

1 Marc S. Stern  
1825 NW 65<sup>th</sup> Street  
2 Seattle, WA 98117  
3 (206) 448-7996  
4 marc@hutzbah.com

Honorable Richard A. Jones

5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

8 In re:

No. 2:16-cv-01684-RAJ

9 DEBRA LEA WILSON,

10 Debtor.

11  
12 \_\_\_\_\_  
13 DEBRA WILSON,

14 Debtor-Appellant

15 v.

16 JAMES RIGBY, et al.

17 Appellees,  
18 \_\_\_\_\_  
19

BRIEF OF *AMICI CURIAE* NATIONAL  
CONSUMER BANKRUPTCY RIGHTS  
CENTER AND NATIONAL  
ASSOCIATION OF CONSUMER  
BANKRUPTCY ATTORNEYS IN  
SUPPORT OF DEBTOR AND SEEKING  
REVERSAL OF THE BANKRUPTCY  
COURT'S DECISION

20  
21  
22  
23  
24  
25 On Brief:  
26 J. Erik Heath, Esq.  
27  
28

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORTIES ..... iii

CORPORATE DISCLOSURE STATEMENT ..... vi

CERTIFICATION OF AUTHORSHIP ..... vi

I. STATEMENT OF INTEREST OF *AMICI CURIAE*..... 1

II. SUMMARY OF ARGUMENT .....2

III. ARGUMENT .....4

    A. The Function and Design of Property Exemptions Serve an  
    Important Public Policy.....4

    B. Debtors May Freely Amend Exemptions at Any Time, Even to  
    Capture Value Created Postpetition .....8

    C. The *Gebhart* Rule Does Not Support Trustee’s Proposal To  
    Limit Exemptions ..... 12

        1. *Gebhart* Only Concerns Appreciation Beyond  
        Exemption Limits ..... 13

        2. The Washington Homestead Exemption Falls  
        Outside of *Gebhart*. ..... 17

IV. CONCLUSION .....20

TABLE OF AUTHORITIES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CASES

*Algona v. Sharp*, 30 Wash. App. 837 (1982).....18

*Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312, 313 (9th Cir. 1995).....3, 13, 14

*American Universal Ins. Co., v. Pugh*, 821 F.2d 1352 (9th Cir. 1987).....8

*In re Arnold*, 252 B.R. 778 (B.A.P. 9th Cir. 2000) .....9

*Clark v. Davis*, 37 Wn.2d 850 (1951) .....19

*In re Chesanow*, 25 B.R. 228 (Bankr. D. Conn. 1982) .....7

*DeGiacomo v. Traverse (In re Traverse)*, 753 F.3d 19, 28 (1st Cir. 2014).....19

*In re Doan*, 672 F.2d 831 (11th Cir. 1982) .....9

*In re Elliott*, 523 B.R. 188 (B.A.P. 9th Cir. 2014) .....9

*In re Farr*, 278 B.R. 171 (B.A.P. 9th Cir. 2002).....6

*Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206 (9th Cir. 2010) .....*passim*

*In re Gitts*, 116 B.R. 174 (B.A.P. 9th Cir. 1990).....18

*Gladstone v. U.S. Bancorp*, 811 F.3d 1133 (9th Cir. 2016) .....5

*In re Goswami*, 304 B.R. 386 (B.A.P. 9th Cir. 2003) .....8

*In re Gray*, 523 B.R. 170 (B.A.P. 9th Cir. 2014) .....9

*Harris v. Viegelahn*, — U.S. —, 135 S. Ct. 1829, 1838 (2015).....4

*In re Jefferies*, 468 B.R. 373, 378 (B.A.P. 9th Cir. 2012).....7

*Klein v. Chappell (In re Chappell)*, 373 B.R. 73 (B.A.P. 9th Cir. 2007).....14

*Kokoszka v. Belford*, 417 U.S. 642 (1974) .....4

*In re KVN Corp.*, 514 B.R. 1 (B.A.P. 9th Cir. 2014) .....10

*Law v. Siegel*, 134 S. Ct. 1188 (2014).....6, 9, 12

*Lien v. Hoffman*, 49 Wn.2d 642 (1952) .....19

1 *In re Lopez*, No. 03-40205, 2005 Bankr. LEXIS 3037  
 2 (Bankr. D. Idaho Sep. 18, 2005)..... 11  
 3 *Lucius v. McLemore*, 741 F.2d 125, 127 (6th Cir. 1984) ..... 9  
 4 *In re Maddox*, 27 B.R. 592 (N.D. Ga. 1983)..... 7  
 5 *In re Mannone*, 512 B.R. 148 (Bankr. E.D.N.Y. 2014) ..... 11  
 6 *Martinson v. Michael (In re Michael)*, 163 F.3d 526 (9th Cir. 1998)..... 8, 9  
 7 *In re McComber*, 422 B.R. 334 (Bankr. D. Mass. 2010) ..... 8  
 8 *In re McQueen*, 21 B.R. 736 (Bankr. D. Vt. 1982) ..... 8  
 9 *Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*,  
 10 764 F.3d 1168, 1175 (9th Cir. 2014)..... 7, 17  
 11 *In re O'Brien*, 443 B.R. 117 (Bankr. W.D. Mich. 2011)..... 11  
 12 *Ohio v. Kovacs*, 469 U.S. 274 (1985)..... 4  
 13 *Owen v. Owen*, 500 U.S. 305, 308 (1991)..... 5  
 14 *Pinebrook Homeowners Assn. v. Owen*, 48 Wash. App. 424 (1987) ..... 18  
 15 *In re Potter*, 226 B.R. 422 (B.A.P. 8th Cir. 1999) ..... 11  
 16 *In re Rolland*, 317 B.R. 402 (Bankr. C.D. Cal. 2004) ..... 6  
 17 *Rousey v. Jacoway*, 544 U.S. 320 (2005)..... 4  
 18 *Schwab v. Reilly*, 560 U.S. 770 (2010)..... 4, 5  
 19 *Schwaber v. Reed (In re Reed)*, 941 F.2d 1317 (9th Cir. 1991) ..... 10  
 20 *United States v. Whiting Pools*, 462 U.S. 198 (1983) ..... 5  
 21 *In re Vandeventer*, 368 B.R. 50 (Bankr. C.D. Ill. 2007) ..... 8  
 22 *Viet Vu v. Kendall (In re Viet Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000)..... 10  
 23 *Viewcrest Condo. Ass'n v. Robertson*, -- Wash. App. --,  
 24 2016 Wash. App. LEXIS 3070 (Ct. App. Dec. 27, 2016) ..... 18  
 25 *In re Wilson*, 494 B.R. 502 (Bankr. C.D. Cal. 2013) ..... 11  
 26

27 STATUTES AND RULES  
 28

1

2 11 U.S.C. § 522(a)(2) ..... 9

3 11 U.S.C. § 522(b)(2) ..... 6

4 11 U.S.C. § 522(c) ..... 5

5 11 U.S.C. 522(d) ..... 6, 7

6 11 U.S.C. § 522(l) ..... 5

7

8 11 U.S.C. § 541 ..... 4

9 11 U.S.C. § 541(a)(1) ..... 5

10 11 U.S.C. § 541(a)(6) ..... 6, 5, 10

11 11 U.S.C. § 554 ..... 16

12 11 U.S.C. 704(a)(1) ..... 8

13

14 Ariz. Rev. Stat. § 33-1101 ..... 17

15 Nev. Rev. St. § 21.090(1)(g) ..... 17

16 Wash. Rev. Code § 6.13.070(1) ..... 18

17 Wash. Const. Art. XIX, § 1 ..... 19

18

19

20 Federal Rule of Bankruptcy Procedure 1009(a) ..... 2

21

22 OTHER

23 Marc Stern & Janine Lee, *Proper Valuation of Property and Exemptions in*

24 *Consumer Cases*, 33 Am. Bankr. Inst. J. 22 (July 2014). ..... 7

25

26

27

28

1 CORPORATE DISCLOSURE STATEMENT

2  
3 Pursuant to Fed. R. Bankr. P. 8012, *amici curiae*, the National Consumer  
4 Bankruptcy Rights Center and the National Association of Consumer Bankruptcy  
5 Attorneys, state that they are both nongovernmental corporate entities that have no  
6 parent corporations and do not issue stock.  
7

8  
9 CERTIFICATION OF AUTHORSHIP

10 Pursuant to Fed. R. Bankr. P. 8017(c)(4), the undersigned counsel of record  
11 certifies that this brief was not authored by a party's counsel, nor did party or  
12 party's counsel contribute money intended to fund this brief and no person other  
13 than amici contributed money to fund this brief.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1           **I.       STATEMENT OF INTEREST OF *AMICI CURIAE***

2  
3           NCBRC is a nonprofit organization dedicated to preserving the bankruptcy  
4 rights of consumer debtors and protecting the bankruptcy system's integrity. The  
5 Bankruptcy Code grants financially distressed debtors certain rights that are  
6 critical to the bankruptcy system's operation. Yet consumer debtors with limited  
7 financial resources and minimal exposure to that system often are ill-equipped to  
8 protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in  
9 systemically-important cases to ensure that courts have a full understanding of the  
10 applicable bankruptcy law, the case, and its implications for consumer debtors.  
11  
12

13  
14           NACBA is also a nonprofit organization whose members are attorneys  
15 across the country. NACBA advocates nationally on issues that cannot adequately  
16 be addressed by individual member attorneys. It is the only national association of  
17 attorneys organized for the specific purpose of protecting the rights of consumer  
18 bankruptcy debtors.  
19  
20

21           NCBRC, NACBA and its membership have a vital interest in the outcome  
22 of this case. Exemptions are essential to achieving the fresh start that is a  
23 fundamental goal of bankruptcy. In mandating that exemptions be liberally  
24 construed in favor of the debtor, courts have recognized Congress's intent to  
25 protect the essentials of daily life for consumers in financial distress. Here, the  
26  
27  
28

1 debtor claimed her federal homestead exemption to the extent of her equity at the  
2 time of filing. When she sought to amend her exemptions to include appreciation  
3  
4 of the value of her home, as she had a right to do under Federal Rule of  
5 Bankruptcy Procedure 1009(a), the bankruptcy court erroneously concluded that  
6  
7 she could not amend her exemptions to cover that appreciation. The denial of the  
8 debtor's right to amend to capture an increase in the fair market value of her home  
9  
10 up to the exemption limit has far-reaching implications for consumer debtors  
11 nationally.

## 12 II. SUMMARY OF ARGUMENT

13  
14 A debtor's ability to exempt specific property from the bankruptcy estate is  
15 a crucial part of obtaining a fresh start. However, that fresh start can be denied in  
16  
17 cases, such as this one, where the trustee asserts a strained reading of the  
18 Bankruptcy Code in order to curtail a debtor's otherwise clear right to exempt  
19  
20 property.

21 Because of the important role that exemptions play, Supreme Court  
22 precedent dictates that bankruptcy courts have no authority to deny a debtor a  
23  
24 claimed exemption without a clear statutory basis for doing so. The Code  
25 provides no such authority to deny an amendment to an exemption that seeks to  
26  
27 cover postpetition appreciation where the fair market value of the property  
28

1 remains below the maximum homestead exemption amount. Trustee's only  
2 support for this approach is based on a misinterpretation of the case *Gebhart v.*  
3  
4 *Gaughan (In re Gebhart)*, 621 F.3d 1206, 1211 (9th Cir. 2010). *Gebhart*, which  
5 did not address the Washington homestead exemption, also involved a different  
6 set of facts. Further, at least one of the cases relied upon by *Gebhart* in fact  
7 supports the debtor's amended exemption here. *See Alsberg v. Robertson (In re*  
8 *Alsberg)*, 68 F.3d 312, 313 (9th Cir. 1995) (allowing the debtor to amend).  
9

10  
11 Trustee's radical approach is also contrary to the purpose of exemptions and  
12 the concept of a fresh start. Ms. Wilson's case exemplifies this backwards result.  
13 Instead of receiving the protection of her homestead exemption, Ms. Wilson, who  
14 is a 69-year-old woman living in a one-bedroom condominium, is deprived of the  
15 tools she needs to obtain her fresh start. This court should reverse the bankruptcy  
16 court's decision and reinforce the debtor's important right to claim exemptions in  
17  
18  
19 bankruptcy.  
20  
21  
22  
23  
24  
25  
26  
27  
28

1       **III. ARGUMENT**

2

3       The oft-cited principal purpose of the Bankruptcy Code is to grant a fresh

4 start to the honest but unfortunate debtor. *Harris v. Viegelahn*, — U.S. —, 135 S.

5 Ct. 1829, 1838 (2015); *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974).

6

7       “[E]xemptions in bankruptcy cases are part and parcel of the fundamental

8 bankruptcy concept of a ‘fresh start.’” *Schwab v. Reilly*, 560 U.S. 770, 791

9 (2010); *see also Rousey v. Jacoway*, 544 U.S. 320, 325 (2005). Because of their

10 cherished role, exemptions are structured to allow debtors to maximize their

11 value, and can only be denied in limited circumstances. The *Gebhart* decision

12 does not curtail a debtor’s right to assert exemptions – by amendment or otherwise

13 – and it even relies upon Ninth Circuit precedent that reinforces the debtor’s right

14 to exempt postpetition appreciation.

15

16

17

18       **A. The Function and Design of Property Exemptions Serve an**

19       **Important Public Policy.**

20       Because this case involves important rights concerning bankruptcy

21 exemptions, it is important first to explain why those exemptions are important,

22 and how they work.

23

24       “The commencement of a case under the Bankruptcy Code creates an estate

25 which, with limited exceptions, consists of all of the debtor's property.” *Ohio v.*

26 *Kovacs*, 469 U.S. 274, 284 n.12 (1985) (citing 11 U.S.C. § 541). The scope of

27

28

1 this estate is “broad,” including “all legal or equitable interests of the debtor in  
2 property as of the commencement of the case.” *United States v. Whiting Pools*,  
3 462 U.S. 198, 204-205 (1983) (quoting 11 U.S.C. § 541(a)(1)); *see also Gladstone*  
4 *v. U.S. Bancorp*, 811 F.3d 1133, 1139-40 (9th Cir. 2016). Although most property  
5 acquisitions after the petition date are excluded from the estate, there are limited  
6 statutory exceptions. For example, certain inheritances to which the debtor  
7 becomes entitled within 180 days of filing are brought into the estate, as well as  
8 “[p]roceeds, product, offspring, rents, or profits of or from property of the estate.”  
9 11 U.S.C. § 541(a)(6)-(7).

10  
11  
12  
13  
14       Once formed, this broad estate is “subject to the debtor’s right to reclaim  
15 certain property as ‘exempt.’” *Schwab*, 560 U.S. at 774; *see* 11 U.S.C. § 522(l).  
16 “An exemption is an interest withdrawn from the estate (and hence from the  
17 creditors) for the benefit of the debtor.” *Owen v. Owen*, 500 U.S. 305, 308  
18 (1991); *see also Schwab*, 560 U.S. at 775-76; *Gladstone*, 811 F.3d at 1142. With  
19 only some exceptions, “[p]roperty exempted... is not liable during or after the  
20 case for any debt of the debtor that arose... before the commencement of the  
21 case.” 11 U.S.C. § 522(c).

22  
23  
24       As described above, these exemptions are crucial to fulfilling the  
25 Bankruptcy Code’s promise of a fresh start. They do this “by enabling the debtor  
26  
27  
28

1 to emerge from bankruptcy with adequate and necessary possessions,” thus  
2 allowing “the debtor to maintain an appropriate standard of living as he or she  
3 goes forward after the bankruptcy case.” *In re Farr*, 278 B.R. 171, 175 (B.A.P.  
4 9th Cir. 2002) (quoting H. R. Rep. No. 95–595, at 126 (1977), reprinted in 1978  
5 U.S.C.C.A.N. 5963, 6087); *see also In re Rolland*, 317 B.R. 402, 412-13 (Bankr.  
6 C.D. Cal. 2004) (“Exemptions serve to protect and foster a debtor's fresh start  
7 from bankruptcy.”).

8  
9  
10  
11 These exemptions are so critical to a debtor’s fresh start that they can only  
12 be denied based on the specific, limited circumstances enumerated in the Code.  
13  
14 *Law v. Siegel*, 134 S. Ct. 1188, 1194-95 (2014) (bankruptcy court erred by  
15 surcharging a debtor’s exemption to account for debtor’s own fraud). The  
16 importance of this exemption scheme is further reflected, as discussed below, in  
17 the wide latitude debtors are given to amend exemptions.

18  
19 Even though bankruptcy is an inherently federal scheme, the right to an  
20 exemption is determined by a patchwork of state and federal statutes. The  
21 Bankruptcy Code itself contains a list of exemptions for various types of property.  
22 11 U.S.C. 522(d). However, the Code also allows states to opt out of the federal  
23 exemption scheme, which many have done. *See* 11 U.S.C. § 522(b)(2). Debtors  
24 filing in those “opt-out” states find the source of their exemptions in only state law  
25  
26  
27  
28

1 or federal nonbankruptcy law. However, Washington has not opted out of the  
2 federal exemptions, and bankruptcy debtors can therefore elect to claim  
3 exemptions under either Washington law or the Bankruptcy Code. *In re Jefferies*,  
4 468 B.R. 373, 378 (B.A.P. 9th Cir. 2012).

6 The federal exemption scheme (along with many state law schemes) defines  
7 a permissible exemption by the debtor's "interest," not by "equity" or "value."  
8 *See* 11 U.S.C. § 522(d)(1) (defining a "debtor's aggregate *interest*, not to exceed  
9 \$15,000 in value, in real property" (emphasis added)). Thus, a debtor can exempt  
10 any interest in property, even a possessory interest, *see In re Maddox*, 27 B.R.  
11 592, 596 (N.D. Ga. 1983) (this phrase is "a broad term encompassing many rights  
12 of a party, tangible, intangible, legal and equitable"), and even if there is no equity  
13 in the asset, *In re Chesanow*, 25 B.R. 228, 229 (Bankr. D. Conn. 1982) ("The  
14 word 'interest' is not the substantive equivalent of the word 'equity'"). Some  
15 statutes, rather than protecting a particular dollar value of a debtor's interest, focus  
16 on protecting a particular asset. *See, e.g., Mwangi v. Wells Fargo Bank, N.A. (In*  
17 *re Mwangi)*, 764 F.3d 1168, 1175 (9th Cir. 2014).

23 Determining both the value of the property and the amount of the  
24 exemption is crucial step in a bankruptcy case. *See* Marc Stern & Janine Lee,  
25 *Proper Valuation of Property and Exemptions in Consumer Cases*, 33 Am. Bankr.  
26

1 Inst. J. 22 (July 2014). Only after the nature and extent of the estate’s property is  
 2 finally determined, does the Bankruptcy Code authorize the Trustee to collect and  
 3  
 4 reduce to cash the remaining non-exempt property for distribution to creditors.  
 5 *See* 11 U.S.C. 704(a)(1); *In re Vandeventer*, 368 B.R. 50, 53 (Bankr. C.D. Ill.  
 6  
 7 2007) (“a trustee is limited to collecting and reducing to money ‘property of the  
 8 estate’”). Debtors may then use the exempt property to embark on their post-  
 9  
 10 bankruptcy lives.

11 **B. Debtors May Freely Amend Exemptions at Any Time, Even to**  
 12 **Capture Value Created Postpetition.**

13 Under the bankruptcy rules, “the debtor has the absolute right to amend any  
 14 ‘list, schedule, or statement’ prior to closure of the case. This right to amend  
 15 includes the right to amend the debtor’s list of property claimed exempt.” *In re*  
 16 *Goswami*, 304 B.R. 386, 392-93 (B.A.P. 9th Cir. 2003) (citing Fed. R. Bankr. P.  
 17  
 18 1009(a); *Martinson v. Michael (In re Michael)*, 163 F.3d 526, 529 (9th Cir.  
 19  
 20 1998)).<sup>1</sup> Debtors may even amend their scheduled exemptions to switch between  
 21 federal and state exemption schemes, as was done here. *In re McComber*, 422  
 22  
 23 B.R. 334 (Bankr. D. Mass. 2010); *In re McQueen*, 21 B.R. 736 (Bankr. D. Vt.  
 24  
 25 1982).

26 \_\_\_\_\_  
 27 <sup>1</sup> Although not a statute, Rule 1009 was promulgated by the Supreme Court pursuant to  
 28 authority granted by Congress under 28 U.S.C. 2075, and it has the force of law. *See American*  
*Universal Ins. Co., v. Pugh*, 821 F.2d 1352, 1354 (9th Cir. 1987).

1           Only narrow circumstances justify denying a debtor the right to amend  
2 schedules and assert exemptions. For decades, the law in the Ninth Circuit was  
3 that “[t]he bankruptcy court has no discretion to disallow amended exemptions,  
4 unless the amendment has been made in bad faith or prejudices third parties.” *In*  
5 *re Arnold*, 252 B.R. 778, 784 (B.A.P. 9th Cir. 2000) (citing *Michael*, 163 F.3d at  
6 529); *see also Lucius v. McLemore*, 741 F.2d 125, 127 (6th Cir. 1984); *In re*  
7 *Doan*, 672 F.2d 831, 833 (11th Cir. 1982); *In re Elliott*, 523 B.R. 188 (B.A.P. 9th  
8 Cir. 2014); *In re Gray*, 523 B.R. 170 (B.A.P. 9th Cir. 2014). However, in 2014,  
9 the Supreme Court strengthened the debtor’s right to amend exemptions even  
10 further, when it ruled that exemptions could not even be surcharged on account of  
11 the debtor’s own fraud. *See Siegel*, 134 S. Ct. at 1194-95; *see also Elliott*, 523  
12 B.R. at 193 (noting that *Siegel* abrogated the *Michael* and *Arnold* line of authority  
13 giving discretion to forbid amendments).

14  
15  
16  
17  
18  
19           Against the background of these rules favoring both amendments and  
20 exemptions, it is clear that debtors can assert exemptions against value that was  
21 created postpetition. In fact, by the express terms of the statute, exemptions can  
22 be valued not just “as of the date of the filing of the petition,” as noted by Trustee  
23 and the bankruptcy court, but also “with respect to property that becomes property  
24 of the estate after such date, as of the date such property becomes property of the  
25  
26  
27  
28

1 estate.” 11 U.S.C. § 522(a)(2). For purposes of valuing exemptions, postpetition  
2 appreciation would fall under this latter definition because it inherently enters the  
3  
4 estate after “the date of the filing of the petition.” The *Gebhart* Court implicitly  
5 recognized this reality when it categorized postpetition appreciation as Section  
6  
7 541(a)(6) estate property – a category of postpetition property that brings into the  
8 bankruptcy estate “[p]roceeds, product, offspring, rents, or profits of or from  
9  
10 property of the estate.” *See Gebhart*, 621 F.3d at 1211 (citing 11 U.S.C. §  
11 541(a)(6); *see also Schwaber v. Reed (In re Reed)*, 941 F.2d 1317, 1323 (9th Cir.  
12 1991); *Viet Vu v. Kendall (In re Viet Vu)*, 245 B.R. 644, 647-48 (B.A.P. 9th Cir.  
13 2000)). Nothing in the Bankruptcy Code precludes the debtor’s amendment of  
14  
15 exemptions to cover property that enters the estate after the filing of the petition.

16       It is already clear in other contexts that value created postpetition remains  
17  
18 subordinate to a debtor’s exemption. For example, there are many cases  
19  
20 concerning postpetition appreciation in equity arising from the reduction of  
21  
22 mortgage balances in the controversial context of negotiated “carve-out  
23  
24 agreements.” These cases typically involve homes that were underwater as of the  
25  
26 petition date. The trustee and the mortgage company will cut a deal to short sell  
27  
28 the home, and carve out a nominal amount to distribute to unsecured creditors.  
Because these homes were underwater on the petition date, the value created in

1 these transactions occurs solely post-petition. However, as controversial as this  
2 practice is, *see, e.g., In re KVN Corp.*, 514 B.R. 1, 7 (B.A.P. 9th Cir. 2014), it is  
3 uncontroversial that, at a minimum, the debtor is able to assert exemptions against  
4 the value that is created postpetition. *See In re Potter*, 226 B.R. 422 (B.A.P. 8th  
5 Cir. 1999) (“Except to the extent of the debtor’s potential exemption rights, post-  
6 petition appreciation in the value of property accrues for the benefit of the  
7 estate.”); *In re Wilson*, 494 B.R. 502, 506 (Bankr. C.D. Cal. 2013) (value created  
8 by postpetition short sale that included a distribution to the estate was an  
9 exemptible interest); *see also In re Mannone*, 512 B.R. 148, 153-54 (Bankr.  
10 E.D.N.Y. 2014) (same). Other common instances where debtors can amend  
11 exemptions include those when valuations were not known at the time of filing the  
12 case, but were later determined upon liquidation. *In re Lopez*, No. 03-40205,  
13 2005 Bankr. LEXIS 3037, at \*4-6 (Bankr. D. Idaho Sep. 18, 2005) (debtors  
14 entitled to file amendment to exempt settlement proceeds of legal claim, the value  
15 of which was uncertain on the day of petition); *In re O'Brien*, 443 B.R. 117, 131-  
16 32 (Bankr. W.D. Mich. 2011) (amending schedules to reflect subsequent tax  
17 refunds). These common practices would be disrupted entirely if Trustee’s rule  
18 were adopted.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Trustee's position does violence to the sanctity of property exemptions. It  
2 cannot be disputed that, if there were \$125,000 in equity in the debtor's home at  
3  
4 the time of filing, then she would have been able to claim the entire amount as  
5 exempt under Washington's homestead law. In fact, even a debtor who has  
6  
7 concealed a home entirely from the bankruptcy trustee, only to later amend the  
8  
9 schedules and add the asset and exemption, is still entitled to the full exemption  
10  
11 amount. *See Siegel*, 134 S. Ct. at 1194-95. Trustee takes the remarkable position  
12  
13 that, only because that equity was created postpetition, the debtor (who did  
14  
15 nothing wrong) is deprived of her exemption rights.

16 To be clear, there is no statutory support for Trustee's radical argument that  
17  
18 debtors can be prevented from obtaining the full value of their property  
19  
20 exemptions based solely on technicalities surrounding valuation dates. The lack  
21  
22 of any statutory basis to deny exemptions based solely on when the value was  
23  
24 created mandates that the debtor's exemption be allowed. *See Siegel*, 134 S. Ct. at  
25  
26 1194-95.

27  
28  
**C. The *Gebhart* Rule Does Not Support Trustee's Proposal To Limit Exemptions.**

The court below based its decision on a perfunctory application from  
*Gebhart*. To the extent that the debtor wishes to obtain appreciation beyond her  
exemption, that may be correct. However, *Gebhart* is completely inapplicable to

1 the bankruptcy court's decision to deny Ms. Wilson her homestead exemption.

2 Neither the legal theory supporting *Gebhart*, nor the specific Washington

3  
4 exemptions at issue here, support such an application.

5  
6 **1. *Gebhart* Only Concerns Appreciation Beyond Exemption Limits.**

7 Both Trustee and the bankruptcy court below apparently read the *Gebhart*

8 Court as creating an absolute rule that all postpetition appreciation inures to the

9 benefit of the estate – regardless of a debtor's property exemptions. However, the

10  
11 *Gebhart* Court expressly refused to go so far.

12 First and foremost, the issue in this case was squarely resolved by one of

13 the cases relied upon by the *Gebhart* Court. In a similar fact pattern, the *Alsberg*

14 case involved a home that actually had negative equity in it at the time of filing

15 (fair market value of \$259,000, a mortgage balance of \$225,125, and tax liens of

16 approximately \$86,000). *Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312, 313

17 (9th Cir. 1995). The following year, the debtor was able to find a buyer for the

18 property, and sold it at a price of \$380,000. After the first mortgage had been paid

19 off, and the remaining \$115,000 was paid into escrow, the debtor amended his

20 schedules and “for the first time, [] claimed a homestead exemption of \$45,000.”

21 *Id.* at 314. Although the Ninth Circuit rejected the debtor's attempt to obtain the

22 full proceeds, it unequivocally reaffirmed his right to assert a homestead

1 exemption against the new value. *See id.* at 315 (“When Alsberg subsequently  
2 filed a claim for a \$ 45,000 homestead exemption after the sale of the property, he  
3 became entitled to \$ 45,000 of the proceeds, and no more.”).

5       Among other precedent, the *Gebhart* Court relied on the rationale in  
6 *Alsberg*, and even used limiting language affecting this precise issue. As the  
7 Court described, its rule on postpetition appreciation applies only “when the total  
8 [postpetition] fair market value of the property is in fact greater than the  
9 exemption limit at the time of filing.” *Gebhart*, 621 F.3d at 1211. By describing  
10 its rule in these terms, the court implicitly recognized that debtors would still be  
11 able to assert exemptions in amounts up to “the exemption limit” to protect  
12 increases in value due to postpetition appreciation – with only the equity beyond  
13 that limit inuring to the benefit of the estate. One of the decisions that *Gebhart*  
14 affirmed had likewise noted the possibility of amended exemptions when it  
15 reasoned that “[w]here the debtor claims a specific dollar amount as exempt, the  
16 debtor is bound by that amount and, *in the absence of an amendment*, cannot  
17 claim that the entire property is exempt.” *Klein v. Chappell (In re Chappell)*, 373  
18 B.R. 73, 81 (B.A.P. 9th Cir. 2007) (emphasis added).

24       Nor could the *Gebhart* Court have gone as far as Trustee suggests because  
25 the fact patterns from that case did not raise the issue at play here or in *Alsberg*.  
26  
27  
28

1 The focus of the *Gebhart* Court was whether the bankruptcy estate had *any*  
2 control over the property. *See Gebhart*, 621 F.3d at 1209 (primary issue in that  
3 case is “whether the Trustee's failure to object to the homestead exemption claim  
4 within the period allowed by statute resulted in the homestead property being  
5 withdrawn from the bankruptcy estate at that point.”). There, the equity in the  
6 property as of the petition date was slightly below the maximum homestead  
7 amount. *See Gebhart*, 621 F.3d at 1208 (\$89,703 in equity, and a \$100,000  
8 homestead exemption). Though the debtor received his discharge within months  
9 of filing, the case was still not administratively closed three years later. At that  
10 point, the trustee, believing that the value of the house had increased substantially  
11 since the bankruptcy filing, sought to sell the home. *Id.* The *Gebhart* debtor did  
12 not seek to amend his exemptions by which he would have been entitled to  
13 exempt his interest up to \$100,000. Nor did the *Gebhart* debtor seek  
14 abandonment of the property by the trustee until after the equity in the home had  
15 significantly increased beyond the maximum exemption amount. Instead, the  
16 *Gebhart* debtor argued that his entire homestead and any related appreciation were  
17 removed from the estate when the trustee failed to contest his original exemption  
18 claim. *See Gebhart*, 621 F.3d at 1208. The *Gebhart* Court concluded that the  
19 appreciation beyond the claimed exemption was property of the estate, but it did  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 not address the situation as here where the Debtor has sought to amend her  
2 exemption to claim the maximum amount available and where the value of the  
3  
4 equity does not exceed that maximum amount.

5  
6 In *Gebhart*, the debtor also argued that the trustee failed to administer the  
7 case quickly and expeditiously and instead did not administratively close the case  
8 for years after the debtor received his discharge. *See id.* at 1212. The Court noted  
9 that the debtor's concerns that trustee would hold cases open in order to capture  
10 appreciation was legitimate, but further noted the remedy for the debtor was to  
11 seek abandonment under section 544. *See id.* at 1212 n.3. Here, Ms. Wilson  
12 sought to invoke the exact remedy recommended by the *Gebhart* Court by filing a  
13 motion seeking abandonment of the property under 11 U.S.C. § 554; *see* Docket  
14 #61, No. 13-20904 (Bankr. W.D. Wash. July 18, 2016). Only after filing that  
15 motion, did the Trustee seek to sell the property. *See* Docket #80, Ex Parte  
16 Motion to Employ Real Estate Agent, No. 13-20904 (Bankr. W.D. Wash. Sept. 6,  
17 2016). At no time, did the Trustee assert that based on the value of the property,  
18 the Debtor's equity exceeded the maximum amount of the Washington homestead  
19 exemption. On these bases, *Gebhart* is not only distinguishable, but supports the  
20 Debtor's position and requires reversal of the bankruptcy court.  
21  
22  
23  
24  
25  
26  
27  
28

1           **2. The Washington Homestead Exemption Falls Outside of *Gebhart*.**

2           The bankruptcy court erred in its application of *Gebhart* for another reason.  
3  
4           *Gebhart* does not apply to exemption statutes, such as the Washington exemption  
5 at play here, which exempt assets themselves as opposed to the debtor’s interest in  
6 the asset.  
7

8           As the Ninth Circuit has explained, the *Gebhart* approach is an exception to  
9 the “general rule that exempt property immediately reverts in the debtor.”  
10  
11           *Mwangi*, 764 F.3d at 1175. In order to determine whether to apply the general  
12 rule or the *Gebhart* exception, courts first look “to the text of the statute to  
13 determine whether the statute exempts the asset or an interest therein.” *Id.* The  
14  
15           *Mwangi* case involved a Nevada statute that exempted “[f]or any workweek, 75  
16 percent of the disposable earnings of a judgment debtor during that week.” *Id.* at  
17  
18           1175 n. 2 (quoting Nev. Rev. St. § 21.090(1)(g)). Although the exemption had its  
19 limits, the *Mwangi* Court found *Gebhart* clearly inapplicable because “[o]n its  
20 face, § 21.090(1)(g) defines the property that the debtor is authorized to exempt as  
21 the asset itself, i.e., disposable earnings.” *Id.* at 1176. By contrast, the exemption  
22 schemes at play in *Gebhart* both explicitly applied to a debtor’s “interest.” *See*  
23  
24           *Gebhart*, 764 F.3d at 1210 (citing 11 U.S.C. § 522(d)(1) (“debtor’s aggregate  
25 interest”); Ariz. Rev. Stat. § 33-1101 (“The person’s interest”)).  
26  
27  
28

1 The Washington homestead exemption at issue here is similar to the  
2 exemption from *Mwangi*. Unlike *Gebhart*, it contains no reference to the debtor’s  
3 interest, but instead provides that “the homestead is exempt from attachment and  
4 from execution or forced sale for the debtor...” Wash. Rev. Code § 6.13.070(1).  
5 Like *Mwangi*, there may be a ceiling on this exemption, *see* Wash. Rev. Code §  
6 6.13.070(1), but the statute expressly exempts the property itself, and not the  
7 debtor’s interest in the property. Debtors are able to claim this exemption in the  
8 property any time before the sale – even after filing the bankruptcy petition. *See*  
9 *In re Gitts*, 116 B.R. 174, 180 (B.A.P. 9th Cir. 1990).  
10  
11

12 State law jurisprudence supports this straightforward reading of this  
13 homestead exemption. It has long been recognized that the Washington  
14 homestead “is neither a lien nor an encumbrance, but a species of land tenure  
15 exempt from execution and forced sale in all but the enumerated circumstances.”  
16 *Algona v. Sharp*, 30 Wash. App. 837, 843 (1982); *see also Viewcrest Condo. Ass’n*  
17 *v. Robertson*, -- Wash. App. --, 2016 Wash. App. LEXIS 3070, at \*4 (Ct. App.  
18 Dec. 27, 2016) (“The Homestead Act grants homeowners the right to be free from  
19 execution or forced sale of the homestead, with certain exceptions.”); *Pinebrook*  
20 *Homeowners Assn. v. Owen*, 48 Wash. App. 424, 429-30 (1987).  
21  
22  
23  
24  
25  
26  
27  
28

1 Further, there is a strong public policy underlying the Washington  
2 homestead that supports this interpretation. After all, the homestead in  
3 Washington “implement[s] the policy that each citizen have a home ‘where his  
4 family may be sheltered and live beyond the reach of financial misfortune.’”  
5 *Algona*, 30 Wash. App. at 841 (quoting *Clark v. Davis*, 37 Wn.2d 850, 852  
6 (1951)). Indeed, this policy is so deeply embedded in Washington law that it is  
7 enshrined in the State Constitution. Wash. Const. Art. XIX, § 1 (“The legislature  
8 shall protect by law from forced sale a certain portion of the homestead and other  
9 property of all heads of families.”). These policies have consistently led courts to  
10 reason that “homestead laws are to be liberally construed in favor of the debtor.”  
11 *Algona*, 30 Wash. App. at 842; *see also Lien v. Hoffman*, 49 Wn.2d 642, 647  
12 (1952).

13  
14  
15  
16  
17  
18 Bankruptcy law takes into account these policies and rules of construction.  
19 *See DeGiacomo v. Traverse (In re Traverse)*, 753 F.3d 19, 28 (1st Cir. 2014)  
20 (looking to liberal construction of Massachusetts homestead laws in bankruptcy  
21 context). Here, these state law policies provide further reason to protect the  
22 debtor’s homestead.  
23  
24  
25  
26  
27  
28

1 **IV. CONCLUSION**

2 This court should reverse the bankruptcy court’s decision 1) overruling the  
3  
4 Debtor’s motion to amend exemptions and 2) overruling the Debtor motion  
5 seeking the Trustee to abandon the property and 3) granting the Trustee’s motion  
6 to sell the Debtor’s homestead property. The Debtor is entitled to amend her  
7  
8 exemption and exempt postpetition appreciation in the property up to the  
9 maximum amount of the Washington homestead exemption. In the alternative,  
10 the nature of the Washington homestead exemption, which exempts the  
11 “property,” precludes trustees from capturing appreciation in property that is  
12 otherwise fully exempt.  
13  
14

15 *s/ Marc S. Stern*  
16 \_\_\_\_\_  
17 Marc S. Stern, WSBA #8194  
18 Attorney for NCBRC and NACBA  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 CERTIFICATE OF COMPLIANCE  
2 WITH TYPE-VOLUME LIMITATION,  
3 TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

4 1. This brief complies with the type-volume limitation of Fed. R. Bankr.  
5 P. 8015(a)(7) because it contains 4,320 words, as determined by the word-count  
6 function of Microsoft Word 2011, excluding the parts of the brief exempted by  
7 Fed. R. Bankr. P. 8015(a)(7)(B)(iii).  
8

9 2. This brief complies with the typeface requirements of Fed. R. Bankr.  
10 P. 8015(a)(5) and the type style requirements of Fed. R. Bankr. P. 8015(a)(6)  
11 because it has been prepared in a proportionally spaced typeface using Microsoft  
12 Word 2011 in 14-point Times New Roman font.  
13

14  
15 *s/ Marc S. Stern*  
16 Marc S. Stern, WSBA #8194  
17 Attorney for NCBRC and NACBA  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record in the case:

Alexander Sether Kleinberg akleinberg@eisenhowerlaw.com  
Larry B. Feinstein lbf@chutzpa.com  
Binah B. Yeung binahy@schweetlaw.com  
Bankruptcy Appeals ECFHelp\_Seattle@wawb.uscourts.gov

DATED this 3rd day of February, 2017

s/ Tanya Bainter  
Tanya Bainter