No. 07-35704

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re STEVEN JAY CHAPPELL AND JULIE LYNN CHAPPELL,
Debtors.

STEVEN JAY CHAPPELL and JULIE LYNN CHAPPELL,
Debtors-Appellants

— v. —

MICHAEL P. KLEIN,
Trustee-Appellee

ON APPEAL FROM THE BANKRUPTCY APPELLATE PANEL
FOR THE NINTH CIRCUIT – NO. 06-01435

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTORS-APPELLANTS AND SEEKING REVERSAL OF THE BANKRUPTCY APPELLATE PANEL DECISION

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March 12, 2008

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Chappell v. Klein, No. 07-35704.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.
NONE.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

Dated: March 12, 2008

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Tara Twomey, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 400,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Kagenveama,* No. 06-17083 (9th Cir.); *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir. 2007).

NACBA and its membership have a vital interest in the outcome of this case. The Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate, thereby putting that property beyond the reach of the trustee and creditors. The purpose of exemption law has always been to

allow debtors to keep those items of property deemed essential to daily life. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start. The Bankruptcy Appellate Panel decision strikes at the heart of debtors' fresh start by injecting uncertainty and delay into the exemption process. If the decision below stands, debtors, at the outset of a case, can no longer be certain about what property they will be allowed to keep and what property will be liquidated for the benefit of their creditors. In addition, the monetary cost of bankruptcy and the emotional costs of filing a bankruptcy case will be greatly increased for debtors ultimately impairing access to the fresh start Congress intended to afford to honest debtors. NACBA's interest is to ensure that the "fresh start" principle at the core of the Bankruptcy Code is not eroded by uncertainty and delay.

SUMMARY OF ARGUMENT

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. To achieve these dual goals, the Bankrutpcy Code first creates the bankruptcy estate upon commencement of a case. However, section 522 of the Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate pursuant to the federal exemptions, listed in 11 U.S.C. § 522(d), or the applicable state exemptions. Because exempt property is withdrawn from the bankruptcy estate and revested in the debtor, post-petition appreciation of fully exempt assets inures to the benefit of the debtor, not creditors.

In this case, the debtors' description of the property claimed exempt and valuation of the exemption was sufficient to put the trustee on notice that debtors were exempting their entire interest in their residence from the bankruptcy estate. The trustee did not object to their claimed exemptions, and therefore after the deadline for objections passed, the debtors' homestead was withdrawn from the property of the estate by operation of law.

The decision by the Bankruptcy Appellate Panel below, which creates incentives for trustees to delay and leaves debtors' homesteads in limbo

indefinitely, runs counter to the underlying purpose of the homestead acts and of the Bankruptcy Code's fresh start policy. It also undercuts the goal of finality in bankruptcy cases and shifts the responsibility for the expeditious administration of the bankruptcy estate from the trustee to the debtor. For these reasons, the decision of the Bankruptcy Appellate Panel should be reversed.

STATUTORY FRAMEWORK

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974); *In re Sanchez*, 372 B.R. 289, 296-98 (Bankr. S.D. Tex. 2007). To achieve these twin objectives, the Bankruptcy Code employs a mechanism by which all the debtor's non-exempt assets may be liquidated by a trustee. *See* 11 U.S.C. § 704(a)(1). In turn, the trustee distributes the liquidation proceeds to creditors in accordance with an elaborate system that dictates the order in which claims are paid and in what amount. *See, e.g.,* 11 U.S.C. §§ 506, 507.

I. The Bankruptcy Estate.

To achieve the dual goals of bankruptcy, the Code first creates the bankruptcy estate upon commencement of a case. 11 U.S.C. § 541. Section 541(a) defines the bankruptcy estate and contains an expansive definition of property that includes all legal or equitable interests in property whether tangible or intangible, real or personal. 5 COLLIER ON BANKRUPTCY ¶ 541.01 (A. Resnick and H. Sommer, eds. 15th ed. rev. Dec. 2007). Property of the estate is distinct from the property of the debtor. *See In re Jumpp*, 356 B.R. 789, 794 (B.A.P. 1st Cir. 2006)(distinguishing between acts against the

debtor, property of the debtor and property of the estate for purposes of applying the automatic stay). Some property, such as that described in section 541(b), is specifically excluded from becoming property of the estate. *See, e.g.*, 11 U.S.C. § 541(b)(5) (excluding certain funds placed in an education savings accounts). Other property initially considered part of the bankruptcy estate may be removed from the estate through the exemption process. 11 U.S.C. § 522(b), (l); *see* Part IB, *infra*. Certain property may also be added to the bankruptcy estate after the commencement of the case. For example, property acquired by inheritance by the debtor within 180 days of the filing of the petition may become property of the estate. *See* 11 U.S.C. § 541(a)(5). Similarly, proceeds or rents from estate property are property of the estate. *See* 11 U.S.C. § 541(a)(6). The Bankruptcy Code authorizes the trustee to collect and reduce to cash any property of the estate for distribution to creditors. *See* 11 U.S.C. § 704(a)(1); *In re Vandeventer*, 368 B.R. 50, 53 (Bankr. C.D. Ill. 2007)("a trustee is limited to collecting and reducing to money 'property of the estate'").

II. Exempt Property

Historically, the purpose of exemption law has always been to allow debtors to keep those items of property deemed essential to daily life. In the bankruptcy context, exemptions serve the overriding purpose of helping the

debtor to obtain a fresh start by maintaining essential property necessary to build a new life. *See* H.R. Rep. No. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (purpose of this scheme is to provide "adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start."); *Rousey v. Jacoway*, 544 U.S. 320, 322, 325 (2005). Accordingly, section 522 of the Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate pursuant to the federal exemptions, listed in 11 U.S.C. § 522(d), or the applicable state exemptions.[1] Subsections 522(b) and 522(l) of the Code and Federal Rule of Bankruptcy Procedure 4003 set forth the method by which exempt property is withdrawn from the bankruptcy estate and revested in the debtor.

> Section 522(b) states, in part, as follows:
>
> Notwithstanding section 541 of this Title…*an individual may exempt from property of the estate* the property listed in paragraph (2) [federal exemptions] or, in the alternative paragraph (3) of this subsection [state exemptions].

Section 522(l), in turn, requires the debtor to file a list of property that the debtor claims as exempt under subsection (b). *See also* FED. R. BANKR. P.

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[1] The Bankruptcy Code allows states to "opt out" of the federal exemption scheme. 11 U.S.C. § 522(b)(1). Domiciliaries of "opt-out states" are limited to using state law exemptions and any federal non-bankruptcy exemptions. 11 U.S.C. § 522(b)(3). The State of Washington has not "opted out", and therefore the Chappells had the option of choosing federal or state exemptions. They elected to use the federal exemption scheme. ER.22

4003(a). Debtors most commonly satisfy this requirement by completing and filing Official Form 6C, "Schedule C – Property Claimed as Exempt." This form directs the debtor to provide a description of the property being claimed as exempt, the law providing each exemption, the value of the claimed exemption and the current value of the property. The information provided by the debtor must be sufficient to put interested parties, including the trustee, on notice as to what property the debtor is claiming as exempt. *Preblich v. Battley*, 181 F.3d 1048, 1053 (9th Cir. 1999). If no timely objection[2] is made to the debtor's claimed exemptions, or if a timely objection is overruled,[3] the exempt assets are withdrawn from the property of the estate by operation of law. 11 U.S.C. § 522(l); *In re Cunningham*, 513 F.3d 318, 323 (1st Cir. 2008), *citing Owen v. Owen*, 500 U.S. 305, 308 (1991); *In re Bell*, 225 F.3d 203, 215 (2d Cir. 2000)("It is well-settled law that the effect of this self-executing exemption is to remove property from the estate and to vest it in the debtor").

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[2] An objection to an exemption must be filed within 30 days after the meeting of creditors is concluded. FED. R. BANKR. P. 4003(b). There are two exceptions to this general rule, neither of which applies in this case. The time for objection is automatically extended if the debtor files amended or supplemental schedules. The court may also extend the time for objection if a party in interest requests such an extension before the time to object expires.

[3] The objecting party has the burden of proving that exemptions are not properly claimed. FED. R. BANKR. P. 4003(c).

ARGUMENT

I. Post-petition appreciation of a fully exempt asset is not property of the estate subject to administration by the trustee.

A. Appreciation of fully exempt property is not property of the estate.

Property that has been exempted belongs to the debtor. In accordance with section 522(l), exempt property is removed from the property of the estate. As a result, any appreciation in exempt property must inure to the benefit of the debtor and the debtor's fresh start, not to creditors. *See In re Polis*, 217 F.3d 899, 902 (7th Cir. 2000); *Schwaber v. Reed*, 940 F.2d 1317, 1323 (9th Cir. 1991); *In re Jones*, 357 B.R. 888 (Bankr. M.D. Ga. 2005). By contrast, post-petition appreciation of non-exempt assets is property of the estate, subject to debtor's potential exemption rights. 11 U.S.C. § 541(a)(6); *see In re Hyman*, 123 B.R. 342 (B.A.P. 9th Cir. 1991)("Postpetition Appreciation of Assets with Non-Exempt Equity Accrues to the Benefit of the Estate").

The Bankruptcy Appellate Panel ("BAP") below relies on section 541(a)(6) in finding that appreciation in the Chappells' homestead remained property of the estate. *In re Chappell*, 373 B.R. 73, 79, 81 (B.A.P. 9th Cir. 2007)("the estate's entitlement to post-petition appreciation…is based upon § 541(a)(6)"). Section 541(a)(6) provides that property of the estate includes

"[p]roceeds, products, offspring, rents, or profits of or from ***property of the estate***, except such as are earnings from services performed by an individual debtor after the commencement of the case." (emphasis added). The section clearly and plainly only applies to appreciation of property of the estate. Thus, although the net cast by section 541(a)(6) may be wide, it simply cannot reach appreciation of assets that are not property of the estate. As a result, section 541(a)(6) is of no avail to the trustee in this case because the Chappells' interest in their residence was fully exempt on the date of the petition. *See* Part IB, *infra*.

Reed and *Hyman v. Plotkin,* 967 F.2d 1316 (9th Cir. 1992)—two cases on which the BAP relied—are distinguishable from the case at bar because the debtors in those cases only claimed a partial exemption in their homestead property. In *Reed*, the total value of the homestead property was $600,000 and the whole encumbrance was $380,000. 940 F.2d at 1318. The value of the debtor's one-half interest was $110,000, and the debtor claimed a homestead exemption of $45,000 leaving non-exempt equity of $65,000. Similarly, in *Hyman*, the debtors valued their home at $415,000 and listed encumbrances totaling $347,611. 967 F.2d at 1318. Again the value of the debtors' equity in the property ($67,389) exceeded the claimed exemption ($45,000) resulting in non-exempt equity of $22,389. *Id.* Because the

property at issue in these cases was only partially exempt, the *Reed* and *Hyman* courts held that section 541(a)(6) required that post-petition appreciation would inure to the benefit of the estate. *See Reed*, 940 F.2d at 1323 ("No doubt Debtor's argument that appreciation inured to him would have merit if his entire interest in the residence had been set aside or abandoned to him; it was not.").

Here, however, the plain language of section 541(a)(6) must control. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000)(plain meaning of the statute controls where the disposition is not absurd); *United States v. Steele,* 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself."). Fully exempt assets are not property of the estate, and as a result appreciation in those assets inures to the benefit of the debtor. Such an outcome is neither absurd nor a "disreputable loophole" that courts must somehow close. *Polis*, 217 F.3d at 903.

A bright-line rule in which appreciation of exempt assets inures to the debtor and appreciation of non-exempt assets inures to the estate allows the parties to proceed from the objection deadline date (assuming no objection is filed), knowing which property is property of the estate and which property

belongs to the debtor. *In re Peterman*, 358 B.R. 801, 804 (Bankr. D. Colo. 2006) (citations omitted). From that day forward, the debtor "can treat exempted property as his or her own and is not forced to wait until some unknown future date when the trustee or another party in interest might haul the debtor into court seeking that property." *Id.*

As Judge Posner noted in *Polis*:

> If the assets sought to be exempted by the debtor were not valued at a date early in the bankruptcy proceeding, neither the debtor nor the creditors would know who had the right to them. So long as the property did not appreciate beyond the limit of the exemption, the property would be the debtor's; if it did appreciate beyond that point, the appreciation would belong to the creditors.

217 F.3d at 903. Such a system would hardly promote the finality contemplated by Rule 4003 and mandated by *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644, 112 S. Ct. 1644 (1992). *See Morgan-Busby v. Gladstone*, 272 B.R. 257, 265 (B.A.P. 9th Cir. 2002)("*Taylor* made it clear that the purpose of the short objection period…is to encourage finality').

B. On the date of the petition the Chappells' interest in their homestead was fully exempt.

The nature and extent of the debtors' exemption rights are determined as of the date of the petition. *See Owen v. Owen,* 500 U.S. at 314; *In re Cunningham*, 513 F.3d at 325; *Polis*, 217 F.3d at 902; *In re Chiu*, 266 B.R.

743, 751 (B.A.P. 9th Cir. 2001); *In re Herman*, 120 B.R. 127, 130 (B.A.P. 9th Cir. 1990). The "value" of the property sought to be exempted "means fair market value as of the date of the filing of the petition," and not on a later date on which the asset may be worth more. 11 U.S.C. § 522(a)(2); *see Cunningham,* 513 F.3d at 324; *Polis*, 217 F.3d at 902. Thus, courts must take a retrospective "snapshot" of the law and the facts as they stood on the day the petition was filed, even though the judicial decision-making process on exemption issues takes place subsequent to the filing of the petition. *In re Orso*, 283 F.3d 686, 691-92 (5th Cir. 2002), *citing White v. Stump*, 266 U.S. 310, 313 (1924).

On the date of the petition, June 30, 2004, the Chappells filed a list of property that they claimed as exempt pursuant to section 522(b). *Chappell*, 373 B.R. at 75; ER.49 [ER.x are citations are to the Excerpts of Record]. On Schedule C, the debtors provided a description of the property being claimed as exempt, the law providing each exemption, the value of the claimed exemption and the current value of the property. ER.22. This list included their residence on Camano Island, which they valued at $350,000 and which was encumbered by $328,488.75 in consensual liens. *Chappell*, 373 B.R. at 75; ER.22, ER.23. The debtors claimed an exemption in their residence under section 522(d)(1), the federal homestead exemption. ER.22, ER.23.

The value of the exemption was listed as $21,511.25. This amount, which equaled the difference between the value of the property and the consensual liens, was undisputedly the ***value*** of the Chappells' entire interest in their residential property on the date of the petition. ER.22. By listing the exact value of their equity, the Chappells were signaling to all parties in interest that they were exempting the entire amount of their homestead. No party in interest could have been confused by the amount that the Chappells had listed, nor could any party in interest have misunderstood the Chappells' intent in so listing that amount. The Chappells simply took their home's value on the petition date, subtracted all of their consensual liens from that value, and listed the remainder as exempt—precisely as the Code, Rules and Official Forms allow them to do.

II. Debtors' description of the property claimed exempt and valuation of the exemption was sufficient to put the trustee on notice that debtors were exempting their entire interest in their residence from the bankruptcy estate.

In completing Schedule C, debtors must provide enough information to put interested parties on notice as to what property the debtor is claiming as exempt. *Preblich v. Battley*, 181 F.3d 1048, 1052 (9th Cir. 1999). Here, the debtors described the property claimed exempt as "98 S Glacier Peak Dr. Camano Island, WA 98282 – residence." There can be no uncertainty as to what property debtors were seeking to exempt. *Cf. Preblich*, 181 F.3d at

1053 (finding exemption claimed in property described by debtor as "Wages" was insufficient to put trustee on notice of exemption in escrow proceeds related to deeds of trust); *In re Wenande*, 107 B.R. 770, 772 (Bankr. D. Wyo. 1989)(generic descriptions of property, such as "stocks" and "intangibles," insufficient to provide trustee with adequate notice of property claimed exempt). The debtors' Schedule C identified section 522(d)(1) as the basis for the exemption claimed. Finally, the Schedule C sets forth both the current value of the exemption and the market value of the property.

Based on the debtors' Schedule C, the Bankruptcy Appellate Panel found that the Chappells merely "claimed an exemption in a specified amount." *Chappell*, 373 B.R. at 78. This conclusion is without legal basis and simply makes no sense. Indeed, the BAP's conclusion unfairly transforms the debtors' valuation of their exemption, as required by Schedule C, into an exemption in a sum certain. Schedule C "simply asks a debtor to list the property claimed exempt and to place values on the exemption and the property." *See In re Anderson*, 377 B.R. 865, 875 (B.A.P. 6th Cir. 2007). The figure of $21,511.25 listed on the petition represented the value of the Chappells' entire interest in their residence on the date of the petition. Nothing in the Bankruptcy Code, Bankruptcy Rules

or Official Forms requires the debtors to do more in order to demonstrate intent to exempt property. No "magic words" are required. *See id.* (rejecting trustee suggestion that to assert an "in-kind exemption" the debtor must list the value as unknown and the exemption as 100%).[4]

By listing the value of their entire interest—the value of the property over the value of the consensual liens—debtors clearly put the trustee on notice of their intent to remove the entire property from the bankruptcy estate. *See id.* at 876. ("We are persuaded generally that a debtors' listing of an exemption in an amount sufficient to exempt all of the available (i.e. unencumbered) value in the property indicates his or her intent to exempt the property in full."); *Jones*, 357 B.R. at 896 ("If a debtor has claimed an exemption in all the value that is available, it follows that he has exempted the property in full."). To the extent the trustee was uncertain about whether the Chappells were exempting a sum certain or an interest in property, it was the trustee's responsibility to timely object or request an extension of time to

[4] While amicus disagrees with the BAP's finding that the debtors' claim of exemption was ambiguous and inadequate to exempt the entire interest in their residence, the BAP did not provide any guidance as to what information it would deem sufficient. If debtors need to provide something more than the Official Form requires then this court should make clear what that something is. The proper way to claim a homestead interest as fully exempt should not remain a mystery to debtors and their counsel. If there are some "magic words" that debtors must use, such as "property interest is claimed as fully exempt," this court should say what they are.

object. *Taylor*, 503 U.S. at 644; *Jones*, 357 B.R. at 897. To require otherwise "would reverse the burden of proof placed on an objecting party…and render the 30-day objection period meaningless." *Anderson*, 377 B.R. at 876, *citing In re Harrington*, 306 B.R. 172, 181-83 (Bankr. E.D. Tex. 2003). Because the trustee was on notice that the Chappells claimed their entire interest in their residence as exempt and in the absence of a valid objection, section 522(l) operated to withdraw the debtors' residence from the estate without any further action by the Chappells.

III. Unlike California law, the federal homestead exemption in section 522(d)(1) exempts realty not just sale proceeds.

To date all the cases decided by the Ninth Circuit related to exemptions and post-petition appreciation have been based upon the California homestead exemption. *Alsberg v. Robertson*, 68 F.3d 312, 315 (9th Cir. 1995); *see also Hyman*, 967 F.2d at 1318("This case turns largely on the proper interpretation of California's homestead exemption statute.") In relevant part, California Civil Procedure Code §704.720 states: "If a homestead is sold under this division…*the proceeds of sale*…are exempt in the amount of the homestead exemption provided in Section 704.730." (Emphasis added). In *Reed* the court found that this language "makes it clear that the 'homestead exemption' in California is merely a debtor's right to retain a certain sum of money when the court orders sale of a homestead."

See Reed, 940 F.2d at 1321. That is, the exemption only applies when there is an actual sale of the property. *See Hyman*, 967 F.2d at 1321. In applying the California homestead exemption, the Ninth Circuit has created a rule under which the debtor's residence remains in the estate for the duration of the case, post-petition appreciation inures to the benefit of the estate, and the debtor is given a right to proceeds that mature at the time of sale.[5] While this rule may make sense when there is non-exempt equity, as in *Hyman* and *Reed*, it does not comply with the letter or the purpose of the Bankruptcy Code when there is no non-exempt equity on the petition date.

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[5] It is not clear that this rule remains valid subsequent to the Supreme Court's ruling in *Taylor*. The rulings in *Reed* and *Hyman* were decided prior to *Taylor* and involved debtors with non-exempt equity. *Alsberg* blindly follows *Hyman* and fails to even consider the effect of *Taylor*. A process, such as that advocated by *Reed* and *Hyman*, that leaves the debtor and their residence in limbo until the case is closed runs counter to *Taylor,* which held the purpose of a short objection period was to encourage finality.

If exemptions are to be considered based on value as of the date of the petition as required by section 522(a)(2), then even under California law debtors in the same situation as the Chappells should be able to exempt their entire interest in their residence. The "existence of exemptions presupposes a hypothetical attempt by the trustee to levy upon and sell all of the debtor's property upon the filing of the petition." *In re Herman*, 120 B.R. 127, 129 (B.A.P. 9th 1990). Under California exemption law, a homestead is exempt from forced sale if the total of all liens and encumbrances plus the homestead amount exceed the value of the home. CAL. CIV. PRO. CODE § 704.720(a); 704.800. Since a judgment creditor would be unable to sell the debtors' property as of the date of the petition, the trustee should have no greater rights. Although, as argued below, this case is distinguishable from cases under California law, *Amicus* believes that if this court does find *Alsberg* to be a viable precedent, it should be overruled, *en banc* if necessary, for the reasons set forth in this brief.

In contrast to these cases based on the California homestead exemption, this case involves the federal homestead exemption in 11 U.S.C. § 522(d)(1). This exemption permits the debtor to exempt, "[t]he debtor's aggregate interest, not to exceed $18,450 in value, in real property or personal property that the debtor or dependent of the debtor uses as a residence."[6] Thus unlike the California exemption that applies to "proceeds of sale," the federal exemption applies to an "interest…in real property." *Compare* CAL. CIV. PRO. CODE § 704.720 *with* 11 U.S.C. § 522(d)(1). Courts have recognized the distinction between real property and proceeds from the sale of real property under section 522(d)(1). In *Buick v. Makaroff*, 237 B.R. 607 (Bankr. W.D. Pa. 1999), the court granted a debtor's exemption of proceeds from the post-petition sale of a homestead under section 522(d)(1), "notwithstanding that only realty, and not proceeds derived from a sale thereof, is described as subject to exemption under § 522(d)(1)." *Id.* at 609; *see also Jones*, 357 B.R. at 892 (finding the California exemption statute to be "significantly different" than the Georgia

[6] The dollar limitation applies separately with respect to each debtor in a joint case. 11 U.S.C. § 522(m). The Chappells, who filed a joint case, are permitted to double the applicable exemptions. There is no dispute that the value of the homestead exemption claimed by the Chappells on Schedule C was less than the maximum value they were permitted under section 522(d)(1). The dollar amount of the exemption has since increased pursuant to 11 U.S.C. § 104(b), but that increase is not applicable in this case.

exemption statutes, which "use language adapted from the federal exemption" in section 522(d)(1)).

The Chappells claimed as exempt the entire interest in their property as of the date of the petition. Pursuant to Schedule C, the debtors listed a value for that exemption ($21,511.25). Valuing the exemption as required by the Official Form does not transform the debtors' claimed exemption into one for a sum certain as the Bankruptcy Appellate Panel found. *See Chappell*, 373 B.R. at 78. Unlike the debtors in *Reed*, *Hyman* and *Alsberg*, the Chappells did not assert an exemption merely in the proceeds from the sale of their homestead. Therefore, even if *Alsberg* would be controlling in a case decided under California exemption law, it is not applicable here.

IV. The Bankruptcy Appellate Panel's decision shifts the responsibility for the expeditious administration of the bankruptcy estate from the trustee to the debtor, undercutting the goal of finality in bankruptcy cases.

A. Abandonment of the debtors' homestead was not necessary in this case to remove the property from the estate.

Fully exempt property is removed from the property of the estate by operation of law: abandonment[7] is not necessary. *Bell*, 225 F.3d at 215 ("It is well-settled law that the effect of this self-executing exemption is to remove property from the estate and to vest it in the debtor"). In this case, there was no need, contrary to the BAP's suggestion, for the trustee or the debtor to seek abandonment of the property. *See In re Hahn*, 60 B.R. 69, 72-73 (Bankr. D. Minn. 1985)(abandonment by trustee unnecessary where debtors' homestead exemption had already been allowed by the running of the 30-day objection period after the meeting of creditors).

B. Once debtors have fulfilled their duties under the Bankruptcy Code, the trustee, not debtors, are responsible for the expeditious administration of the estate.

[7] Section 554 of the Bankruptcy Code provides the means for parties in interest, most commonly the trustee, to divest the bankruptcy estate of property. Abandonment is accomplished in one of three ways: 1) it is initiated by the trustee; 2) a party in interest may request the court to order abandonment of particular property; and 3) any scheduled property that remains unadministered at the close of the case is deemed abandoned unless a court orders otherwise. 11 U.S.C. § 554.

According to the BAP, blame for the loss of the Chappells' homestead falls squarely on the Chappells themselves because they did not take affirmative steps to have the property abandoned by the trustee. *Chappell*, 373 B.R. at 82-83. This is an extraordinary conclusion that immediately shifts the responsibility for the expeditious administration of the bankruptcy estate from the trustee to the debtor, concomitantly undercutting the goal of finality in bankruptcy cases. *See* 11 U.S.C. § 704(a). In this case, the Chappells filed their petition and schedules on June 30, 2004 and received their discharge on October 23, 2004. ER.49, ER.50. The trustee, however, made no indication of his intent to liquidate the debtors' residence until July 26, 2006—more than two years after the debtors filed their bankruptcy case and more than 20 months after the debtors received their discharge. *Chappell*, 373 B.R. at 75; ER.55.

The solution urged by the BAP—that debtors must extricate their property from the estate—fails to take into account the challenges faced by parties other than the trustee who must seek a court order to force abandonment of property. For example, in *In re Bolden*, the court stated that:

> An order compelling abandonment is the exception, not the rule. Abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset. *Morgan v. K.C. Machine & Tool Co.*, 816 F.2d 238,

> 246 (6th Cir. 1987). Where the benefits of administration exceed the costs of the administration, abandonment should not be compelled. *Id*. In *K.C. Machine & Tool Co*., the court stated, 'Absent an attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should be very rarely ordered.' *Id*.

In re Bolden, 327 B.R. 657, 667 (Bankr. C.D. Cal. 2005). In essence, the debtor must demonstrate that the property is of no "material benefit" to the estate to obtain an order of abandonment. *Id*. at 668. Based on the BAP decision below, which allows the trustee to sit on property indefinitely without consequence, it is unclear how debtors would ever meet their burden to demonstrate the property is of no "material benefit" in an appreciating market. Courts, creditors, and trustees would simply be able to wait debtors out in order to capture future appreciation. As in this case, debtors would be forced to make mortgage payments (which builds equity) in order to avoid foreclosure by the mortgagee, only years later to have their equity stripped from them by the trustee.[8]

[8] An unbending rule that all appreciation in property inures to the benefit of the estate if that property is partially exempt and partially non-exempt does not take into account an increase in equity resulting from debtor's effort to reduce the amount of consensual liens. *See, e.g., Hyman*, 967 F.2d 1316, 1318 (9th Cir. 1992). Indeed, despite the fact that the Chappells continued to pay their mortgage, the BAP did not suggest that they would be credited for any equity resulting from the reduction of consensual liens. Failure to credit the Chappells, or any debtor, for equity gained in this manner certainly violates the section 541(a)(6) bar on pulling post-petition wages into the bankruptcy estate.

C. The failure of the trustee to act diligently comes at a heavy cost, and it is one that the debtors should not have to bear.

Under the Bankruptcy Code, debtors have a duty to file accurate and complete schedules of assets and liabilities at the time of the petition. *See* 11 U.S.C. § 521(a)(1)(B)(i). The debtor is also required to provide a list of property claimed as exempt. *See* 11 U.S.C. 522(l). The chapter 7 trustee is responsible for, *inter alia*, investigating the financial affairs of the debtor and collecting and reducing to cash the property of the estate. 11 U.S.C. § 704(a)(1), (a)(4). The trustee is also charged with closing the estate as "expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a)(1); *see also* FED. R. BANKR. P. 1001 ("rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding). Parties in interest include the debtor as well as creditors. *See* FED. R. BANKR. P. 2002(a); *In re Kazis*, 257 B.R. 112, 114 (Bankr. D. Mass. 2001). Although courts have given trustees a reasonable amount of time to determine if the property is burdensome or of inconsequential value, there comes a point at which the trustee must either "fish or cut bait." *See In re Ira Haupt & Co*., 398 F.2d 607, 613 (2d Cir. 1968). "The trustee cannot… simply sit back and wait for the debtor to finally force the issue through the abandonment process." *Anderson*, 357 B.R. at 472.

The failure of the trustee to act diligently comes at a heavy cost, and it is one that the debtors should not have to bear. A debtor's fresh start is only feasible if the debtor emerges from bankruptcy with the means of providing the necessities of life, including a roof over their heads. If the trustee, who failed to provide any notice of an intent to liquidate the debtors' residence during the two years following the filing of the petition, prevails in his case, the Chappells—who have done everything required of them by the Code, Rules and Official Forms to fully exempt their property—will lose their home.

D. Requiring debtors to move for abandonment of property that is fully exempt on the petition date contradicts the fresh start policy of the Bankruptcy Code and the policy of homestead exemptions.

Homestead acts across the country promote the stability and welfare of the state by ensuring that each citizen may have a home where the family may be sheltered and live beyond the reach of financial misfortune. *See, e.g. In re Dependency of Schermer*, 169 P.3d 452, 465 (Wash. 2007); *Public Health Trust of Dade County v. Lopez*, 531 So.2d 946, 948 (Fla. 1988). The purpose of homestead exemptions requires that they be construed liberally in favor of the debtor. *See In re Kwiecinski*, 245 B.R. 672, 675 (10th Cir. B.A.P. 2000); *In re McCambry*, 327 B.R. 469, 472 (Bankr. D. Kan. 2005); *In re Melber*, 315 B.R. 181, 189 (Bankr. D. Mass. 2004). This maxim applies

equally to state and federal homestead provisions. *See In re Russell*, 80 B.R. 662, 664 (Bankr. D. Vt. 1987).

The decision by the Bankruptcy Appellate Panel below, which creates incentives for trustees to delay and leaves debtors' homesteads in limbo indefinitely, runs counter to the underlying purpose of the homestead acts and of the Bankruptcy Code's fresh start and finality policies. Importantly, the ruling prevents debtors from knowing whether or not they will lose their home if they file a chapter 7 bankruptcy case. Especially in a rising real estate market, many debtors, even those with almost no equity on the date of the bankruptcy petition, would be unable to file a chapter 7 case without the risk of losing the family's home. This uncertainty impedes debtors' ability to make intelligent and informed decisions about filing for bankruptcy. In addition, it would force debtors to incur additional costs in seeking abandonment, and it would promote uncertainty over finality.

All of these results would greatly increase both the monetary cost of bankruptcy and the emotional costs of filing a bankruptcy case, ultimately impairing access to the fresh start Congress intended to afford to honest debtors. It is for these reasons that the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure provide a speedy process in which final

decisions on exemptions are to be made. The BAP decision, which contradicts these provisions and policies, should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the decision of the Bankruptcy Appellate Panel should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2008 an original and 15 copies of the foregoing Brief of *Amicus Curiae* in Support of Appellant and Reversal were sent to the Clerk for the Ninth Circuit Court of Appeals via Federal Express and two copies mailed, first-class, postage paid, to counsel listed below:

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