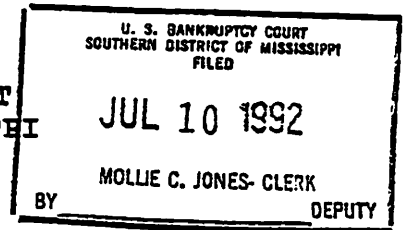


IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON AND WESTERN DIVISIONS



IN RE:  
JAMES A. AND RHONDA C. FREEMAN 9003595JC  
WILLIAM WAYNE SWILLEY 9200272JC  
LEE CAROLYN WRIGHT 9200273JC  
ROBERT E. FISHER 9200459WC  
SANTOS C. AND MAIDIE K. PEREZ 9201007JC  
(Chapter 7s)

IN RE:  
RODERICK AND GLENDA DAVIS 9103295JC  
RICKY TERRELL 9104012JC  
ROBERT LEE AND WILLIE MAIE CAMERON 9104282JC  
GWEN H. JONES 9104354JC  
BARBARA D. EVANS 9104396JC  
CORNELIOS AND NANCY GREENWOOD 9104424JC  
TIMOTHY J. AND SHERRY S. SEESE 9104454JC  
MONTORA WHISENTON WINSTON 9104683JC  
ROBERT AND ARLENE BOOTH 9104792JC  
LEDORIS SMITH FIELDS 9104821WC  
JOHN A. MONTGOMERY 9200112JC  
JAMES D. AND PATRICIA A. BENFIELD 9200134JC  
DUDLEY JONES AND MARY CATHERINE COLE 9200152JC  
CINDY PARTICK 9200180JC  
JAMES HOWARD AND JERRIE MAE JOHNSON 9200479JC  
(Chapter 13s)

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Financial Services, Inc.  
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Edward Ellington, Judge

MEMORANDUM OPINION

The central issue in all of the above styled cases is  
whether a debtor in Mississippi may now utilize the provisions of

§ 522(f)(2) of the Bankruptcy Code<sup>1</sup> to avoid a nonpossessory, nonpurchase-money security interest in household furnishings, goods and certain other items of personal property that impairs an exemption to which the debtor would be entitled but for the exclusionary language of Miss. Code Ann. § 85-3-1(d) (1991).

If this central issue is answered in the affirmative, then the question arises in both chapter 7 and 13 cases as to exactly which items of property fall within the parameters of § 522(f)(2), and therefore are proper subjects of a lien avoidance action under § 522(f).

#### GENERAL BACKGROUND

Section 522 of the code enumerates the type and monetary value of property a debtor may exempt from his estate and from the claims of his creditors. Basically, it provides that a debtor can elect to use exemptions provided under the state law where he files his petition or those exemptions enumerated in § 522(d). Section 522 further provides that a state may adopt legislation prohibiting a debtor from choosing the Federal exemptions provided by § 522(d). This type of legislation is commonly referred to as an "opt-out" provision.

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<sup>1</sup> Hereinafter, all code sections refer to the U. S. Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

The State of Mississippi has elected to "opt-out" of the Federal exemptions<sup>2</sup>, and therefore under Mississippi law a debtor in bankruptcy may use only those exemptions provided under the Mississippi exemption statutes. Presently, as a part of the exemption laws in Mississippi, there is language which purports to preclude debtors from avoiding nonpossessory, nonpurchase-money security interest of the type contemplated in § 522(f)(2).<sup>3</sup>

This action on the part of Mississippi to prohibit debtors from avoiding liens as provided in § 522(f)(2) and similar actions by Texas and Louisiana have been approved by the Fifth Circuit Court of Appeals in at least four separate cases.<sup>4</sup>

On May 23, 1991, the U. S. Supreme Court rendered an opinion regarding § 522 lien avoidance in the case of Owen v. Owen, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1833, 114 L.Ed 2d 350 (1991). The Owen opinion actually involved the avoidance of a judicial lien on real property pursuant to § 522(f)(1) rather than the avoidance of consensual liens pursuant to § 522(f)(2). However, because of the broad analysis by the Court of § 522(f), questions have arisen as to whether the previous opinions of the Fifth Circuit regarding § 522(f)(2) have been superseded, and whether debtors in

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<sup>2</sup> Miss. Code Ann. §85-3-2 (1991).

<sup>3</sup> Miss. Code Ann. §85-3-1(d) (1991).

<sup>4</sup> In Re McManus, 681 F.2d 353 (5th Cir. 1982)  
In Re Allen, 725 F.2d 290 (5th Cir. 1984)  
In Re Bessent, 831 F.2d 82 (5th Cir. 1987)  
In Re Fox, 902 F.2d 411 (5th Cir. 1990).

Mississippi can now utilize § 522(f)(2) to avoid certain consensual liens regardless of the language contained in Mississippi law.

The issue of whether the previous opinions of the Fifth Circuit have been superseded and thus, whether liens can be avoided pursuant to § 522(f)(2), has already been adjudicated in the Bankruptcy Court for the Northern District of Mississippi. In an opinion rendered by Judge David W. Houston, III, on March 27, 1992, the court held that Owen v. Owen, supra, effectively superseded the earlier opinions of the Fifth Circuit and that, therefore, pursuant to § 522(f)(2) security interests can be avoided to the extent that the debtors' exemptions are impaired. Barkley v. Tower Loan of Mississippi (In Re Kennedy), 139 B.R. 389 (Bankr. N.D. Miss. 1992).

The decision of Judge Houston is on appeal to the District Court for the Northern District of Mississippi.

The second issue in the cases at bar, as to how to define and specifically identify which items are of the type that can have the lien avoided, was not dealt with in the opinion by Judge Houston.

#### PROCEDURAL BACKGROUND

In four of the five chapter 7 cases before the Court, the Debtors filed motions to avoid the nonpossessory, nonpurchase-money security interests of Tower Loan of Mississippi, Inc (Tower). Tower filed responses to these four motions and a motion to lift the stay pursuant to § 362 in one of the cases. In the remaining

chapter 7 case, the Debtor filed a motion to avoid the nonpossessory, nonpurchase-money security interest of Sunburst Financial Services dba Rapid Finance (Rapid). Rapid filed a response to the motion.

In the chapter 13 cases before the Court, the Debtors filed motions to avoid the nonpossessory, nonpurchase money security interests of Tower. Tower filed a response to each of these motions.

Additionally, in certain of the chapter 13 cases Tower filed objections to the Debtors' proposed plans of reorganization. Tower objected because the Debtors propose to pay it as an unsecured creditor in anticipation that its liens will be avoided.

At the trial on May 21, 1992, various stipulations, both written and oral, were entered into the record. Generally as to Tower, the parties agreed on the value of the collateral, that Tower had properly perfected security interests in various items of personal property, and that certain items of property clearly fall within or without the definition contained in § 522(f)(2), and therefore will or will not be subject to lien avoidance, in the event the court rules that liens can be avoided pursuant to § 522(f)(2).

Attached to this opinion and incorporated herein by reference is Appendix A. It sets forth in detail the various pleadings and stipulations as to each particular case.

FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

As stated at the beginning of this opinion, this Court must determine two broad issues:

1. Whether a debtor in Mississippi may now utilize the provisions of § 522(f)(2) of the code to avoid a nonpossessory, nonpurchase-money security interest in household furnishings, goods and certain other items of personal property that impairs an exemption to which the debtor would be entitled but for the exclusionary language of Miss. Code Ann. § 85-3-1(d); and
2. How to define and specifically identify which items of property fall within the scope of § 522(f)(2), and therefore are the type of property that may be properly subject to lien avoidance, if lien avoidance is permissible.

As previously noted, in the case of Barkley v. Tower Loan of Mississippi (In Re Kennedy), 139 B.R. 389 (Bankr. N.D. Miss. 1992), Judge David W. Houston, III answered the first issue in the affirmative. This Court is of the opinion that the rational and legal conclusions of Judge Houston are correct. This Court adopts his opinion as the ruling of this Court.

Therefore, this Court holds that based upon the holding of the U. S. Supreme Court in Owen v. Owen, supra, a debtor may now utilize the provisions of § 522(f)(2) of the code to avoid liens

that impair an exemption to which the debtor would be entitled but for the exclusionary language of Miss. Code Ann. § 85-3-1(d) (1991).

This Court will now consider the second issue of defining and identifying those items on which the debtor may avoid the fixing of a lien.

The relevant statutes are as follows:

**Miss. Code Ann. §85-3-1**

There shall be exempt from seizure under execution or attachment:

(a) Tangible personal property of any kind, not exceeding Ten Thousand Dollars (\$10,000.00) in value, which shall be selected by the debtor; provided, however, this paragraph shall not apply to distress warrants issued for collection of taxes due the state or to wages described in Section 85-3-4.

. . . .

(d) Nothing in this section shall in any way affect the rights or remedies of the holder or owner of a statutory lien or voluntary security interest.

**11 USC § 522(f)**

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, appliances, 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; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

As can be seen, the Mississippi statute provides that tangible personal property of any kind may be exempt as long as the value does not exceed \$10,000.00. It does not attempt to specify or enumerate any particular items of personal property that the debtor can claim as exempt.

On the other hand § 522(f) of the Bankruptcy Code is restrictive to a certain extent as to the items on which a lien can be avoided.

Simply stated, Miss. Code Ann. § 85-3-1 (1991) is an exemption statute, and § 522(f) of the Code is a lien avoidance statute. The fact that a particular item may be claimed as exempt under Mississippi law does not mean that a lien on it may be avoided under § 522(f) of the Code. Thus, the Court must define and determine those particular items that come within the purview of § 522(f)(2). Of necessity this must be done on an item by item, case by case basis if the parties cannot agree as to a particular item.



As can be seen from reading § 522(f)(2), there is almost no limit to the particular items that arguably could come within its purview, and new items continue to come on the market all the time. For instance, the case of In Re Vale, 10 B.R. 396 (Bankr.N.D.Ind. 1989), contains a long list of court decisions that have dealt with numerous items of personal property.

However, the primary problem in determining which items of personal property may be subject to lien avoidance seems to arise in defining the term "household goods" within the meaning of § 522(f)(2)(A). This Court is of the opinion that the best definition it has found is the one articulated by the Fourth Circuit Court of Appeals in the case of McGreevy v. ITT Financial Services (In Re McGreevy), 955 F.2d 957 (4th Cir. 1992), where the court held:

... "household goods" under section 522(f)(2)(A) are those items of personal property that are typically found in or around the home and used by the debtor or his dependents to support and facilitate day-to-day living within the home, including maintenance and upkeep of the home itself.

McGreevy, 955 F.2d at 961.

This Court adopts the aforesaid definition as the appropriate definition.

In its opinion, the Fourth Circuit stated that since the adoption of the Bankruptcy Code in 1978 two different definitions of "household goods" have achieved prominence. One definition has focused upon the *necessity* of the goods to the debtor. The second definition has included *all* goods typically found and used in or

around a home, whether or not they would be strictly necessary to a debtor's fresh start. The court rejected the first definition because it found no language in § 522(f)(2) that restricted lien avoidance to pure "necessities." This Court agrees with its reading of the statute.

The Fourth Circuit also was of the opinion that the second, "all inclusive", definition was more defensible than the "necessity" definition, but was still inadequate, stating:

This second definition is more tenable than the necessity definition because it is grounded at least generally in the statutory text. Ultimately, however, it fails to capture fully the functional nexus between the good and the household that distinguishes a household good from a good that happens (even typically so) to be used in the house. We therefore reject this definition as well.

McGreevy, 965 F.2d at 961.

This Court interprets the opinion as holding that a household item does not have to be an absolute necessity in order for the lien on that item to be avoidable. Conversely, the fact that an item might be found or kept in the home of the debtor does not necessarily mean that the lien can be avoided, if the item is not used to support and facilitate home life.

For instance, although a debtor might not be able to establish that it is absolutely necessary to have two televisions in a home, nevertheless the liens can be avoided on both televisions because they are routinely found in homes and are used to support and facilitate home life. On the other hand, although a debtor might like to fish as a recreation and normally keeps a

fishing boat and trailer at his home, a lien cannot be avoided on the boat and trailer because they are not used to support and facilitate home life.

In the McGreevy case the Fourth Circuit said that under its definition, whether certain goods constitute "household goods" will necessarily depend in whole or in part upon the cultural environment and geographic location of the debtor's household. The court then ruled that a shotgun and a rifle which were primarily used to hunt deer and for target practice did not constitute "household goods." However, the court further stated that it was not prepared to conclude that firearms per se can never be household goods. McGreevy, 965 F.2d at 962.

Considering the threat of criminal elements in today's society and in this district, it is the opinion of this Court that normally a debtor would be able to avoid the lien on one firearm if it is normally kept in the home and is reasonably necessary for the protection of the home and its occupants.

In its brief, the attorney for Tower urges the Court to adopt the definition of household goods established by the Federal Trade Commission and found at 16 C.F.R. § 441.1(1). The definition by the Federal Trade Commission is very restrictive and the language of § 522(f)(2) is much broader. The argument of Tower is rejected for that reason and as more fully explained in Boyer v. ITT Financial Services (In Re Boyer), 63 B.R. 153 (Bankr. E.D. Mo. 1986) and In Re Vale, 110 B.R. 396 (Bankr. N.D. Ind. 1989).

CONCLUSION

It is the conclusion of this Court that a debtor may now utilize 11 U.S.C. 522(f)(2) to avoid liens that impair exemptions on certain personal property.

It is the further conclusion of this Court that the appropriate definition of "household goods" is the one found in In Re McGreevy, supra. In addition to "household goods" there are numerous other items of personal property included in § 522(f)(2) which seem to be largely self explanatory and not in dispute.

In regard to those items which are not included in § 522(f)(2) and on which the liens cannot be avoided, the creditors are entitled to be paid as provided by the Code or to have the stay lifted.

There are hundreds of items listed on Appendix A. The Court will not attempt to rule on each item at this time. The attorneys for the parties are directed to confer on each case and submit to the Court orders consistent with this opinion. If any items remain in dispute, the Court will make additional findings as to each item.

This the 10<sup>th</sup> day of July, 1992.

  
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U. S. BANKRUPTCY JUDGE