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CONSTITUTIONALITY OF "OPT-OUT" STATUTES PROVIDING FOR EXEMPTIONS TO BANKRUPTS

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I. INTRODUCTION

To have a $320,000 house, a Jaquar XJ-S, a Cadillac, a Jeep, and a job which pays $100,000 a year defines a widespread perception of the American dream. This also describes, in part, one debtor's recent "fresh start" following bankruptcy, wherein he was permitted to retain all this property free from pre-bankruptcy creditor's claims.[1] The fresh start concept, which allows a debtor to exempt enough property to begin life anew after bankruptcy, is based on a consensus that this is preferable to creating a class of at least temporary wards of the state.[2] This was one of the primary considerations that motivated enactment of the Bankruptcy Reform Act of 1978 (1978 Code).[3] Although the above described property it not typical of the assets retained by most bankrupts, the case exemplifies the tremendous im-

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1. *See Going Under in Style*, KANSAS CITY MAGAZINE, May 1982, at 20: "[T]he bankruptcy proceeding allowed . . . [restauranteur Stanford Glazer] to keep the equity in the house he bought for $320,000 . . . [plus] his Jaguar XJ-S, his Cadillac and his Jeep." He also retained his $100,000-plus yearly salary through a series of transactions through which he repurchased his business at a premium, borrowing from the same creditor to whom he was previously indebted. *Id.*

2. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 126 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087-88.

3. 11 U.S.C. §§ 101-151326 (Supp. V 1981). The United States Supreme Court emphasized the fresh start policy inherent in the former Bankruptcy Act in Local Loan Co. v. Hunt, 292 U.S. 234 (1934):

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portance and potential effect of understanding and utilizing the bankruptcy exemption laws.[4] This Article examines those laws which permit a bankrupt to retain property free of creditor's claims, concentrating particularly on the relationship between the federal and Missouri exemption provisions.

Prior to enactment of the 1978 Code, the task of formulating a substantive exemption policy was abdicated to the states.[5] As a result, an incongruous patchwork of exemptions was created, varying greatly from state to state.[6] In an effort to provide debtors with an alternative to state exemptions, many of which were outdated, the 1978 Code permits the debtor to

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> One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free of the obligations and responsibilities consequent upon business misfortunes." . . . This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Id. at 244 (citations omitted). The legislative history of the Bankruptcy Reform Act similarly acknowledges that "there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start." H.R. REP. NO. 595, 95th Cong., 1st Sess. 126 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087.

4. Stanford Glazer was able to retain his business salary and two of his cars due to a unique business deal wherein he was able to buy back his business from the creditor on a deferred payment at a premium price. He was able to retain his house and one car by utilizing the Kansas exemption statutes. KAN. STAT. ANN. § 60-2301 (1980) exempts all equity in a debtor's home (in fact, a debtor can pay down the mortgage to shield any cash on hand from creditors) and *id.* § 60-2304(3) exempts "[o]ne means of conveyance regularly used for the transportation of the person or for transportation to and from the person's regular place of work, without regard to the value of such vehicle."

5. The Bankruptcy Act of 1898, 11 U.S.C. § 24 (1976) (repealed 1978), provided that:

> [T]his title shall not affect the allowance of bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State.

6. *See* Duncan, *Through the Trap Door Darkly: Nebraska Exemption Policy and the Bankruptcy Reform Act of 1978*, 20 NEB. L. REV. 219 (1981):

> Exemptions in some states were criticized as being obsolete and "parsimonious in the extreme." . . . [O]ther states' exemptions were perceived as being overly generous to debtors and unfair to creditors. The result was a bankruptcy exemption policy which treated debtors and creditors unequally based solely upon the domicile of the debtor.

Id. at 222 (citing Countryman, *Consumers in Bankruptcy Cases*, 18 WASHBURN L.J. 1, 2

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elect either the enumerated federal exemptions[7] or the applicable nonbankruptcy exemptions. Any state, however, can deny the right to elect federal exemptions by passing legislation specifically opting out of the federal scheme.[8] A majority of states have elected to enact their own exemption laws, reflecting their views of creditors' rights and the state's particular geographic and economic needs.[9] On August 13, 1982, Missouri joined those states that have opted out of the federal exemption scheme,[10] thereby limiting debtors filing bankruptcy in Missouri to those exemptions provided in Missouri law.

II. The Exemption Statutes: Federal and Missouri

In order to comprehend the impact of the opt-out provision, it is necessary to consider the federal exemptions as provided in section 522(d) of the 1978 Code. This section provides exemptions for numerous categories of

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(1978)). *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 126 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6087.

7. *See* 11 U.S.C. § 522(d) (Supp. V 1981).

8. *See id.* § 522(b). This section resulted from a compromise between the House and Senate bills. The original House bill permitted a debtor to elect either a federal list of exemptions or those exemptions available under non-bankruptcy law. H.R. 8200, 95th Cong., 1st Sess. § 522(b) (1977). The Senate version followed the approach of the former act and deferred to non-bankruptcy exemptions. S. 2266, 95th Cong., 2d Sess. § 522(b) (1977). As enacted, section 522(b) provides:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—
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> (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
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> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law . . . .

9. For example, Cal. Civ. Code § 1260 (West 1980), allows a head of family a homestead exemption of $45,000, presumably due to the high cost of real estate in that area. In Kansas, the homestead exemption may consist of 160 acres of farm land or one acre within the limits of an incorporated town or city. Kan. Stat. Ann. § 60-2301 (Supp. 1982).

10. This is the effective date of Mo. Rev. Stat. § 513.427 (Supp. 1982), which provides:

> Every person by or against whom an order is sought for relief under Title 11, United States Code, shall be permitted to exempt from property of the estate any property that is exempt from attachment and execution under the law of the state of Missouri or under federal law, other than Title 11, United States Code, Section 522(d), and no such person is authorized to claim as exempt the property that is specified under Title 11, United States Code, Section 522(d).

specific property, including a homestead exemption[11] of $7,500 in real or personal property used by the debtor as a residence; an exemption for one motor vehicle in the amount of $1,200; plus exemptions for personal effects up to $200 per item, $500 in jewelry, $750 in implements, professional books, and tools of the trade, unlimited life insurance contract rights, and $4,000 in life insurance dividends, interest, and loan value. The federal provisions also allow reasonable exemption of alimony and pensions and unlimited exemption of health aids and government benefits.[12] In addition to the provisions which exempt distinct property, section 522(d)(5) of the 1978 Code exempts "[t]he debtor's aggregate interest, not to exceed in value $400 *plus any unused amount of the [homestead] exemption . . . , in any property.*"[13] This subsection, commonly referred to as the "wild card" provision, enables a debtor, at his discretion, to select any type of property to exempt with a potential combined exemption of up to $7,900.[14] As demonstrated by legislative history, Congress intended that this innovative provision would avoid the prior discrimination against non-homeowners.[15] Renters are an expanding and significant portion of the populace, replacing the homeowners of the past who could endure losses accompanying times of financial hardship as long as they retained ownership of their house and enough land to provide for their basic needs. By utilizing the wild card provision, the non-homeowner, or the homeowner with minimal equity in his property, can avail himself of the homestead exemption by exempting valuable property to the extent of the unused portion of that exemption.

Exclusion of a comparable wild card provision from state exemption statutes, in states which have elected to opt out of the federal exemptions, has created a furor of constitutional attacks on the allegedly deficient state provisions. Debtors have charged that the failure of states to include a wild card exemption violates the constitutional provision that Congress may "establish uniform Laws on the subject of Bankruptcies."[16] Violations of the

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11. The homestead exemption traditionally permits a debtor to exempt a prescribed amount of equity in his residence.

12. In brief, the remaining exemptions enumerated in section 522(d) are the debtor's right to receive, or property which is traceable to, an award under a crime victim's reparation law; a reasonable wrongful death award or life insurance payment for an individual of whom the debtor was a dependent; payment, not to exceed $7,500 for personal injuries; and reasonable payment in compensation for loss of future earnings of the debtor. 11 U.S.C. § 522(d) (Supp. V 1981).

13. *Id.* § 522(d)(5) (emphasis added).

14. This sum equals the unused portion of the $7,500 homestead exemption plus $400.

15. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 361 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6316-17. ("Paragraph (5) [of § 522(d) of the Bankruptcy Code] permits the exemption of $500.00, plus any unused amount of the homestead exemption, in any property, in order not to discriminate against the nonhomeowner.").

16. U.S. CONST. art. I, § 8, cl. 4.

supremacy clause of the United States Constitution[17] also have been alleged, as debtors claim that the federal wild card provision has preempted inconsistent state statutes. Further, the provision which permits states to opt out of the federal exemptions has been attacked as an impermissible delegation of congressional power.

In addition to the controversy with regard to whether states should be required to provide their bankrupts with a wild card provision, there has been extensive litigation as to whether the opt-out provision permits states to avoid other sections of the 1978 Code besides the laundry list of exemptions in section 522(d). More specifically, there has been substantial litigation concerning section 522(f),[18] which permits a debtor to avoid a judicial lien or a nonpossessory, nonpurchase-money security interest in household goods, and section 522(m),[19] which requires exemptions to apply separately with respect to each debtor in a joint case.

With Missouri's decision to opt out of the federal exemptions comes the susceptibility of the state exemption statutes to constitutional challenge.[20] The Missouri statutes generally provide for the following exemptions: a homestead exemption of $8,000, consisting of a dwelling house and the land used in connection therewith;[21] a separate exemption in the amount of $1,000 for a mobile home used as a principal residence; an exemption of $500 for one motor vehicle; plus exemptions for personal effects ($1,000), jewelry ($500), tools of the trade ($2,000), unlimited life insurance contract rights, and life insurance loan value ($5,000).[22] The Missouri statute also exempts $500 per month in alimony and, as with the federal scheme, permits reasonable exemptions for pensions and unlimited exemptions for health aids and government benefits.[23] Additional provisions exempt "[a]ny other property of any kind, not to exceed in value . . . [$400] in the aggregate,"[24] and provide that "[e]ach head of a family may . . . exempt . . . any other property . . . not exceeding in value . . . [$850] plus . . . [$250] for each of such person's unmarried dependent children under the

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17. *Id.* art. VI, cl. 2. For a discussion of the supremacy/delegation argument, see Part III *infra*.

18. 11 U.S.C. § 522(f) (Supp. V 1981). *See In re* McManus, 681 F.2d 353 (5th Cir. 1982); *In re* Snellings, 10 Bankr. 949 (W.D. Va. 1981); Part III.B *infra*.

19. 11 U.S.C. § 522(m) (Supp. V 1981). *See* Cheeseman v. Nachman, 656 F.2d 60 (4th Cir. 1981); *In re* Wilson, 22 Bankr. 146 (D. Or. 1982); *In re* Hartmann, 19 Bankr. 844 (D. Neb. 1982); *In re* Morgan, 15 Bankr. 620 (E.D. Va. 1981); *In re* Thompson, 4 Bankr. 823 (E.D. Va. 1980).

20. To date, at least 17 of the 29 states that have opted out of the federal exemptions have had their statutes contested on constitutional grounds.

21. Mo. Rev. Stat. § 513.475 (Supp. 1982).

22. *Id.* § 513.430(1), (2), (4), (5), (6), (7), (8).

23. *Id.* § 513.430(9), (10). *Id.* § 513.430(11) exempts the debtor's right to receive payment on account of the wrongful death of an individual of whom the debtor was a dependent.

24. *Id.* § 513.430(3).

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age of eighteen years, except ten percent of any debt, income, salary or wages due such head of a family."[25]

A comparison of the Missouri exemptions with the federal provisions reveals that Missouri provides a total exemption of $1,000 for personal effects, while federal law has no ceiling on the total exemption for personal goods provided each item is $200 or less.[26] Although there is not a large variance in many of the state and federal provisions exempting specific property,[27] Missouri provides an exemption for tools of the trade of $1,250 more than federal law.[28] While federal exemptions provide for reasonable exemption of alimony and pensions, Missouri limits the former to $500 per month.[29]

One of the most significant differences between the Missouri and federal exemptions is the wild card exemption. Although Missouri allows the debtor some latitude to determine the assets he desires to to exempt,[30] it provides no correlative provision to the federal wild card exemption. By specifically providing an exemption for a mobile home residence (permitting a much smaller exemption than for a dwelling used as a homestead) and altogether ignoring renters, the Missouri legislature has manifested a policy designed to exempt equity in a dwelling house or mobile home and to provide no exemption where there is no such equity. In other words, it appears that the legislature viewed equality as providing the debtor with a place to live, whether it be a single family home, a mobile home, or an apartment (the latter being safe from attachment by creditors, since the debtor has no equity or ownership rights). As demonstrated by the indifference to renters, equality is not viewed in terms of providing an equal dollar amount of exemption to each debtor, as under federal law. Although the Missouri approach differs from the federal exemption scheme, the Missouri

25. *Id.* § 513.440.

26. *Compare* 11 U.S.C. § 522(d)(3) (Supp. V 1981) *with* MO. REV. STAT. § 513.430 (Supp. 1982).

27. For example, both statutes provide exemptions for personal jewelry in the amount of $500 (MO. REV. STAT. § 513.430(2) (Supp. 1982); 11 U.S.C. § 522(d)(4) (Supp. V 1981)); unlimited life insurance contract rights (MO. REV. STAT. § 513.430(7) (Supp. 1982); 11 U.S.C. § 522(d)(7) (Supp. V 1981)); unlimited health aids and government benefits (MO. REV. STAT. § 513.430(9), (10) (Supp. 1982); 11 U.S.C. § 522(d)(9), (10) (Supp. V 1981)).

28. Pursuant to MO. REV. STAT. § 513.430(4) (Supp. 1982), the debtor may exempt "[a]ny implements, professional books or tools of the trade of such person . . . not to exceed two thousand dollars in value in the aggregate." In contrast, 11 U.S.C. § 522(d)(6) (Supp. V 1981) permits exemption of the "debtor's aggregate interest, not to exceed $750 in value," in tools of the trade. Of course, a debtor electing federal exemptions may increase the tools of the trade exemption through use of the wild card provision.

29. *Compare* MO. REV. STAT. § 513.430(10) (Supp. 1982) *with* 11 U.S.C. § 522(d)(10)(D) (Supp. V 1981).

30. *See* MO. REV. STAT. §§ 513.430(3), .440 (Supp. 1982).

statutes appear to promote effectively the two foremost goals of the 1978 Bankruptcy Code: (1) permitting each debtor, depending on his specific living situation, to retain enough property to ensure a fresh start and (2) providing the maximum amount of property for the benefit of the creditors.[31]

In considering these goals, it is arguable that the Missouri statutes more effectively adhere to the purposes of the 1978 Bankruptcy Code than do the federal provisions, as the former emphasize that the debtor retain in kind the essentials that permit him a fresh start, while the federal law permits a renter to exempt any property, thereby depriving creditors, whether or not the property is required to enable the debtor to get back on his feet.[32] Regardless of the effectiveness of the Missouri homestead exemption, similar state statutes have been successfully attacked on constitutional grounds as contravening the standard set by the wild card provision.

Missouri's exemption statutes also deviate substantially from the federal exemptions with regard to *who* may use the exemptions. Section 522(m) of the 1978 Bankruptcy Code applies "separately with respect to each debtor in a joint case."[33] But Missouri's homestead statute provides:

> The exemption allowed under this section shall not be allowed for more than one owner of any homestead if one owner claims the entire amount allowed under this subsection; but, if more than one owner of any homestead claims an exemption under this section, the exemption allowed to each of such owners shall not exceed, in the aggregate, the total exemption allowed under this subsection as to any one homestead.[34]

Accordingly, Missouri allows only one homestead exemption, either for married debtors filing jointly or for divorced debtors who retain co-ownership of one homestead, while the federal statute permits each spouse to receive a separate exemption.

At the present time it does not appear as though the new Missouri exemptions will affect the lien avoidance provisions of section 522(f) of the 1978 Code.[35] However, other states that have opted out of the federal ex-

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31. *See* note 3 *supra*; *see also In re* Bradford, 6 Bankr. 741, 744 (D. Nev. 1980) ("The objective of bankruptcy laws is to equitably distribute the bankrupt's assets among creditors and to enable the bankrupt to make a fresh start.").

32. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 171 (1973); Countryman, *supra* note 6. "To the extent that . . . exemption laws are excessively generous and protect more of the debtor's property than is necessary for his fresh start, they impede the federal bankruptcy policy of equitable distribution to creditors." Duncan, *supra* note 6, at 222.

33. 11 U.S.C. § 522(m) (Supp. V 1981).

34. MO. REV. STAT. § 513.475(1) (Supp. 1982).

35. 11 U.S.C. § 522(f) (Supp. V 1981). There is no mention of lien avoidance in the new Missouri statutes. However, the property in which a debtor may avoid a

emptions also have attempted to eschew section 522(f), either legislatively[36] or judicially.[37] Although the Missouri legislature has declined to opt out of the federal lien avoidance statute, the Missouri courts may have an opportunity to determine whether Missouri's opt-out affects lien avoidance as well as exemptions.

III. CONSTITUTIONAL ATTACKS ON STATE OPT-OUT STATUTES

Section 522(b)(1) of the 1978 Code[38] occupies a somewhat unique position in our system of dual federalism. It does not itself contain any express limitations on the grant of power to the states to deny citizens of a state the use of the federal exemptions. This grant of power could conceivably include an ability to limit a debtor's exemptions to a list of inconsequential items. Such a result could greatly impair the fresh start concept which forms an important basis of federal bankruptcy law. This seeming incongruity in the possible effect of section 522(b)(1) has led to some conflicting decisions by those courts called on to interpret state opt-out statutes in light of the remainder of the 1978 Code.

Constitutional attacks on the various state opt-out statutes have already taken several forms. Undoubtedly, with the passage of time, arguments will be attempted that differ from those discussed in this Article. At this point, three separate arguments have been raised.

The first argument has the longest history and an unbroken string of failures. The argument involves the power granted to the federal government in the Constitution to "establish uniform Laws on the subject of Bankruptcies throughout the United States."[39] The concept underlying this argument is that to allow each state to enact its own individual exemption scheme inherently violates the uniformity requirement set forth in the Constitution. But early Supreme Court decisions interpret the uniformity requirement as involving only "geographical uniformity."[40] Under this interpretation, uniformity within a given state will satisfy the constitutional requirement. At this time there is no indication that any segment of the judiciary would reconsider the past decisions in this area,[41] and the uniformity requirement can probably be considered of little practical use in challenging the validity of state exemption statutes.

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lien will be indirectly affected by the increased exemption for tools of the trade and decreased exemptions in other areas.

36. *See, e.g.*, *In re* McManus, 681 F.2d 353 (5th Cir. 1982); Part III.B *infra*.

37. *See, e.g.*, *In re* Foster, 16 Bankr. 467 (N.D. Ohio 1981).

38. 11 U.S.C. § 522(b)(1) (Supp. V 1981).

39. U.S. CONST. art. I, § 8, cl. 4.

40. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902); Fairbank v. United States, 181 U.S. 283 (1901); Knowlton v. Moore, 178 U.S. 41 (1900); The Head Money Cases, 112 U.S. 580 (1884).

41. For an example of a recent decision applying the reasoning of the early Supreme Court cases, see *In re* Sullivan, 680 F.2d 1131, 1133 (7th Cir. 1982).

The second of the constitutional arguments was raised by the debtor/plaintiff in *In re Kelley*.[42] The debtor, a single woman, argued that the Florida statute prohibiting her from using the federal exemptions was unconstitutional because some of the state exemptions were available only to a debtor who was head of a family. Although the Florida statute provided a family head with exemptions somewhat similar to those provided under federal law, comparable exemptions were not provided to the non-head of a family.[43] Faced with the equal protection issue, the *Kelley* court stated, "[T]he decisive issue before this Court is whether or not the Florida exemptions accord plaintiff treatment so arbitrary and disparate that she is denied equal protection of the law."[44] The court found the test for challenges based on the equal protection clause to be that set forth by the United States Supreme Court in *Reed v. Reed*:[45] when essentially economic legislation is involved, the different treatment accorded different classes by a statute need only be reasonably related to some legitimate objective of the statute.[46] If a classification is reasonable and not arbitrary, equal protection demands only that the statute treat all persons within a class equally. Very little legislation has been invalidated under this particular test.[47] The court in *Kelley* continued this trend by finding the Florida statute constitutional. The law's purpose was stated to be "to promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizen, and by preserving a home where the family may be sheltered and live beyond the reach of economic misfortune."[48] The court found that this purpose had a fair and substantial relation to the designation of classes based on status as the head of a family.[49] In light of such a finding, the statute survived equal protection attack.

Unlike the uniformity argument, the equal protection argument does not seem to be a settled issue despite the court's ruling in *Kelley*. Many of the state exemption schemes discriminate in whole or in part between heads of family and other classifications.[50] Despite the traditional deference the

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42. 21 Bankr. 375 (M.D. Fla. 1982).

43. *See* FLA. STAT. ANN. § 222.20 (West Supp. 1983).

44. 21 Bankr. at 376. In deciding this issue, the *Kelley* court considered an earlier decision of the United States District Court for the Middle District of Florida which had declared the Florida exemption scheme constitutional in the face of a challenge based on the uniformity requirement. *In re* Lausch, 16 Bankr. 162, 163 (M.D. Fla. 1981). *Lausch* provides another recent example of a court accepting the continued validity of the geographical uniformity concept.

45. 404 U.S. 71 (1971).

46. *Id.* at 75-76.

47. *See* United States v. Kras, 409 U.S. 434 (1973) (upholding requirement that fees be paid as a condition of discharge in voluntary bankruptcy).

48. 21 Bankr. at 376.

49. *Id.*

50. Missouri's exemption scheme is among those which provide greater exemptions for a head of family. MO. REV. STAT. § 513.440 (Supp. 1982).

judiciary has shown to legislatures when faced with equal protection attacks on economic legislation, it is possible that a court may become convinced that a constitutional violation exists if faced with an egregious discrimination with little or no real justification. Classifications based on status as the head of a family are inherently troublesome, raising such issues as what effect a divorce or separation has on status, the ability of a spouse to claim exemptions, and the status of a family head who is not primarily responsible for the support of that family. Because such classifications exist in many of the state exemption schemes, the equal protection argument is very likely to resurface.[51]

The third argument that has been raised regarding the constitutionality of state opt-out provisions is based on the supremacy clause of the Constitution.[52] Implicit in the argument is the concept of the proper delegation of powers by Congress to the states. This argument is the most important of those discussed herein and, unlike the previous two arguments, has met with some success in the courts. The basic issue involves the validity of homestead exemptions in light of their effect on the position of non-homeowners vis-a-vis homeowners. The present federal exemptions take a different approach to the homestead exemption than did the 1898 Bankruptcy Act[53] (and than do many of the state exemption statutes).[54] The legislative history of the wild card exemption provided in section 522(d)(5) makes it clear that Congress intended, by enacting that subsection, to equalize the exemptions available to a homeowner with equity in his property and to other classes of debtors.[55] However, inequality in the treatment of the two groups can be effectively reinstated by a state which opts out of the section 522(d) exemptions but does not provide equal exemptions for homeowners and non-homeowners in its own exemption statute.

Although it can be argued that there is at least some justification for

51. In *In re* Sullivan, 680 F.2d 1131, 1132 n.1 (7th Cir. 1982), the plaintiff raised an equal protection challenge to the Illinois statute, but the challenge was deemed waived when not developed in the plaintiff's opening or reply brief. A similar challenge was rejected, however, in *In re* Goering, 23 Bankr. 1010 (N.D. Ill. 1982).

52. U.S. CONST. art. VI, cl. 2 ("Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding").

53. *See* 11 U.S.C. § 24 (1976) (repealed 1978).

54. Many state exemption statutes, the only exemptions available under the Bankruptcy Act of 1898, have been on the books for years and are regarded as antiquated and outmoded. Congressional dissatisfaction with the existing state exemption laws can be found throughout the legislative history of the Bankruptcy Reform Act of 1978. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 126 (1977), *reprinted in* 1978 U.S. CODE CONG. AND AD. NEWS 5963, 6087.

55. *See id.*, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6089; *see also In re* Smith, 640 F.2d 888, 891 (7th Cir. 1981) (excellent discussion of legislative history and congressional intent behind section 522(d)(5)).

allowing a homeowner faced with the loss of his home a greater exemption than a non-homeowner, that is not the focus of the supremacy/delegation argument. The issue is not whether the treatment of homeowners and non-homeowners should be equalized but whether Congress *intended* to equalize the treatment, whether by enacting section 522(d)(5) Congress meant to express a policy so inherent in federal bankruptcy law that the policy forms a limitation on the power granted the states in section 522(b)(1). This argument has been found wanting in some courts but has, at least temporarily, prevailed in others. It is an argument to which the new Missouri exemption statute will undoubtedly be exposed.

The primary case in which the supremacy/delegation argument was accepted is *In re Rhodes*,[56] in which the lower court found that the Tennessee General Assembly had exceeded the authority granted it under section 522(b)(1) in enacting the Tennessee opt-out statute.[57] The court based its decision both on unlawful delegation of power by Congress and on a perceived violation of the supremacy clause, finding precedent for the decision in two earlier cases: *Cheeseman v. Nachman*[58] and *In re Smith*.[59] The United States Court of Appeals for the Sixth Circuit reversed, however, on both grounds, rejecting the strict interpretation of the lower court.[60]

A recent case in which the supremacy/delegation argument was accepted by a court is *In re Locarno*.[61] There the court thoroughly reviewed the existing case law on the subject before finding that, under a two-step test,[62] the Maryland statute went beyond the permissible scope of power delegated to the states under section 522(b)(1) and therefore violated the supremacy clause.[63] More specifically, the court stated:

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56. 14 Bankr. 629 (M.D. Tenn. 1981).

57. TENN. CODE ANN. §§ 26-2-101 to -311 (1980).

58. 656 F.2d 60 (4th Cir. 1981). *Cheeseman* dealt primarily with a conflict between a state opt-out provision and 11 U.S.C. § 522(m) (Supp. V 1981). For a detailed treatment of this case, see Part III.A *infra*.

59. 640 F.2d 888 (7th Cir. 1981). *Smith* involved interpretation of the federal exemption statutes. The constitutionality of a state opt-out provision was not contested.

60. Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983). The court of appeals sustained the congressional opt-out scheme as within the legislative duty to establish uniform bankruptcy laws. *Id.* at 162. The court also interpreted section 522(b)(1) as an express congressional refusal to pre-empt the field of bankruptcy exemptions. *Id.* at 163.

61. 23 Bankr. 622 (D. Md. 1982).

62. The court applied the test set forth by the Supreme Court in Perez v. Campbell, 402 U.S. 637, 644 (1971): "first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." 23 Bankr. at 629.

63. 23 Bankr. at 630. The court noted an earlier Maryland bankruptcy court case, *In re* Davis, 16 Bankr. 62 (D. Md. 1981), in which the Maryland opt-out statute was found to be violative of the supremacy clause. *Id.* at 64.

> [I]n preferring one class of debtor over another class, by denying to nonhomeowner-debtors the same treatment afforded to homeowner-debtors, the Maryland exemption statute conflicts with the avowed policy of the Congress in enacting the Bankruptcy code of granting to all debtors a "fresh start." Because of the failure of the Maryland General Assembly to provide a comparable exemption to nonhomeowners as it provided to homeowners in § 11-504(f)(1), it has exceeded the congressional delegation of power to "opt-out" of the federal exemptions, thus rendering § 11-504(2) unconstitutional and void.[64]

The court specifically discussed the contrary decision reached by the United States Court of Appeals for the Seventh Circuit in *In re Sullivan*[65] but rejected the Seventh Circuit's reasoning.[66]

After finding the attempt by the Maryland legislature to opt out of the federal exemptions unconstitutional and void, the court went on to hold that the opt-out provision could be severed from the rest of the exemption legislation, leaving the remainder intact as an alternative list of exemptions to those provided in section 522(d). In so finding, the court stated:

> Subsection 11-504(g) is found to be severable from the remainder of the Maryland exemption statute on two grounds. First, if there is no "opt-out" provision which prevents a debtor from claiming the federal exemptions, the state is free to enact such exemptions as it has, without fear of exceeding the scope of the power delegated by Congress. It is this abuse of the delegated power which rendered invalid the action of the state. To hold unconstitutional the state exemptions themselves, absent an "opt-out" of the federal exemptions would defeat the congressional purpose of giving debtors a choice between the state and federal exemptions.[67]

Locarno serves to illustrate the continuing nature of the controversy regarding state opt-out statutes when challenged in light of the supremacy/delegation argument.

Other cases in which courts have accepted or indicated some sympathy toward the supremacy/delegation argument include *In re Parrish*[68] and *In re*

64. 23 Bankr. at 630.

65. 680 F.2d 1131 (7th Cir. 1982). *Sullivan* is discussed in greater detail in text accompanying notes 72-76 *infra*. The decision in that case is in direct conflict with *Locarno* and other similar cases.

66. 23 Bankr. at 631.

67. *Id.*

68. 19 Bankr. 331 (D. Colo. 1982). Although the court held in *Parrish* that what constitutes property adequate to provide a fresh start may vary from the standards set in § 522(d) and that the Colorado exemption statute was constitutional, the court stated:

> The Court agrees with those cases cited by the debtor that state that Congress cannot delegate unfettered authority to the states to regulate bankruptcy exemptions. The states, if they decide to exercise the "opt-out" authority delegated by Congress must provide their citizens with a

Balgemann.[69] These cases combine the delegation concept with an interpretation of the effect of the supremacy clause and, in fact, the two concepts are very closely related in this area. Basically, courts have acknowledged that the Constitution grants Congress the power to enact federal laws in the area of bankruptcy. When Congress acts to set federal standards in an area where the Constitution grants it control, it cannot constitutionally delegate power to the states such that the states, acting under that delegated power, would be able to enact laws which effectively conflict with the federal standards previously set by Congress. To do so is both an unlawful delegation of power and a violation of the supremacy clause. This conflict is the incongruity seemingly inherent in section 522(b)(1). Congress both sets federal standards (and seemingly federal policy) and then apparently gives the states the power to act in a manner which could effectively destroy those standards.

Other courts have not been convinced by the supremacy/delegation argument. In *In re Lausch*,[70] the court rejected a delegation argument and stated:

> By providing a list of federal exemptions, Congress made a limited exercise of its bankruptcy power, leaving the states to exercise their concurrent power to determine the available bankruptcy exemptions. Therefore, 11 U.S.C. § 522(b)(1) is not an unconstitutional delegation of congressional legislative power but is merely a recognition of the concurrent legislative power of the state legislatures to enact laws governing bankruptcy exemptions.[71]

Although addressed primarily to the delegation concept, the court necessarily considered and rejected the idea of a supremacy clause violation in its finding that concurrent jurisdiction existed. There can be no supremacy clause violation unless Congress has in some way acted to preempt the field under consideration.

A case in which the court directly considered and rejected the reasoning in *Rhodes* is *In re Sullivan*.[72] In *Sullivan*, the court examined the "marked

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> scheme of bankruptcy exemptions that is not inconsistent with those of the Code.

Id. at 335. The Colorado exemption scheme, while not identical to that provided in § 522(d), was found to be "quite close" and therefore withstood constitutional challenge. *Id.*

69. 16 Bankr. 780 (N.D. Ill. 1982). *Balgemann* held the Illinois opt-out statute and exemption list invalid as violative of the supremacy clause. The continued validity of *Balgemann* must be considered doubtful in light of the Seventh Circuit's decision upholding the same statutes in *In re* Sullivan, 680 F.2d 1131 (7th Cir. 1982).

70. 16 Bankr. 162 (M.D. Fla. 1981).

71. *Id.* at 165.

72. 680 F.2d 1131 (7th Cir. 1982). *Sullivan* discusses the uniformity argument as well as the preemption/delegation/supremacy argument. The case provides an excellent chart of the case law development interpreting § 522(b)(1)).

discrepancy" between the federal exemptions and the Illinois exemption scheme in the face of uniformity and supremacy/delegation arguments. The court found the Illinois statutes valid.[73] Once again, the primary issue was different treatment of homeowners and non-homeowners. After holding that only geographical uniformity was constitutionally required,[74] the court turned its attention to the *Rhodes* decision, stating:

> [W]e are not persuaded by the reasoning of the *Rhodes* court. First, . . . it is not accurate to attribute the motivation of the House in proposing the Section 522(d) exemptions to the Congress that eventually enacted the Code. The statute's treatment of exemptions reflects at the very least a mixed intention on the part of Congress. Second, and more significant, the *Rhodes* court is applying a preemption analysis to a situation in which Congress has *specifically directed* that a state can choose to declare Section 522(d) inapplicable to its citizens. To apply a preemption analysis in this context is to ignore totally the explicit language of the Section 522(b)(1) opt-out provision.[75]

The court went on to state: "Where a state is thus exercising its own power, no unconstitutional delegation of Congressional power can be found."[76]

It is evident that different courts have arrived at sharply contrasting interpretations of the meaning and effect of section 522(b)(1). Which interpretation will ultimately prevail is not evident at this time.[77] The recent Missouri opt-out statute does, however, appear to be potentially vulnerable to a *Rhodes*-type attack. Missouri Revised Statutes section 513.475[78] provides a homestead exemption of up to $8,000 in a person's "dwelling house and appurtenances, and the land used in connection therewith." Although an exemption is also provided for mobile homes,[79] it is not equal to that provided in the homestead exemption and there is no other provision equalizing the treatment between homeowners and nonhomeowners. This differing treatment of the two groups is the basis for the *Rhodes* opinion. Whether or not the Missouri statute will be invalidated, as were those of Tennessee and Maryland, will depend on the interpretation of the courts when and if they are faced with the issues involved. The Missouri legislators should have been aware of the constitutional questions concerning opt-out statutes. They apparently chose to enact the present statute despite these questions.

73. 680 F.2d at 1138.

74. *Id.*

75. *Id.* at 1136.

76. *Id.* at 1137.

77. In light of the United States Supreme Court's decision invalidating the jurisdictional provisions of the Bankruptcy Reform Act in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982), the question may very well become moot before it is finally settled.

78. (Supp. 1982).

79. MO. REV. STAT. § 513.430(6) (Supp. 1982).

Whether or not the courts will consider their actions to be constitutionally valid remains to be seen.

A. *Section 522(m)*

The Missouri legislature has gone to great lengths to insure that each homestead is entitled to the maximum exemption of $8,000, regardless of whether one or two debtors own that particular dwelling. According to Missouri Revised Statutes section 513.475,[80] the homestead exemption permits only one owner of a residence to claim the entire amount. If more than one owner claims the exemption, the exemption allowed shall not exceed in the aggregate the total exemption allowed. In effect, only one debtor in a joint case is allowed the full benefit of the homestead exemption. Thus, Missouri's homestead exemption contravenes section 522(m) of the 1978 Bankruptcy Code, which provides that "[t]his section shall apply separately with respect to each debtor in a joint case."[81]

Virginia was the first state to judicially reconcile its homestead exemption with section 522(m). Virginia Code section 34-4 provides that "[e]very householder or head of family . . . shall be entitled . . . to hold exempt . . . his real and personal property . . . to the value of not exceeding five thousand dollars."[82] Under Virginia Code section 34-1, the term "householder" includes "any person, married or unmarried, who maintains a separate residence or living quarters, whether or not others are living with him."[83] Head of a family is not defined.[84] Although the decisions of the Virginia bankruptcy courts differ as to whether the Virginia homestead exemption is available to both a husband and wife living together,[85] the first district court to consider the question ruled that either the husband *or* wife

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80. (Supp. 1982).

81. 11 U.S.C. § 522(m) (Supp. V 1981).

82. VA. CODE § 34-4 (1979). Virginia opted out of the federal exemption statutes by enacting *id.* § 34-3.1 which provides: "No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of § 522 of the Bankruptcy Reform Act (Public Law 95-598), except as may otherwise be expressly permitted under this title."

83. *Id.* § 34-1.

84. However, "the terms householder and head of household [are] interchangeable." *In re* Thompson, 4 Bankr. 823, 825 (E.D. Va. 1980).

85. The court in *In re* Thompson, 2 Bankr. 380 (E.D. Va. 1979), allowed a debtor wife to file a homestead deed under Virginia law and thus claim an exemption in the bankruptcy proceeding for the property listed on the deed. *See also In re* White, 11 Bankr. 775 (E.D. Va. 1981), wherein the court held that the wife was not entitled to the homestead exemption when she and her husband filed jointly. *Id.* at 776. The court also held that even though the Virginia statute, as interpreted by the court, did not permit each debtor to claim exemptions as prescribed under the federal bankruptcy law, it was constitutional due to the specific federal opt-out provision. *Id.* The court in *In re* Morgan, 15 Bankr. 620 (E.D. Va. 1981), was not faced with deciding whether both debtors may exempt property, since the trustee with-

is entitled to the exemption in this situation, never both.[86] In support of its decision, the court found that the state legislature

> intended that single persons maintaining a separate residence and persons separated or divorced from their spouses and maintaining a separate residence should be entitled to an exemption . . . . The Legislature did not . . . intend to grant double exemptions where there was one residence occupied by two people, that is, in this case, a man and his wife.[87]

After reaching this decision, the court cursorily dismissed the constitutional conflict inherent in its interpretation of the Virginia homestead exemption.[88]

When faced with the same issue, the United States Court of Appeals for the Fourth Circuit ruled that the Virginia statute must be read as allowing a homestead exemption to each spouse, living together, if he or she contributes to the maintenance of the household, citing the ambiguities in the "householder" definition and the strong policy considerations of conserving the family home.[89] In interpreting the definitional statute, the court stated:

> It may be read to allow one person in each residence to be a householder because the other people living with him or her typically do not maintain other "separate" residences. Under the construction, a husband and wife living together could not both be householders because they would not be living in residences separate from each other. On the other hand, this statute may as easily be construed to permit any individual who contributes to the maintenance of a residence, without regard to whether others in the same residence contribute to its maintenance, to be a householder. For example, a young married couple living together, but apart from either set of their parents, could be regarded as maintaining a "separate" residence. Under this latter construction, a husband and wife could both be householders.[90]

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drew his objection following the decision in Cheeseman v. Nachman, 656 F.2d 60 (4th Cir. 1981).

86. *In re* Thompson, 4 Bankr. 823, 825 (E.D. Va. 1980).

87. *Id.*

88. The court rejected the constitutional attack, stating:

> [T]his interpretation does not challenge the constitutionality of a state statute, which this Court is loathe to do, as statutes should be construed, if fairly possible, to avoid constitutional questions. . . . Furthermore, it is an axiom of statutory construction that a statute is accorded a presumption of validity and that a reviewing court should endeavor to adopt a construction upholding validity.

Id.

89. Cheeseman v. Nachman, 656 F.2d 60, 63 (4th Cir. 1981). The lower court had denied the wife's status as a householder and precluded her from claiming a Virginia homestead exemption. *Id.* at 61.

90. *Id.* at 63.

In comparison with the Virginia exemption, it appears that the Missouri homestead exemption cannot be interpreted to allow a husband and wife living together each to utilize a homestead exemption of $8,000. The statute clearly dictates that "if more than one owner of a homestead claims an exemption under this section, the exemption allowed to each of such owners shall not exceed, in the aggregate, the total exemption allowed under this subsection as to any homestead."[91] By this specific wording, the ambiguity created by the definitions found in the Virginia statute has been avoided.

The Missouri homestead exemption also serves public policy considerations of conserving the family home.[92] Since "the [joint] debtors (husband and wife) have one residence; since they are not living separately, there is only one home to conserve."[93] Separation or divorce will not entitle the debtors to an additional homestead exemption unless one of the debtors purchases an additional residence. This aspect of the homestead exemption may encourage far-sighted debtors to perpetrate the appearance of separate residences in order to retain more than one dwelling, especially in a case where the debtors own a vacation home in addition to their principal residence. Further, the outcome with regard to who gets the exemption is uncertain under the Missouri statute when joint debtors do not file their petitions simultaneously.[94] It is unclear whether the first debtor to file is entitled to the entire homestead exemption or whether an equitable division of the exemption is required.

If indeed the Missouri homestead exemption may in effect be used by only one debtor in a joint case, then the constitutionality of the statute in light of section 522(m) of the 1978 Code must be considered. In a recent Nebraska case, *In re Hartmann*,[95] the court ruled that only the husband was entitled to the Nebraska homestead exemption because only "heads of families" are entitled to the exemption.[96] In reconciling this ruling with section 522(m), the court stated:

> Although it is true that sub-section (m) could not be altered by the Nebraska legislature, when the legislature decided that the federal exemptions of sub-section (d) would not be applicable to petitions filed in the state, the alternative provision under § 522(b)(1) was no longer operative and reference under sub-section (b) reverted to sub-paragraph (2). The result is that an indi-

91. MO. REV. STAT. § 513.475 (Supp. 1982).

92. Compare the court's discussion of public policy considerations in *Cheeseman*, 656 F.2d at 64.

93. *In re* Thompson, 4 Bankr. 823, 825 (E.D. Va. 1980).

94. This situation would occur most frequently when one party to a recent divorce files bankruptcy.

95. 19 Bankr. 844 (D. Neb. 1982).

96. *Id.* at 845. Compare *Cheeseman*, where the court defined "householder" to include each spouse living together, if he or she contributes to the maintenance of the household. 656 F.2d at 63.

> vidual in Nebraska must look solely to state law for his exemptions. In other words, if property is exempt to others under state law but not to the specific individual, that individual may not by analogy claim the exemptions for himself.[97]

This explanation usurps the explicit language of the 1978 Bankruptcy Code. Section 522(b)(1) provides that a debtor may exempt property under subsection (d) unless state law prohibits. Accordingly, the opt-out provision only precludes a debtor from exempting the property listed in section 522(d).[98] All other provisions remain unaffected.[99] Therefore, section 522(m), a directive by Congress to assure each debtor the benefit of all exemptions, must be adhered to. Neither a bankruptcy court nor a state legislature may single out one debtor in a joint case to receive the benefit of the homestead exemption.

The bankruptcy court in Oregon has analyzed the federal statute with regard to its state exemption for personal property.[100] Notwithstanding its recognition that the statute applied to each debtor in a joint case, based on legislative intent and liberal statutory construction, the court was unimpressed with section 522(m). The court was "not persuaded that § 522(m) is a limiting power on the exemption scheme of a state which has chosen to 'opt out' of the federal exemption scheme."[101] Rather, the court viewed section 522(b) as a carte blanche for states to define their own exemptions without limitation.[102]

However, the majority of the cases that have considered the scope of the opt-out provision have confined avoidance of the federal exemptions

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97. 19 Bankr. at 845.

98. *See* 11 U.S.C. § 522(b)(1) (Supp. V 1981), which provides that a debtor may exempt "property that is specified under subsection (d) of this section, unless State law . . . specifically does not so authorize."

99. *See In re* Stacey, 9 BANKR. CT. DEC. (CRR) 932 (S.D. Cal. 1982), where the court stated that the opt-out statute permitted the states to adopt, if they so chose, legislation which does not authorize debtors domiciled within their borders to avail themselves of the provisions of § 522(d)(1)-(11). *Id.* at 933. Also, numerous cases have limited the opt out to § 522(d) when considering the effect the provision has on § 522(f). *See In re* Strain, 16 Bankr. 797 (D. Idaho 1982); *In re* Fredrickson, 12 Bankr. 506 (D.S.D. 1981); *In re* Meadows, 9 Bankr. 882 (N.D. Ga. 1981).

In re Pearl, 28 Bankr. 492 (E.D.N.Y. 1983) recognized a direct conflict between the New York homestead exemption and section 522(m). The New York law allowed only one exemption per homestead res, regardless of the number of debtors owning the property. The court held that the state scheme must yield to the federal policy and allowed joint debtors to double their homestead exemption. *Id.* at 495-96.

100. *In re* Wilson, 22 Bankr. 146 (D. Or. 1982). In this case, the debtors, members of the same household, sought to claim exemptions exceeding $400 in the aggregate but less than $800 for personal property.

101. *Id.* at 148.

102. *Id.* ("Legislative history . . . shows an intention to provide the states an unlimited right to define their own exemptions.").

exclusively to the laundry list of section 522(d). This issue has been most frequently considered in cases involving the constitutionality of state actions which manifest an attempt to opt out of the lien avoidance provision of section 522(f) since, like section 522(m), there is no opt-out provision from this subsection. Courts that have confronted the issue have consistently held that "Congress never intended for the state to have the power to opt out of . . . [section] 522(f)(2) despite the grant of authority to states to determine the amount of exemptions which they would allow."[103] As stated in *Curry v. Associates Financial Services*:[104]

> While the states are permitted not to authorize the federal exemptions but instead make the state exemptions available in bankruptcy proceedings, Congress did not permit the states to exercise any discretion over lien avoidance. Lien avoidance was a congressional response to what was perceived as a nationwide problem. Dragnet security interests in household goods and personal property seriously threatened the rehabilitation of the bankrupt and therefore one of the overriding goals of federal bankruptcy law.[105]

In the same light, Congress intentionally enacted section 522(m) to allow each debtor the right to elect exemptions regardless of whether the debtor files in a joint case or is a partial owner of a homestead with another debtor. In other words, Congress intended that husband and wife debtors each should be entitled to all exemptions, regardless of whether they maintain the same residence and regardless of whether a state has opted out of the federal exemptions.

It is arguable that the Missouri statute is not inconsistent with section 522(m), as it does not specifically preclude both debtors in a joint case from using the homestead exemption. Rather, the Missouri statute provides that if more than one owner claims a homestead exemption, the exemption allowed to each owner shall not exceed, in the aggregate, the total exemption allowed under the homestead exemption. Accordingly, although under the technical wording of section 522(m), the Missouri statute permits each debtor in a joint case to claim a homestead exemption, a husband and wife, living together, are only entitled to *one-half* the homestead exemption available to other debtors. This emasculates the spirit and intent of section 522(m) by denying a married debtor the same exemption as that available to individual homeowners. Therefore, pursuant to the supremacy clause, any conflict between the homestead exemption and section 522(m) must be constitutionally resolved in favor of the federal law.[106]

103. *In re* Meadows, 9 Bankr. 882, 883 (N.D. Ga. 1981).
104. 11 Bankr. 716 (N.D. Ohio 1981).
105. *Id.* at 721.
106. Perez v. Campbell, 402 U.S. 637, 652 (1971).

B. *Section 522(f) Lien Avoidance*

One other aspect of the federal exemptions may cause some controversy as the new Missouri opt-out statute is interpreted for the first time by the courts. This involves the lien avoidance provision in section 522(f). That section states:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
> (1) a judicial lien; or
> (2) a nonpossessory, nonpurchase-money security interest in any—
> (A) household furnishings, household goods, wearing apparel, applicances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
> (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor;
> (C) professionally prescribed health aids for the debtor or a dependent of the debtor.[107]

The relevant legislative history and subsequent interpretation of this provision indicate a congressional concern with the protection of debtors from creditors who threaten to repossess collateral which might be very important to the debtor yet of little real value to the creditors. Faced with losing his household goods, a debtor might be coerced into an unwise bargain reaffirming his debt rather than going to the expense of replacing such items. On the other hand, the average creditor would have little or no use for such items and would be primarily concerned with the leverage a lien on such items would provide in negotiating with a typical debtor. Congress attempted to prevent this situation from hampering a debtor's fresh start by enacting section 522(f).[108]

Notwithstanding the legal problems which can arise as courts determine the relationship between an opt-out statute and section 522(f), that section has already been faced with a myriad of legal and constitutional challenges.[109] These issues are of direct interest only to practitioners involved with section 522(f) and do not concern the primary subject matter of this Article. However, the ultimate effect and validity of section 522(f) will be significant in determining its interrelationship with other parts of state

107. 11 U.S.C. § 522(f) (Supp. V 1981).

108. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 117 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079; *see also In re* Thurman, 20 Bankr. 978, 980 (W.D. Tenn. 1982).

109. *See, e.g.*, United States v. Security Indus. Bank, 103 S. Ct. 407 (1982).

opt-out statutes, and it is this interrelationship with which this Article is primarily concerned.

The basic argument the courts face in interpreting state opt-out provisions and the effect such provisions have on section 522(f) is, once again, a supremacy argument. The question is whether a state can opt out of section 522(f) as well as the federal exemptions. As one court stated: "The question then must be whether in granting states the option to determine which exemptions debtors of that state would use, Congress also intended to permit state law to modify or pre-empt other substantive provisions of the bankruptcy law."[110] Several courts have been persuaded that the answer to that question, in light of the supremacy clause, is no.[111] Other courts have reached a different conclusion.[112] The United States Court of Appeals for the Fifth Circuit tentatively adopted the latter position in *In re McManus*,[113] an appeal from a decision denying a debtor's avoidance of a lien that fell within the province of section 522(f). The Fifth Circuit examined the Louisiana opt-out statute[114] and concluded that it had expressly defined mortgaged household goods and furnishings out of the list of exempt property.[115] The court noted that section 522(f) permits lien avoidance only to the "extent that such lien impairs an exemption to which the debtor would have been entitled under" section 522(b).[116] In light of the fact that debtors, under section 522(b), were only entitled to those exemptions provided in the Louisiana opt-out statute, which specifically excluded mortgaged household goods and furnishings from the list of exempt property, the court held: "The chattel mortgages the debtors in the cases sub judice wish to avoid do not impair an exemption to which they would have been entitled under section 522(b)."[117] Consequently the security interests could not be avoided under section 522(f). The court discussed the possibility that a different result might occur if Louisiana law had not been so specific

110. *In re* Marinsky, 9 Bankr. 579, 582 (N.D. Ohio. 1981).

111. *See In re* Maddox, 27 Bankr. 592 (N.D. Ga. 1983); *In re* McKelvey, 20 Bankr. 405 (D. Ariz. 1982); *In re* Strain, 16 Bankr. 797 (D. Idaho 1982); *In re* Fredrickson, 12 Bankr. 506 (D.S.D. 1981); *In re* Pine, 11 Bankr. 595 (E.D. Tenn. 1981); *In re* Meadows, 9 Bankr. 882 (N.D. Ga. 1981).

112. *See In re* Foster, 16 Bankr. 467 (N.D. Ohio 1981). This decision was based on reasoning very similar to that in *McManus*. *See* text accompanying notes 113-20 *infra*.

113. 681 F.2d 353 (5th Cir. 1982). On appeal, the case was consolidated with another decision cancelling a nonpossessory, non-purchase-money lien on the basis of section 522(f). *Id.* at 355.

114. LA. REV. STAT. ANN. § 13:3881B (West 1980).

115. 681 F.2d at 357. The court cited LA. REV. STAT. ANN. 13:3885 (West 1980), which provides that "a person who has granted a chattel mortgage on his property . . . may not thereafter claim an exemption from the seizure of such mortgaged property for the enforcement of the mortgage."

116. 681 F.2d at 355.

117. *Id.* at 357.

in defining such property, if subject to a mortgage, out of the list of exempt property.[118]

The effect to be afforded future claims by debtors for lien avoidance in Missouri based on section 522(f) is, at this time, unclear. The Missouri statutes do not contain any provision differentiating between mortgaged and non-mortgaged property such as the Fifth Circuit was confronted with in *McManus*. Indeed, other than the statement in Missouri Revised Statutes section 513.430 that "property shall be exempt from attachment and execution *to the extent of any person's interest therein*,"[119] the Missouri statutes do not contain any provision which makes any type of statement about the possible future status of section 522(f). Without guidance from the legislature, the continued effect of section 522(f) will be determined by the interpretation the courts place on the Missouri opt-out statute. It seems certain that some creditor will contest the now somewhat routine procedure of lien avoidance prevailing under section 522(f) in light of the new Missouri statute. What position the courts will adopt is uncertain, but the cases cited herein show that conflicting modes of judicial interpretation have surfaced in other courts. This consideration does not seem to be potentially as significant in Missouri as some of the other issues regarding state opt-out statutes which have been discussed in this Article. It is, however, of importance to a debtor faced with the loss of his household goods.

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118. *Id.*
119. MO. REV. STAT. § 513.430 (Supp. 1982) (emphasis added).