

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DWIGHT H. OWENS., Petitioner

v. HELEN OWEN

CASE NO: 89-1008

PLACE: Washington, D.C.

DATE: November 5, 1990

PAGES: 1 - 33

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IN THE SUPREME COURT OF THE UNITED STATES

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DWIGHT H. OWEN, :
Petitioner :
v. : No. 89-1008
HELEN OWEN :
- - - - - X

Washington, D.C.
Monday, November 5, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:52 p.m.

APPEARANCES:
ROBERT L. FISHELL, ESQ., Sarasota, Florida; on behalf of the Petitioner.
TIMOTHY B. DYK, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

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14
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16
17
18
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20
21
22
23
24
25

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
ROBERT L. FISHELL, ESQ.	
On behalf of the Petitioner	3
TIMOTHY B. DYK, ESQ.	
On behalf of the Respondent	19
<u>REBUTTAL ARGUMENT OF</u>	
ROBERT L. FISHELL, ESQ.	
On behalf of the Petitioner	32

1 property was not immune by reason of the exemption to the
2 attachment of a lien which they attached to the property
3 prior to the time that the exemption was obtained.

4 Now each of the cases, each of the decisions
5 below, the bankruptcy court, the district court, and the
6 court of appeals concluded essentially that the lien was
7 not avoidable because the property was not exempt in the
8 sense that the lien, having attached prior to the time of
9 the exemption right, rendered the property an exception to
10 the homestead exemption.

11 QUESTION: That was the way South Carolina law
12 treated it, wasn't it?

13 MR. FISHELL: That is Florida law.

14 QUESTION: Oh, I am sorry, Florida law.

15 MR. FISHELL: That's purely an expression of the
16 way Florida law treated it. As you will note in the
17 bankruptcy court decision, the critical part of the holding
18 there asserts or states virtually the precise application
19 of Florida law without any effect being given to 522(f).
20 The court of appeals' decision specifically stated that,
21 that the property was specifically subject to this
22 exception, meaning a lien attaching prior to the right of
23 the homestead remained subject to that lien and could be
24 enforced despite the later acquisition in the homestead
25 right.

1 Now that leads us to the central issue involved
2 in this case. If, whether or not it is permissible for
3 State law to define as an exception to the exemption a
4 property encumbered by the lien. In other words, the only
5 reason the property is defeated as to the exemption is by
6 virtue of the attachment of the lien. Now the lien is --

7 QUESTION: Well, Mr. Fishell, could, could a State
8 decide that it wasn't going to allow an exemption at all for
9 homesteads?

10 MR. FISHELL: I see nothing wrong, I see nothing
11 wrong with that conclusion. In other words, I don't believe
12 that it would be impermissible for a state to determine that
13 it was not going to allow the homestead exemption, period.

14 QUESTION: And if it did that, then there wouldn't
15 be any relief available under 522(f)?

16 MR. FISHELL: Absolutely. It wouldn't come into
17 play at all, because there would be no exemption upon which
18 this particular judicial lien had attached. Consequently
19 the lien avoidance would not come into play, and this case
20 would not be here. The fact of the matter is that Florida
21 law provides for the homestead exemption. On the date that
22 this debtor filed his petition he was entitled to assert
23 that exemption.

24 QUESTION: Well, that Florida law -- Florida law
25 at the time this bankruptcy was filed provided that this

1 homestead was not exempt. It provided that it was subject
2 to a lien. So you can't say that it was just totally
3 exempt.

4 MR. FISHELL: Well --

5 QUESTION: Wasn't that true under Florida law?
6 That lien was enforceable despite the homestead exception?

7 MR. FISHELL: The lien -- yes, Your Honor. The
8 lien remains enforceable as to a preexisting judicial lien
9 under State law.

10 QUESTION: Well, to that extent the -- this
11 property was not exempt.

12 MR. FISHELL: But only to that extent was it not
13 exempt, only as to this particular creditor. The attachment
14 of a lien does not have the effect of rendering the
15 homestead exemption unavailable for all purposes to a debtor
16 who later qualifies for the homestead, even if the property
17 already has a lien attached.

18 QUESTION: You think, then, you think a State
19 couldn't say, well, we grant a homestead exemption, but,
20 except that all mechanics liens will be good against the
21 homestead?

22 MR. FISHELL: Well --

23 QUESTION: Yes or no?

24 MR. FISHELL: I think they could. I am not, I am
25 not suggesting --

1 QUESTION: So they could say, they could say sure,
2 we have a homestead exemption that is good against all liens
3 except mechanics liens?

4 MR. FISHELL: Your Honor, I'm not suggesting that
5 the Florida --

6 QUESTION: And then how about in bankruptcy then?

7 MR. FISHELL: I am not suggesting that the Florida
8 statute regarding -- or the Florida decision law regarding
9 homestead exemptions is in any sense invalid. The issue
10 here is really whether or not this is going to survive
11 through the lien avoidance mechanism in the bankruptcy
12 proceedings. There is nothing wrong with Florida deciding
13 that they are not going to allow an exemption for a
14 particular creditor, and that is all this is.

15 They are not going to allow an exemption for a
16 particular creditor to be -- to deny that creditor a right
17 against the property. But at the same time that doesn't
18 prevent the -- the homesteader from achieving homestead
19 status for the property, which he could protect against the
20 wide world, other than this creditor. Florida is perfectly,
21 it is perfectly all right for them to allow such a
22 protection for a given creditor.

23 That is not the end of the question, though. The
24 issue then becomes what is the effect of 522(f) once the
25 bankruptcy petition is filed? Now when we focus on that we

1 note that this is a judicial lien, it has not been
2 challenged, it is being anything other than that. On the
3 date that the debtor filed his petition he was entitled to
4 the exemption generally under Florida law. The bankruptcy
5 court acknowledged this.

6 QUESTION: But to say he was entitled to the
7 exemption generally really doesn't say a whole lot, does
8 it? I mean, he was not entitled to have the exemption
9 supersede the preexisting lien.

10 MR. FISHELL: Under State --

11 QUESTION: Under State law.

12 MR. FISHELL: Under State law, Your Honor, that
13 is correct. That is correct. But the real problem here is
14 if this State law rule carries over into bankruptcy, then
15 we have destroyed any effectiveness of the lien avoidance
16 provision in bankruptcy. Because if it were permissible for
17 Florida to say by decision law, which it has, that this
18 particular lien is going to be enforceable despite the later
19 acquisition of the homestead right, then that situation
20 carried over into bankruptcy is going to defeat the
21 effectiveness of 522(f). The only --

22 QUESTION: Well, I think -- why didn't Congress
23 intend that by permitting a State to opt out of the Federal
24 scheme and specify its own exemptions?

25 MR. FISHELL: Well, Your Honor --

1 QUESTION: You would think they would have
2 contemplated that the State could quali -- could define the
3 exemptions they were granting in any way they wanted to.

4 MR. FISHELL: Well, Your Honor, they did in a
5 sense, Congress did in a sense allow States to opt out.
6 But the opt out is essentially limited to the types and
7 quantities of property that may be exempted in bankruptcy.
8 They allow States to choose their own. There is no question
9 about that. Florida has done so, but Florida -- the Florida
10 statute, which in effect opts Florida out of the bank, of
11 the Federal exemptions, makes no reference to attempting to
12 opt out of the lien avoidance provision of 522(f). It is
13 silent on that. You don't --

14 QUESTION: I guess that is why the case is here.

15 MR. FISHELL: Yes, Your Honor, I think so. So I
16 don't think, I don't think we have Florida -- Florida hasn't
17 made any attempt to evade or opt out of the lien avoidance
18 provision. It has only opted out of the list of quantities
19 and types of property on which an exemption may be enjoyed.
20 Now, if, if we have, as we do here, a situation where the
21 exception to the exemption, which is in this case the lien
22 encumbered -- the lien, the encumbrance, if that is an
23 exception to the exemption, then it no longer is the
24 impairment of the exemption, was in the application of
25 522(f). If it disappears as an impairment, then the, the

1 concept of impairment disappears. The exception takes it
2 out of, out of the realm of property upon which the lien
3 avoidance could be applied.

4 I don't think that Congress ever intended that a
5 State would be entitled to define its exemptions in such a
6 way that it could defeat the operation of another section
7 of the code.

8 QUESTION: Do you give any significance to the
9 introductory clause of 522(f), notwithstanding any waiver
10 of exemptions? That is really not necessary under your
11 view, is it, under the way you read the statute?

12 MR. FISHELL: Well, Your Honor, the --

13 QUESTION: Or is it? Am I wrong?

14 MR. FISHELL: Some State statutes have, have
15 defined their exemption laws in such a way that certain,
16 certain acts or agreements undertaken between the creditor
17 and the debtor have the effect of waiving an exemption or
18 waiving a protection in bankruptcy that might be, that might
19 be, might have been accorded the debtor in the particular
20 property.

21 QUESTION: Those aren't taken care of by 522(e)?

22 MR. FISHELL: No, Your Honor, I don't -- 522(f)
23 I think is broad enough to cover any kind of exemption that
24 --

25 QUESTION: But is it needed in light of 522(e),

1 under your view, under your interpretation? I don't, I
2 don't see what force and effect it has. It's a transition
3 from the previous section.

4 MR. FISHELL: Well, in other words, even a
5 voluntary relinquishment of a protection that the debtor
6 might have under State law wouldn't preclude him from
7 asserting his exemption rights once bankruptcy is filed and
8 lien avoidance is sought.

9 QUESTION: All right.

10 MR. FISHELL: That --

11 QUESTION: How critical is the language in the
12 statute 522(f) that refers to an exemption to which the
13 debtor would have been entitled?

14 MR. FISHELL: Well, I think that is significant
15 if you look at it from the point of view that there must be
16 some reason for the lien avoidance remedy that Congress
17 enacted. That is probably a recognition that there are
18 reasons, liens arising under State law which would impair
19 exemptions -- there might, there would be some reason why
20 the State law would have the effect of denying a debtor the
21 right to use the exemption and protect his exemption through
22 bankruptcy, and thus deny him the full benefit and meaning
23 of his fresh start.

24 I think the -- I think both the Senate and House
25 versions with respect to the legislative history indicate

1 that the lien was, the lien could be avoided, and that it
2 was intended to operate where the debtor could have enjoyed
3 an exemption in the absence of the lien. It was a
4 recognition that a lien normally or otherwise unaffected by
5 the bankruptcy discharge would pass through and remain
6 attached to the exempt property, and it would frustrate the
7 debtor's fresh start.

8 It was, I believe under the bankruptcy act, there
9 was essentially no remedy for avoidance of liens that
10 attached to property prior to bankruptcy. In other words,
11 the bankruptcy discharge had no effect on liens. They
12 passed through, the creditor was free to assert his rights
13 as a secured creditor following bankruptcy, and the fresh
14 start was less than fresh. I think that is, I think if, if
15 we permit, if we permit or fail to independently apply the
16 lien avoidance provision to the State exemption definitions,
17 that we will run the risk of having the result that we have
18 here.

19 The State specifically excepts from its exemption
20 as to this creditor a lien attaching -- if lien avoidance
21 is not independently applied to the State exemption scheme,
22 then the exception to the exemption, as noted by the court
23 of appeals in this case, they concluded it was an exception
24 to the exemption, if the lien is the exception to the
25 exemption, then it is taken out of the application of lien

1 avoidance, because the exception makes it impossible to
2 assert the exemption.

3 QUESTION: Mr. Fishell, do you, do you give any
4 weight to the fact that 522(f) does not say notwithstanding
5 any waiver or exemption that the debtor may avoid a lien on
6 the interest of the debtor? It says the debtor may avoid
7 the fixing of a lien. Is, is that at all a suggestion that
8 it's only talking about, it is not referring to liens that
9 have attached earlier, before the bankruptcy proceeding?

10 MR. FISHELL: No, Your Honor, I don't, I don't
11 think that that -- I don't think that that refers to a
12 situation where a lien -- if it, if it is in essence a
13 prospective fixing of the lien, this may in many ways be an
14 unrealistic view in the sense that if a debt is discharged
15 it may not constitute a lien postpetition. In other words,
16 I am sure that the lien attaches at some point. If it
17 attaches prepetition, then it can constitute an impairment
18 to the exemption. Does that answer your question, Your
19 Honor?

20 QUESTION: Yes, I think -- I think I, I think
21 I -- I understand what you are saying, but I don't
22 under -- I don't understand why the, why the statute is
23 phrased the way it is. One would have thought they would
24 have just said the debtor may avoid a lien on the interest
25 of the debtor, but it doesn't. It says, may avoid the

1 fixing of a lien. It's sort of a strange phrase. Maybe it
2 means nothing, which is essentially what you say, it doesn't
3 mean anything.

4 MR. FISHELL: Well, I don't -- all I am suggesting
5 is that I don't, I don't think that it had to have referred
6 to a situation where the Congress contemplated the fixing
7 of a lien at some time postpetition. In other words, 522(f)
8 wouldn't apply until --

9 QUESTION: Um hum.

10 MR. FISHELL: -- a bankruptcy petition is filed.
11 And if it was only prospective in its application, I don't
12 think that's, I don't think that's what Congress had in
13 mind.

14 QUESTION: What did they have in mind? Do you
15 have any other meaning for the fixing of -- or are you
16 just -- I mean, maybe it doesn't have any --

17 MR. FISHELL: Well, I don't think, I don't think
18 that it necessarily cannot -- I don't think it's a situation
19 where it could not be read to apply to liens attaching prior
20 to bankruptcy. I don't see the significance of reading it
21 in such a limited fashion.

22 QUESTION: May I ask you another question just
23 referring to the language of 522(f). The avoidances of the
24 lien or the fixing of the lien, to the extent that such lien
25 impairs an exemption to which the debtor would have been

1 entitled under subsection (b). Now as I understand it, in
2 this case the property was exempt from the claims of general
3 creditors under subsection (b), which was, isn't -- didn't
4 it in effect keep the property out of the estate for
5 administration of bankruptcy purposes?

6 MR. FISHELL: That's, that is correct, Your Honor,
7 the bankruptcy.

8 QUESTION: So that there was no impairment of the
9 exemption. Even if the lien survived and the only remedy
10 of the creditors, the secured creditors' only remedy is a,
11 perhaps a State lawsuit or a postbankruptcy enforcement of
12 the lien, but the property was, you retain the entire
13 exemption from the bankruptcy proceedings. That's --

14 MR. FISHELL: Your Honor, the bankruptcy court
15 decision on that issue specifically did not determine --

16 QUESTION: I understand.

17 MR. FISHELL: -- this particular creditor's rights
18 with respect to the property.

19 QUESTION: But it did hold, as I understand it,
20 that the property was exempt from, it didn't have to be
21 listed, or whatever you do, as an asset of the estate.

22 MR. FISHELL: That's, that's correct. It allowed
23 it as a general exemption --

24 QUESTION: Which is, it seems to me -- that's the
25 complete exemption to which you are entitled if the property

1 was exempt. It was exempt from the claims of general
2 creditors and it couldn't be charged for the costs of
3 administration or anything like that. So it seems to me
4 under the language of it, I don't quite understand how you,
5 how you can say that the lien impaired the exemption. You
6 got the exemption.

7 MR. FISHELL: Well, the impairment exists because
8 under State law this property remains subject to this
9 particular creditor's lien.

10 QUESTION: Right. But that's independently of
11 the bankruptcy proceeding. The property is exempt from any
12 bankruptcy remedy.

13 MR. FISHELL: Well --

14 QUESTION: Maybe I, maybe I missed something in
15 that language.

16 MR. FISHELL: The lien avoidance provision is
17 specifically designed to avoid liens that impair exemptions.
18 Now the bankruptcy court determined that the debtor was
19 entitled to this exemption, this lien remains enforceable
20 under nonbankruptcy law following discharge unless this lien
21 is avoided. 522(f) gives that relief. It, the lien
22 is -- or, the exemption is impaired because the property
23 remains subject to the lien, and the lien is enforceable.
24 Therefore, if the lien is not avoidable under 522(f), the
25 creditor executes on the property and the debtor has lost

1 his homestead.

2 QUESTION: But not in the bankruptcy proceeding.

3 MR. FISHELL: No, sir. The -- if the lien is, if
4 for some reason the lien were not avoided, the creditor
5 would be able to proceed in State court and execute on the
6 property. But the lien avoidance is a Federal bankruptcy
7 remedy to preserve exemptions. Under the -- I think the
8 legislative history of these sections of the code, and as
9 early as the Commission on Bankruptcy Laws in 1973, there
10 was a great deal of concern about, about property, exempt
11 property, if you will, being lost following bankruptcy
12 because liens were not avoided, exemptions of themselves
13 didn't have the effect of insulating the property from, from
14 preexisting liens. There was no lien avoidance remedy prior
15 to the code.

16 I think the lien avoidance was a specific Federal
17 remedy designed to enhance the debtor's fresh start, and to
18 assure that the property, if it was exempt and for some
19 reason remains subject to a lien, a lien could be avoided.
20 Now, the lien avoidance remedy applies to only very specific
21 kinds of liens, (f)(1) and (f)(2). The (f)(1) is the
22 nonconsensual judicial lien. (f)(2) is a more limited
23 remedy.

24 I think, I think that if this Court does not
25 recognize that this lien is impaired, or this exemption is

1 not impaired, it is only not impaired because the court of
2 appeals has concluded that there is an exception for lien
3 encumbered property. If it is lien encumbered property that
4 falls within the confines of (f)(1), where, where will
5 (f)(1) apply if State law or State legislatures can create
6 exceptions to the exemption schemes which include
7 definitions that take the property out of the operation of
8 522(f). (f) would be rendered a useless and meaningless
9 remedy if the definitions could include exceptions for lien
10 encumbrances.

11 I'd like to reserve the rest of my time, Your
12 Honor.

13 QUESTION: Very well, Mr. Fishell. Mr. Dyk, we'll
14 hear now from you.

15 ORAL ARGUMENT OF TIMOTHY B. DYK

16 ON BEHALF OF THE RESPONDENT

17 MR. DYK: Mr. Chief Justice, and may it please
18 the Court:

19 Florida is known in the bankruptcy parlance as a
20 debtors' State, and it is called that because it is
21 unusually generous in terms of the exemptions that it
22 grants. Under the Federal scheme of exemptions in 522(d),
23 only 20, only \$7,500 would be available for a homestead
24 exemption. In Florida there is an acreage limitation, but
25 the amount is unlimited. Now, essentially what the

1 petitioner in this case is suggesting is that Congress, in
2 section 522(f), was intending to force the States to be more
3 generous than they decided to be. I think there is --

4 QUESTION: Mr. Dyk, is the Florida homestead
5 allowance, is it of a specific dollar amount or is it of a,
6 is it of a piece of property?

7 MR. DYK: It's a piece of property. In rural
8 areas it's 160 acres, in urban areas it's a half an acre.
9 And what you have here with respect to the first argument
10 that we make in this case, and that is that there is no
11 exemption on which 522(f) can operate, is an agreement
12 between the petitioner and respondent that to the extent
13 that this property is covered by a lien it is simply not
14 exempt by virtue of section 522(b). There is no exemption
15 to the extent that the property is covered by a lien. And
16 our suggestion is that 522(f) simply has nothing on which
17 to operate under these circumstances, because it only
18 applies when it would impair an exemption to which the
19 debtor is otherwise entitled. There isn't any exemption --

20 QUESTION: Wasn't there a, didn't the bankruptcy
21 court decide that there wasn't a exemption? I suppose when
22 you file here you have to file the schedule of your property
23 and you have to make a specific claim about, that some
24 property is exempt.

25 MR. DYK: The, the bankruptcy court --

1 QUESTION: Yes, yes, yes. And didn't your client
2 object to this claim?

3 MR. DYK: Yes.

4 QUESTION: And the bankruptcy court rejected that.

5 MR. DYK: No, not quite --

6 QUESTION: Well --

7 MR. DYK: What the bankruptcy --

8 QUESTION: Well, you objected to it, but you
9 didn't win.

10 MR. DYK: No. Well, what, what the bankruptcy
11 court did, and I am not sure that this opinion of the
12 bankruptcy court is in the appendix to the petition, but
13 what the bankruptcy court said was this property is exempt
14 from the claims of unsecured creditors, and I am not going
15 to decide initially --

16 QUESTION: Well, that's right, but that's -- I
17 know the lien avoidance was not at issue at that time.

18 MR. DYK: Yes, it was.

19 QUESTION: Well, he didn't decide it, anyway.

20 MR. DYK: He didn't --

21 QUESTION: He said that, he said that this
22 property was exempt under Florida law in this bankruptcy
23 proceeding from the claims of general creditors, and was
24 not subject to the general administration of the trustee.

25 MR. DYK: That's correct. And what happened was

1 when the exemption was claimed, the respondent filed an
2 objection to that exemption on the very ground that we are
3 talking about now. The respondent said there is no
4 exemption available here to the extent that this property
5 is subject to the lien, because that is the way Florida law
6 defines the exemption. And the bankruptcy court, in our
7 view, didn't quite look at it correctly. It said well, I
8 am going to rule that there is an exemption, but I am not
9 going to decide the lien question. In our view --QUESTION:
10 We didn't appeal that order, I guess?

11 MR. DYK: I don't think it was appealable, because
12 it wasn't an adverse judgment against us. He hadn't decided
13 the lien question. There wasn't a final judgment that would
14 have been appealable.

15 QUESTION: Well, literally he cited against you
16 by saying that there was an exemption. You say there wasn't
17 an exemption.

18 MR. DYK: No, he reserved the question of whether
19 --

20 QUESTION: I know, but -- you, you, just a while
21 ago you said that, you said that this property just wasn't
22 exempt.

23 MR. DYK: That's correct.

24 QUESTION: There wasn't anything for 522(f) to
25 operate on.

1 MR. DYK: That's correct, and that is what we said
2 in the bankruptcy court. And he, and what he said was well,
3 I am going to view this as exempt from the claims of general
4 creditors, but I am not going to reach the question of what
5 the effect of that is on the lien. There wasn't -- he
6 reserved that for the future. He didn't decide that until
7 some future time.

8 QUESTION: What sort of a -- what phase of the
9 bankruptcy proceedings was it that the bankruptcy judge made
10 this particular finding?

11 MR. DYK: Very -- early in the bankruptcy
12 proceedings. What, what happens is there is a schedule of
13 property filed as part of the bankruptcy petition. The
14 condominium that is at issue here was listed there and an
15 exemption was claimed for it.

16 QUESTION: Right on, right on the schedule?

17 MR. DYK: Right on the schedule. And there was
18 an objection, as required by the rules, filed --

19 QUESTION: By your client?

20 MR. DYK: Yes. There was an objection filed with
21 respect to that exemption on the ground that there was no
22 exemption available under Florida law to the extent of the
23 lien. And the bankruptcy court ultimately got around to
24 resolving that question in a later ruling in the course of
25 the case rather than in this earlier ruling.

1 QUESTION: Yes, but, let me just stop you, if I
2 may. If the property worth more -- had been, I don't know
3 what the facts are, worth more than the amount of your
4 client's claim, so that theoretically there would be a
5 portion available to the claims of general creditors, at
6 least it is established that the property was that, to that
7 extent exempt.

8 MR. DYK: Oh, absolutely. There is not question
9 about that.

10 QUESTION: So then if it's, if it's at least in
11 the category of exempt property, why, how do you get around
12 the language of 522(f) that the only thing that, about the
13 exemption that wasn't impaired is the lien, to the extent
14 that such lien impairs an exemption, to which --

15 MR. DYK: Justice Stevens, I was not agreeing that
16 it is exempt property. The way Florida defines the
17 exemption, it is exempt property only to the extent that it
18 is not covered by the preexisting lien. It is not exempt
19 to the extent that it's covered by the preexisting lien.
20 What Congress did in 522 was to --

21 QUESTION: In other words, the condominium is
22 treated as though it were two separate parcels. One parcel
23 is exempt, that is the part that the general creditors are
24 trying to reach, and the other parcel is nonexempt.

25 MR. DYK: Right. And just as the -- Florida could

1 have decided to, instead of having a half-acre exemption,
2 it could have a quarter-acre exemption, or an
3 eighth-of-an-acre exemption. It has decided to define this
4 in terms of property which is subject to preexisting lien
5 and property which isn't.

6 QUESTION: The problem I have with that is the
7 language of the statute refers to an interest of the debtor
8 in property to the extent that such lien impairs an
9 exemption, and so forth, which seems to me to assume for
10 purposes of that language that the amount of the lien is
11 less than the total value of the property.

12 MR. DYK: Well, I --

13 QUESTION: It talks about to the extent of the
14 impairment.

15 MR. DYK: Well, I think in many cases it, the
16 amount of the lien will be less than the total amount of
17 the property, just apparently it doesn't happen to be the
18 case here. What --

19 QUESTION: Well, but not, not under your view,
20 because you say there are really two kinds of property.

21 MR. DYK: There are two kinds of property. In
22 this particular case it is probable that the lien was
23 greater than the amount of the property. So, in Justice
24 Stevens' hypothetical, there wasn't any property which would
25 qualify for the exemption here, because it was all subject

1 to a lien. In most situations the property probably would
2 be greater in value than the amount of the lien, but that
3 didn't happen to be the case here.

4 And what Congress was concerned about, the
5 petitioner has suggested that 522(f) is meaningless if our
6 construction is adopted. What Congress was concerned about
7 here was several things. First of all, it was concerned
8 with the rule of Long against Bullard, this ancient Supreme
9 Court case which said that even if there is an exemption,
10 that as a matter of Federal law, apparently, that the lien
11 is going to be preserved. And Congress, when it enacted
12 522, decided to adopt the rule of Long v. Bullard as a
13 general matter, and you see that in 522(c), and to preserve
14 most liens. In particular it decided to preserve purchase
15 money mortgages and liens, but to carve out an exception
16 from the rule of Long against Bullard in the case of these
17 judicial liens and nonpurchase money, nonpossessory liens.

18 And what it was doing in that respect was trying
19 to serve State policy in those States that had opted out of
20 the Federal exemptions to, where a State did not define the
21 property in the limited way that Florida did here, it,
22 Congress decided to assist State policy by voiding the lien.
23 And 522(f), of course, had other purposes also, because
24 there is the alternative list of Federal bankruptcy
25 exemptions. 522(f) operates with respect to that. There

1 are Federal nonbankruptcy exemptions. It operates with
2 respect to that. And there are liens created by States
3 outside of the debtor's domiciliary State, and 522(f)
4 operates with respect to those also. So it's a meaningful
5 provision in all of these respects, if you would opt our
6 interpretation.

7 QUESTION: Mr. Dyk, to prevail, do you have to
8 read the, the 522(f) language would have been entitled as
9 is entitled?

10 MR. DYK: No. No, Justice O'Connor. I think it's
11 a question of what the would is referring to. I think it
12 does not mean would have been entitled if Florida had been
13 more generous in defining its exemptions. That is not what
14 the would means. Would have been entitled means would have
15 been entitled, except for the rule of Long against Bullard,
16 in other words this Federal lien preservation policy. So
17 that's, that's what the meaning of the word would is in
18 there.

19 And as far as Justice Scalia's question about
20 fixing, the use of the word fixing, I don't attribute any
21 significance to that either. A lot of people puzzled about
22 that. It can't mean prospectively, because the automatic
23 stay provision in section 362 of the code would prevent the
24 fixing of the judicial lien after the filing of a bankruptcy
25 petition. So it has to be referring to past --

1 QUESTION: Is the first phrase, notwithstanding
2 any exemption of -- any waiver of exemptions, necessary just
3 for absolute clarity?

4 MR. DYK: Well, I think, I think what -- there is
5 a question as to whether, for example, a State would have
6 the power to allow people to waive exemptions. The answer
7 to -- and that is dealt with in the clause that you read and
8 also in section 522(e) --

9 QUESTION: (e), yes.

10 MR. DYK: -- which also talks about waivers. I
11 think that's a rather different question than we have in
12 this case, and a somewhat difficult one in view of some of
13 the past Supreme Court cases dealing with the issue of
14 waiver. But that's a, a separate question which the Court
15 may have to save for some other day. But in terms of the
16 ability of the State to define property, that's what the
17 controversy was all about between the House and the Senate
18 in enacting section 522. And the Senate essentially won
19 out and the States were given the right to define what is
20 property for purposes of the exemption, what the exemption
21 should be, and the effort to federalize the exemptions
22 essentially failed.

23 Florida has the right to define the exemption.
24 It has opted out of the Federal exemption scheme. And so
25 it has defined the exemption not to include property to the

1 extent of the lien, there is nothing on, which 522 can offer
2 it.

3 QUESTION: Could you, I know you did it already
4 and I just didn't follow part of your discussion, could you
5 give me an example of the avoidance of a judicial lien to
6 which this language applies?

7 MR. DYK: Yes, Justice Stevens. Let's suppose,
8 for example, the State had created a \$400 exemption for
9 personal property, and the consequence there is that an
10 individual comes into bankruptcy and he decides, he
11 designates which \$400 worth of property he would like to
12 exempt. Now under State law, some of that property may come
13 into bankruptcy subject to liens. 522(f) says, under those
14 circumstances, if the State has a \$400 exemption you are
15 going to avoid the judicial liens and nonpossessory,
16 nonpurchase money liens in that property. That is not a
17 situation in which a State has made a choice, such as
18 Florida's, to preserve the lien. It has just been silent
19 about it. And that is fairly frequent.

20 The second part of our argument, of course,
21 relates to this interesting question of retroactivity, which
22 has occupied this Court in a number of occasions over the
23 last several years. And what we suggest is there's an
24 alternative ground, if you need to reach it, to affirm the
25 judgment below, and that is that Federal law should not be

1 construed to require the retroactive application of State
2 law. State law here is very clear that when there is a new
3 exemption created, as there was here for single people, that
4 it doesn't apply to preexisting liens. So under Florida
5 there's a rule against retroactivity of these exemptions.

6 In the Security Industrial Bank case, of course,
7 this Court determined that Federal law 522(f) should not be
8 construed to operate retroactively. We have
9 suggested -- and under the Kener case, Justice Holmes'
10 opinion in the Kener case, that Federal law should not be
11 construed as requiring that State law operate retroactively.
12 And that is essentially for the same reasons as this Court
13 articulated in Holt and Security Industrial Bank, and
14 articulated most clearly in the Kener case.

15 Unless there are further questions, I have nothing
16 further.

17 QUESTION: Thank you, Mr. --

18 QUESTION: Well, one question, if I may.

19 QUESTION: Excuse me.

20 QUESTION: Your interpretation does rather cut
21 against the fresh start policy, I suppose?

22 MR. DYK: I don't, I don't think it, it really
23 does, Justice O'Connor. The fresh start policy is not a
24 policy that the debtor carry all his property through
25 bankruptcy. It's a, it's a policy that he have a certain

1 amount of property to begin again. And the States are to
2 define what that property is, and some States are very
3 generous, the way Florida is, and some States are not so
4 generous. As I said at the beginning of my argument, I
5 don't think there is any indication in the legislative
6 history of 522 that Congress was somehow dissatisfied with
7 Florida's generosity and felt that something more was
8 required. If they hadn't done that they would have enacted
9 the mandatory Federal exemptions that were proposed, and
10 they would have increased, vastly increased the amount of
11 those exemptions. Florida is giving people much more than
12 the \$7,500 Federal exemption in the vast majority of these
13 cases.

14 QUESTION: May I ask you another question, and
15 along the same line? I gather under the fresh start policy
16 your client's claim against your opponent to the extent that
17 it exceeded the value of this property has been discharged?
18 It was not a nondischargeable debt?

19 MR. DYK: That is correct. There is no question
20 but that there is no personal liability of the debtor here.
21 The sole question is whether the property is going to pass
22 through bankruptcy with the lien intact or without the lien
23 intact.

24 QUESTION: And if the lien attaches, if the lien
25 survives and the value of the property fluctuates, how do,

1 how do we know the value of the lien when the debt has been
2 discharged? I am a little puzzled. Maybe I'm just stupid
3 about this, but I --

4 MR. DYK: Well, there's another provision of the
5 Bankruptcy Code, 506, which deals with this, if I understand
6 your question correctly. And under 506(d), if the lien
7 exceeds the value of the property at the time of the
8 bankruptcy, that that excess amount of the lien is voided
9 as a result of passing through bankruptcy. So if we had a
10 situation here where the property is worth \$135,000 and the
11 lien is \$158,000, as a result of the bankruptcy proceeding
12 the lien is reduced to \$135,000.

13 QUESTION: Now the bankruptcy proceeding is over,
14 isn't it?

15 MR. DYK: Yes.

16 QUESTION: So has that, has the amount of the,
17 the value of the lien been ascertained?

18 MR. DYK: I think the amount of the lien has been
19 ascertained at \$158,000. I don't think there was any
20 determination of the value. The value was listed at
21 \$135,000, and I don't recall that there was any dispute
22 about that.

23 QUESTION: I see. Okay, thank you.

24 QUESTION: Thank you, Mr. Dyk. Mr. Fishell, do
25 you have rebuttal?

1 REBUTTAL ARGUMENT OF ROBERT L. FISHELL

2 ON BEHALF OF THE PETITIONER

3 MR. FISHELL: Yes, Your Honor. Yes, Mr. Chief
4 Justice. The generosity or lack thereof the State chooses
5 to give is up to the State, and the Bankruptcy Code leaves,
6 leaves that as it is. But the lien avoidance remedy is
7 something that is Federally created. If you -- both the
8 Senate and the House versions of the legislative history
9 make it apparent that a lien was to avoided to the extent
10 that an exemption could be enjoyed in the absence of the
11 lien. I, the --

12 If this, if this, if this debtor's property is
13 executed on, he will be deprived of his exemption by a lone
14 creditor. This will not serve to benefit the general
15 administration of his estate. It will not serve to benefit
16 the larger share of his, of his creditors. This would not
17 in, by any stretch of the imagination, pardon me -- succeed
18 in giving this debtor a fresh start. This was a no asset
19 case. His lone asset is the homestead. Florida law gives
20 him the homestead. This lien is the only, the only thing
21 that takes that exemption away. This lien is precisely
22 within the definition of the terms and the conditions of
23 522(f)(1), and needs to be avoided.

24 If you permit State exceptions for lien encumbered
25 property to defeat 522(f), then we will return to precode

1 days where all liens passed through bankruptcy unavoids.
2 and the creditor -- and the debtor has no remedy, has no means
3 of securing the exemption to himself following his
4 discharge. That's the reason that I believe that, that if
5 this Court takes an independent application of 522(f) upon
6 whatever categories, quantities, or types of property that
7 a State has included within its list of exemptions, and
8 makes an independent application of the lien avoidance
9 provision above and beyond the list selected by the State,
10 then the lien must be avoided. If it is not, then the
11 exemption definitions created by the State will allow States
12 to evade the lien avoidance concept or remedy altogether.

13 Thank you, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fishell.
15 The case is submitted.

16 (Whereupon, at 2:39 p.m., the case in the
17 above-entitled matter was submitted.)

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CERTIFICATION

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#89-1008 - DWIGHT H. OWEN, Petitioner v. HELEN OWEN

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BY *Josephine Hulse*

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