.  
157. Id. at 1832.  
158. Id. (citing WIS. STAT. § 766.31(2)-(3) (1989)).  
159. Id.  
160. Id. See supra note 155 for the majority’s response to Justice Kennedy’s view.  
161. Farrey, 111 S. Ct. at 1832-33.  
162. See supra note 4 and accompanying text for the three elements of § 522(f)(1).}
ing its decision on this one element, the Court relied heavily on several variables including the form of ownership in which the spouse held the marital home prior to divorce, how the applicable state law views marital property at the time of divorce, the wording used in the divorce decree, and a court's interpretation as to the timing of the fixing of the lien. The Court's reliance on these factors is very significant since in certain situations a debtor spouse will still be able to manipulate the Code to avoid a former spouse's divorce lien through use of section 522(f)(1). A look at divorce liens in a post-Farrey world illuminates the remaining grey areas associated with the application of section 522(f)(1) to divorce liens.

III. THE IMPACT OF FARREY ON FUTURE DIVORCE LIENS

The Supreme Court's decision in Farrey attempted to resolve the conflict in the lower courts regarding the application of section 522(f)(1) to divorce liens. According to Farrey, in order to avoid a divorce lien under section 522(f)(1) a debtor must possess the interest to which the lien is fixed prior to the lien's attachment. While this rule reaches the fair and equitable result in this case, it will not do so in all situations where divorce liens exist. Furthermore, while Farrey resolved some of the conflict as to the third prong of the provision, it did not end the confusion as to the other two prongs. The following Section examines the impact of Farrey on future divorce liens in the context of the factual situations presented by the four courts of appeals' cases decided before Farrey. This examination primarily focuses on the form of ownership (joint tenancy or sole ownership) in which the home is held and the effect of state law on determining the timing of the attachment of the lien. In examining these factors, this Section incorporates the role of equitable distribution law in determining a debtor spouse's interest in marital property and the question of whether divorce liens are "judicial liens" as required under section 522(f)(1).

A. Joint Tenancies: Maus v. Maus and In re Borman

The Court of Appeals for the Tenth Circuit decided both Maus and Borman. Although both cases involved marital homes that were held in joint tenancies, the court in Maus allowed the wife to avoid her...
husband’s lien, while in Borman the court did not allow the husband to avoid his former wife’s lien.

1. Maus v. Maus

In Maus, the spouses reached a verbal property settlement which was incorporated into the divorce decree. Nikki Maus (the wife) was granted the home “free and clear of any and all claims” of Jesse Maus (her former husband). Nikki was also ordered to pay Jesse $22,000 in order to achieve an equitable distribution of the marital property. Three years later, Nikki filed for bankruptcy and claimed the home as exempt property. She listed the $22,000 obligation to Jesse as an unsecured debt, but in case the obligation was viewed as a lien, she sought to have it avoided under section 522(f)(1).

The bankruptcy court held that the debt was a consensual lien created by the consent and agreement of the parties in the property settlement and, therefore, not avoidable under section 522(f)(1) since the provision only applies to judicial liens. However, the district court held that the lien was a judicial lien and allowed Nikki to avoid it. The Court of Appeals for the Tenth Circuit affirmed. First, the court agreed that the lien was a judicial lien. Then, the court found that the divorce decree extinguished Jesse’s pre-existing interest in the property as the decree specifically stated that Nikki was to get the home free and clear of any and all claims of her husband. Consequently, the court concluded that the lien could only have attached to Nikki’s interest in the home.

2. In re Borman

In In re Borman, pursuant to the divorce decree, the former wife was allowed to retain possession of the home and make mortgage pay-

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166. 837 F.2d 935 (10th Cir. 1988).
167. Id. at 937 (quoting from the Maus’ property settlement agreement, which was incorporated in the divorce decree).
168. Id.
169. Id.
170. Id.
171. Id. See supra note 111 for a definition of consensual lien.
172. Maus, 837 F.2d at 937.
173. The court stated that, under Kansas law, any obligation arising under chapter 60 of the Kansas Statutes Annotated is considered a judicial lien, and since divorce proceedings are commenced under chapter 60, the husband’s claim was considered a judicial lien. Id. at 938.
174. Id. at 939.
175. Id.
176. 886 F.2d 273 (10th Cir. 1989).
ments until the house was appraised.\textsuperscript{177} After the appraisal, the husband was to pay the wife one-half of the appraised value and then receive title to the house.\textsuperscript{178} On the husband's motion, the trial court modified the divorce decree to require the husband to pay the wife approximately $19,000 as a condition for receiving title to the house.\textsuperscript{179} The debt to the ex-wife was to be secured by a lien on the marital home, which had been held in a joint tenancy.\textsuperscript{180} However, when the cash settlement was due, Mr. Borman filed for bankruptcy and claimed a homestead exemption on the house.\textsuperscript{181} Subsequently, Borman filed a motion to avoid his former wife's lien.\textsuperscript{182} The bankruptcy court allowed Borman to avoid his wife's lien and the district court affirmed.\textsuperscript{183}

The Court of Appeals for the Tenth Circuit reversed and held that the divorce lien could not be avoided.\textsuperscript{184} The court determined that the divorce lien was an equitable lien and that avoidance of it would lead to unjust enrichment of the debtor spouse since "it [was] clear the property was intended to be the source from which the debt would be paid."\textsuperscript{185} The court, adopting the rationale it employed in \textit{In re Donahue},\textsuperscript{186} distinguished its earlier decision in \textit{Maus} by stating that "the critical difference [was] that the decree in \textit{Maus} awarded the property to the debtor spouse free and clear of any claims of the non-debtor spouse."\textsuperscript{187}

\textsuperscript{177} \textit{Id.} at 273.
\textsuperscript{178} \textit{Id.} at 273-74.
\textsuperscript{179} \textit{Id.} at 274.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} The wife did not object to the husband's claimed exemption. \textit{Id.}
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.} at 274. In reaching its holding, the \textit{Borman} court relied predominately on the reasoning in \textit{Parker v. Donahue (In re Donahue)}, 862 F.2d 259 (10th Cir. 1988). \textit{Donahue} did not deal directly with the question of avoidance of a divorce lien, but rather whether such a lien was an equitable lien or equitable mortgage. The Court of Appeals for the Tenth Circuit held that where a divorce decree intends, either implicitly or explicitly, that a specific property of one spouse secure a debt to the other spouse, the decree creates an equitable lien upon that property. \textit{Id.} at 265-66. Use of the term "lien" was not necessary in the divorce agreement. Alternative words, such as "subject to," that establish that the property was to be security for the debt are sufficient. \textit{Id.} at 265 n.9. The court held that whether the creditor spouse's interest was called an equitable lien or an equitable mortgage, the debt was secured. \textit{Id.} at 266.
\textsuperscript{185} \textit{Borman}, 886 F.2d at 274.
\textsuperscript{186} 862 F.2d 259 (10th Cir. 1988).
\textsuperscript{187} \textit{Borman}, 886 F.2d at 274.
3. Application of Farrey to Joint Tenancies

Like Farrey, Maus and Borman involved homesteads held during marriage as joint tenancies. Also like Farrey, Maus and Borman involved divorce decrees that extinguished the spouses’ pre-existing undivided half interests, created new property interests for each spouse who was granted the home, and created divorce liens for the other spouse. Based on these similarities, it would seem that after Farrey divorce liens in joint tenancy situations like Maus and Borman would not be avoided, just as the Farrey lien was not avoided.

This result is clear in Borman, but is less obvious in Maus. In Borman, under the modified divorce decree the husband was not to receive full title to the house until after he had paid his debt to his ex-wife. Even before the divorce decree was modified, the house was to be held in a joint tenancy until the husband paid the wife one-half of the appraised value. Therefore, under Farrey, the husband would never have “possessed the interest to which the lien fixed, before it fixed,” and thus could not have avoided his wife’s lien.

In Maus, the spouses similarly had held the home in a joint tenancy prior to the divorce and, after the divorce, one spouse (the wife, Nikki) possessed the home with her husband’s lien attached. Seemingly, Farrey would prevent Nikki from avoiding her former husband’s lien. However, in Farrey, the Supreme Court recognized that the critical question of when the debtor came into possession of the interest to which the divorce lien attached was a question of state law. Under Kansas law (controlling in Maus), on the filing of a divorce petition, “each spouse becomes the owner of a vested, but undetermined, interest in all property individually or jointly held. . . . [However], [t]he court may cut off all of a spouse's rights to property by using specific language.” This was done in the Maus decree.

Unlike Farrey, where the divorce decree stated that Mr. Sanderfoot acquired the property “free and clear of any claim 'except as expressly provided in this [decree],’” the Maus’ divorce decree stated that Nikki was “hereby granted [the marital home] as her sole and separate property free and clear of any and all claims of

188. See supra notes 166-87 and accompanying text.
189. Borman, 886 F.2d at 274.
190. Id. at 273-74.
192. Id.
194. Farrey, 111 S. Ct. at 1830 (emphasis added).
While Sanderfoot “took [his new] interest and the lien together, as... an already encumbered estate,” it can be argued that Nikki first acquired an unencumbered estate and then Jesse’s lien was fixed upon it. Because Jesse’s lien could only have attached to Nikki’s interest, it would be subject to avoidance under section 522(f)(1) even after Farrey.

While this argument for avoidance of Jesse’s lien essentially puts form over substance and disregards the intent of Nikki and Jesse Maus prior to the drafting of the divorce decree, this kind of interpretation and result has not been eliminated by Farrey. Although “adept drafting” can mitigate and possibly eliminate this potential problem in joint tenancy situations, sole ownerships present a more difficult problem.

B. Sole Ownership: Boyd v. Robinson\(^{197}\) and In re Pederson\(^{198}\)

Both Boyd and Pederson involved homes that were purchased by one spouse prior to marriage and held solely by that spouse during the marriage. Each home was granted to the spouse who had originally purchased the home. However, in Boyd the court did not allow the wife to avoid her ex-husband’s lien, while in Pederson the court allowed the husband to avoid his ex-wife’s lien.

1. Boyd v. Robinson\(^{199}\)

In Boyd v. Robinson, title to the home was held solely by the wife (Boyd) since she had purchased the home prior to the marriage.\(^{200}\) In the divorce proceeding Boyd was awarded the home “subject to a lien for one-half of the equity acquired by the parties together after marriage.”\(^{201}\) Boyd filed a petition for bankruptcy and tried to avoid her

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195. Maus, 837 F.2d at 937. When a divorce decree awards a home “free and clear of all claims” of the former spouse, it had generally been held that the spouse who retained the home had the only interest in the home and the divorce lien attached to that interest. See, e.g., id. at 937-39. However, when a divorce settlement awards the home “subject to” the lien of the other spouse and it is clear that the home is to be the source of funds to effectuate the division of the marital property, some courts have created an equitable lien in favor of the non-debtor spouse and generally held it could not be avoided. Borman v. Leiker (In re Borman), 886 F.2d 273, 274 (10th Cir. 1989). See supra note 184 for further discussion of equitable liens and treatment of them by the courts.

196. Farrey, 111 S. Ct. at 1830.
197. 741 F.2d 1112 (8th Cir. 1984).
198. 875 F.2d 781 (9th Cir. 1989).
199. 741 F.2d 1112 (8th Cir. 1984). See supra notes 86-113 for a more detailed discussion of Boyd.
200. Boyd, 741 F.2d at 1113.
201. Id. (citing to the Designated Record (D.R.) 27).
ex-husband’s divorce lien under section 522(f)(1). The bankruptcy court classified his lien as a judicial lien and allowed Boyd to avoid her ex-husband’s lien. The district court reversed as it determined the lien was an equitable mortgage rather than a judicial lien.

On appeal to the Court of Appeals for the Eighth Circuit, the court held that Boyd could not avoid the lien that her ex-husband (Robinson) held on the marital home since the lien attached to Robinson’s pre-existing interest. In reaching this conclusion, the court primarily relied on the Minnesota statutory law that created Robinson’s pre-existing interest.

2. *In re Pederson*

In the dissolution decree for the marriage of Earnest Pederson and Bonnie Stedman the state court granted the marital home to Pederson as his “sole and separate property.” Prior to the marriage, Pederson owned the marital home as his separate property. However, in recognition that certain improvements had been made out of marital funds, Stedman was granted an $8000 lien to run “against the real property.” Less than three weeks after the divorce decree was finalized, Pederson filed for bankruptcy, claimed a homestead exemption and moved to avoid Stedman’s lien on the home pursuant to section 522(f)(1). The bankruptcy court denied the motion. The Bankruptcy Appellate Panel reversed the bankruptcy court’s decision and avoided Stedman’s lien. The Court of Appeals for the Ninth Circuit affirmed.

The court of appeals noted three reasons in support of its decision. First, based on the definitions of lien and judicial lien in the

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202. *Id.*
203. *Id.*
206. *Boyd*, 741 F.2d at 1114.
207. 875 F.2d 781 (9th Cir. 1989).
208. *Id.* at 783 (citing *In re Pederson*, No. 85-3-00646-1, at 1 (Wash. Super. Ct. July 3, 1986)). The decree did not provide for alimony, support, or maintenance payments. *Id.* at 782.
209. *Id.* at 782.
210. *Id.*
211. *Id.*
212. *Id.* The bankruptcy court determined that the lien was not a judicial lien as defined under the Bankruptcy Code. Therefore, it was not subject to § 522(f)(1). *Id.*
213. *Id.* The Bankruptcy Appellate Panel held that Stedman’s lien was a judicial lien under the Code and could be avoided under § 522(f)(1). *Id.*
214. *Id.* at 782-84.
Code,\textsuperscript{215} the court held that the wife's lien was a judicial lien because it was created by a judgment and was a "charge against" the marital home, which was awarded to Pederson in order to secure payment of the equitable distribution of the marital property.\textsuperscript{216} Second, since the "dissolution decree clearly indicate[d] that Stedman's lien attached to Pederson's property [interest]," the court held that Stedman's lien impaired Pederson's homestead exemption.\textsuperscript{217} Finally, the court found that Stedman had no pre-existing interest in the homestead to which the divorce lien could have attached.\textsuperscript{218} The court's reasoning focused on the ability of a state court under Washington law to award title to the residence outright to one spouse.\textsuperscript{219} Since the dissolution decree entered by the state court specifically granted the home to Pederson as his "sole and separate property," at the time of the divorce only Pederson possessed an interest to which a lien could attach.\textsuperscript{220}

3. Application of Farrey to Sole Ownership

Under Farrey, the "critical inquiry [is] whether the debtor ever possessed the interest to which the lien fixed, before it fixed."\textsuperscript{221} Where a sole ownership exists, only one party has title to the property. When a couple divorces, if the spouse with title is the spouse granted the marital home, arguably that spouse has and had the only property interest in the marital home. Therefore, that spouse possessed the interest to which the lien fixed, before it fixed. Accordingly, the divorce lien would attach to that spouse's interest and could be avoided under section 522(f)(1).

In Pederson, not only was title to the marital home in Pederson's name before and during the marriage, but the state court's dissolution order granted the home to him as his "sole and separate property."\textsuperscript{222} Even though Stedman (the wife) was granted a lien representing her "interest" in the marital home, the dissolution decree stated that her lien was to attach to Pederson's separate real property.\textsuperscript{223} Therefore, the lien attached to Pederson's "sole and separate" interest, and under

\textsuperscript{215} See supra notes 109, 110 and accompanying text for the Code's definitions of lien and judicial lien, respectively.

\textsuperscript{216} In re Pederson, 875 F.2d 781, 782 (9th Cir. 1989).

\textsuperscript{217} Id. at 783.

\textsuperscript{218} Id. (adopting the rationale of Maus).

\textsuperscript{219} Id.

\textsuperscript{220} Id. (quoting In re Pederson, No. 85-3-00646-1, at 1 (Wash. Super. Ct. July 3, 1986)).


\textsuperscript{222} Pederson, 875 F.2d at 783.

\textsuperscript{223} Id. Although the equitable distribution law in Washington recognized that
Farrey’s interpretation of section 522(f)(1), Pederson possessed his fee simple interest before the lien fixed and could avoid his wife’s lien.

The divorce lien in Boyd is more problematic. As stated before, the critical question under Farrey is “whether the debtor ever possessed the interest to which the lien fixed, before it fixed.”224 Like Pederson, Boyd (the wife) held title to the marital home solely in her name prior to the divorce as well as after the divorce.225 Applying Farrey literally, Boyd possessed the specific interest to which the lien fixed, before the lien fixed. Consequently, the lien could be avoided under section 522(f)(1).

However, title alone may not be determinative of what interest a spouse possessed in the marital home prior to the fixing of the lien. The Court, in Farrey, stated that this critical inquiry is a question of state law.226 Since every state has adopted some form of equitable distribution in the area of divorce law, either by statute or judicial decision,227 the doctrine must be taken into account by the bankruptcy courts and other federal courts when determining the “pre-existing interests” of both divorcing spouses.

According to Minnesota statutory law (controlling in Boyd), each spouse has an “undivided interest in marital property from the time it is acquired.”228 Consequently, one can argue that Robinson (Boyd’s husband) had an interest in the marital home prior to the divorce and, although title to the home was solely in Boyd’s name, Boyd had less than a fee simple interest. Moreover, the dissolution decree in Boyd expressly stated that Boyd was to receive the marital home “subject to” a lien for one-half of the equity acquired by Boyd and Robinson after marriage,229 in contrast to Pederson where the divorce decree granted the property outright to Pederson. Use of the words “subject to” in the divorce decree provides the argument that the divorce decree first extinguished Boyd’s and Robinson’s pre-existing interests and then created for Boyd a new fee simple interest already encumbered by her husband’s lien. Applying Farrey to this view of the property interests, the husband’s lien could not be avoided.

Although this last approach reaches the equitable result,

Stedman had an interest in the marital home, that interest was effectively extinguished by the wording used in the divorce decree.

224. Farrey, 111 S. Ct. at 1830 (emphasis added).
226. Farrey, 111 S. Ct. at 1830.
227. See supra note 63.
228. Boyd, 741 F.2d at 1114.
229. Id. at 1113.
problems do exist with it. First, the mere existence of an equitable distribution law may not be enough to create a pre-existing interest where property ostensibly belongs to one spouse. Second, even if equitable distribution law does create a pre-existing interest for the non-titled spouse, the wording used in a divorce decree can be interpreted to have extinguished the interest created under equitable distribution law prior to the fixing of the lien, as was done in Pederson.

Unfortunately, Farrey does not provide any guidance in these areas. First, Farrey dealt with property held in a joint tenancy, which presents fewer difficulties in determining the pre-existing interests of the spouses than does sole ownership. Second, and more importantly, Sanderfoot (the debtor spouse in Farrey) did not challenge the characterization of Wisconsin law as extinguishing the prior interests of both spouses and creating new ones.230 Since the Court did not discuss this issue, the question of whether equitable distribution law can create an enforceable pre-existing interest in property that otherwise appears to belong entirely to someone else is one with which the lower courts will have to struggle.

Farrey may, however, afford the lower courts a means of avoiding the problem of determining pre-existing interests in sole ownership situations. Since the Court did not address whether a divorce lien is a judicial lien,231 focusing instead on whether the lien attached to the debtor's interest in the marital home, the lower courts may be able to rely on the consensual lien theory or the equitable lien theory to refrain from applying section 522(f)(1) to a particular divorce lien.232 Classification of a divorce lien as a consensual lien renders section 522(f)(1) inapplicable since the provision only applies to judicial liens.233 Some courts have classified divorce liens as consensual liens when the liens were created by the consent and agreement of the parties in their separation agreement and then incorporated by the court into their divorce decree as a matter of formality.234 When the spouses have not previously agreed to a lien and the lien is created entirely by the court, some courts have held that the lien is an equitable lien and did not avoid the lien on that basis.235 However, in con-

230. Farrey, 111 S. Ct. at 1831-32 (Kennedy, J., concurring).
231. Ms. Farrey did not challenge the court of appeals' determination that her lien was a judicial lien. Id. at 1828.
232. See supra notes 184-85 and accompanying text for a discussion of the equitable lien theory.
235. See Parker v. Donahue (In re Donahue), 862 F.2d 259 (10th Cir. 1988); In re
contrast to consensual liens which are not judicial liens, there is no consensus on whether equitable liens are judicial liens.236

Nevertheless, the same interpretation problems that exist with determining a debtor's interest in the marital home also exist in determining whether a divorce lien is a judicial lien. When the wording used in the divorce decree awards the property to the debtor spouse free and clear of any claims of the non-debtor spouse, this wording gives rise to the argument that the prior agreement is now void and the lien that was created was a general judgment lien, even though the parties previously agreed to a lien on the home.237 In addition, some courts hold divorce liens to be judicial liens simply because they were imposed by the filing of a judgment and decree in a court, ignoring the substantive nature of the consensual agreement between the parties.238 Furthermore, other courts look to federal law to determine whether a divorce lien is a judicial lien, specifically the Code definitions of "lien" and "judicial lien."239

Since the Supreme Court has, however, "consistently recognized that '[t]he whole subject of the domestic relations of husband and wife ... belongs to the laws of the States and not to the laws of the United States,' "240 a federal definition of "judicial lien" for bankruptcy purposes should not override state definitions for family law purposes.241

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236. Several courts have held that divorce liens are equitable liens. However, these courts have differed on whether equitable liens are judicial liens. See Hartley v. Liberty Park Assocs., 774 P.2d 40 (Wash. App. 1989) (holding that an equitable lien is not a judicial lien); Zachary v. Zachary, 99 B.R. 916 (S.D. Ind. 1989) (same); In re Warren, 91 B.R. 930 (Bankr. D. Or. 1988) (same). But see In re Stone, 119 B.R. 222 (Bankr. E.D. Wash. 1990) (holding that an equitable lien is a judicial lien); In re Dudley, 68 B.R. 426 (Bankr. S.D. Fla. 1986) (same).

237. See In re Pederson, 875 F.2d 781 (9th Cir. 1989); Maus v. Maus, 837 F.2d 935, 939 (10th Cir. 1988).

238. Wood v. Godfrey (In re Godfrey), 102 B.R. 769, 773 (Bankr. 9th Cir. 1989); Duncan v. Szczepanski (In re Duncan), 85 B.R. 80, 82-83 (W.D. Wis. 1988).


240. Rose v. Rose, 481 U.S. 619, 625 (1987) (quoting In re Burrus, 136 U.S. 586, 593-94 (1890)). The Court further stated that when state family law conflicts with a federal statute, the Court's review under the Supremacy Clause is limited to a determination of whether Congress has clearly mandated that federal law preempt state law. Id. In order for a state law governing domestic relations to be overruled, it "must do 'major damage' to 'clear and substantial' federal interests." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)).

241. The federal definitions of lien and judicial lien should not create a question of
Moreover, to uphold a divorce lien when the lien is agreed to by the parties, but avoid the lien when it is created by the family court "ignores the function and purpose of the marriage dissolution proceedings and creates an artificial and unfair distinction between the two manners of distributing property."242 Such a distinction undermines the equity powers of the state courts in granting enforceable judgments, especially since "the family courts are considerably limited in the methods available to them to perform their dictated functions."243

In summary, although Farrey has essentially resolved the question in joint tenancy situations of whether a spouse who was granted the marital home in divorce can avoid a divorce lien that was held by the former spouse and was created during the distribution of marital property at divorce, the decision has left many issues unanswered in sole ownership situations. Since the "critical" inquiry is a "question of state law,"244 divorce liens can still be avoided by virtue of the choice of words used in the divorce decree, the interpretation of these words, and the application of pertinent state law by various courts. Although conscientious drafting may mitigate this inequitable result, due to the variance among state divorce laws the possibility still exists for ex-spouses with divorce liens to be left vulnerable to the scheming ex-spouse who tries to unilaterally modify the divorce decree in complete disregard of the state courts and the state statutes requiring an equitable distribution of the marital property. This will lead to arbitrary and inconsistent results where in virtually identical situations some divorce liens will be avoided while others will not, thereby, creating more, not less, confusion and conflict.

preemption. See Boyd v. Robinson (In re Boyd), 31 B.R. 591, 596 (D. Minn. 1983), aff'd, 741 F.2d 1112 (8th Cir. 1984). The court stated:

Federal courts have traditionally abstained when faced with family law questions . . . . Given this unique character of family law, for the bankruptcy court to impose such a formalistic approach in its decision while ignoring the purpose of the marriage dissolution proceedings and intent of the family court is to come dangerously close to imposing its own judgment in place of the family courts . . . . [This] is not a proper subject for review of or preemption by the federal bankruptcy court . . . [for which it] can remove jurisdiction over the disposition of marital assets from the state trial and Supreme Courts or grant to a federal court the power to supercede, . . . or alter a marital distribution [created in the state courts].

Id.

242. Id.
243. Id.
IV. PROPOSAL FOR RESOLUTION OF THE CONFLICT—AN AMENDMENT TO THE BANKRUPTCY CODE

Bankruptcy law is guided by the Code, but divorce law has no such uniform code. As a result, divorcing spouses are subject to the laws of their states that control divorces and divorce liens. Although state courts have an incentive to see that their decisions are enforceable, confusion, conflict, and controversy exist among the federal courts handling this issue. The determination of whether to avoid a particular divorce lien is highly fact driven and extremely dependent upon individual state law in the area of domestic relations. The Supreme Court's decision in Farrey, while attempting to resolve this issue, does not go far enough. The most viable solution to this conflict is to amend section 522(f)(1) of the Code.


Currently, section 522(f)(1) provides:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien . . . .

B. Proposed Amendment to 11 U.S.C. § 522(f)(1)

Under the proposed amendment section 522(f)(1) would provide:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien, except for a lien arising from a divorce decree given to a spouse on the marital home, on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien . . . .

C. Discussion of the Proposed Amendment

The proposed amendment eliminates the opportunity for inequi-

245. See supra note 68. Although divorce law has no uniform code, there are underlying policies, like equitable distribution, which do have a somewhat uniform impact. See supra notes 63-71 and accompanying text.
246. See supra notes 152-53 and accompanying text.
table treatment of an ex-spouse with a divorce lien that still exists under Farrey, while maintaining the spirit and purpose of the Code. The proposed amendment will minimally, if at all, hinder the "fresh start" of the debtor since the debtor will receive the same share of the marital property that he or she would have received after the divorce had no bankruptcy occurred.

Furthermore, the debtor will still get a "fresh start," but it will be the fresh start promoted by the Code, that is, freedom from consumer and commercial creditor harassment, rather than a type of enhanced fresh start obtained at the expense of the debtor's former spouse. As the Supreme Court has stated "the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" The debtor spouse who pursues avoidance of a divorce lien is generally not the "honest but unfortunate debtor," but the crafty spouse seeking to circumvent the divorce decree by attempting to avoid the divorce lien. Once the lien is avoided, the debtor spouse has essentially used (or more aptly, abused) the bankruptcy system to circumvent the divorce decree in order to evade the debtor's responsibilities to his or her former spouse. As a result, the debtor spouse is unjustly enriched by his or her acquisition of the former spouse's share of the marital property.

Finally, the proposed amendment does not vitiate the homestead exemption. The homestead exemption, as well as other exemptions, is permitted against other creditors such as the consumer and commercial creditors against whom the exemptions were primarily aimed. The amended section 522(f)(1) would not allow "'[t]he homestead law . . . [to] be employed by either spouse to wrong the other." Furthermore, the bankruptcy system would be more efficient because of decreased litigation through the reduction of conflict between bankruptcy law and divorce law.

The Code unquestionably promotes giving a debtor a fresh start, but that fresh start is presumed to be with his or her own property not "with someone else's property." This amendment will allow both spouses to get a new beginning or fresh start after the divorce.

248. See supra notes 30-56 and accompanying text.
CONCLUSION

Section 522(f)(1) of the Bankruptcy Reform Act of 1978 is an important and useful tool in aiding a debtor to achieve a fresh start after bankruptcy unencumbered by prior debts. However, as enacted, the provision creates much confusion, difficulty, and controversy for both the courts and the attorneys involved when the lien sought to be avoided arises from a divorce settlement.

The proposed amendment would benefit the parties, the attorneys, and the courts. It would prevent the conniving debtor spouse from abusing the bankruptcy laws, give both spouses a new beginning, and provide clearer guidance to attorneys and the courts. In addition, it would minimize at least one area of conflict between divorce law and bankruptcy law, reduce litigation, and reinforce the goal of equitable distribution in the family law area without hindering the fresh start goal of bankruptcy law. Therefore, in light of the legislative history and purpose of section 522(f)(1), the policy concerns relevant to our current society, and the elimination of confusion in the courts and potential inequitable results, Congress should amend section 522(f)(1) of the Code to except from avoidance under it liens on the marital home that are granted to a former spouse in a divorce proceeding to secure an equitable distribution of the marital property.

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