

BALANCING THE RIGHTS OF DEBTORS AND CREDITORS: § 522(F)(1) OF THE BANKRUPTCY CODE

INTRODUCTION

Through the bankruptcy laws, society attempts to achieve a proper balance between the interests of failed debtors and unfortunate creditors.¹ The continually changing economic and social environment, however, makes the endeavor to achieve the "right" balance extremely difficult.² Nevertheless, whether a "right" balance can ever be found, the bankruptcy laws must, *at a minimum*, set forth clear rules and provide for predictable results so that creditors, debtors and their attorneys can plan their future relationships.³

Currently, § 522(f)(1) of the Bankruptcy Code ("Code")—the provision allowing a debtor to avoid a judicial lien where the lien "impairs" the debtor's exempt property—is dramatically failing to provide this clarity and predictability.⁴ The judicial decisions involving the interpretation and application of § 522(f)(1) have consistently contradicted one another.⁵ Moreover, despite the 1994 Amendments to the

¹ See generally Jane Forbes, *In Re Lucas: A Blueprint For Unlimited Exemptions in Bankruptcy*, 23 U. Tol. L. Rev. 565, 565-66 (1992); Rhet Frimet, *The Birth of Bankruptcy in the United States*, 96 Com. L.J. 160, 160 (1991); Lawrence Ponoroff and F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 Mich. L. Rev. 2234, 2235 (1997).

² See KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 92-93 (1997); RICHARD B. HERZOG, JR., *BANKRUPTCY: A CONCISE GUIDE FOR CREDITORS AND DEBTORS* 3-4 (1983).

³ See GROSS, *supra* note 2, at 92-93; HERZOG, *supra* note 2, at 3-4.

⁴ 11 U.S.C. §§ 101-1330 (1994); see, e.g., *In re Finn*, 211 B.R. 780, 784 (B.A.P. 1st Cir. 1997) (DeJesus, J., dissenting) (arguing for adoption of entire lien avoidance approach); *In re Ryan*, 210 B.R. 7, 12 (Bankr. D. Mass. 1997) (adhering to full avoidance approach); see also *East Cambridge Sav. Bank v. Silveira*, Memorandum & Order, 1, 7 (No. 96-11388-WGY) (D. Mass. 1997), *vacated and remanded*, 1998 WL 175119 (1st Cir. Apr. 21, 1998); *Gonzalez v. First Nat'l Bank of Boston*, 191 B.R. 2, 3-4 (Bankr. D. Mass. 1996) ("*Gonzalez II*"). But see *East Cambridge Sav. Bank v. Silveira*, 1998 WL 175119, at *4, 6 (1st Cir. Apr. 21, 1998). Section 522(f)(1) allows debtors to avoid judicial and non-purchase money liens that impair exempt property. See 11 U.S.C. § 522(f)(1) (1994). Although § 522(f)(1) also provides for the avoidance of non-purchase money liens, for purposes of the article, I will only address judicial liens. Moreover, while there are numerous types of exemptions, for purposes of this article, I will focus primarily on the homestead exemption.

⁵ 11 U.S.C. § 522(f)(1); see, e.g., *Finn*, 211 B.R. at 784; *Silveira*, Memorandum & Order at 7; *Gonzalez II*, 191 B.R. at 3-4; *Bellenoit v. Avco Leasing Serv.*, 157 B.R. 185, 186-87 (Bankr. D. Mass. 1992); *In re Bovay*, 112 B.R. 503, 503 (Bankr. N.D.N.Y. 1989); *In re Cravey*, 100 B.R. 119, 120 (Bankr. S.D. Ga. 1989).

Code—which were intended to clarify this provision's ambiguities—courts continue to produce different results.⁶ The varying opinions handed down by Massachusetts courts exemplify the confusion caused by § 522(f)(1).⁷ Although the United States Court of Appeals for the First Circuit, in *East Cambridge Savings Bank v. Silveira*, recently adopted the “full avoidance” approach, thereby resolving the issue for that circuit, the conflicting decisions of the lower courts illustrate the confusion that is bound to arise in other circuits.⁸

Part I of this Note explains briefly the bankruptcy process and the policy objectives behind the bankruptcy and exemption laws.⁹ Part II details the various approaches different courts took prior to the 1994 Amendments to the Code when interpreting and applying § 522(f)(1).¹⁰ Part III sets forth Congress's response to the confusion resulting from these inconsistent judicial approaches and explains the 1994 Code Amendments.¹¹ Part IV describes the different approaches courts, particularly Massachusetts courts, have taken subsequent to the passage of the 1994 Code Amendments in interpreting and applying § 522(f)(1).¹² Last, Part V explains the flaws plaguing most of the approaches and sets forth the reasons why the “full lien avoidance” approach, as ultimately adopted by the First Circuit, is the correct approach.¹³

I. BACKGROUND

The United States is a capitalist society where individuals are encouraged to be innovative and to take risks.¹⁴ Our economy and way of life improve when individuals take risks that turn out to be successful.¹⁵ What happens, however, to those individuals who take risks, but fail? One option that the federal government, pursuant to the United States Constitution, has given these individuals is bankruptcy.¹⁶

⁶ 11 U.S.C. § 522(f)(2) (1994); see, e.g., *Finn*, 211 B.R. at 784; *Silveira*, Memorandum & Order, at 7; *Ryan*, 210 B.R. at 12; *Gonzalez II*, 191 B.R. at 3-4. But see *Silveira*, 1998 WL 175119, at *4, 6.

⁷ 11 U.S.C. § 522(f)(2); see, e.g., *Finn*, 211 B.R. at 784; *Silveira*, Memorandum & Order, at 7; *Ryan*, 210 B.R. at 12; *Gonzalez II*, 191 B.R. at 3-4. But see *Silveira*, 1998 WL 175119, at *4, 6.

⁸ 1998 WL 175119, at *5; see generally *Finn*, 211 B.R. at 784; *Ryan*, 210 B.R. at 12; *Silveira*, Memorandum & Order, at 7; *Gonzalez II*, 191 B.R. at 3-4.

⁹ See *infra* notes 14-63 and accompanying text.

¹⁰ See *infra* notes 64-210 and accompanying text.

¹¹ See *infra* notes 211-33 and accompanying text.

¹² See *infra* notes 234-313 and accompanying text.

¹³ See *infra* notes 314-75 and accompanying text.

¹⁴ See HERZOG, *supra* note 2, at 2-3.

¹⁵ See *id.*

¹⁶ 11 U.S.C. §§ 101-1330 (1994). Article I, Section 8, Clause 4 of the United States Constitu-

Whether the bankruptcy laws stem from society's sense of compassion for other people or from its own self-interest in avoiding having these individuals become dependent upon the state for support, the Code is designed to relieve some of the hardships endured by those individuals who have tried but failed.¹⁷

A. *The Bankruptcy Process*

When a debtor files a petition for bankruptcy, all of the debtor's property is placed into the bankruptcy "estate."¹⁸ From this estate, the secured creditors, in order of priority, are paid their debts owed.¹⁹ The remainder of the estate's assets, if any exist, are then pooled together and distributed to the unsecured creditors on a pro rata basis.²⁰

Section 522(b) of the Code allows a debtor to exempt certain property from the estate.²¹ Section 522(b) provides in relevant part: "[A]n individual debtor may exempt from property of the estate the property listed in either paragraph (1) or . . . paragraph (2) of this section."²² Paragraph (1) provides for federal exemptions listed under § 522(d), unless a state, pursuant to paragraph (2)(A), "opts-out" of the federal exemption laws.²³ Paragraph (2)(A) allows a state to establish its own exemption laws, thereby "opting-out" of the federal exemption scheme.²⁴

To protect exempt property, § 522(f)(1) permits a debtor to avoid judicial liens that "impair an exemption."²⁵ Section 522(f)(1) provides in relevant part:

tion provides "[t]he Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

¹⁷ 11 U.S.C. §§ 101-1330. The Honorable William Houston Brown explained that by providing a debtor with a fresh-start, bankruptcy "shift[s] the burden of support for the debtor and the debtor's dependents from the public to private credit sources." Honorable William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt-Out" as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 163 (1997).

¹⁸ 11 U.S.C. §§ 541, 542 (1994). An individual may file a voluntary petition for bankruptcy or a debtor's creditors may file an involuntary petition. *See id.*

¹⁹ *Id.* § 507 (1994).

²⁰ *Id.*

²¹ *Id.* § 522(b) (1994). In 1991, in *Owen v. Owen*, the United States Supreme Court explained that although a state may establish its own exemption scheme, it may not write its exemption laws in a manner that attempts to circumvent a debtor's avoidance powers under § 522(f)—such as defining exempt property in a way that excludes property that is encumbered by a judicial lien. 500 U.S. 305, 313-14 (1991); *see also* 11 U.S.C. § 522(f).

²² 11 U.S.C. § 522(b).

²³ *Id.* § 522(b)(1).

²⁴ *Id.* § 522(b)(2)(A).

²⁵ *Id.* § 522(f)(1). A lien that is avoided becomes unsecured and the claim is pooled together with all other unsecured claims. *See supra* note 19 and accompanying text.

Notwithstanding any waiver of exemptions but subject to paragraph (3), 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—

(A) a judicial lien . . .²⁶

Through the interplay of § 522(b)'s right to exempt property and § 522(f)(1)'s avoidance powers, the Code enables a debtor to keep a certain amount of property after bankruptcy.²⁷

B. Policies

1. The Bankruptcy Code

The Code has three primary objectives: 1) to relieve an honest debtor of some of the hardships resulting from overwhelming debt obligations; 2) to prevent fraudulent debtor conduct that is harmful to creditors; and 3) to provide some protection for creditors against other creditors.²⁸ The first of these objectives is achieved through the Code's fresh-start policy.²⁹ The fresh-start policy is intended to serve two functions: 1) to enable a particular debtor to once again return to society as a productive member, and 2) to provide an incentive for potential future entrepreneurs to take reasonable risks.³⁰

First, to enable a particular debtor to once again return to society as a productive member, the Code attempts to provide a debtor with the financial means necessary to start life anew.³¹ As Randell Schmit explained, "allowing the debtor to keep this property after bankruptcy ensures that the debtor does not become a ward of the state."³² Further, the Code attempts to preserve a debtor's self-esteem, thereby helping to ensure that the debtor has the mental capacity to once again be a productive member of society.³³

²⁶ 11 U.S.C. § 522(f)(1).

²⁷ *Id.* §§ 522(b), 522(f)(1).

²⁸ See Frimet, *supra* note 1, at 160.

²⁹ See GROSS, *supra* note 2, at 91; HERZOG, *supra* note 2, at 3-5; Brown, *supra* note 17, at 163.

³⁰ See GROSS, *supra* note 2, at 91; HERZOG, *supra* note 2, at 7.

³¹ See GROSS, *supra* note 2, at 91; Brown, *supra* note 17, at 163.

³² Randall B. Schmidt, *R.I.P. Chabot? Ninth Circuit Bankruptcy Debtor's Right to Avoid a Judicial Lien on a Homestead is Still "Impaired" and the Clarification Doctrine in Doubt After In re Wilson*, 31 U.S.F. L. REV. 1051, 1055 (1997) (citing *In re Pladson*, 35 F.3d 462, 464 (9th Cir. 1994)).

³³ See HERZOG, *supra* note 2, at 7.

Second, the fresh-start policy is designed to provide an incentive for people to take the risks essential to the proper functioning of our capitalist society.³⁴ By providing debtors with a fresh-start, the Code assures potential future entrepreneurs that some protection exists for them in the event of failure.³⁵ Thus, the fresh-start policy acts as an incentive for people to take reasonable risks.³⁶

In addition to providing honest debtors with some relief from overwhelming debt obligations, the Code also endeavors to protect creditors from fraudulent and harmful debtor activity.³⁷ The Code does not permit individuals to take unreasonable risks with the comfort of knowing that bankruptcy will absolve them entirely of all the consequences of the failed endeavors.³⁸ Rather, the Code is designed to protect only the "honest" debtor—one who has taken reasonable risks, has tried and has failed.³⁹ Thus, the Code endeavors to strike a balance between relieving some of the hardships faced by "honest" debtors and partially protecting the rights of creditors.⁴⁰ Moreover, by protecting creditors, the Code helps to protect future debtors.⁴¹ As Judge Posner stated, "the welfare of debtors and of creditors is intertwined; the fewer the protections for creditors, the higher interest rates are, and interest is paid by debtors; conversely, the greater the protection for creditors, the lower interest rates are, and debtors as a group benefit."⁴²

To further the Code's objective of protecting creditors from harmful debtor activity, Congress has built various safeguards into the Code.⁴³ For example, once a debtor has received a bankruptcy discharge, that debtor cannot receive another discharge for the next six years.⁴⁴ Also, with regard to exemptions, § 522(f) allows a debtor to avoid only *judicial* or *non-purchase money liens* and only *to the extent* that they impair an exemption.⁴⁵ Thus, these safeguards, along with numer-

³⁴ See *id.* at 2-3.

³⁵ See 11 U.S.C. § 522; HERZOG, *supra* note 2, at 2-3.

³⁶ See GROSS, *supra* note 2, at 91-93; HERZOG, *supra* note 2, at 2-3.

³⁷ See Forbes, *supra* note 1, at 565-66; Frimet, *supra* note 1, at 160.

³⁸ See GROSS, *supra* note 2, at 93; Forbes, *supra* note 1, at 565-66.

³⁹ See Brown, *supra* note 17, at 163.

⁴⁰ See GROSS, *supra* note 2, at 93; Brown, *supra* note 17, at 163; Frimet, *supra* note 1, at 160.

⁴¹ See *In re Thompson*, 867 F.2d 416, 419 (7th Cir. 1989) (citing *In re Xonics Imaging, Inc.*, 837 F.2d 763, 765 (7th Cir. 1988)).

⁴² *Id.*

⁴³ See, e.g., 11 U.S.C. §§ 522(f), 541 (1994).

⁴⁴ See *id.* § 727(a)(8). Even within the six-year period, however, an individual debtor previously granted a discharge under Chapter 7 might still be able to get relief from creditors by filing under Chapter 13, the payback section of the Code. *Id.* § 1328; see also KENNETH J. DORAN, PERSONAL BANKRUPTCY AND DEBT ADJUSTMENT 5 (1996).

⁴⁵ See 11 U.S.C. § 522(f).

ous other protections, help protect creditors from unreasonable debt- or activity, which in turn also protects future debtors.⁴⁶ Nevertheless, a constant tension exists between relieving an honest debtor of the hardships resulting from overwhelming debt obligations and protecting the rights of creditors.⁴⁷

Finally, the Code seeks to protect creditors from each other.⁴⁸ The federal bankruptcy system is premised upon the notion that creditors in like positions should be treated equally.⁴⁹ Because a debtor filing bankruptcy is usually insolvent, there generally will not be enough assets to satisfy all outstanding debt obligations.⁵⁰ Thus, creditors frequently lose money as a result of a debtor filing bankruptcy.⁵¹ Recognizing this probable result, the bankruptcy system is designed to prevent a "race of diligence."⁵² A race of diligence is the scramble that occurs when all of a debtor's creditors resort to garnishment, foreclosure, levy and execution to satisfy the debtor's obligations.⁵³ The race of diligence results in an unequal distribution of the debtor's assets, which is contrary to the goals behind the Code.⁵⁴ Thus, to preserve the remaining assets, ensure an orderly distribution of these assets and prevent creditor harassment of debtors, the Code contains various provisions to discourage creditors from racing to collect their debts owed.⁵⁵

⁴⁶ See, e.g., 11 U.S.C. § 547 (trustee has power to avoid transfers of debtor's interest in property deemed preferential); *Id.* § 362(a) (automatic stay, beginning when a debtor files bankruptcy, halts most debt collection activity against debtor by creditors); see also *Thompson*, 867 F.2d at 419 (citing *Xonics Imaging*, 837 F.2d at 765).

⁴⁷ See GROSS, *supra* note 2, at 91; HERZOG, *supra* note 2, at 2-3.

⁴⁸ See Frimet, *supra* note 1, at 160.

⁴⁹ See GROSS, *supra* note 2, at 158. The Code sets up a complex priority system among creditors depending on the source of a creditor's claim and whether it is secured or unsecured. See 11 U.S.C. § 507 (1994). A secured claim is one backed by a lien on property owned by the debtor. See DORAN, *supra* note 44, at 50. Moreover, a lien is a "charge against or interest in property to secure payment of a debt for performance of an obligation." 11 U.S.C. § 101(37) (1994). An unsecured claim, on the other hand, is not backed by any collateral. See DORAN, *supra*, at 51. After all secured creditors are paid, in order of priority, the unsecured creditors receive any remaining money on a pro rata basis. See 11 U.S.C. § 507.

⁵⁰ See HERZOG, *supra* note 2, at 4.

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *supra* notes 43-54 and accompanying text.

2. Exemption Laws

The exemption laws are designed primarily to further the Code's fresh-start policy.⁵⁶ Section 522(b) allows a debtor to exempt certain property from the bankruptcy estate, thereby permitting the debtor to retain specified property after bankruptcy.⁵⁷ As the Supreme Court explained, "the section [§ 522] . . . was enacted to protect the debtor's essential needs and to enable him to have a fresh-start economically."⁵⁸

Section 522(f)(1) is designed to protect this exempt property by allowing a debtor to avoid a judicial lien that impairs an exemption.⁵⁹ In effect, § 522(f)(1) helps prevent a race to the courthouse between a creditor and debtor.⁶⁰ Thus, a creditor merely beating a debtor to the courthouse—getting a judgment lien before the debtor files for bankruptcy—should not, and does not, mean that the slower debtor forfeits otherwise exempt property.⁶¹ As Judge Posner explained, "[i]t [§ 522(f)(1)] allows the debtor to avoid a judicial lien on exempt property—that is, a lien obtained by a creditor who has beaten the debtor to court."⁶² Thus, by allowing a debtor to avoid judicial liens that impair an exemption, § 522(f)(1) protects a debtor's exempt property.⁶³

II. JUDICIAL INTERPRETATION AND APPLICATION OF § 522(F)(1) PRIOR TO THE 1994 AMENDMENTS

A. Three Fact Patterns

When addressing the issue of the avoidance of judicial liens that impair exempt property under § 522(f)(1), one of three fact patterns will usually be present.⁶⁴ The first fact pattern entails an unavoidable encumbrance, such as a mortgage, that is equal to or greater than the value of the property.⁶⁵ For example, a debtor owns a home valued at \$100,000, which is encumbered by a \$100,000 first mortgage.

⁵⁶ See HERZOG, *supra* note 2, at 3–5.

⁵⁷ See 11 U.S.C. § 522(b). Section 522(b) provides in pertinent part, "[n]otwithstanding section 541 of this title, 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 section." *Id.*

⁵⁸ See *United States v. Security Indus. Bank*, 459 U.S. 70, 83 (1982); see also ARTIUR WINSTON, COMPLETE GUIDE TO CREDIT AND COLLECTION LAW 145 (1996) (assets deemed necessary for sustenance and living).

⁵⁹ See 11 U.S.C. § 522(f)(1).

⁶⁰ *Id.*; see also HERZOG, *supra* note 2, at 4.

⁶¹ See HERZOG, *supra* note 2, at 4; see also *Thompson*, 867 F.2d at 418–19.

⁶² *Thompson*, 867 F.2d at 418–19 (citing H.R. REP. NO. 95–595, 5787, 6087–88 (1978)).

⁶³ See 11 U.S.C. § 522(f)(1).

⁶⁴ See *infra* notes 65–67.

⁶⁵ See, e.g., *In re Simonson*, 758 F.2d 103, 105 (3d Cir. 1985); *In re Bovay*, 112 B.R. 503, 503 (Bankr. N.D.N.Y. 1989).

Under the second fact pattern, the unavoidable encumbrance and exemption consume the full value of the property.⁶⁶ For example, the debtor owns a home worth \$100,000, which is subject to a \$90,000 first mortgage. Moreover, the debtor is allowed a \$10,000 exemption.

Under the third fact pattern, there exists equity in the property beyond the unavoidable encumbrance and exemption, but the equity is less than the amount of the judicial lien.⁶⁷ For example, the debtor owns a home valued at \$100,000, which is encumbered by a \$60,000 first mortgage. Moreover, the debtor is entitled to a \$20,000 homestead exemption. Thus, there exists \$20,000 in equity beyond the unavoidable encumbrance and exemption. In addition, the creditor has a \$30,000 judicial lien.

B. *Judicial Approaches*

1. Situations Involving the First Fact Pattern

Prior to the 1994 Amendments to the Code, courts interpreted and applied § 522(f)(1) in vastly different ways, even when considering the same fact pattern.⁶⁸ When there is no equity in the property beyond the unavoidable encumbrances, a recurring question is whether there exists any exemption that can be impaired.⁶⁹ The central issue to which courts provide different interpretations is the correct definition of the word "interest," as used in § 522(f)(1)'s phrase "avoid the fixing of a lien on an interest of the debtor"⁷⁰ While some courts narrowly define "interest" to entail the quantity of equity in the property, other courts broadly interpret "interest" to encompass equitable interests, such as the right of possession.⁷¹

⁶⁶ See, e.g., *Bellenoit v. Avco Leasing Serv.*, 157 B.R. 185, 186-87 (Bankr. D. Mass. 1992).

⁶⁷ See, e.g., *East Cambridge Sav. Bank v. Silveira*, 1998 WL 175119, at *4, 6 (1st Cir. Apr. 21, 1998); *In re Finn*, 211 B.R. 780, 781 (B.A.P. 1st Cir. 1997); *East Cambridge Sav. Bank v. Silveira*, Memorandum & Order, 1, 3-4 (No. 96-11388-WGY) (D. Mass. 1997) *vacated and remanded*, 1998 WL 175119 (1st Cir. Apr. 21, 1998); *In re Ryan*, 210 B.R. 7, 8 (Bankr. D. Mass. 1997).

⁶⁸ See generally *In re Witkowski*, 176 B.R. 114, 116-17; see also *infra* notes 69-210.

⁶⁹ See *Simonson*, 758 F.2d at 108; *Bovay*, 112 B.R. at 504-05; *In re Cravey*, 100 B.R. 119, 121-22 (Bankr. S.D. Ca. 1989); see also *Holloway v. John Hancock Mut. Life Ins.*, 81 F.3d 1062, 1068-69 (11th Cir. 1996).

⁷⁰ 11 U.S.C. § 522(f)(1) (1994); see *Simonson*, 758 F.2d at 108; *Bovay*, 112 B.R. at 504-05; *Cravey*, 100 B.R. at 121-22.

⁷¹ See *infra* notes 72-118.

a. *The Complete Avoidance Approach*

Under the complete avoidance approach, courts emphasize the Code's fresh-start policy and interpret broadly the word "interest" to include equitable interests.⁷² The complete avoidance approach is illustrated by *In re Cravey*.⁷³ In 1989, in *Cravey*, the United States Bankruptcy Court for the Southern District of Georgia held that, pursuant to § 522(f)(1), the judicial liens were avoided completely.⁷⁴ The debtor's property was valued at \$85,000.⁷⁵ To secure an \$83,891.65 debt, debtors conveyed title to this property to Vidalia Federal Savings & Loan Association.⁷⁶ The debtors later filed a motion to avoid judicial liens held by a second creditor—the respondents—alleging that these liens impaired exemptions to which the debtors were entitled to under the Georgia exemption statute.⁷⁷ The respondents, however, argued that because the debtors no longer had legal title to the property, the debtors had no interest in the property to which they could claim an exemption.⁷⁸

In finding for the debtors, the court engaged in a two-part analysis.⁷⁹ The court first addressed the issue of whether the debtors were entitled to the claimed exemption under state law, explaining that under § 522 an exemption must first exist to trigger the lien avoidance provision—§ 522(f)(1).⁸⁰ Focusing on the word "interest," as used in the state exemption law, the court expressly differentiated between the meaning of the word "interest" and "equity."⁸¹ The court broadly interpreted the word interest and explained that equity is only one form of interest.⁸² The court noted, "a debtor's 'interest' is not synonymous with a debtor's 'equity'"⁸³ The court explained that interest includes residual rights, such as the right of possession, the right to enjoy future equity created by repayment of the debt and the right to reclaim

⁷² See, e.g., *Holloway*, 81 F.3d at 1069; *Cravey*, 100 B.R. at 122.

⁷³ 100 B.R. at 122.

⁷⁴ See *id.*

⁷⁵ See *id.* at 120.

⁷⁶ See *id.* at 120–21.

⁷⁷ See *id.* at 119. The court turned to the state exemption statute because, pursuant to § 522(b)(2)(A), Georgia has opted out of the federal exemption scheme. See *id.* at 119, 121.

⁷⁸ See *Cravey*, 110 B.R. at 121.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.* at 121–22.

⁸² See *id.*

⁸³ See *Cravey*, 110 B.R. at 122.

legal title through such repayment.⁸⁴ Consequently, the court concluded that the debtors had exemptible interests in the property.⁸⁵

Second, the court addressed the issue of whether the lien, in fact, impaired the exemption.⁸⁶ Emphasizing the debtor's interest in the creation of future equity, the court reasoned that this residual interest must be considered when addressing any lien avoidance issue in order to further the Code's fresh-start policy.⁸⁷ The court explained that to allow the judicial liens to survive bankruptcy would hinder the purpose behind the federal lien avoidance provisions, which the court explained was "to provide property necessary for the debtor's fresh-start exempt from further claims of pre-petition creditors."⁸⁸ The court reasoned that the Code's fresh-start policy required that any post-bankruptcy appreciation in the property must accrue for the benefit of the debtor.⁸⁹ Thus, the court held that, pursuant to § 522(f)(1), the judicial liens were completely avoided.⁹⁰

b. *The Not Impair Approach*

In contrast to the complete avoidance approach, some courts have adopted the "not impair" approach.⁹¹ Under this approach, courts adhere to a strict reading of the statutory language and narrowly interpret the word "interest" as meaning the quantity of equity remaining in the property.⁹² The court in *In re Simonson* adopted the not impair approach.⁹³ In 1985, in *Simonson*, the United States Court of Appeals for the Third Circuit held that the debtors had no interest in the property to which an exemption could attach and therefore, the judicial liens could not be avoided under § 522(f)(1).⁹⁴

The debtors' property had a fair market value of less than \$80,872.12 and they agreed to sell it for \$58,250.⁹⁵ The property was en-

⁸⁴ See *id.* at 121-22.

⁸⁵ See *id.* at 122.

⁸⁶ See *id.* at 121-22.

⁸⁷ See *id.* at 122.

⁸⁸ *Cravey*, 110 B.R. at 122.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See, e.g., *Simonson*, 758 F.2d at 106; *In re Seltzer*, 185 B.R. 116, 119 (Bankr. E.D.N.Y. 1995); *Sheaffer v. Marshall Nat'l Bank & Trust Co.*, 159 B.R. 758, 762 (Bankr. E.D. Va. 1993); *Bovay*, 112 B.R. at 506. I have designated my own name for this approach for easy reference when I subsequently refer to it.

⁹² See, e.g., *Simonson*, 758 F.2d at 106; *Sheaffer*, 159 B.R. at 762; see also *Holloway*, 81 F.3d at 1068.

⁹³ See 758 F.2d at 106.

⁹⁴ See *id.*

⁹⁵ See *id.* at 105.

cumbered by two mortgages totaling \$66,460.79.⁹⁶ Moreover, the debtors claimed a \$15,000 homestead exemption.⁹⁷ The property also was subject to two judicial liens equaling \$14,411.33.⁹⁸ Using the agreed-upon liquidation value of the property as the reference point, the court noted that there remained no equity in the property beyond the unavoidable encumbrances.⁹⁹ The court narrowly interpreted the word "interest" as meaning the quantity of equity in the property.¹⁰⁰ Moreover, the court stated that Congress intended the word "interest" to mean an interest of the debtor "measured by taking into account those interests of other parties which may not be avoided under § 522(f)." ¹⁰¹ Thus, the court implicitly reasoned that senior *unavoidable encumbrances* were responsible for the impairment and not the *judicial liens*.¹⁰²

Rejecting the reasoning behind the complete avoidance approach, the court stated that it could not find any support that Congress intended § 522 to be a means of protecting for the debtor the creation of future equity in property.¹⁰³ Rather, the court reasoned that § 522 only was intended to protect the fixed amount of an allowable exemption.¹⁰⁴ Thus, the court concluded that in the absence of any remaining equity in the property, the "problem of lien avoidance under § 522(f) simply does not arise," and therefore, the judicial lien could not be avoided as impairing an exemption.¹⁰⁵

Similarly, the court in *In re Bovay* followed the not impair approach, although applying different reasoning.¹⁰⁶ In 1989, in *Bovay*, the United States Bankruptcy Court for the Northern District of New York held that the judicial lien could not be avoided because it did not impair any exempt property.¹⁰⁷ The debtor's property was valued at \$45,000 and was encumbered by two mortgages totaling \$23,491.17 and an unavoidable tax lien of \$47,551.49.¹⁰⁸ Thus, there was no equity in the property beyond the unavoidable encumbrances.¹⁰⁹

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *Simonson*, 758 F.2d at 105.

⁹⁹ See *id.* at 106.

¹⁰⁰ See *id.* at 105-06.

¹⁰¹ *Id.* at 105.

¹⁰² See *id.* at 105-06.

¹⁰³ See *Simonson*, 758 F.2d at 106.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ 112 B.R. at 504-06.

¹⁰⁷ See *id.* at 506.

¹⁰⁸ See *id.* at 503.

¹⁰⁹ See *id.*

The court engaged in a three-step analysis to determine whether the judicial lien impaired the debtor's exemption.¹¹⁰ The court first determined that the negative number that resulted after subtracting the unavoidable encumbrances from the fair market value of the property was equivalent to the debtor having zero equity in the property.¹¹¹ Second, the court explained that the debtor, nevertheless, had an "interest" in the property.¹¹² Relying on precedent, the court conceded that the debtor had residual interests in the form of "his right to possess the property and to build up his equity in the future."¹¹³ The court next explained, however, that these residual interests were not exemptions to which the debtor would have been entitled.¹¹⁴ Adhering to the plain language of the state's exemption statute, the court reasoned that an exemption that could be impaired is limited to the quantity of equity remaining after the unavoidable encumbrances are subtracted from the fair market value of the property.¹¹⁵ Consequently, the court noted that because the unavoidable encumbrances exceeded the value of the property, there was no exemptible interest that a judicial lien could impair.¹¹⁶ The court implicitly reasoned that the *judicial lien* did not impair any exemption because the *unavoidable encumbrances* already had impaired the exemption.¹¹⁷ Thus, the court held that the judicial lien could not be avoided under § 522(f)(1).¹¹⁸

2. Situations Involving the Second and Third Fact Patterns

When there is either no equity or only some equity—but less than the value of the judicial lien—existing beyond the unavoidable encumbrances and the exemption, courts generally have taken one of three different approaches: 1) the "full avoidance" approach; 2) the "carve-out" approach; or 3) the "subordination" approach.¹¹⁹

¹¹⁰ See *id.* at 504–05.

¹¹¹ See *Bovay*, 112 B.R. at 504.

¹¹² See *id.* at 504–05.

¹¹³ *Id.* at 504 (citing *Alu v. State of N.Y. Dep't of Taxation & Fin.*, 41 B.R. 955, 957 (Bankr. E.D.N.Y. 1984)).

¹¹⁴ See *id.* at 505.

¹¹⁵ See *id.* The court turned to the state exemption statute because, pursuant to § 522(b)(2)(A), New York has opted out of the federal exemption scheme. See 11 U.S.C. § 522(b)(2)(A). The state's exemption statute provides for exemption of "[p]roperty . . . not exceeding ten thousand dollars in value above liens and encumbrances." 112 B.R. at 504 (citing N.Y. C.P.L.R. § 5206(a) (McKinney's Supp. 1990)).

¹¹⁶ See *Bovay*, 112 B.R. at 505.

¹¹⁷ See *id.* at 503, 505–06.

¹¹⁸ See *id.* at 506.

¹¹⁹ See, e.g., *In re Chabot*, 992 F.2d 891, 895–96 (9th Cir. 1993) (following carve-out approach);

a. *The Full Avoidance Approach*

One approach some courts have taken when addressing the second and third fact patterns is the full avoidance approach.¹²⁰ Under this approach, courts adhere to a strict reading of the statutory language and narrowly interpret a debtor's "interest" in the property as meaning the quantity of equity in the property.¹²¹ Moreover, courts adhering to the full avoidance approach interpret § 522(f)(1)'s phrase "to the extent" as meaning any portion of the judicial lien that is unsecured.¹²²

The court in *In re Carney* followed the full avoidance approach.¹²³ In 1985, in *Carney*, the United States Bankruptcy Court for the District of Massachusetts held that the portion of the judicial lien that exceeded the debtor's equity in the property could be completely avoided under § 522(f)(1).¹²⁴ The debtor owned a home valued at \$59,000, which was subject to a \$35,000 mortgage.¹²⁵ Moreover, the debtor claimed a \$12,500 homestead exemption.¹²⁶ Thus, there remained \$11,500 in equity beyond the unavoidable encumbrances and exemption.¹²⁷ In addition, Cain obtained a judicial lien in the amount of \$3993.85 and Colony Ford Truck Sales procured a judicial lien in the sum of \$10,103.34.¹²⁸

In addressing the issue of lien avoidance under § 522(f)(1), the court adhered to a strict reading of the statutory language and interpreted narrowly the debtor's "interest" in the property as meaning the quantity of equity in the property.¹²⁹ Moreover, the court interpreted the phrase "to the extent" as meaning any portion of the lien that exceeded the remaining equity in the property.¹³⁰ The court explained that Cain's lien, which had priority over Colony's lien, did not impair

Bellenoit, 157 B.R. at 189-90 (adhering to subordination approach); *In re Carney*, 47 B.R. 296, 299 (Bankr. D. Mass. 1985) (following full avoidance approach).

¹²⁰ See, e.g., *Carney*, 47 B.R. at 299; *In re Duncan*, 43 B.R. 833, 840 (Bankr. D. Alaska 1984); see also *infra* notes 121-36 and accompanying text.

¹²¹ See, e.g., *Carney*, 47 B.R. at 299; *Duncan*, 43 B.R. at 838; see also *infra* notes 123-36 and accompanying text.

¹²² See, e.g., *Carney*, 47 B.R. at 299; *Duncan*, 43 B.R. at 838; see also *infra* notes 123-36 and accompanying text.

¹²³ 47 B.R. at 299.

¹²⁴ See *id.*

¹²⁵ See *id.* at 297.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *Carney*, 47 B.R. at 297-98.

¹²⁹ See *id.* at 299.

¹³⁰ See *id.*

the exemption and therefore, the entire lien was valid.¹³¹ The court reasoned that there was sufficient equity in the property to which the lien could attach.¹³²

The court then noted that after Cain's lien, there remained only \$7506.15 in equity to which Colony's \$10,103.34 judicial lien could attach.¹³³ To determine whether Colony's judicial lien impaired the debtor's exemption, the court set forth a three-step test: 1) subtract all consensual liens from the value of the property; 2) subtract the exemption claimed from the remaining value; and 3) from the remainder, subtract the judicial liens.¹³⁴ The court explained that *to the extent* that all or any portion of a judicial lien exceeds the remainder left over from step two, it may be avoided.¹³⁵ Applying the three-part test, the court determined that the judicial lien impaired the debtor's exemption to the extent of \$2597—the \$10,103.34 judicial lien less the \$7506.15 of remaining equity—and thus, the court concluded that the lien could be avoided to that extent.¹³⁶

b. *Carve-out Approach*

A second approach taken by some courts is the "carve-out" approach.¹³⁷ Under this approach, courts interpret the phrase "to the extent" as a limiting phrase, meaning to the extent of an allowable exemption.¹³⁸ Thus, where there is insufficient equity to which an exemption can attach, courts following the carve-out approach hold that the exemption is carved out of the judicial lien.¹³⁹ As a result, the

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *Carney*, 47 B.R. at 299.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See, e.g., *In re Sanders*, 39 F.3d 258, 262 (10th Cir. 1994); *Chabot*, 992 F.2d at 896; *In re Cerniglia*, 137 B.R. 722, 725–26 (Bankr. S.D. Ill. 1992); *In re Sanglier*, 124 B.R. 511, 514 (Bankr. E.D. Mich. 1991).

¹³⁸ See, e.g., *Sanders*, 39 F.3d at 261–62; *Chabot*, 992 F.2d at 895–96; *Cerniglia*, 137 B.R. at 725–26; *Sanglier*, 124 B.R. at 515.

¹³⁹ See, e.g., *Sanders*, 39 F.3d at 261–62; *Chabot*, 992 F.2d at 895–96; *Cerniglia*, 137 B.R. at 725–26; *Sanglier*, 124 B.R. at 515. These courts explain that the exemption is carved out of the judicial lien even when the lien is at the time valued at zero, as in the first fact pattern. See *Sanders*, 39 F.3d at 261–62; *Chabot*, 992 F.2d at 895–96; *Cerniglia*, 137 B.R. at 725–26; *Sanglier*, 124 B.R. at 515. Thus, theoretically, the carve-out approach also can be applied to fact pattern one—no equity exists beyond the unavoidable encumbrance. See *Sanders*, 39 F.3d at 261–62; *Chabot*, 992 F.2d at 895–96; *Cerniglia*, 137 B.R. at 725–26; *Sanglier*, 124 B.R. at 515. The result, however, is the same as the full avoidance approach, because the dollar amount of the exemption is zero. See *Sanders*, 39 F.3d at 261–62; *Chabot*, 992 F.2d at 895–96; *Cerniglia*, 137 B.R. at 725–26; *Sanglier*, 124 B.R. at 515; see also *Cravey*, 100 B.R. at 120.

maximum amount of a judicial lien that a debtor can avoid is the amount of a claimed exemption.¹⁴⁰

The Supreme Court's decision in *Dewsnup v. Timm* is essential to the reasoning behind the carve-out approach.¹⁴¹ In 1992, in *Dewsnup*, the United States Supreme Court held that, pursuant to § 506(d), the debtor could not "strip down" a creditor's lien—granted by a deed of trust—on real property to a judicially determined value.¹⁴² The debtor argued that because the \$119,000 lien exceeded the fair market value of the property—judicially determined to be \$39,000—the Court should, pursuant to § 506(d), reduce the lien to the value of the property ("strip down").¹⁴³ The Court, however, noted that § 506(d) only applies when a claim is "not an allowed secured claim."¹⁴⁴ As a result, because the claim here was an allowed secured claim under § 502, the Court explained that the lien could not be stripped down under § 506(d).¹⁴⁵ The Court reasoned that to allow such a reduction would leave any future appreciation in the property to the benefit of the debtor, which the Court explained, should accrue for the benefit of the creditor.¹⁴⁶

The Court garnered support for its position against lien-stripping from the pre-Code rule that liens on real property generally pass through bankruptcy unaffected.¹⁴⁷ The Court explained that pre-Code rules remain applicable unless a Code provision expressly states otherwise.¹⁴⁸ Here, the Court explained, the Code has not so spoken.¹⁴⁹ Consequently, the Court held that the entire lien passed through bankruptcy unaffected.¹⁵⁰

Relying in part on *Dewsnup*, the United States Bankruptcy Court for the Southern District of Illinois in *In re Cerniglia* adopted the

¹⁴⁰ See, e.g., *Sanders*, 39 F.3d at 261–62; *Chabot*, 992 F.2d at 895–96; *Cerniglia*, 137 B.R. at 726–27; *Sanglier*, 124 B.R. at 514, 515.

¹⁴¹ 502 U.S. 410, 416–20 (1992).

¹⁴² See *id.*; see also 11 U.S.C. § 506(d) (1994). Section 506(d) states in pertinent part: "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" 11 U.S.C. § 506(d). *Dewsnup* concerns the issue of lienstripping. See 502 U.S. at 416–20. Lienstripping occurs when a court reduces the amount of a lien so that it equals the judicially determined fair market value of the property. See *id.* Thus, the remaining portion of the lien is nullified. See *id.*

¹⁴³ See *Dewsnup*, 502 U.S. at 413.

¹⁴⁴ *Id.*; see also 11 U.S.C. §§ 502(a), 506(d). Section 502(a) states in relevant part: "[a] claim or interest . . . is deemed allowed, unless a party in interest . . . object[s]." 11 U.S.C. § 502(a) (1994).

¹⁴⁵ See *Dewsnup*, 502 U.S. at 417; see also 11 U.S.C. §§ 502(a), 506(d).

¹⁴⁶ See *Dewsnup*, 502 U.S. at 417.

¹⁴⁷ See *id.* at 419 (citing *Long v. Bullard*, 117 U.S. 617, 620–21 (1886)).

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at 420.

carve-out approach with respect to § 522(f)(1).¹⁵¹ In 1992, in *Cerniglia*, the court held that the judicial lien did not attach to the debtor's exempt property and therefore, the lien could not be avoided under § 522(f)(1).¹⁵² The debtor's residence was valued at \$115,000 and was encumbered by a \$101,105.99 mortgage.¹⁵³ Moreover, the debtor claimed a \$15,000 homestead exemption.¹⁵⁴ The property also was subject to a \$358,986.70 judicial lien.¹⁵⁵

The court began its analysis by noting that there were two lines of cases interpreting and applying § 522(f)(1) differently: those courts adopting the full avoidance approach and those following the carve-out approach.¹⁵⁶ The court explained that the difference between each of these approaches was their contrary allocation of any post-bankruptcy appreciation: the full avoidance approach entitles the debtor to any post-bankruptcy appreciation, while the carve-out approach gives such appreciation to the creditor.¹⁵⁷ The court then discredited the full avoidance approach by explaining that it has been implicitly rejected by the Supreme Court.¹⁵⁸ Noting that the full avoidance approach incorporates § 506(d)'s "strip down" analysis into § 522(f)(1)'s lien avoidance process, the court explained that this "lien-stripping" rationale is no longer valid following the Supreme Court's rejection of the "strip-down" of liens under § 506(d).¹⁵⁹

The court then alluded to the Supreme Court's reaffirmation of the pre-Code rule that liens on real property survive bankruptcy in the absence of a statutory provision providing otherwise.¹⁶⁰ The court implicitly determined that this pre-Code rule is partially preempted by § 522(f)(1), which allows a debtor to avoid a judicial lien "to the extent" it impairs an exemption.¹⁶¹ Thus, the court recognized that through the interplay of § 522(f)(1) and the pre-Code rule, a lien that impairs an exemption is only avoided to the extent of an allowable exemption.¹⁶²

¹⁵¹ 137 B.R. at 725.

¹⁵² See *id.* at 728.

¹⁵³ See *id.* at 723.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *Cerniglia*, 137 B.R. at 723-24.

¹⁵⁷ See *id.* at 724.

¹⁵⁸ See *id.* (citing *Dewsnup*, 502 U.S. at 417-20).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at 725 (citing *Dewsnup*, 502 U.S. at 419).

¹⁶¹ See *Cerniglia*, 137 B.R. at 724-25.

¹⁶² See *id.* at 725.

Recognizing that the application of the carve-out approach often results in the survival of liens, which in turn clouds the debtor's title, the court explained that this result would not inhibit the debtor's fresh-start.¹⁶³ Interpreting narrowly the Code's fresh-start policy, the court emphasized that the exemption was limited only to the specific amount of the allowable exemption.¹⁶⁴ The court stated, "section 522(f)(1) was not intended to free the debtor's property completely of judicial liens. Rather it is the purpose and effect of this provision to preserve the debtor's exemption and thus his fresh-start by allowing avoidance of liens in the specific amount of the debtor's exemption."¹⁶⁵ In addition, the court explained that the exemption gives the debtor a "superior right" in the property up to the specific amount of the allowable exemption, thereby protecting the debtor's exemption after bankruptcy.¹⁶⁶ Thus, adhering to the plain language of § 522(f)(1), the court reasoned that a debtor's exemption is "impaired" to the extent a judicial lien attaches to any portion of the exemption.¹⁶⁷ Nevertheless, the court concluded that, pursuant to the state exemption law, the lien could not be avoided because the state law specifically prevents a judicial lien from attaching to a debtor's homestead interest.¹⁶⁸

Similarly, the court in *City National Bank v. Chabot* followed the carve-out approach.¹⁶⁹ In 1993, in *Chabot*, the United States Court of Appeals for the Ninth Circuit held that the creditor's judicial lien could not be avoided because there was sufficient equity in the property to which the debtor's \$45,000 exemption could attach.¹⁷⁰ The debtors owned a residence valued at \$400,000, which was encumbered by two unavoidable deeds of trust equaling \$124,953.30.¹⁷¹ Moreover, the Chabots were entitled to a \$45,000 homestead exemption.¹⁷² Thus, there remained \$230,046.68 in equity beyond the unavoidable encumbrances and homestead exemption.¹⁷³

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *Cerniglia*, 137 B.R. at 725.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 726-28. The court turned to the state exemption statute because, pursuant to § 522(b)(2)(A), Illinois opted out of the federal exemption scheme. See *id.*; see also 11 U.S.C. § 522(b)(2)(A).

¹⁶⁹ 992 F.2d at 895-96.

¹⁷⁰ See *id.* at 892, 896.

¹⁷¹ See *id.* at 892.

¹⁷² See *id.*

¹⁷³ See *id.*

Adhering to a strict reading of the statutory language, the court reasoned that § 522(f)(1)'s phrase "to the extent" limited the extent a judicial lien could impair an exemption to the amount of the claimed exemption.¹⁷⁴ The court explained that the exemption laws only entitle a debtor to the set amount of the exemption, "no more and no less."¹⁷⁵ Moreover, the court narrowly interpreted the Code's fresh-start policy as requiring the protection of only the specific amount of the allowable exemption.¹⁷⁶ The court explained that any post-bankruptcy appreciation should accrue for the benefit of the judicial lienholder.¹⁷⁷ Consequently, because there was sufficient equity to satisfy the \$45,000 exemption, the court concluded that City National Bank's judicial lien of \$241,579.08 survived bankruptcy in its entirety.¹⁷⁸

c. Subordination Approach

A third approach taken by some courts is the "subordination" approach.¹⁷⁹ Under this approach, courts begin with an application of the carve-out approach, but then interpret differently the word "avoid" as meaning to subordinate, rather than to nullify.¹⁸⁰ The subordination approach was applied in *In re D'Amelio*.¹⁸¹ In 1992, in *D'Amelio*, the United States Bankruptcy Court for the District of Massachusetts held that the judicial liens fully survived bankruptcy, although assuming a subordinate position to the claimed exemption.¹⁸² The debtor and his spouse owned property valued at \$154,000 as tenants-by-the-entirety.¹⁸³ The property was subject to a first mortgage of \$86,829.36 and a second mortgage of \$28,453.07.¹⁸⁴ Thus, there existed \$38,717.57 in equity beyond the unavoidable encumbrances, of which the debtor's interest was \$19,358.78—one-half interest in the property owned as tenants-by-the-entirety.¹⁸⁵ Moreover, the debtor claimed a \$7900 homestead ex-

¹⁷⁴ See *Chabot*, 992 F.2d at 895.

¹⁷⁵ *Id.* at 896.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 892, 896.

¹⁷⁹ See, e.g., *Bellenoit*, 157 B.R. at 188; *In re D'Amelio*, 142 B.R. 8, 10 (Bankr. D. Mass. 1992).

¹⁸⁰ See, e.g., *Bellenoit*, 157 B.R. at 188; *D'Amelio*, 142 B.R. at 10.

¹⁸¹ 142 B.R. at 10.

¹⁸² See *id.* Judge Hillman later changed his interpretation of § 522(f) and in *In re Garro*, he adopted the carve-out approach. 161 B.R. 869, 870 (Bankr. D. Mass. 1993).

¹⁸³ See *D'Amelio*, 142 B.R. at 9.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

emption.¹⁸⁶ Also, the debtor's interest was encumbered by judicial liens totaling \$51,653.81.¹⁸⁷

Partially adopting the reasoning of the carve-out approach, the court stated that § 522 limits the extent that a lien can be avoided to the amount of the claimed exemption.¹⁸⁸ The court relied on *Cerniglia* and that court's reference to the Supreme Court's holding that liens on real property generally survive bankruptcy unaffected.¹⁸⁹ Quoting *Cerniglia*, the court noted:

[s]ection 522(f)(1) gives the debtor only a limited power to avoid liens in order to preserve his exemption. This power may not be expanded to allow avoidance of the unsecured portion of the lien that would otherwise survive the debtor's discharge. To so interpret § 522(f)(1) would be to grant the debtor not merely the benefit of his exemption in the homestead property but also all the benefits of ownership beyond the exemption amount¹⁹⁰

Thus, purporting to adhere to the plain meaning of the statute, the court partially adopted the reasoning of the carve-out approach.¹⁹¹

The court, however, continued its analysis and departed from the carve-out approach in its interpretation of the word "avoid."¹⁹² As opposed to the carve-out approach's nullification of the portion of the lien found to impair the exemption, the court here viewed the issue in terms of priority.¹⁹³ The court reasoned that "to avoid can be to go around as well as declare a nullity."¹⁹⁴ Thus, the court held that those judicial liens that impaired the exemption assumed a subordinate position to that of the exemption.¹⁹⁵

The court in *Bellenoit v. Avco Leasing Services* further developed the subordination approach.¹⁹⁶ In 1992, in *Bellenoit*, the United States Bankruptcy Court for the District of Massachusetts held that the portion of the judicial lien that impaired the debtor's exemption was

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *D'Amelio*, 142 B.R. at 9-10.

¹⁸⁹ See *id.* at 10 (quoting *Cerniglia*, 137 B.R. at 722 (citing *Dewsnup*, 502 U.S. at 410)).

¹⁹⁰ *Id.* (quoting *Cerniglia*, 137 B.R. at 725).

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See *D'Amelio*, 142 B.R. at 10.

¹⁹⁴ *Id.*

¹⁹⁵ See *id.*

¹⁹⁶ 157 B.R. at 186-90.

subordinated to the exemption.¹⁹⁷ The debtor and his wife owned a home as tenants-by-the-entirety.¹⁹⁸ This residence was valued at \$285,200 and was subject to an unavoidable mortgage of \$268,000.¹⁹⁹ Thus, the debtor's equity in the property was \$8600—debtor's one-half interest in the \$17,200 of equity remaining in the property owned by debtor and his wife as tenants-by-the-entirety.²⁰⁰ Moreover, the debtor claimed a homestead exemption of \$7900, thereby leaving only \$700 in equity to which a \$600,000 judicial lien could attach.²⁰¹

The court expressly agreed with the *D'Amelio* court.²⁰² Nevertheless, the court noted that the conclusion in *D'Amelio* did not provide an answer as to *which* liens impair a debtor's exemption.²⁰³ While the court in *D'Amelio* merely concluded that the judicial liens are subordinated to the exemption, here, the court expanded on the reordering concept introduced in *D'Amelio*.²⁰⁴ The court explained that lien avoidance begins with the lien, or the part thereof, that consumes the last portion of equity to which the exemption could attach.²⁰⁵ For example, here there remains \$8600 in equity and the debtor claims a \$7900 homestead exemption.²⁰⁶ The judicial liens therefore would first attach to the \$700 that existed above the \$7900 and then the homestead exemption would attach to the final remaining \$7900 of equity.²⁰⁷ Any remaining value of the judicial liens would be subordinated to the exemption.²⁰⁸ In effect, the court noted that the lien "is split to make room for the debtor's exemption."²⁰⁹ Thus, the court concluded that the lien was partially avoided by displacement.²¹⁰

¹⁹⁷ See *id.* at 189–90.

¹⁹⁸ See *id.* at 186.

¹⁹⁹ See *id.*

²⁰⁰ See *id.* at 186–87.

²⁰¹ See *Bellenoit*, 157 B.R. at 187. But see *id.* at 187 n.3 (stating that it is unclear whether debtor is claiming \$7900 as exemption or merely saying that amount is the equity from which his exemption may be taken).

²⁰² See *id.* at 187; see also *D'Amelio*, 142 B.R. at 10.

²⁰³ See *Bellenoit*, 157 B.R. at 187 (citing *D'Amelio*, 142 B.R. at 10).

²⁰⁴ See *id.* at 187–88 (citing *D'Amelio*, 142 B.R. at 10).

²⁰⁵ See *id.* at 188.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *Bellenoit*, 157 B.R. at 188.

²⁰⁹ *Id.* at 188.

²¹⁰ See *id.* at 187, 189–90.

III. CONGRESSIONAL RESPONSE: THE 1994 AMENDMENTS TO THE CODE

Recognizing the ongoing confusion surrounding the interpretation and application of § 522(f)(1), Congress amended the Code in 1994 by adding § 522(f)(2).²¹¹ This new provision was designed to provide a definition for § 522(f)(1)'s phrase "impair an exemption."²¹² Section 522(f)(2) provides:

For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of

- (i) the lien;
 - (ii) all other liens on the property;
 - (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
- exceeds the value that the debtor's interest in the property would have in the absence of any liens.²¹³

Specifically, with the addition of § 522(f)(2), Congress intended to avoid the above-illustrated confusion by providing a "simple arithmetic test" to determine whether a lien impairs an exemption.²¹⁴

In the legislative history to the 1994 Amendments, Congress makes clear that § 522(f)(2) was solely intended to be a clarification amendment.²¹⁵ As the House report explains, "[b]ecause the Bankruptcy Code does not currently define the meaning of the words 'impair an exemption' in § 522(f), several court decisions have, in recent years, reached results that were not intended by Congress when it drafted the Code."²¹⁶ In the House report, Congress addressed three particular areas plagued by confusion and explained that certain decisions would be overruled by this clarification amendment.²¹⁷

The first area of confusion that Congress intended to clarify by the 1994 Amendments involved the first fact pattern—no equity in the

²¹¹ See 140 CONG. REC. 10,752, 10,769 (1994); see also 11 U.S.C. § 522(f)(1)–(2) (1994).

²¹² 140 CONG. REC. at 10,769.

²¹³ See 11 U.S.C. § 522(f)(2).

²¹⁴ 140 CONG. REC. at 10,769. The legislative history to § 522(f)(2) states, "because the Bankruptcy Code does not currently define the meaning of the words 'impair an exemption' in section 522(f), several court decisions have, in recent years, reached results that were not intended by Congress when it drafted the Code. This amendment would provide a simple arithmetic test to determine whether a lien impairs an exemption . . ." 140 CONG. REC. at 10,769.

²¹⁵ See Schmidt, *supra* note 32, at 1053; see also 140 CONG. REC. at 10,769.

²¹⁶ 140 CONG. REC. at 10,769.

²¹⁷ See *id.* Congress explicitly addressed three areas that would be overruled by the amendment; however, for purposes of this note, I will only address the first two areas. See *id.*

property beyond the unavoidable encumbrances.²¹⁸ Purporting to follow the majority of courts, Congress took the position that a judicial lien could impair an exemption where there remained no equity in the property above any unavoidable encumbrances, reasoning that a debtor has equitable rights in the property, such as a possessory interest.²¹⁹ Congress explained that a debtor is entitled to exempt these residual interests.²²⁰ Congress stated that to follow the minority of courts that have held that the *unavoidable encumbrance* impaired the exemption and therefore, the judicial lien could not be avoided, would inhibit a debtor's fresh-start.²²¹ Congress further explained that if the judicial lien is not avoided, any post-bankruptcy appreciation in the property would accrue for the benefit of the creditor, thereby threatening to deprive a debtor of his exemption.²²² Thus, Congress stated that a judicial lien can impair an exemption where there exists no equity in the property beyond the unavoidable encumbrances and therefore, the lien can be avoided.²²³ In effect, Congress adhered to the complete avoidance approach adopted by the court in *Cravey* and rejected the "not impair" approach, as followed by the courts in *Simonson* and *Bovay*.²²⁴

The second area of confusion that Congress endeavored to clarify involves the second fact pattern—no equity existing beyond the unavoidable encumbrances and exemption.²²⁵ Congress overruled those cases adhering to the carve-out approach, including *Chabot*.²²⁶ Congress agreed with the majority of courts that have found that, where there is no equity beyond the unavoidable encumbrances and exemption, the judicial lien is avoided in its entirety.²²⁷ Congress explained that the avoidance of the entire lien in such situations preserves the debtor's exemption after bankruptcy.²²⁸ In rejecting the minority view that adopts the carve-out approach—as illustrated by *Chabot*—Congress reasoned that the carve-out approach threatens the debtor's fresh-start.²²⁹ Congress stated that any equity created in the property

²¹⁸ See *id.*; see also *supra* notes 68–118 and accompanying text.

²¹⁹ See 140 CONG. REC. at 10,769.

²²⁰ See *id.*

²²¹ See *id.*

²²² See *id.*

²²³ See *id.*

²²⁴ See 140 CONG. REC. at 10,769; see also *supra* notes 68–118 and accompanying text.

²²⁵ See 140 CONG. REC. at 10,769; see also *supra* notes 120–210 and accompanying text.

²²⁶ See 140 CONG. REC. at 10,769; see also *supra* notes 137–78 and accompanying text.

²²⁷ See 140 CONG. REC. at 10,769.

²²⁸ See *id.*

²²⁹ See *id.*; see also *supra* notes 137–78 and accompanying text.

as a result of mortgage payments made from the debtor's post-bankruptcy income—income that the fresh-start is supposed to protect for the debtor—would accrue for the benefit of the lienholder.²³⁰ Moreover, Congress explained that the debtor's fresh-start would be further endangered because the judicial lien may prevent the debtor from selling his home prior to paying the judicial lienholder.²³¹ Thus, concerned with preserving the debtor's exemption and fresh-start, Congress rejected the carve-out approach.²³² Although Congress expressly addressed the confusion surrounding the first and second fact patterns, it did not address those situations involving the third fact pattern.²³³

IV. POST-AMENDMENT JUDICIAL APPROACHES TO THE INTERPRETATION AND APPLICATION OF § 522(f)(1)

A. Overview

In the legislative history to the 1994 Amendments, Congress explicitly rejected the not impair and carve-out approaches, but it did not expressly address the subordination and full avoidance approaches.²³⁴ Nevertheless, no court has applied the subordination approach since the passage of the 1994 Amendments to the Code, and a few courts have even gone so far as to reject this approach expressly.²³⁵ On the other hand, following the 1994 Amendments to the Code, some courts have continued to adhere to the full avoidance approach, while other courts began adopting a new approach—the “entire lien avoidance” approach.²³⁶ Thus, despite the 1994 Amendments, courts have never-

²³⁰ See 140 CONG. REC. at 10,769.

²³¹ See *id.*

²³² See *id.*

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See, e.g., *In re Donahue*, 205 B.R. 661, 662 (Bankr. D. Mass. 1997). In 1997, in *Donahue*, the United States Bankruptcy Court for the District of Massachusetts held that the judicial lien was avoided by nullification, and not merely subordinated to the exemption. See *id.* The court explained that although the 1994 amendments did not apply to that case, the court could consider the legislative history. See *id.* In viewing the legislative history, the court rejected the creditor's argument that *Bellenoit* requires the subordination of the judicial lien. See *id.*; see also *Bellenoit v. Avco Leasing Serv.*, 157 B.R. 185, 185 (Bankr. D. Mass. 1992). Rather, the court held that the lien was voided and not subordinated. See *Donahue*, 205 B.R. at 662.

²³⁶ See, e.g., *East Cambridge Sav. Bank v. Silveira*, 1998 WL 175119, at *4, 6 (1st Cir. Apr. 21, 1998); *In re Finn*, 211 B.R. 780, 784 (B.A.P. 1st Cir. Sept. 5, 1997); *East Cambridge Sav. Bank v. Silveira*, Memorandum & Order, 1, 7 (No. 96-11388-WGY) (D. Mass. 1997), vacated and remanded, 1998 WL 175119 (1st Cir. Apr. 21, 1998); *In re Ryan*, 210 B.R. 7, 13 (Bankr. D. Mass. 1997).

theless adopted different interpretations of the statutory language, the legislative history and the policy objectives behind the Code.²³⁷ Consequently, the confusion surrounding § 522(f) persists, causing courts to continue to struggle over how to interpret and apply this provision.²³⁸

B. *The Gonzalez Saga*

A clear illustration of the confusion that continues to surround § 522(f)(1) is the *Gonzalez* saga.²³⁹ In 1993, prior to the 1994 Amendments to the Code, in *In re Gonzalez*, the United States Bankruptcy Court for the District of Massachusetts followed the carve-out approach, holding that the debtor could avoid the judicial lien in the amount of the claimed exemption.²⁴⁰ The debtor's property was valued at \$129,100 and was encumbered by a \$106,000 mortgage.²⁴¹ Moreover, the debtor claimed a \$4235 homestead exemption.²⁴² Thus, there remained \$18,865 in equity to which a \$300,000 judicial lien could attach.²⁴³ Adhering to a strict reading of the statutory language, the court explained that the word "extent" in § 522(f)(1) means "range . . . over which something extends."²⁴⁴ Thus, the court reasoned that the judicial lien could only be avoided to the extent of the claimed exemption—\$4235.²⁴⁵ The court held that the remainder of the judicial lien that exceeded the existing equity—the unsecured portion—was subordinated to the unavoidable encumbrances and exemption.²⁴⁶

On appeal, in 1996, in *Gonzalez v. First National Bank of Boston*, the United States District Court for the District of Massachusetts held that the debtors were entitled to completely avoid the judicial lien.²⁴⁷ Because the case commenced before the adoption of the 1994 Amendments to the Code, the court explained that the 1994 Amendments did not apply to this case.²⁴⁸ Nevertheless, the court announced that the legislative history "is enlightening and relevant."²⁴⁹ The court noted

²³⁷ See, e.g., *Silveira*, 1998 WL 175119, at *4, 6; *Finn*, 211 B.R. at 784; *Silveira*, Memorandum & Order, at 7; *Ryan*, 210 B.R. at 13.

²³⁸ See, e.g., *Finn*, 211 B.R. at 784; *Silveira*, Memorandum & Order, at 7; *Ryan*, 210 B.R. at 13. But see *Silveira*, 1998 WL 175119, at *4.

²³⁹ See *In re Gonzalez*, 191 B.R. 2, 4 (Bankr. D. Mass. 1996) ("*Gonzalez I*"); *In re Gonzalez*, 149 B.R. 9, 12 (Bankr. D. Mass. 1993) ("*Gonzalez II*").

²⁴⁰ *Gonzalez I*, 149 B.R. at 11-12.

²⁴¹ See *id.* at 10.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986)).

²⁴⁵ See *Gonzalez I*, 149 B.R. at 10.

²⁴⁶ See *id.* at 11-12.

²⁴⁷ *Gonzalez II*, 191 B.R. at 3-4.

²⁴⁸ See *id.* at 3.

²⁴⁹ *Id.*

that the legislative history directly rejected the carve-out approach, as adopted by the court in *Chabot*.²⁵⁰ Thus, the *Gonzalez* court reversed the lower court's ruling, reasoning that the result was in direct contradiction to Congress's intent.²⁵¹ Rather, the court concluded that the entire judicial lien could be completely avoided.²⁵² The court, however, did not explain whether it was applying the full avoidance or entire lien avoidance approach.²⁵³

C. Current Judicial Approaches—Full Avoidance vs. Entire Lien Avoidance

As the *Gonzalez* cases illustrate, courts disagree over the meaning of the statutory language, the legislative history to the 1994 Amendments and the policy objectives behind the Code.²⁵⁴

1. The Full Avoidance Approach

Following the 1994 Amendments to the Code, some courts have continued to adhere to the full avoidance approach, thereby completely avoiding any portion of a judicial lien that exceeds the quantity of equity remaining in the property.²⁵⁵ In 1998, in *East Cambridge Savings Bank v. Silveira*, the United States Court of Appeals for the First Circuit adopted the full avoidance approach, holding that the debtor could avoid only partially the judicial lien.²⁵⁶ The debtor sought to avoid a \$209,500 judicial lien on his home, which was valued at \$157,000.²⁵⁷ The home was subject to a \$117,680 mortgage and the debtor was entitled to a \$15,000 homestead exemption.²⁵⁸ Thus, there remained \$24,320 in equity after the mortgage and exemption.²⁵⁹

Purporting to adhere to the plain language of the statute, the court explained that the statutory language supports the application

²⁵⁰ See *id.* at 3–4 (quoting 140 CONG. REC. 10,752, 10,769 (1994)).

²⁵¹ See *id.* at 4.

²⁵² See *Gonzalez II*, 191 B.R. at 3–4.

²⁵³ See *id.* In making its calculations, the court used the liquidation value of the property, rather than the standard fair market value. See *id.* Under the liquidation valuation, there remained no equity beyond the unavoidable encumbrances and exemption, whereas, under a fair market evaluation, there did remain some equity. See *id.*

²⁵⁴ See, e.g., *Finn*, 211 B.R. at 784 (applying full avoidance approach); *Silveira*, Memorandum & Order, at 7 (adhering to entire lien avoidance approach); *Gonzalez II*, 191 B.R. at 3–4 (unclear whether applying full avoidance or entire lien avoidance approach). But see *Silveira*, 1998 WL 175119, at *4 (adopting the full avoidance approach).

²⁵⁵ See, e.g., *Silveira*, 1998 WL 175119, at *4; *Finn*, 211 B.R. at 784; *Ryan*, 210 B.R. at 13.

²⁵⁶ 1998 WL 175119, at *4.

²⁵⁷ See *id.* at *1.

²⁵⁸ See *id.*

²⁵⁹ See *id.*

of the partial lien avoidance approach.²⁶⁰ The court reasoned that if Congress had intended the provision to be a "all-or-nothing" matter, it would not have used the word "if" in lieu of the phrase "to the extent that."²⁶¹ The court further reasoned that partial lien avoidance comports with the statute's intended purpose.²⁶² Introducing hypothetical scenarios, the court explained that the entire lien avoidance approach would lead to results that "seemed arbitrary and unfair."²⁶³ Particularly, the court explained that it would be arbitrary to allow a \$30,000 lien to remain intact where there existed \$30,000 in equity, but to avoid the entire lien if the amount was increased by only \$1—totalling \$30,001.²⁶⁴ Thus, the court adopted the partial lien avoidance approach and allowed the debtor to avoid only \$185,180—the portion of the lien that impaired his exemption.²⁶⁵

Moreover, in 1997, in *In re Ryan*, the United States Bankruptcy Court for the District of Massachusetts held that a debtor could only partially avoid a judicial lien.²⁶⁶ The debtor's property was valued at \$140,000 and was subject to a \$38,021.08 mortgage.²⁶⁷ Moreover, the debtor claimed a \$10,161 homestead exemption.²⁶⁸ Thus, there existed \$91,817.92 in equity beyond the unavoidable encumbrance and exemption to which a \$290,596.79 judicial lien could attach.²⁶⁹

Adhering to a strict reading of the statutory language of § 522(f)(2), the court reasoned that the phrase "to the extent" allows only partial lien avoidance—avoidance to the extent of the impairment that results from the application of the arithmetic formula.²⁷⁰ The court explained that "[t]he formula set forth in § 522(f)(2)(A) is straightforward and easily applied."²⁷¹ At the same time, however, the court conceded that the legislative history is confusing and suggests that Congress intended entire lien avoidance.²⁷² Nevertheless, the court explained that where the statutory language is unambiguous, the plain

²⁶⁰ See *id.* at *2.

²⁶¹ 1998 WL 175119, at *2.

²⁶² See *id.* at *3.

²⁶³ See *id.* at *3 n.3.

²⁶⁴ See *id.*

²⁶⁵ See *id.* at *4, 6.

²⁶⁶ 210 B.R. at 13.

²⁶⁷ See *id.* at 8.

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See *id.* at 10, 12–13.

²⁷¹ *Ryan*, 210 B.R. at 10.

²⁷² See *id.* at 10–11. Judge Feeney explained, "[t]he commentary about the *Chabot* case contained in the legislative history suggests that partially secured liens should be avoided in their entirety" *Id.* at 11.

language governs, irrespective of the legislative history.²⁷³ The court concluded that § 522(f)(2) only requires avoidance of the portion of the judicial lien which impairs an exemption, as determined by that section's arithmetic formula.²⁷⁴ Consequently, the court determined that the lien was partially avoided in the amount of \$198,778.87—the amount in excess of the quantity of equity remaining in the property.²⁷⁵

Likewise, in 1997, in *Federal Deposit Insurance Corp. v. Finn*, the United States Bankruptcy Appellate Panel of the First Circuit ("BAP") followed the full avoidance approach.²⁷⁶ In *Finn*, the BAP overruled the federal district court's avoidance of a judicial lien in its entirety and instead, held that the debtor could only partially avoid the lien.²⁷⁷ The debtor owned a home that was valued at \$225,000.²⁷⁸ The home was encumbered by several mortgages and liens: a first mortgage of \$66,965.34, a second mortgage of \$87,932, a first judicial lien of \$1,300,000 and a second judicial lien of \$766,552.63.²⁷⁹ Moreover, the debtor claimed a \$15,700 homestead exemption.²⁸⁰

Adhering to a strict reading of the statutory language of § 522(f)(2), the court reasoned that the arithmetic formula compelled partial lien avoidance.²⁸¹ On the other hand, the court noted that the legislative history was confusing because Congress alluded to cases that did not support the correlating fact patterns.²⁸² Nevertheless, the court stated that "review of the analysis of the legislative history is not necessary where the plain meaning of the statute is conclusive."²⁸³

Moreover, the court reasoned that partial avoidance of the lien is consistent with bankruptcy policies.²⁸⁴ First, the court explained that the full avoidance approach preserves the exemption and allows post-bankruptcy appreciation to accrue for the benefit of the debtor.²⁸⁵ Second, the court stated that the full avoidance approach provides certainty and definiteness by setting judicial liens at a fixed amount.²⁸⁶

²⁷³ See *id.* at 12 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

²⁷⁴ See *id.* at 12-13.

²⁷⁵ See *id.*

²⁷⁶ 211 B.R. at 784.

²⁷⁷ See *id.*

²⁷⁸ See *id.* at 780-81. The valuation of the home is the debtor's valuation. See *id.* at 780-81 & n.1.

²⁷⁹ See *id.* at 781.

²⁸⁰ See *id.*

²⁸¹ See *Finn*, 211 B.R. at 782-83.

²⁸² See *id.* at 782.

²⁸³ See *id.*

²⁸⁴ See *id.* at 783.

²⁸⁵ See *id.*

²⁸⁶ See *Finn*, 211 B.R. at 783.

Thus, the court held that, pursuant to § 522(f)(1), the debtor could avoid only that portion of the judicial lien that exceeded the debtor's equity in the property.²⁸⁷

2. The Entire Lien Avoidance Approach

At the same time, following the 1994 Amendments, some courts adopted a new approach—the “entire lien avoidance” approach.²⁸⁸ Under this approach, courts adhere to a strict reading of the statutory language.²⁸⁹ Courts following this approach explain that § 522(f) mandates that a lien is either avoided in its entirety or fully survives bankruptcy.²⁹⁰

The entire lien avoidance approach is illustrated by *East Cambridge Savings Bank v. Silveira*.²⁹¹ In 1997, in *Silveira*, the United States District Court for the District of Massachusetts held that, pursuant to § 522(f)(1), the entire lien was avoided.²⁹² In *Silveira*, the debtor sought to avoid a \$209,500 judicial lien on his home, which was valued at \$157,000.²⁹³ The home was subject to a \$117,680 mortgage and the debtor was entitled to a \$15,000 homestead exemption.²⁹⁴ Thus, there remained \$24,320 in equity after the mortgage and exemption.²⁹⁵

Adhering to a strict reading of the statutory language, the court avoided the \$209,500 lien entirely, reasoning that § 522(f)(2) mandates the avoidance of the entire lien if that lien impairs an exemption to any extent.²⁹⁶ The court explained, “Congress set forth a clear formula which, if satisfied, requires the avoidance of the lien.”²⁹⁷ Moreover, the court reasoned that the legislative history to the 1994 Amendments to the Code likewise mandate entire lien avoidance.²⁹⁸ Specifically, the court referenced a passage from the legislative history in

²⁸⁷ See *id.* at 784.

²⁸⁸ See, e.g., *Silveira*, Memorandum & Order, at 7; see also *Finn*, 211 B.R. at 785 (DeJesus, J., dissenting).

²⁸⁹ See, e.g., *Silveira*, Memorandum & Order, at 5; *In re Thomsen*, 181 B.R. 1013, 1016 (Bankr. M.D. Ga. 1995); see also *Finn*, 211 B.R. at 785 (DeJesus, J., dissenting).

²⁹⁰ See, e.g., *Finn*, 211 B.R. at 785 (DeJesus, J., dissenting); *Silveira*, Memorandum & Order, at 5; *Thomsen*, 181 B.R. at 1016.

²⁹¹ Memorandum & Order, at 5–7. Although United States Court of Appeals for the First Circuit vacated the decision in this case, the theory expounded by the court remains important because similar issues are bound to arise in other circuits that have not yet decided, for themselves, which approach is correct. See *Silveira*, 1998 WL 175119, at *6.

²⁹² See *Silveira*, Memorandum & Order, at 7.

²⁹³ See *id.* at 1, 3–4 nn.1–2.

²⁹⁴ See *id.* at 1, 3–4 n.2.

²⁹⁵ See *id.*

²⁹⁶ See *id.* at 5, 7.

²⁹⁷ *Silveira*, Memorandum & Order, at 5.

²⁹⁸ See *id.* at 5–6.

which Congress rejected the not impair approach.²⁹⁹ The court explained that Congress also implicitly rejected the full lien avoidance approach in this passage.³⁰⁰ Without providing any reasoning, the court merely stated, "[p]articularly relevant is the following excerpt where the House Report rejects the partial avoidance approach [here referred to as the full avoidance approach]"³⁰¹ The court then cited the passage in which Congress expressly rejected the not impair approach.³⁰²

In addition to garnering support from the statutory language and the legislative history to the 1994 Amendments, the court also explained that the entire lien avoidance approach furthers the Code's fresh-start policy.³⁰³ Particularly, the court noted that the entire lien avoidance approach protects a debtor's interest in the property after bankruptcy because any future increase in the value of the property accrues for the benefit of the debtor.³⁰⁴ Thus, the court concluded that, pursuant to § 522(f)(1), the entire lien was avoided.³⁰⁵

Similarly, in a dissenting opinion in *Finn*, Judge DeJesus argued in favor of adopting the entire lien avoidance approach.³⁰⁶ Judge DeJesus agreed with the lower court's opinion and argued that the entire lien should be avoided.³⁰⁷ In addition, Judge DeJesus referenced a long passage from *In re Thomsen* to support his position that § 522(f)(1) mandates the avoidance of the entire lien where the lien impairs an exemption in any amount.³⁰⁸ Particularly, he emphasized *Thomsen's* explanation that "[a] lien is an absolute entitlement. Property is either subject to a lien, or not."³⁰⁹ Judge DeJesus implicitly reasoned that a

²⁹⁹ See *id.* at 6.

³⁰⁰ See *id.* at 5-6.

³⁰¹ *Id.* at 5-6.

³⁰² See *Silveira*, Memorandum & Order, at 6.

³⁰³ See *id.* at 7.

³⁰⁴ See *id.*

³⁰⁵ See *id.*

³⁰⁶ See *Finn*, 211 B.R. at 784-85.

³⁰⁷ See *id.* at 784; see also *supra* notes 265-76 and accompanying text for discussion of the facts and the majority opinion in *Finn*.

³⁰⁸ See *Finn*, 211 B.R. at 784-85 (quoting *Thomsen*, 181 B.R. at 1016). In *Thomsen*, the United States Bankruptcy Court for the District of Georgia held that the entire judicial lien could be avoided pursuant to § 522(f)(1). See 181 B.R. at 1016. In *Thomsen*, there did not exist any equity beyond the unavoidable encumbrances and exemption. See *id.* at 1017. In reviewing § 522(f)(2) and the legislative history to the 1994 Amendments to the Code, the court explained that there is confusion over whether the entire lien avoidance or full avoidance approach is the correct approach under § 522(f)(1). See *id.* at 1016. Nevertheless, the court did not have to answer the question because there was no remaining equity in the property; therefore, under either approach, the entire lien would be avoided. See *id.* Thus, the court concluded that the lien was avoided in full pursuant to § 522(f)(1). See *id.*

³⁰⁹ *Finn*, 211 B.R. at 785 (citing *Thomsen*, 181 B.R. at 1016).

lien does not have a numerical sum and therefore, rejected the ability of the majority to bifurcate a lien.³¹⁰ Specifically, Judge DeJesus quoted *Thomsen*, in which the court stated, "the concept of bifurcation of the lien, rather than the debt that it secures, is heretofore unknown."³¹¹ Alluding to *Thomsen*, Judge DeJesus noted that in addition to the carve-out approach, which the amendments rejected, and the claims bifurcation approach of § 506, the only remaining approach is entire lien avoidance.³¹² Thus, Judge DeJesus concluded that where a judicial lien is found to impair an exemption to any extent, § 522(f)(2) mandates complete avoidance of the lien.³¹³

V. ANALYSIS

Although the 1994 Amendments to the Code were intended to clarify § 522(f)(1), they have not produced such a result.³¹⁴ Rather, following the 1994 Amendments, courts have continued to interpret and apply § 522(f) differently, even when addressing the same fact pattern.³¹⁵ Through the passage of the 1994 Amendments, Congress only managed to produce a limited amount of clarity with its express rejection of the not impair and carve-out approaches and its implicit rejection of the subordination approach.³¹⁶

The legislative history does explain that in situations involving the first fact pattern—no equity existing beyond the unavoidable encumbrances—a judicial lien does impair an exemption, thereby rejecting the "not impair" approach.³¹⁷ Moreover, in the legislative history, Congress interpreted the phrase "to the extent" as not meaning to the extent of the allowable exemption, thereby rejecting the carve-out approach.³¹⁸ In addition, although Congress did not expressly discredit the subordination approach, it implicitly rejected it by broadly interpreting the Code's fresh-start policy.³¹⁹

³¹⁰ See *id.* at 784–85.

³¹¹ *Id.* at 785.

³¹² See *id.*

³¹³ See *id.*

³¹⁴ See 140 CONG. REC. 10,752, 10,769 (1994); see, e.g., *In re Finn*, 211 B.R. 780, 784 (B.A.P. 1st Cir. Sept. 5, 1997); *East Cambridge Sav. Bank v. Silveira*, Memorandum & Order, 1, 7 (No. 96-11388-WGY) (D. Mass. 1997), *vacated and remanded*, 1998 WL 175119 (1st Cir. Apr. 21, 1998). But see *East Cambridge Savings Bank v. Silveira*, 1998 WL 175119, at *4, 6 (1st Cir. Apr. 21, 1998).

³¹⁵ See, e.g., *Finn*, 211 B.R. at 784; *Silveira*, Memorandum & Order, at 7; *In re Ryan*, 210 B.R. 7, 12 (Bankr. D. Mass. 1997); *Gonzalez v. First Nat'l Bank of Boston*, 191 B.R. 2, 3–4 (Bankr. D. Mass. 1996) ("*Gonzalez II*").

³¹⁶ See 140 CONG. REC. at 10,769.

³¹⁷ See *id.*

³¹⁸ See *id.*

³¹⁹ See *id.* at 10,769.

Despite this limited clarity, courts have continued to differ over whether to apply the full avoidance or entire lien avoidance approach.³²⁰ Nevertheless, as recognized by the First Circuit, the full avoidance approach is the only approach which comports with the statutory language, the legislative history to the 1994 Amendments and the policy objectives behind the Code; therefore, it is the approach courts should follow when interpreting and applying § 522(f)(1).³²¹ Whereas the entire lien avoidance approach results in a windfall for debtors, the full avoidance approach strikes an appropriate balance between the interests of failed debtors and their creditors.³²²

A. *The Confusion Surrounding the 1994 Amendments to the Code*

The legislative history to the 1994 Amendments is confusing in many respects.³²³ For example, Congress misinterpreted the holding in *Gonzalez*.³²⁴ Congress stated that *Gonzalez* fit into the first fact pattern—no equity beyond the unavoidable encumbrances.³²⁵ In *Gonzalez*, however, there was equity in the debtor's property in the amount of \$23,100.³²⁶ Moreover, Congress was purporting to overrule the not impair approach when it referred to *Gonzalez*.³²⁷ The court in *Gonzalez*, however, applied the carve-out approach.³²⁸ Thus, Congress cited a case to serve as an illustration for a position that it did not represent.³²⁹

Despite the confusion caused by such mischaracterizations, Congress did explain that the not impair and carve-out approaches were overruled.³³⁰ Moreover, Congress expressed its broad interpretation of the Code's fresh-start policy and its related view that any post-bankruptcy appreciation should accrue for the benefit of the debtor.³³¹

³²⁰ See, e.g., *Finn*, 211 B.R. at 784–85; *Ryan*, 210 B.R. at 12–13; see also *Silveira*, Memorandum & Order, at 5.

³²¹ See 11 U.S.C. § 522(f) (1994); *Silveira*, 1998 WL 175119, at *4; 140 CONG. REC. at 10,769; see also *supra* notes 120–36, 255–87 and accompanying text.

³²² See *supra* notes 120–36, 255–313 and accompanying text.

³²³ See 140 CONG. REC. at 10,769; see also *Silveira*, 1998 WL 175119, at *5 (noting that cases cited in legislative history do not fit examples discussed); *Finn*, 211 B.R. at 782 (same); *Ryan*, 210 B.R. at 9 (“[A]lthough the legislative history states that the amendment was intended to overrule these decisions, the hypothetical scenarios do not present the facts or the issues in the cases cited.”).

³²⁴ See 140 CONG. REC. at 10,769; see also *In re Gonzalez*, 149 B.R. 9, 12 (Bankr. D. Mass. 1993) (“*Gonzalez I*”).

³²⁵ See 140 CONG. REC. at 10,769.

³²⁶ See *Gonzalez I*, 149 B.R. at 10.

³²⁷ See 140 CONG. REC. at 10,769.

³²⁸ See *Gonzalez I*, 149 B.R. at 10–12.

³²⁹ See 140 CONG. REC. at 10,769; see also *Gonzalez I*, 149 B.R. at 10–12.

³³⁰ See 140 CONG. REC. at 10,769.

³³¹ See *id.*

Thus, the legislative history does provide some guidelines for courts to consider when interpreting and applying § 522(f).³³²

B. *The Full Avoidance Approach: The Correct Approach*

The full avoidance approach is the only approach that garners support from the statutory language, the legislative history to the 1994 Amendments and the policy objectives behind the Code.³³³ A strict reading of § 522(f)(2) provides support for the full avoidance approach.³³⁴ Courts following this approach merely plug the appropriate numbers into the "simple arithmetic" formula and avoid that portion of the lien.³³⁵ As Judge Federman wrote, "[t]he guiding purpose behind the revision is to leave the debtor with a total of mortgage debt, judicial liens²⁶

and homestead exemptions equal to the value of the property at the time of the bankruptcy."³³⁶

At the same time, the full avoidance approach comports with Congress's intent, as propounded by the 1994 Amendments to the Code.³³⁷ In the 1994 Amendments, Congress broadly interpreted the Code's fresh-start policy and explained that any post-bankruptcy appreciation should accrue for the benefit of the debtor.³³⁸ Thus, the full avoidance approach furthers the Code's fresh-start policy by preserving the debtor's exempt property and allowing any post-bankruptcy appreciation to accrue for the benefit of the debtor.³³⁹ Moreover, the full avoidance approach furthers the Code's other policy objective of helping to protect some of the rights of creditors by preserving the secured portion of their liens.³⁴⁰ Thus, the full avoidance approach strikes a balance between the Code's fresh-start policy and its goal of protecting some of the rights of creditors.³⁴¹

³³² See *id.*

³³³ See 11 U.S.C. § 522(f); 140 CONG. REC. at 10,769; see also *supra* notes 28-63 and accompanying text.

³³⁴ See 11 U.S.C. § 522(f)(2) (1994); see also *Silveira*, 1998 WL 175119, at *2; *Finn*, 211 B.R. at 783-84; *Ryan*, 210 B.R. at 12-13.

³³⁵ See *Silveira*, 1998 WL 175119, at *2; *Finn*, 211 B.R. at 783-84; *Ryan*, 210 B.R. at 12-13.

³³⁶ See Judge Arthur B. Federman, *The Bankruptcy Reform Act of 1994*, 51 J. MO. BAR 105, 106 (Mar./Apr. 1995).

³³⁷ See 140 CONG. REC. at 10,769.

³³⁸ See *id.*

³³⁹ See, e.g., *Finn*, 211 B.R. at 784; *Ryan*, 210 B.R. at 7.

³⁴⁰ See, e.g., *Finn*, 211 B.R. at 784; *Ryan*, 210 B.R. at 7; see also *supra* notes 28-63 and accompanying text.

³⁴¹ See *supra* notes 28-63 and accompanying text.

C. *The Implicit Rejection of the Subordination Approach*

Adhering to a strict reading of the statutory language of § 522(f)(1), the word "avoid" can be interpreted to mean either to nullify or to subordinate.³⁴² Due to the statutory ambiguity, one must turn to the legislative history for clarification.³⁴³ Although Congress did not expressly reject the subordination approach in the legislative history to the 1994 Amendments to the Code, it implicitly rejected this approach.³⁴⁴ In the legislative history, Congress did express its view that post-bankruptcy appreciation should accrue for the benefit of the debtor in order to fulfill the Code's fresh-start policy.³⁴⁵ In overruling both the not impair and carve-out approaches, Congress expressly stated its concern that under those approaches post-bankruptcy appreciation would go to the benefit of the creditor.³⁴⁶ In particular, in overruling *Chabot*, Congress explained that a major flaw with the carve-out approach was that any equity created by mortgage payments would go to the benefit of the judicial lienholder.³⁴⁷ Congress stated that the fresh-start policy was supposed to protect the debtor.³⁴⁸ Thus, given Congress's broad interpretation of the fresh-start policy, the subordination approach—which leaves any post-bankruptcy appreciation to the creditor—is contrary to Congress's intent.³⁴⁹

Moreover, courts following the subordination approach apply faulty reasoning in their reliance on *Dewsnup v. Timm*.³⁵⁰ Although *Dewsnup* reaffirmed the pre-Code rule that liens on real property generally survive bankruptcy, it qualified this position by explaining that such liens only survive when the Code does not provide otherwise.³⁵¹ Section 522(f), however, does provide otherwise.³⁵² Moreover, the Court in *Dewsnup* expressly stated that its holding was narrowly limited to the facts of that case.³⁵³ In sum, the legislative history clearly

³⁴² See 11 U.S.C. § 522(f)(1) (1994); see, e.g., *Finn*, 211 B.R. at 784; *Ryan*, 210 B.R. at 12-13; *Bellenoit v. Avco Leasing Serv.*, 157 B.R. 185, 188 (Bankr. D. Mass. 1992); *In re D'Amelio*, 142 B.R. 8, 10 (Bankr. D. Mass. 1992).

³⁴³ See generally *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242-46 (1989).

³⁴⁴ See 140 CONG. REC. at 10,769.

³⁴⁵ See *id.*

³⁴⁶ See *id.*

³⁴⁷ See *id.*

³⁴⁸ See *id.*

³⁴⁹ See 140 CONG. REC. at 10,769; see also *supra* 179-210 and accompanying text.

³⁵⁰ *Dewsnup v. Timm*, 502 U.S. 413-19 (1992); see *Bellenoit*, 157 B.R. at 188; *D'Amelio*, 142 B.R. at 10.

³⁵¹ See *Dewsnup*, 502 U.S. at 419-20.

³⁵² See 11 U.S.C. § 522(f).

³⁵³ See *Dewsnup*, 502 U.S. at 416-17.

illustrates that Congress intended the word "avoid" to mean nullify.³⁵⁴ Thus, courts following the subordination approach inaccurately interpret and apply § 522(f)(1).³⁵⁵

D. *Flaws with the Entire Lien Avoidance Approach*

Courts following the entire lien avoidance approach likewise apply faulty reasoning.³⁵⁶ The entire lien avoidance approach, the opposite extreme from the subordination approach, clearly does not result from a strict reading of the statutory language.³⁵⁷ Courts following this approach ignore the phrase "to the extent" and act as though the phrase means "if."³⁵⁸ Although the court in *Silveira* reasoned that a strict reading of the statutory language mandates the entire avoidance of a judicial lien that impairs an exemption to any extent, it offered no justification for such a reading.³⁵⁹

One might argue, however, that the legislative history does suggest that Congress intended entire lien avoidance.³⁶⁰ In explaining the purpose of the addition of § 522(f)(2), the record states "[t]his amendment would provide a simple arithmetic test to determine *whether* a lien impairs an exemption"³⁶¹ Although the actual statutory language uses the phrase "to the extent," one may argue that the legislative history behind the provision suggests that the provision was merely intended to determine "whether" a lien impaired an exemption, not the extent of the impairment.³⁶²

On the other hand, the legislative history to the 1994 Amendments to the Code does not require the application of the entire lien avoidance approach.³⁶³ Although courts following the entire lien avoidance approach explain that the legislative history supports such an approach, they cite passages where Congress referred to either the first or second fact pattern.³⁶⁴ In the legislative history, Congress never addressed the third fact pattern—where equity remains beyond the

³⁵⁴ See 140 CONG. REC. at 10,769.

³⁵⁵ See *Bellenoit*, 157 B.R. at 188; *D'Amelio*, 142 B.R. at 10.

³⁵⁶ See, e.g., *Silveira*, Memorandum & Order, at 5-7; see also *Finn*, 211 B.R. at 784-85 (DeJesus, J., dissenting).

³⁵⁷ See *supra* notes 288-313 and accompanying text.

³⁵⁸ See *In re Corson*, 206 B.R. 17, 22 (Bankr. D. Conn. 1997).

³⁵⁹ See *Silveira*, Memorandum & Order, at 5-6.

³⁶⁰ See 140 CONG. REC. at 10,769.

³⁶¹ *Id.* (emphasis added).

³⁶² See *id.*; see also 11 U.S.C. § 522(f)(2).

³⁶³ See 140 CONG. REC. at 10,769.

³⁶⁴ See *id.*; see also *Silveira*, Memorandum & Order, at 6.

unavoidable encumbrance and exemption.³⁶⁵ Thus, the legislative history offers little guidance for determining whether Congress intended full or entire lien avoidance.³⁶⁶ Nevertheless, because the statutory language is clear, one should not even consider the legislative history with respect to this issue.³⁶⁷

In addition to being contrary to the plain statutory language, the entire lien avoidance approach is inconsistent with the policy objectives behind the Code.³⁶⁸ Although under the entire lien avoidance approach post-bankruptcy appreciation goes to the benefit of the debtor, this approach goes too far.³⁶⁹ The entire lien avoidance approach fails to consider the Code's other policy objective of helping to protect the rights of creditors.³⁷⁰ Thus, the entire lien avoidance approach results in a windfall to debtors, giving them a "head start," rather than a "fresh-start."³⁷¹

Moreover, the entire lien avoidance approach has the potential of producing arbitrary results and makes a judicial determination of the value of the property extremely critical.³⁷² For example, if there is a \$40,000 judicial lien and the court determines that the value of the property is such that there remains \$40,000 in equity beyond the unavoidable encumbrances and the exemption, then the entire lien would survive bankruptcy. On the other hand, if the court determines that the value of the property is such that there remains \$39,999 in equity beyond the unavoidable encumbrances and the exemption, then the entire lien would be avoided.

In addition, support for the entire lien avoidance approach is wrongly garnered from *Dewsnup*.³⁷³ Although the United States Supreme Court prohibited lienstripping in *Dewsnup*, the Court expressly narrowed its holding to the facts of that case.³⁷⁴ Also, the Court was dealing with § 506(d), as well as with a deed of trust, a type of lien that assumes a higher priority position than a judicial lien.³⁷⁵

³⁶⁵ See 140 CONG. REC. at 10,769.

³⁶⁶ See *id.*

³⁶⁷ See *Ron Pair*, 489 U.S. at 242-45.

³⁶⁸ See *supra* notes 27-62 and accompanying text.

³⁶⁹ See *supra* notes 277-302 and accompanying text.

³⁷⁰ See *supra* notes 36-62 and accompanying text.

³⁷¹ *In re Chabot*, 100 B.R. 18, 22 (Bankr. C.D. Cal. 1989) (citing *Polk County Fed. Sav. & Loan Ass'n of Dcs Moines v. Weathers (In re Weathers)*, 15 B.R. 945, 951 (Bankr. D. Kan. 1981)).

³⁷² See *Silveira*, 1998 WL 175119, at *3 n.3.

³⁷³ 11 U.S.C. §§ 502(d), 506(d), 522(f)(1) (1994); see *Dewsnup*, 502 U.S. at 410.

³⁷⁴ See *Dewsnup*, 502 U.S. at 410.

³⁷⁵ See *id.*

CONCLUSION

In sum, the strict statutory language of § 522(f)(1), the legislative history to the 1994 Amendments to the Code and the policy objectives behind the Code mandate the application of the full avoidance approach. This approach strikes an appropriate balance between relieving failed debtors of some of the hardships resulting from overwhelming debt obligations and protecting the rights of unfortunate creditors. In addition, the adoption of the full avoidance approach will help provide the clarity and predictability that debtors, creditors and their attorneys need in order to plan their future relationships.

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