

IN THE UNITED STATES BANKRUPTCY COURT

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FOR THE DISTRICT OF UTAH

COUNTER COPY - DO NOT REMOVE -

In re)	
HARVEY DEAN McCOY and)	Bankruptcy No. 80-01523
SHERRY LYNN McCOY,)	Civil Proceeding No. 81P-0182
)	
Debtors.)	
)	
HARVEY DEAN McCOY and)	
SHERRY LYNN McCOY,)	
)	
Plaintiffs,)	MEMORANDUM DECISION
vs.)	
INTERLAKE THRIFT,)	
)	
Defendant.)	

Appearances: Gerald S. Wight, Vlahos, Perkins and Sharp, Ogden, Utah, for the debtor; Richard R. Medsker, Ogden, Utah, for Interlake Thrift.

INTRODUCTION AND BACKGROUND

This case asks whether 11 U.S.C. Section 522(f) is applicable in Chapter 13. Compare, e.g., In re Thurman, 20 B.R. 978 (W.D. Tenn. 1982); In re Mattson, 20 B.R. 382 (W.D. Wisc. 1982) with In re Aycock, 15 B.R. 728 (E.D.N.C. 1981); In re Sands, 15 B.R. 563 (M.D.N.C. 1981).

Debtors have filed a complaint to avoid liens under Section 522(f). Defendant Interlake Thrift has answered, and without denying any averment of the complaint, has argued that Section 522(f) is unavailable in Chapter 13. Interlake has moved for summary judgment on this defense, debtors have responded, and the issue is ripe for decision.¹

SECTION 522(f) AND CHAPTER 13

Section 522(f) and its purpose have been described by this court in In re Pillow, 8 B.R. 404, 405-406 (D. Utah 1981). Section 522(f) is applicable in Chapter 13 for the following reasons.

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Interlake, by its answer, also argued that Section 522(f) is unconstitutional. This argument, however, was abandoned on the motion for summary judgment.

First, 11 U.S.C. Section 103(a), which governs the applicability of chapters under the Code, makes Chapter 5 applicable in Chapter 13. This express declaration is not overruled, as discussed below, by ostensible conflicts between Section 522(f) and Chapter 13.

Second, the logic of Chapter 13 supports this result. Congress provided incentives for filing in Chapter 13. In turn, it was expected that creditors would receive a broader distribution in Chapter 13. See, e.g., In re Smith, 8 B.R. 543 (D. Utah 1981); In re Iacovoni, 2 B.R. 256 (D. Utah 1980). Permitting lien avoidance under Section 522(f) in Chapter 7 but not in Chapter 13 would have been a disincentive for filing in Chapter 13, contrary to the congressional objective. In turn, lien avoidance in Chapter 13 may facilitate broader distributions to creditors, in aid of the congressional purpose. For example, 11 U.S.C. Section 1322(b)(8) allows a plan to "provide for the payment of all or any part of a claim against the debtor from property of the estate or property of the debtor." The legislative history notes that property of the debtor includes "exempt property." H.R. REP. No. 95-595, 95th Cong., 1st Sess. 429 (1977). Thus, exempt property, disencumbered of liens, may assist in funding a plan. Moreover, in districts such as Utah where Chapter 13 debtors are required to make good faith payments to unsecured creditors, lien avoidance may increase the future income available for payment to unsecured creditors. If a debtor may not avoid these liens, and is forced to deal with them in a plan, depending upon the value of the collateral and present value requirements, feasibility of the plan under 11 U.S.C. Section 1325(a)(6) may be impaired.

Third, Section 522(f) might be integral in other ways to Chapter 13. For example, a sole proprietorship, which is now eligible to file in Chapter 13, may use the equity

created through avoidance of a judicial lien which impairs his homestead exemption to furnish adequate protection to a creditor or to obtain financing for his business. See 11 U.S.C. Section 1304(b).

Finally, the reasons for opposing application of Section 522(f) in Chapter 13 are unpersuasive. It is argued that Section 522(f), which disencumbers exempt property, is unimportant because all property, exempt and nonexempt, reverts in the debtor upon confirmation of a plan. The discussion above, however, demonstrates the significance of freeing exempt property from liens in furtherance of a Chapter 13 plan.²

It also has been argued that Section 522(f), which empowers a debtor to avoid liens, is inconsistent with 11 U.S.C. Section 1325(a) (5)(B)(i), which requires, as a condition of confirmation, that creditors retain their liens. A lien which is avoided, however, under any of the lien avoidance powers, see, e.g., 11 U.S.C. Sections 522(f), 544, 547, 548, is void, and need not be dealt with in a plan. Indeed, to rule otherwise, would eviscerate every lien avoidance power in Chapter 13, and by implication, in Chapter 11 which has a provision similar to Section 1325(a)(5)(B)(i). See 11 U.S.C. Section 1129(b)(2)(A)(i)(I). This result, which renders meaningless the lien avoidance measures, could not have been intended by Congress.

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11 U.S.C. Section 1322(b)(9) allows a plan to "provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity." (Emphasis supplied.) Indeed, Collier notes that "[s]ection 1327(b) and sections 1322(b)(8) and (9) facilitate flexibility in Chapter 13 plans, as well as judicial discretion, by permitting the debtor to propose a plan to satisfy all or part of one or more claims by vesting property of the debtor or property of the estate in a creditor," 5 COLLIER ON BANKRUPTCY ¶1327.01[2], at 1327-3 (15th ed. 1981), or the trustee, id. §1322.01[3][I], at 1322-14. Chapter 11 proscribes the use of exempt property in a plan, absent acquiescence by the debtor. See 11 U.S.C. Section 1123(c). A similar provision is unnecessary in Chapter 13, since only the debtor may propose a plan.

CONCLUSION

For the foregoing reasons, Section 522(f) is applicable in Chapter 13, and the motion for summary judgment is denied. Since Interlake has failed to deny the other averments of the complaint, they are deemed admitted, and judgment may be entered in favor of the debtors. Counsel for debtors will submit a form of judgment and serve it upon counsel for Interlake, consistent with the local rules of this court.

DATED this 15 day of September, 1982.



Ralph R. Mabey
United States Bankruptcy Judge