

JUDGE MICHAEL'S POLICY REGARDING MOTIONS TO AVOID LIENS

We all know that as part of his or her fresh start, an individual debtor is entitled to claim property as exempt. A valid exemption allows the property to be kept by the debtor free and clear of the claims of creditors. Section 522(f) of the Bankruptcy Code allows a debtor to avoid a judicial lien that impairs an exemption, as well as non-possessory, non-purchase money security interests in various items of personal property. We have had a few problems with lien avoidance motions. Most relate to timing.

In order for any property to be the proper subject of lien avoidance, it must be exempt. That means the property must have been properly claimed as exempt on Schedule C. Believe it or not, attorneys file motions to avoid liens on property that the debtor did not claim as exempt. They (the motions, not the attorneys) go down in flames. Not only must the property be claimed as exempt, the exemption must be allowed. That means that one of three things must have happened:

1. The property must have been claimed as exempt on Schedule C when the schedules were initially filed, and more than 30 days must have expired after the first meeting of creditors is concluded without objection to the claim of exemption; or
2. If an Amended Schedule C is filed at a later date, notice of that Amended Schedule C and the deadline to object to the newly claimed exemptions must be given to all creditors and parties in interest and the objection deadline must have expired without objection to the claim of exemption; or
3. Any objections to claims of exemption have been fully litigated and the exemptions allowed by Court order.

Then, and only then, is the property considered “exempt property” for purposes of lien avoidance.

A motion to avoid lien filed with respect to property not claimed as exempt, or on property claimed as exempt but not yet allowed as exempt, is improper. If you have filed a motion to avoid lien too early, you have seen our text-orders denying the motion as premature and directing you to refile it at a later date (aren't those just a joy?). Section 522(f) only allows you to avoid a lien that impairs an exemption. An exemption cannot be impaired until it is allowed. I realize this makes you calendar yet another deadline, but the law is the law.

Motions to avoid liens must also be filed while the case is open. We do not accept pleadings in closed cases. If you fail to file a motion to avoid lien before a case is closed, you have to reopen the case. That costs money and takes time. Creditors whose ox is being gored (i.e., whose lien you want to avoid) have the right to object to the reopening of the case. Therefore, if you have to reopen a case to avoid a lien, you have to provide notice and an opportunity to be heard to those creditors,

and certify that service à la N.D. Okla. Bankr. Local Rule 5005-1(E). Then, after the case is reopened, you must file your motion to avoid lien. It is a two-step process.

The problems with this two-step process are obvious. It will not move quickly and it costs money. Most of the cases reopened to avoid liens involve sales of real estate. Real estate buyers (and sellers, for that matter) are usually in a hurry. They want to close and they want to close now. The lien avoidance issue often comes to light only after a title opinion has been issued and everybody is at the closing. At best, the lien avoidance process slows your client down by a month, costs you (yes *you*, see below) or your client the reopen fee, and takes more of your time. At worst, it chills or kills a sale.

It has also come to the Court's attention that some attorneys exclude the filing of judicial lien avoidance motions from the core services they agree to render to debtors (at least in the absence of additional compensation). The avoidance of a lien under § 522(f) is an essential part of a debtor's fresh start. It should be part of your core duties to your client as a bankruptcy practitioner. If you charge your clients additional fees beyond the amount contained in your disclosure of compensation, those must be disclosed to the Court. If you failed to file the appropriate avoidance motions while the case was open, and later move to reopen the case, the Court will inquire whether you could (and should) have filed those motions timely, and will scrutinize any additional fees you seek accordingly (as well as inquire why your client should be the one to bear the fee to reopen the case). Judgment liens can be researched online, at least in Tulsa County. There is no reason for you to miss these when you are preparing a case for filing.