

Judicial Lien Avoidance

Pursuant to Section 522(f)(1)(A), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such lien impairs an exemption to which the debtor would have been entitled...if such a lien is... a judicial lien.

A judicial lien impairs an exemption right if the sum of –

- The lien +
- Other liens on the property +
- The permitted exemption amount (\$5,000 in Alabama)

= a dollar amount that exceeds the value of the Property.

In order to avoid a lien pursuant to 11 USC §522(f) you must first determine whether the lien is a judicial lien, and then you must determine whether the judicial lien impairs an exemption. Judicial liens are those created by a legal or equitable process or proceeding, and include judgment liens, attachment liens, garnishment liens, and execution liens. A lien arising out of a domestic support obligation (alimony, maintenance, or support) is not subject to lien avoidance. See § 522(f)(1)(A).

The exemptions are listed on Schedule C of the bankruptcy petition. In Alabama, the only real property exemption is the homestead exemption, which is limited to \$5,000 per spouse. No exemption is available for non-homestead real property in Alabama. In determining whether the property is the debtor's homestead, the determinative date will be the date of the petition.

Assuming the property is claimed as exempt, the next step is to determine to what extent, if any, the lien impairs that exemption under the formula set forth in Section 522(f)(2). The formula, as set forth above, provides that there is no impairment if the value of the property is more than the sum of the liens against the property plus the debtor's exemption. The value of the property for this determination should arguably be the replacement cost for the property. However, there is no statutory authority directly on point (as opposed to personal property, which Section 506(a)(2) specifically establishes as replacement value without deduction for costs of sale or marketing). Debtors are commonly using the tax assessed value of the real property for purposes of completing the schedules, and then using that value for purposes of lien avoidance.

A very common and problematic issue is when the lien avoidance motion does not set out what value the debtor is using, and the order does not set out to what extent the lien is impaired. The Northern District of Alabama bankruptcy courts are now employing forms that attempt to clarify the formula. Unfortunately, many motions have been filed and granted that make no reference to any numbers whatsoever. In that instance, the schedules are often the only guidance available as to what the value, amounts of other liens, and amount of exemption claimed and allowed would be. Practically, if you are asked to insure property and you are uncertain whether to list a lien as an exception, if the motion and the accompanying order do not specifically show that the lien is entirely avoided (based upon the formula set forth above), an exception should likely be made.

Contact Underwriting Counsel if you have questions regarding whether to list a judicial lien as an exception on a policy, where such judicial lien may have been avoided in the bankruptcy proceeding. Attached hereto as Exhibit A is a hypothetical sales transaction wherein we have examined whether the two judicial liens impair an exemption.