522(f): Forward to the Past or Back to the Future?

Recent jurisprudence has provided a division of the authority in the state of Florida regarding the avoidance of judgment liens against exempt property. In bankruptcy, liens are avoided by a motion guided under 11 U.S.C. § 522(f) which states:

522 Exemptions

(f) (1) 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 . . .

In Florida, this device is often used to aid bankruptcy debtors in cleansing the title of their most valuable asset: their totally exempt homestead.[1] During the 1980's, a division of authority arose about the right of a debtor to use this provision of the Bankruptcy Code with a ruling by the Honorable Thomas C. Britton which outlined why judgment liens in Florida were not the topic of avoidance under 11 U.S.C. § 522(f). *In re Goodwin*.[2] In 1988, Judge Britton published another opinion forbidding § 522(f) motions. *In re Bird.*[3] Subsequently, the District Court for the Southern District fo Florida reversed Britton's *Bird* decision and, at that time, there was believed not to be any further concern about the right to file § 522(f) motions in Florida.[4] Unfortunately, in 2000, a District Court opinion by Judge Adalberto Jordan has revived the old law of Judge Britton and a division of authority again exists in the state of Florida. *Cannon v Cannon*.[5]

This article will focus upon how the interpretation of the law has evolved over the past 30 years, and how debtors' practitioners can perhaps assuage the court's concerns by hybridizing the § 522(f) motion with pertinent other relief. Lastly, the new Bankruptcy Code adds new, but analogous, issues to the

courts, and a review of the new Bankruptcy Code's affect on the issue and *another* division of authority on § 522(f) will be reviewed.

Goodwin **Revived**

Following the guidance of *Cannon*, two recent bankruptcy decisions prohibited the debtor from obtaining relief to avoid a lien against his homestead. *In re Epstein*[6] and *In re Pearlstein*.[7] The *Epstein* case is a reaction by Judge Friedman to a District Court case which reversed another § 522(f) ruling by Judge Friedman. Judge Friedman's other § 522(f) ruling was *Cannon v. Cannon*.[8] The District Court, upon reviewing Friedman's *Cannon* decision – which criticized the *Goodwin* decision of Britton – reversed the same by agreeing with *Goodwin* in that " . . . the term 'impair,' as used in § 522(f)(1), 'encompasses more than the idea of 'legal' impairment. The term impair means 'to weaken, to make worse, to lessen in power, diminish or relax, or otherwise affect in an injurious manner.'" *Cannon v. Cannon*[9] citing *In re Henderson*, 18 F.3d 1305, 1310 (5th Cir. 1994).[10]

The District Court in *Cannon* concluded that, "[T]he lien does not affect Mr. Cannon's ability to claim the residence as exempt property, has no legal effect with respect to Mr. Cannon's homestead property, does not cloud Mr. Cannon's title, and cannot be enforced against anyone when Mr. Cannon sells the residence . . ." [11] This is deemed to be the minority opinion in the state of Florida.

This argument delivered by the *Cannon* or *Epstein* court requires bankruptcy and Florida constitutional law analysis.. The core of the argument is that a judgment lien could never attach to the homestead by operation of Florida constitutional law. By that interpretation of Florida law, the minority opinion determines that the avoidance of a lien on exempt property cannot occur as there is no lien to avoid. In short, the minority opinion determines

that a bankruptcy court cannot deliver a ruling to a movant as it cannot avoid a nonexistent lien. The minority opinion interprets the lien's nonexistence under Florida, as opposed to federal, legal interpretations.[12] Judge Britton, by interpreting Florida law, concluded that, "I believe that the declaration by a court of a right fully enunciated and provided for in the Florida Constitution, Art. X, § 4, and claimed by a debtor in a bankruptcy case and unchallenged, is duplicative and, therefore, unnecessary."[13]

The effect of *Cannon* is to drive a wedge between title practitioners and owners of real property. If nothing is done during the bankruptcy, the judgment remains unscathed on the title. Title companies generally disfavor such clouds upon the title and want a recorded instrument which affects the legitimacy or effect which the judgment may have or does have upon the homestead. Under the majority opinion in the state of Florida, and prior to *Cannon*, this was easily handled in the bankruptcy court as it could expediently deliver a § 522(f) ruling that avoids the judgment lien's attachment on the homestead. The state law alternatives are not as easily handled[14] and that is why debtors' attorneys preferred filing § 522(f) motions.

Majority Opinion: Lien is a Cloud on Homestead

It cannot be ignored that almost any judgment lien of a creditor clouds the title. The closing agent most often refuses to deliver money to the debtor based upon the final judgment's recording. Closing agents typically will not release funds unless a § 522(f)(1) order grants the debtor's avoidance, or alternatively, the debtor files an action under the Florida statutes to avoid the lien. If none of these events is commenced, the judgment lien is accommodated by an escrow account which will be held for a finite period of time – often less than the allocated limitation's periods of the Florida statutory remedies.[15]

The majority of Florida courts (and almost unanimous within the Middle District of Florida) rules that the recording of unenforceable liens does impair title to Florida homesteads. In the case of *In re Desai*[16], the court wrote:

> Although the lien is legally unenforceable by virtue of the protection provided by the Florida Constitution, the lien still creates a cloud on the title by the fact the lien was recorded in the public records. Recording even an unenforceable lien is sufficient to impair the debtor's homestead exemption and fix against the interest of the debtor.[17]

A Lien "Impairs" the Exempt Homestead

The detractors of *Goodwin* and *Cannon* hold that the mere existence of the judgment lien impairs a debtor's Florida constitutional homestead exemption. Some cases which agree with this majority are: *In re Bird*[18]; *In re Bradlow*[19]; *In re Calandriello*[20]; *In re Davis*[21]; *In re Desai*[22]; *In re Felizardo*[23]; *In re Jacobs*[24]; *In re Presley*[25]; In re Stone[26]; *In re Thornton*,[27]; *In re Watson*[28]; and *In re Willoughby*.[29]

What if Creditor Gets Proceeds from a Homestead Closing?

Judgment creditors whose liens are not avoided, are often offered payment under one of two circumstances. First, when a Chapter 13 debtor refinances the homestead, the creditor is asked for a payoff letter. The creditor's response may seek to obtain payment as it effectively seeks, and as an unsecured creditor it will seek to receive more than what the Chapter 13 plan provides.[30] Alternatively, a creditor may attempt to collect *after* the discharge in Chapter 7 or Chapter 13. To receive money after the discharge is more reprehensible as it is clearly violative of the discharge injunction.[31] In either event, the attempt to collect may be violative of the automatic stay.[32] But, some creditors, when encountering such factual situations, feel confidant that the District Court's *Cannon* opinion or the Bankruptcy Court's *Epstein* opinion provide the creditor with rights to collect by slippery methods – they

tell title companies the payoff figure for their lien which they assert has not been avoided and their lien cannot be avoided under the *Cannon* decision.

All of the above nightmares are not fictional. The unfortunate problem is that the District Court's *Cannon* opinion curtails the ability of attorneys to receive the § 522(f) "comfort orders" which provide documentation outlining and defining the legal relationship between the real property and the recorded judgment. *Cannon* effectively requires the utilization of the state court remedies, which take more time and may increase costs if litigation evolves.

Use *Cannon* for What it Says

An alternative argument would be to utilize the language of *Cannon* to identify how the creditor's requests for payment of the escrowed money are without merit. The minority opinion of *Cannon* clearly states that a lien against the homestead property of the debtor, " . . . does not affect Mr. Cannon's ability to claim the residence as exempt property, has no legal effect with respect to Mr. Cannon's homestead property, does not cloud Mr. Cannon's title, and cannot be enforced against anyone when Mr. Cannon sells the residence . . ."[33] *Cannon* compels the creditor to accept the fact that the judgment lien cannot be enforced, cannot cloud the title, and has no legal effect. If title companies could accept *Cannon*, an affidavit of continuous residency should assert the lien did not attach. Perhaps that could entitle the title company to issue insurance over the judgment lien.

The alternative is not as embracing. Even after *Cannon*, a movant may boldly ask for an alternative remedy: that of *Cannon*. Debtor's counsel can request the avoidance of the lien, or in the alternative, have a determination, as stated in *Cannon*, that the property is exempt, that the lien cannot attach to the property, and that the recorded judgment has no legal effect with respect to the homestead property of the debtor, does not cloud title of the debtor, and

cannot be enforced against anyone.[34] But, it is not ignored that these opinions or adjudications may easily be deemed either declaratory or "alternative 522(f) orders" – both of which courts following *Cannon* will probably not seek to engage in or deliver.

New Phenomenon With Limited Homestead

One thing the framers of the new Bankruptcy Code have made certain – the homestead in Florida can be lessened by the filing of a bankruptcy. The new homestead rules employed by the new Bankruptcy Code limit the homestead exemption to $125,000.00[35] if the home was purchased within 1,215 days[36] of the petition date.[37] Hence, a new issue of avoidance arises: Can the § 522(f) ruling be limited to the amount of the exemption – e.g. if the newly acquired Florida home has been the debtor's residence for less than 1,215 days[38], and the home is worth $400,000.00, would the avoidance be limited to $125,000.00 with the lien attaching to the remaining $275,000 – even though state law would prohibit the sale of the homestead under process or order from any court in state of Florida?[39]

Only four other states employ an unlimited homestead exemption – like Florida – outside of bankruptcy.[40] The rest of the states have dealt with the above-phrased issue of limiting the § 522(f) avoidance. And, not surprisingly, a division of authority has sprouted from the litigation with the majority limiting the avoidance to the exemption amount and the minority allowing the avoidance as to the entire asset. With the implementation § 522(p) limiting the residence of less than 1,215 days to $125,000.00, the issue previously reviewed only by the other 45 states is now a potential issue in Florida. The issue is easier to handle outside of Florida where the amount of the exemption will always be the same in bankruptcy as it is outside of bankruptcy. As one court wrote, ". . . the majority of cases conclude that the plain language of §

522(f) permits avoidance of the lien only in the amount of the debtor's exemption."[41]

In some of the other 45 states, the limitation of the avoidance was a great windfall to the creditor as, "The effect of this position is that the unavoided portion of the lien would survive bankruptcy and would attach to any equity that accumulates above the debtor's homestead amount. In this way, the judicial lienholder, rather than the debtor, partakes of any increase in the property's value following bankruptcy."[42] In Florida, this concern will not arise because the nonexempt portion will only exist *within* the bankruptcy estate. And, the only amount of equity to which the lien can attach will be the amount of equity at the time of filing. The creditor's concerns instead focus upon whether or not the bankruptcy trustee administers the asset for the estate. If the trustee decides not to administer the nonexempt portion of the homestead,[43] the asset returns to the debtor in the world "outside of bankruptcy" where the $125,000.00 limitation of the homestead does *not* exist.[44]

Does Cannon Apply to the Limited Homestead?

Few would dispute that – in bankruptcy – the lien attaches to the nonexempt portion: any equity above the $125,000.00 allowed homestead exemption of § 522(p). The remaining question is what kind of order will the court deliver when the residence is less than 1,215 days old? There are three obvious possibilities (I use the above-referenced $400,00.00 hypothetical home to aid in the analysis – see parentheticals):

(a) *Dream scenario for debtors' attorneys*: Follow the minority opinion of the other 45 states and avoid the entire lien, and follow the the majority opinion of the state of Florida and allow the entire lien to be avoided as to the entire homestead of the debtor (Result: entire home is free of lien); or

(b) *Compromise scenario*: Follow the majority of the other 45 states and allow the lien only to be avoided for the exempt amount; and follow the majority of Florida courts and allow the avoidance of the lien against the

exempt amount (Result: $275,000.00 is liened and $125,000.00 is avoided); or

(c) *Nightmare scenario for debtors' attorneys:* follow both the minority opinion of the other 45 states and follow the minority opinion of Florida which would culminate with an order which gives no relief on the § 522(f) motion – e.g. the $400,00.00 house has no avoidance for the $275,00.00 above the $125,000 exemption provided by § 522(p) and the *Cannon* opinion prohibits the request to avoid the lien on the $125,000.00 exemption (Result: entire home remains liened – at least in bankruptcy).

In reference to the above-recited three possible decisions to be reached, it appears – with the case law as it exists at this time – the Middle District of Florida will definitely not follow (c), most probably not follow (a) and would likely follow (b); while the Southern District of Florida will definitely not follow (a), and probably follow either (b) or (c).[45]

To avoid the uncertainty of such a situation, it would be good practice pointer would be to commence an action under Chapter 222, Florida Statutes[46] as soon as one could possibly prepare the papers. If debtors' counsel are able to discover the existence of this issue at the outset, the commencement of the § 222.01 action – which requires the judgment creditor to file an action within 45 days[47] – may be the only paper one has to file, because the creditor faces a substantial hardship. The 222.01 action creates two financial hurdles to the creditor: (a) the automatic stay[48] and (b) the filing of a lawsuit. In short, it would be only on rare occasion that the judgment creditor would want to incur the expense of a motion for relief from the automatic stay and file an action to maintain a lien against real property which was presumably claimed to be exempt in the bankruptcy schedules and therefore entitled to be released from the lien.

Conclusion

The effect of *Cannon*, at first blush, is to reemploy the *Goodwin* effect: curtail the utilization of motions being filed under 11 U.S.C. § 522(f). However, the ruling of *Cannon* could be deemed to require a factual determination that

the property is homestead.[49] Therefore, when one seeks to move under 11 U.S.C. § 522(f), a court, upon delivery of the factual finding of homestead, can either side with the majority and determine that the property's exemption entitles the Bankruptcy Court to avoid the judgment lien, or in the alternative, the Bankruptcy Court can deliver a denial which determines that the judgment lien has no legal effect with respect to the homestead and cannot cloud the title of the homestead, and cannot be enforced against anyone when the debtor sells the residence. As to the new residents [those within 1,215 days], it is believed that § 522(f) – at best – would only affect the $125,000.00 exemption. Therefore, utilizing § 222.01, Fla. Stat. would appear to be the better and more efficient manner in cleansing the homestead's title from the lien.

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1. Homestead, so long as it is within the one-half acre [municipality] or 160-acre [nonmunicipality] lot size which is totally exempt under Section 4, Fla. Const.

2. 82 B.R. 616 (Bankr. S.D.Fla. 1984)

3. 84 Bankr. 858 (Bankr. S.D.Fla. 1988)

4. *In re Bird,* No. 88-8184-Civ-Aronovitz, slip op. at 9 (S.D.Fla. 1989), reversing, 84 Bankr. 858 (Bankr. S.D.Fla. 1988)

5. *Cannon v. Cannon*, 254 B.R. 773, S.D.Fla. 2000

6. 298 B.R. 917 (Bankr.S.D.Fla. 2003)

7. ___ B.R. ____ (Bankr. S.D.Fla. 2006); 2006 WL 2398767

8. 243 B.R. 153 (Bankr. S.D.Fla. 2000)

9. 254 B.R. 773, 779 (S.D.Fla. 2000)

10. Interestingly, the *Henderson* court determined that under Texas law – after reviewing Florida law – judgment liens impair the title to homesteads and therefore judgment lien avoidance under section 522(f) was permissible.

11. *Cannon* at 779 (citations omitted)

12. *Goodwin* explained this analysis as:

> Under the Florida homestead exemption for real property, the prohibition against forced sale of a homestead does not invalidate the debt or lien. The protection is effective so long as the property retains its homestead character. Under these circumstances, if avoidance of the judicial liens were granted under § 522(f), that relief would add an element of protection greater than the homestead exemption under State law. See *Point East One Condominium Corp. Inc. v. Point East Developers, Inc.*, 348 So. 2d 32, 36 (Fla. Dist. Ct. App. 1977). In Florida, a judicial lien which is presently unenforceable against exempt real property does not impair the exemption. *See Nat'l Deposit Guarantee Corp. v. Peck (In re Peck)*, 55 B.R. 752, 755 (N.D. Ohio 1985) (applying similar principle of Ohio law and denying relief under § 522(f)(1) at 617

13. *Goodwin* at 618.

14. The alternatives are §§ 222.01 or 55.145, Fla. Stat. They read as follows:

> **55.145 Discharge of judgments in bankruptcy**.--At any time after 1 year has elapsed since a bankrupt or debtor was discharged from his or her debts, pursuant to the act of congress relating to bankruptcy, the bankrupt or debtor, his or her receiver or trustee, or any interested party may petition the court in which the judgment was rendered against such bankrupt or debtor for an order to cancel and discharge such judgment. . . .
>
> **222.01 Designation of homestead by owner before levy.--**
>
> (1) Whenever any natural person residing in this state desires to avail himself or herself of the benefit of the provisions of the constitution and laws exempting property as a homestead from forced sale under any process of law, he or she may make a statement, in writing, containing a description of the real property, mobile home, or modular home claimed to be exempt and declaring that the real property, mobile home, or modular home is the homestead of the party in whose behalf such claim is being made. Such statement shall be signed by the person making it and shall be recorded in the circuit court. . . .

15. Section 222.01 requires 45 days for a response to the declaration of homestead, and too often the title company threatens to release the money within 30 days.

16. *In re Desai*, 54 Collier Bankr. Case 2d (Bankr. M.D. Fla. 2005) 1117; 2005 Bankr. LEXIS 1387

17. Citing, *In re Thornton*, 186 B.R. 155, 157 (Bankr.M.D.Fla.1995); *In re Watson*, 116 B.R. 837, 838 (Bankr.M.D.Fla.1990); *In re Calandriello*, 107 B.R. 374, 375-76 (Bankr.M.D.Fla.1989), aff'd, 174 B.R. 339 (M.D.Fla.1992); *Lowe* at 425.

18. No. 88-8184-Civ-Aronovitz, slip op. at 9 (S.D.Fla. May 5, 1989), 1989 U.S. Dist. LEXIS 17397 reversing, 84 Bankr. 858 (Bankr. S.D.Fla. 1988) ["It is ORDERED AND ADJUDGED that the Bankruptcy Orders in this cause, dated January 25, 1988 and March 11, 1989, be, and the same are, hereby REVERSED. This Cause is hereby REMANDED to the Bankruptcy Court to enter an appropriate order pursuant to the provisions of 11 U.S.C. § 522(f) that the judgment lien held by Barnett Bank of Palm Beach County against the debtor's homestead real property be avoided and extinguished."]

19. 119 B.R. 330, 331 (Bankr. S.D.Fla. 1990)["This Court concurs with the reasoning enunciated in Bird and the other cases cited herein, and concludes that § 522(f) authorizes the avoidance of the creditor's liens in that the liens impair the debtor's homestead exemption."]

20. 107 B.R. 374, 375-76 (Bankr. M.D.Fla. 1989) aff'd, 174 B.R. 339 (M.D. Fla. 1992)["As any Florida lawyer who practices real property law knows, practical problems are presented when a certified copy of a judgment against a homeowner is recorded in the official records of the county in which the homeowner's homestead is located. Title companies generally treat such judgments as a cloud on title to the homestead unless avoided in bankruptcy, satisfied, or otherwise removed. When the homeowner later becomes a debtor in bankruptcy, the limitations on the debtor's actions that result denies the debtor the full enjoyment that the Florida Constitution provides. The Bankruptcy Code contains a specific provision designed to prevent the debtors . . . from experiencing problems of this sort."]

21. 23 B.R. 347, 348 (Bankr. S.D.Fla. 1982) ["Under Section 522(f)(1) of the Bankruptcy Code the debtors may avoid the fixing of a lien on an interest of the debtors in property to the extent that such lien impairs the exemption to which the debtors would have been entitled if such lien is a judicial lien. Here the Defendant's judicial lien by virtue of his recording of the final judgment in the above described cause dated January 18, 1982 does impair the homestead exemption of the debtor as defined under the Article X Section 4 of the Florida Constitution, and may be avoided."]

22. 54 Collier Bankr. Case 2d (Bankr. M.D.Fla. 2005) 1117; 2005 Bankr. LEXIS 1387 ["Although the lien is legally unenforceable by virtue of the protection provided by the Florida Constitution, the lien still creates a cloud on the title by the fact the lien was recorded in the public records. Recording even an unenforceable lien is sufficient to impair the debtor's homestead exemption and fix against the interest of the debtor."]

23. 255 B.R. 85,88 (Bankr. S.D.Fla. 2000) ["This Court agrees that even an ineffective lien under Florida law clouds the title of the debtor's homestead and 'impairs' the debtor's exemption for purposes of § 522(f)."]

24. 154 B.R. 359, 360 (Bankr. S.D.Fla. 1992) ["In line with the Calandriello court's reasoning, the debtor's constitutional homestead exemption is likewise impaired here, in that the debtor's lender and the lender's title insurance company have conditioned the debtor's attainment of a second mortgage for his homestead upon an order issued by this Court, avoiding all judgment liens on the house."]

25. 242, B.R. 193 (Bankr. S.D.Fla. 1999) [Quoting *Willoughby* in FN 1– "Although . . . the lien of the judgment does not strictly fix to [homestead], Florida bankruptcy courts nevertheless permit the use of Section 522(f) to eliminate the fixing of the practical cloud that the judgment creates on the title to the property." *In re Willoughby*, 212 B.R. 1011, 1016-17 (Bankr. M.D. Fla. 1997) (citations omitted)]

26. 273 B.R. 680 (Bankr. M.D.Fla. 2002)

27. 186 B.R. 155, 157 (Bankr. M.D. Fla. 1995) [" 'This Court agrees with the line of cases which hold that even if the judicial lien is not presently enforceable against the homestead property, its existence does impair the homestead exemption. . .' *Id*. In *In re Watson*, this Court held that 'any potential enforcement of a judgment lien in the future is a present impairment of the exemption.' "]

28. 116 Bankr. 837 (Bankr. M.D.Fla.1990)

29. 212 B.R. 1011, 1016 FA8 (Bankr. M.D. Fla. 1996) ["There formerly was a split of authority in the state on whether Section 522(f) could be used to avoid this kind of lien. Calandriello at 375. It appears, however, that Calandriello has been accepted as stating the better view, and it is my understanding that it is now the view of the majority, if not all, of the bankruptcy judges in the state. See, e.g., *In re Thornton*, 186 B.R. 155, 157 (Bankr. M.D. Fla. 1995); *In re Jacobs*, 154 B.R. 359, 360 (Bankr. S.D. Fla. 1992); *In re Bradlow*, 119 B.R. 330, 331 (Bankr. S.D. Fla. 1990); *In re Watson*, 116 B.R. 837, 838 (Bankr. M.D. Fla. 1990). Thus, bankruptcy courts now routinely avoid the fixing of judgment liens on Florida exempt homestead property to afford 'full relief' to debtors. Calandriello at 376. A court of appeals recently adopted the same view in a Texas case, citing Calandriello with approval. *In re Henderson*, 18 F.3d 1305, 1311 (5th Cir. 1994)."]

30. The creditor's attempts to receive more than what has been pledged in the Chapter 13 plan would be violative of the Bankruptcy Code and could subject the creditor, and maybe the debtor, to reprimand and sanctions for engaging in prohibited activities.

31. 11 U.S.C. § 524

32. 11 U.S.C. § 362

33. *Cannon* at 779

34. This is a paraphrasing of the above-recited section at page 779 of *Cannon.*

35. The amount will be stated as $125,000.00 throughout this article, but it is acknowledged that the amount is for each debtor, therefore the amount would be $250,000.00 for a joint case.

36. I am intentionally ignoring the "other state's" exemption which have to be employed if residency is less than 730-days under 11 U.S.C. § 522(b)(3)(A).

37. Section 522(p)(1). But, if you moved from one house in Florida – that you owned more than 1,215 prior to the filing – to another home in Florida, the exemption amount is increased to be the sum of the carryover sale amount of the old home together with the new home's $125,000.00 ceiling. See Section 522(p)(2)(B).

38. But greater than 730 days.

39. **ARTICLE X, SECTION 4. Homestead; exemptions.--**

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, . . . the following property owned by a natural person:

> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, . . . ; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

40. Kansas, Texas, South Dakota, and Iowa. This list also includes the District of Columbia.

41. *In re Sanders*, 156 B.R. 667, 670 (D. Utah 1993) citing *Heape v. Citadel Bank of Independence (In re Heape)* 886 F.2d 280, 284 n.5 (10th Cir. 1989) (dictum); *City Nat'l Bank v. Chabot (In re Chabot)*, No. 91-56171, 1993 WL 114719, at 3 (9th Cir. April 16, 1993), *In re Gonzalez*, 149 Bankr. 9, 10 (Bankr. D. Mass. 1993); *In re Prestegaard,* 139 Bankr. 117, 119-20 (Bankr. S.D.N.Y. 1992); *In re Sanglier*, 124 Bankr. 511, 514 (Bankr. E.D. Mich. 1991)

42. *In re Sanders*, 156 B.R. 667, 670 (D. Utah 1993)

43. A trustee could easily abandon the property as all of the proceeds of the sale would not benefit the unsecured creditor and only would benefit the judgment creditor. When the abandonment is made under 11 U.S.C. § 554, the property revests to the debtor as it is no longer property of the estate as defined under 11 U.S.C. § 541.

44. And the rulings of *Cannon* or *Goodwin* would support the debtor's argument to remove the liens from the homestead.

45. Judge Mark and Judge Ray ruled *before* the District Court's *Cannon* decision, that they would allow § 522(f) motions. It is not known how their opinions would change if the *Cannon* issue was brought to their attention.

46. Section 222.01

47. Section 222.01(4) which states:

> **(4)** A lien pursuant to chapter 55 of any lienor upon whom such notice is served, who fails to institute an action for a declaratory judgment to determine the constitutional homestead status of the property described in the notice of homestead or to file an action to foreclose the judgment lien, together with the filing of a lis pendens in the public records of the county in which the homestead is located, within 45 days after service of such notice shall be deemed as not attaching to the property by virtue of its status as homestead property as to the interest of any buyer or lender, or his or her successors or assigns, who takes under the contract of sale or loan commitment described above within 180 days after the filing in the public records of the notice of homestead. This subsection shall not act to prohibit a lien from attaching to the real property described in the notice of homestead at such time as the property loses its homestead status.

48. Specifically, such an action would appear to be violative of Sections 362(a)(2) and (4) which state:

> **(2)** the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> . . .
>
> **(4)** any act to create, perfect, or enforce any lien against property of the estate;

49. A court could as easily deem the Schedule C's assertion of the homestead and the 30 days expiring without objection to the same (after the 341 meeting) will establish the factual conclusion that the property is homestead. See Rule 4003, Fed.R.Bank.P.