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The Effect of a Pre-Bankruptcy Judicial Lien on the Post-Bankruptcy Accrual in Value of Exempt Property

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THE EFFECT OF A PRE-BANKRUPTCY JUDICIAL LIEN ON THE POST-BANKRUPTCY ACCRUAL IN VALUE OF EXEMPT PROPERTY

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Consider the following scenario: An attorney conducting a title search on a principal residence for a potential purchaser, or the purchaser's lending bank, finds a judgment lien enrolled against the present owner of the property and reports it as an exception to clear title. When contacted, the property owner informs the title attorney and the bank that a Chapter 7 discharge in bankruptcy was obtained some five or six years earlier and that the judgment lien should, therefore, be disregarded. Is this pre-bankruptcy judgment lien valid and enforceable following the Chapter 7 discharge?

Any bankruptcy attorney worth his or her salt knows that the familiar adage, "valid liens survive bankruptcy," is not always accurate. The Bankruptcy Code allows debtors and trustees to modify or extinguish liens, either directly or as a consequence of the confirmation process in reorganization cases.[1] However, a debtor's ability to avoid or extinguish a pre-bankruptcy judicial lien has undergone significant changes in recent years because of Supreme Court decisions and revisions to the Bankruptcy Code. Judicial liens often accumulate on the eve of bankruptcy as the debtor and the creditor group race to their respective courthouses. Since the debtor's "fresh start" is directly impacted, the extent to which pre-bankruptcy judicial liens may be enforced post-bankruptcy becomes a critical concern.

Before answering the hypothetical question set forth above, a brief review of the nature of judicial liens and the history of their avoidability through the bankruptcy process is in order.

I. JUDICIAL LIENS

The term "judicial lien" is defined in the Bankruptcy Code as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."[2] Judgment liens are statutory creations in derogation of common law.[3] The extent and ability of an enrolled judgment to encumber assets of the judgment debtor is established by state law. In Mississippi, a judgment must be enrolled in "The Judgment Roll" book maintained by the clerk of the circuit court in each county.[4] Once enrolled, a judgment becomes a lien upon and binds "all the property of the defendant within the county where so enrolled."[5] In the vast majority of jurisdictions, an enrolled judgment automatically encumbers only real proper-

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1. *See generally* 11 U.S.C. §§ 506, 522, 1121-29, 1321-30 (1994).
2. 11 U.S.C. § 101(36) (1994).
3. Mitchell v. Wood, 47 Miss. 231, 233-34 (1872).
4. MISS. CODE ANN. § 11-7-189(1) (1972 & Supp. 1997).
5. MISS. CODE ANN. § 11-7-191 (1972 & Supp. 1997).

ty of the judgment debtor.[6] However, in Mississippi, an enrolled judgment lien immediately attaches to real property and tangible personal property,[7] but does not attach to intangible personal property until a writ of attachment or execution is served.[8] A properly enrolled judgment becomes a lien on after-acquired property from the date the property is acquired.[9] The judgment lien expires after seven years unless the judgment is renewed.[10] Through foreclosure or a levy of execution, the judgment creditor may seize and sell real and/or personal property of the judgment debtor, with the proceeds generated applied towards satisfaction of the judgment debt.

As a safety net against forced impoverishment, each state allows a judgment debtor to claim certain assets as exempt from seizure. These exemptions vary widely from state to state. In Mississippi, up to $75,000 in the value of the homestead of a householder[11] and $10,000 in household goods and other tangible personal property[12] may be claimed as exempt from execution or attachment. Unless extraordinary circumstances are present, such as a bankruptcy filing, these exemptions may not generally be claimed against the enforcement of voluntary or consensual liens.[13]

In addition, a judgment creditor may seek to enforce a judgment lien by seizing a portion of the judgment debtor's wages (intangible personal property) through a garnishment proceeding.[14] Under Mississippi law, up to 25% of the judgment debtor's wages may be available to pay a judgment creditor through garnishment.[15] When a judgment is paid in full or is otherwise satisfied, the judgment creditor's attorney or the circuit clerk is required to endorse the judgment roll to reflect the satisfaction.[16]

Returning to the scenario above, it must be assumed that the judgment lien remains in full force and effect since a notation of satisfaction does not appear on the judgment roll. The fact that the owner may have received a Chapter 7 discharge has no effect on the *in rem* enforceability of the lien. Pursuant to § 524(a) of the Bankruptcy Code, a discharge voids any judgment at any time obtained against the debtor and acts as an injunction against the commencement or continuance of an action to recover the debt, but only to the extent of the debtor's *personal* liability.[17] A pre-petition judgment lien survives bankruptcy and is enforceable *in rem* post-petition if it was not avoided, paid, or otherwise modified so as

6. *See* ELIZABETH WARREN AND JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 60-61 (3d ed. 1996).

7. Simmons v. Thomas, 827 F. Supp. 397, 401 (S.D. Miss. 1993).

8. Grenada Bank v. Willey, 694 F.2d 85, 87 (5th Cir. 1982); Simmons-Belk, Inc. v. May, 283 So. 2d 592, 594 (Miss. 1973).

9. Motor Sec. Co. v. B.M. Stevens Co., 83 So. 2d 177, 179 (Miss. 1955); Cooper v. Turnage, 52 Miss. 431, 433 (1876).

10. MISS. CODE ANN. § 15-1-47 (1995).

11. MISS. CODE ANN. § 85-3-21 (1991).

12. MISS. CODE ANN. § 85-3-1(a) (Supp. 1997).

13. *See, e.g.*, MISS. CODE ANN. § 85-3-1(e) (Supp. 1997).

14. MISS. CODE ANN. §§ 11-35-1 to 11-35-61 (1972 & Supp. 1997).

15. MISS. CODE ANN. § 85-3-4 (1991).

16. MISS. CODE ANN. § 11-7-189(2) (Supp. 1997).

17. 11 U.S.C. § 524(a)(1)-(2) (1994).

to preclude enforcement.[18] The *in rem* enforceability of a lien which passes through the bankruptcy proceeding is limited to execution on non-exempt property which existed at the time the bankruptcy case was filed.[19] A pre-petition judgment lien which has been rendered void as to the debtor's personal liability by § 524(a)(1) cannot be considered as a lien on property acquired by the debtor post-discharge.[20] Troubling questions occur, however, when the enforcement of a lien which passed through bankruptcy unaffected is attempted against property which may have been in existence at the time the bankruptcy case was filed, but which had no unencumbered value to which the lien could attach until well after the entry of the discharge order.

Suppose in our scenario that the debtor enjoyed no unencumbered equity in the homestead property at the time the Chapter 7 case was filed, but subsequent to discharge, equity was created through the pay down of the existing mortgage or by an appreciation in the value of the property through market forces. An argument can be made that this post-discharge increase in the value of the property is subject to the lien if the judgment passed through the bankruptcy unaffected. Unless the judgment lien is somehow dealt with during the course of the bankruptcy proceeding, it could come back to haunt the debtor years later if the homestead is sold or refinanced, or even if an item of tangible personal property, owned by the debtor pre-petition, experiences an extraordinary appreciation in value post-bankruptcy. The extent to which a debtor may neutralize a judgment lien using mechanisms available under the Bankruptcy Code has seen significant changes over the past five years.

II. LIEN STRIPPING

Prior to January 15, 1992, the most effective way for a debtor to deal with an existing judgment lien was to employ the "lien stripping" provisions of §§ 506(a) and 506(d) of the Bankruptcy Code.[21] Section 506(a) provided that a claim may be bifurcated into a secured and unsecured portion after first determining the value of the property which secures the lien.[22] For example, if property worth $30,000 is encumbered by a lien in the amount of $50,000, § 506(a) provides that the claim may be divided into a $30,000 "secured" portion and a $20,000 "unsecured" portion. Section 506(d) provided that, to the extent that a lien secures a claim against the debtor that is not an "allowed secured claim," such lien "is void."[23]

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18. 4 COLLIER ON BANKRUPTCY ¶ 524.02[1]1 (Lawrence P. King, 15th ed., revised 1997) (citing Johnson v. Home State Bank, 501 U.S. 78, 82-83 (1991)); *see also* Farrey v. Sanderfoot, 500 U.S. 291 (1991); Long v. Bullard, 117 U.S. 617 (1886).

19. *See* 4 KING, *supra* n.18, at ¶ 524.02[1].

20. *Id.* (citing Moran v. Saxenien Properties (*In re* Moran), 112 B.R. 197 (Bankr. S.D. Tex. 1989) (holding that post-discharge enforcement of writ of garnishment served pre-petition prohibited); and University of Ala. Hosps. v. Warren (*In re* Warren), 7 B.R. 201 (Bankr. N.D. Ala. 1980) (holding that post-discharge enforcement of pre-petition judicial lien evidenced by writ of garnishment on debtor's employer is prohibited)); *see also In re* Thomas, 102 B.R. 199 (Bankr. E.D. Cal. 1989).

21. 11 U.S.C. § 506(a), (d) (1988).

22. 11 U.S.C. § 506(a) (1984).

23. 11 U.S.C. § 506(d) (1984).

Enterprising debtors' attorneys employed the bifurcation process of §§ 506(a) and 506(d) in Chapter 7 cases to strip away existing judgment liens that encumbered the debtor's property. The process was properly initiated by the filing of a complaint to determine the validity, priority, or extent of a lien. The debtor would establish the property value through expert testimony. Any lien not supported by property value would be unsecured and avoided.

Consider the following fact pattern:

Property value	$30,000.00
First mortgage	50,000.00
Subordinate judicial lien	5,000.00

Since there is insufficient value in the property to satisfy even the first deed of trust, the judgment lien would be totally unsecured if there were no other non-exempt assets to which it could attach.

Sections 506(a) and (d) provided that a lien is void to the extent that there are no assets for the lien to encumber.[24] Chapter 7 consumer debtors often have no significant unencumbered equity in their homestead property or any non-exempt personal property to which a judgment lien may attach. Accordingly, § 506(a) was often employed to have the claim adjudicated as unsecured, and the judicial lien was then avoided pursuant to § 506(d).

Those were happy days for debtors' attorneys. After obtaining an order from the bankruptcy court adjudicating that the judgment was "void," the order was delivered to the local circuit clerk for entry in the file of the collection action which produced the judgment. The record of the lien on the judgment roll would then be physically marked "canceled," thereby destroying any prospective post-discharge enforcement of the lien. Attacking judgment liens in this manner allowed debtors to enjoy a post-discharge "fresh start," with their property stripped clean of judicial liens. It also enabled them to avoid the specter of those liens attaching to any post-bankruptcy increase in equity or value which might develop in their homestead or their tangible personal property. Lien stripping under § 506 protected the truly secured claim while allowing the debtor to expose and extinguish the illusory ones. All of this came to an end in 1992.

III. *Dewsnup v. Timm*

The Supreme Court decision, *Dewsnup v. Timm*,[25] effectively wrote § 506(d) out of Chapter 7 practice. The debtors in the case were farmers who attempted to use § 506 to strip off the unsecured portion of a lien securing a claim of $120,000 encumbering farm land with a fair market value of $39,000.[26] The debtors bifurcated the debt into a secured portion of $39,000 and an unsecured portion of $81,000. The creditor argued that by fixing the secured claim at $39,000, it would be denied the benefit of any increase in market value which

24. 11 U.S.C. § 506(a), (d) (1984).
25. 502 U.S. 410 (1992).
26. *Id.* at 412-13.

might ultimately occur.[27] The Supreme Court agreed with the creditor.[28] In reaching its conclusion, the Court examined § 506(d) and focused on the word "allowed" in the term "allowed secured claim," rather than the word "secured."[29] The Court noted that § 502 of the Bankruptcy Code allows a claim to be disallowed for various reasons and then concluded that the true meaning of § 506(d) is that a lien is void only to the extent that the underlying claim is not "allowed," rather than being merely unsecured.[30] In his dissent, Justice Scalia opined that the majority had completely misunderstood the "plain meaning" of § 506(a) and § 506(d).[31]

Even though *Dewsnup* involved a consensual lien in a Chapter 7 context, subsequent decisions have expanded the lien stripping prohibition of the decision to nonconsensual or involuntary liens, including judgment liens.[32] Despite *Dewsnup*'s clear prohibition against lien stripping in a Chapter 7 case, courts have continued to allow the practice in cases filed under Chapter 13.

IV. CHAPTER 13 LIEN STRIPPING

Section 1322(b)(2) provides that a Chapter 13 plan may modify the rights of holders of secured claims, except for claims "secured only by a security interest in real property that is the debtor's principal residence . . . ."[33] In *Nobleman v. American Savings Bank*,[34] the Supreme Court held that § 506(a) could not be employed to bifurcate a claim, secured exclusively by a mortgage on the debtor's principal residence, into secured and unsecured portions based on a valuation of the property.[35] Doing so would impermissibly modify the rights of the holder of the claim in violation of § 1322(b)(2) if the unsecured portion was not paid in full.[36] However, neither § 1322(b)(2) nor the *Nobleman* decision prohibits a § 506(a)/§ 506(d) stripping of judicial liens in a Chapter 13 case.

Section 1322(b)(2) prohibits the modification of claims secured only by a "security interest" in the debtor's homestead property.[37] The term "security interest" is defined in the Bankruptcy Code as a "lien created by an agreement."[38] A judicial lien, being a non-consensual lien, is outside the anti-modification language of § 1322(b)(2) and the *Nobelman* mandate. In Chapter 13 cases,

27. *Id.* at 417.
28. *Id.*
29. *Id.* at 417-19; *see generally* 11 U.S.C. § 506(d) (1984).
30. *See generally Dewsnup*, 502 U.S. at 417.
31. *See id.* at 420-36.
32. Esler v. Orix Credit Alliance (*In re* Esler), 165 B.R. 583, 584 (Bankr. D. Md. 1994); Rombach v. United States (*In re* Rombach), 159 B.R. 311, 314 (Bankr. C.D. Cal. 1993); *In re* Douiak, 161 B.R. 379, 381 (Bankr. E.D. Tex. 1993); *but cf.* Howard v. National Westminster Bank (*In re* Howard), 184 B.R. 644 (Bankr. E.D.N.Y. 1995).
33. 11 U.S.C. § 1322(b)(2) (1994).
34. 508 U.S. 324 (1993) (superseded by statute as stated in *In re* Escue, 184 B.R. 287 (Bankr. M.D. Tenn. 1995)).
35. *Id.* at 330-32.
36. *Id.* at 328-30.
37. 11 U.S.C. § 1322(b)(2) (1984).
38. 11 U.S.C. § 101(51) (1994).

Bankruptcy Courts have continued to allow the stripping of judicial liens pursuant to § 506 in the post-*Dewsnup*, post-*Nobelman* era.[39]

Although the ability to "void" a judicial lien pursuant to § 506 is no longer available in the Chapter 7 context, relief may be found in § 522(f) which allows a debtor to "avoid the fixing of a [judicial] lien" to the extent that it impairs an exemption.[40]

V. PRE-1994 APPLICATION OF § 522(f)(1)

Section 522(f)(1) allows a debtor to avoid a judicial lien, but only to the extent that such lien impairs an exemption.[41] Prior to October 22, 1994, § 522(f) provided as follows:

> Exemptions
> . . .
>
> (f) Notwithstanding any waiver of exemptions . . . the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--
>
> (1) a judicial lien . . . .[42]

A judicial lien should not be confused with a "statutory lien," which is defined as a "lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory . . . ."[43] A municipality's water and sewer lien which attached automatically pursuant to state law has been found to be a statutory lien.[44] A federal tax lien is not a judicial lien.[45] Most states provide for some type of statutory landlord's lien which would be beyond the avoidability parameters of § 522(f).[46] However, liens in favor of a landlord, created through a judicial eviction process or a sheriff's levy, have been

39. *In re* Toronto, 165 B.R. 746 (Bankr. D. Conn. 1994) (post-*Dewsnup*/post-*Nobelman* decision which acknowledges, in footnote 11, that neither § 1322(b)(2) nor *Nobelman* precludes a § 506(a) valuation and subsequent modification of a judicial lien in a Chapter 13 case); McDonough v. Plaistow Coop. Bank (*In re* McDonough), 166 B.R. 9 (Bankr. D. Mass. 1994) (post-*Dewsnup*/post-*Nobelman* decision which acknowledges that the exception to a debtor's lien stripping ability for a claim secured only by principal residence is not applicable to judicial liens); Cullen v. Redlon & Johnson Supply, Inc. (*In re* Cullen), 150 B.R. 1 (Bankr. D. Me. 1993) (post-*Dewsnup*/pre-*Nobelman* decision in which Chapter 13 debtors employed § 506(d) to void a judicial lien).

40. 11 U.S.C. § 522(f) (1994).

41. *Id.*

42. 11 U.S.C. § 522(f)(1) (1988).

43. 11 U.S.C. § 101(53) (1994).

44. Graffen v. City of Philadelphia, 984 F.2d 91 (3d Cir. 1992); *In re* Aikens, 87 B.R. 350 (Bankr. E.D. Pa. 1988).

45. Senyo v. Internal Revenue Serv. (*In re* Senyo), 82 B.R. 401 (Bankr. W.D. Pa. 1988); *In re* Driscoll, 57 B.R. 322 (Bankr. W.D. Wis. 1986).

46. *See, e.g.*, MISS. CODE ANN. § 89-7-51 (1991) (statutory landlord's lien in Mississippi).

found to be avoidable judicial liens.[47] A lien evidenced by a garnishment based on an underlying judgment is an avoidable judicial lien.[48]

Even though judicial lien avoidance pursuant to § 522(f) has been available since the enactment of the 1978 Code,[49] it seems to have never enjoyed the same popularity as avoidance under § 506(a) and § 506(d). The reluctance of practitioners to embrace § 522(f) may have been a result of the fact that implementation of the section lacked the simplicity of a § 506(d) analysis. Under § 506(d), a judicial lien is void upon a showing that no equity exists to which the lien may attach. Any debate regarding the post-discharge effectiveness of the lien was thus rendered moot. Under § 522(f), a judicial lien may be avoided only "to the extent" that it impairs an exemption, which connotes only partial avoidance of the lien.[50] However, the greatest problem in implementing § 522(f) was that courts were unable to reach a consensus on the definition of "impairment."

Some courts have held that where a homestead exemption could only be exercised in response to an execution, attachment, or judicial sale brought by a lienholder, a judgment lien did not "impair" the debtor's exemption and could not be avoided pursuant to § 522(f), unless such an action was pending when the bankruptcy case was filed.[51] Under this view, the judgment lien flowed through the bankruptcy proceeding and was free to attach to any post-bankruptcy accrual in the value of the homestead property.

Other courts inexplicably held that an exemption could never be "impaired" in an amount greater than the available statutory exemption amount.[52] For example, consider the following:

Property value	$ 7,500.00
Allowable exemption	7,500.00
Superior liens	-0-
Judgment amount	10,000.00

Those decisions would hold that the $10,000 judgment lien could only be partially avoided. Only $7,500 of the judgment would be considered to "impair" the

47. *In re* Bistransin, 95 B.R. 29 (Bankr. W.D. Pa. 1989); MacLure v. Mascaro (*In re* MacLure), 50 B.R. 134 (Bankr. D.R.I. 1985).

48. *In re* Waltjen, 150 B.R. 419 (Bankr. N.D. Ill. 1993) (superseded by statute as stated in *In re* Youngblood, 212 B.R. 593 (Bankr. N.D. Ill. 1997)). Note, when a § 522(f) lien avoidance is not available because the lien at issue is a statutory lien, recourse to § 522(g) and (h), which allow a debtor to employ the lien avoidance powers of a trustee in certain circumstances, should be explored. Also, when confronted with a statutory landlord's lien, do not overlook § 545 of the Bankruptcy Code.

49. Commentaries have characterized the lien avoiding powers granted to a debtor as "[o]ne of the more significant changes in the bankruptcy laws brought by the Bankruptcy Reform Act of 1978 . . . ." 4 KING, *supra* n.18, at ¶ 522.11[1].

50. 11 U.S.C. § 522(f)(1) (1994).

51. *See, e.g.*, Ford Motor Corp. v. Dixon (*In re* Dixon), 885 F.2d 327 (6th Cir. 1989); *In re* Harrison, 164 B.R. 611 (Bankr. N.D. Ill. 1994); David Dorcey Distrib., Inc. v. Sanders (*In re* Sanders), 156 B.R. 667 (D. Utah 1993); Ward v. Bank of Findley (*In re* Ward), 157 B.R. 643 (Bankr. C.D. Ill. 1993); *In re* Cerniglia, 137 B.R. 722 (Bankr. S.D. Ill. 1992).

52. *In re* Jones, 166 B.R. 657 (Bankr. N.D. Ill. 1994); *In re* Gonzalez, 149 B.R. 9 (Bankr. D. Mass. 1993), vacated, Gonzalez v. First Nat'l Bank of Boston, 191 B.R. 2 (D. Mass. 1996); *In re* Presteguard, 139 B.R. 117 (Bankr. S.D.N.Y. 1992); *In re* Cerniglia, 137 B.R. 722 (Bankr. S.D. Ill. 1992).

debtor's homestead exemption. The balance of the judgment, in the amount of $2,500, would remain enforceable post-bankruptcy.

Other courts took the position, which is now consistent with the recently amended statute, that a judicial lien could attach to any equity remaining in the property after subtracting all prior liens and the allowable exemption.[53] This approach left an unavoided portion of the lien which survived bankruptcy.

The Supreme Court attempted to alleviate the confusion surrounding the implementation of § 522(f) by holding, in *Owen v. Owen*, that "the baseline, against which impairment is to be measured," is the amount of an exemption to which the debtor "'would have been entitled'" but for the judicial lien at issue.[54] However, the differing views on how to correctly apply § 522(f) continued and favorably culminated in a revision to the section by the Bankruptcy Reform Act of 1994.[55]

VI. 1994 AMENDMENTS TO § 522(f)

The Bankruptcy Reform Act of 1994,[56] effective from and after October 22, 1994, amended § 522(f) by, *inter alia*,[57] establishing, in § 522(f)(2)(A), a mathematical formula to determine the extent of the impairment to an exemption applicable to judicial lien avoidance under § 522(f)(1)(A), as well as the avoidance of non-possessory, non-purchase money security interests under § 522(f)(1)(B). Section 522(f)(2)(A) now reads as follows:

> For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—
>
> (i) the lien;
>
> (ii) all other liens on the properties; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.[58]

"The lien" means the amount of the underlying judgment which gives rise to the lien the debtor seeks to avoid.[59] The "value" of the debtor's interest in the property is the fair market value at the date of the filing of the bankruptcy petition without a reduction for the costs of sale.[60]

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53. City Nat'l Bank v. Chabot (*In re* Chabot), 992 F.2d 891 (9th Cir. 1993) (superseded by statute, as stated in Jones v. Heskett (*In re* Jones), 106 F.3d 923 n.2 (9th Cir. 1997), by the Bankruptcy Reform Act of 1994, PUB. L. No. 103-393, 108 Stat. 4106).

54. *Owen v. Owen*, 500 U.S. 305, 311 (1991).

55. PUB. L. No. 103-393, 108 Stat. 4106.

56. *Id.*

57. The 1994 Act also renumbered § 522(f)(1) as § 522(f)(1)(A) and amended the section to provide that a judicial lien securing a debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support" may not be avoided unless the debt has been assigned to another entity, either voluntarily or by operation of law. 11 U.S.C. § 522(f)(1)(A) (1994).

58. 11 U.S.C. § 522(f)(2)(A) (1994).

59. Pepper v. Public Serv. Employees Credit Union (*In re* Pepper), 210 B.R. 480, 485 (Bankr. D. Colo. 1997).

60. *In re* Johnson, 184 B.R. 141, 146-47 (Bankr. D. Wy. 1995); *see also Pepper*, 210 B.R. at 486.

A determination of "impairment" under § 522(f)(2)(A) is, in fact, a three-step process. First, the movant must calculate the sum of the judgment sought to be avoided, all of the superior liens on the property, and the dollar amount of the available exemption. Second, the debtor must compare this sum to the value of the property. Third, the difference must then be compared to the amount of the judgment sought to be avoided. If the difference is greater than or equal to the subject judgment, the lien may be avoided in its entirety. If the difference is less than the amount of the lien sought to be avoided, only partial avoidance can be granted. Examples of each situation are as follows:

In re Jakubowski:[61]

1.	(i)	subject judicial lien	$ 8,033.33
	(ii)	other superior liens	58,975.57
	(iii)	exemption	5,000.00
		Total	$72,008.90
2.	Value of property		$49,000.00
	($72,008.90 less $49,000.00)		$23,008.90

3. $23,008.90 >$8,033.33.....Lien avoided in full.[62]

Jones v. Mellon Bank, N.A. (In re Jones):[63]

1.	(i)	subject judicial lien	$10,954.29
	(ii)	other superior liens	28,500.00
	(iii)	exemption	7,500.00
		Total	$46,954.29
2.	Value of property		$36,000.00
	($46,954.29 less $36,000.00)		$10,954.29

3. $10,954.29 = $10,954.29.....Lien avoided in full.[64]

In re Moe:[65]

1.	(i)	subject judicial lien	$216,937.81
	(ii)	other superior liens	5,535.27
	(iii)	exemption	20,000.00
		Total	$242,473.00
2.	Value of property		$ 31,950.00
	($242,473.00 less $31,950.00)		$210,523.00

61. 198 B.R. 262 (Bankr. N.D. Ohio 1996).
62. *Id.* at 264-65.
63. 183 B.R. 93 (Bankr. W.D. Pa. 1995).
64. *Id.* at 95.
65. 199 B.R. 737 (Bankr. D. Mont. 1995).

3. $210,523.00 < $216,937.81.....Partial avoidance. (Lien avoided to extent of $210,253.00. Remainder of $6,414.73 is unavoidable.)[66]

According to the legislative history of § 303 of the Bankruptcy Reform Act of 1994,[67] which incorporates the amendments to § 522(f), the formula adopted by Congress in § 522(f)(2)(A) was based on the decision of *In re Brantz*.[68] The *Brantz* formula specifically provided for only partial avoidance of a lien if equity existed above other superior consensual liens and the available exemptions.[69] This inference of partial avoidability is in conflict with the general tenor of the House Report, which seems to suggest that partially secured liens should be avoided in their entirety.[70] Even though the legislative history of § 303 of the Bankruptcy Reform Act of 1994 has been questioned because the factual scenarios provided do not comport with the cases cited,[71] Congress' intent in amending § 522(f) is clear. By specifically citing and legislatively overruling *In re Gonzales*[72] and *In re Chabot*,[73] Congress made it clear that the exemption interest protected by § 522(f) includes not only the present value of the property, but any future increase in post-discharge value as well.

Based on the confusing legislative history, some attorneys employing the amended statute have argued that even if a small amount of equity remains to which the lien may attach, the lien should nevertheless be avoided in its entirety in order to protect the debtor's fresh start. Those courts faced with this issue have focused on the plain meaning of § 522(f)(2)(A), which provides that a lien impairs an exemption "to the extent that the sum of" all liens and the exemption exceeds the value of the property.[74] A survey of reported decisions reveals that courts seem comfortable in holding that a lien may be avoided in part, with the unavoidable portion remaining as a fixed secured claim which survives to encumber the debtor's property post-bankruptcy.[75] Where the judicial lien impairs the exemption entirely (i.e., where the difference between the total of the subject lien, other superior liens, and the exemption and the value of the property is less than or equal to the amount of the lien sought to be avoided), the lien is

66. *Id.* at 739-40.

67. H. REP. NO. 103-835, at 53-54 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3361-63.

68. 106 B.R. 62 (Bankr. E.D. Pa. 1989).

69. *Id.* at 68.

70. *In re* Ryan, 210 B.R. 7, 10-11 (Bankr. D. Mass. 1997) (examining conflicting language in the House Report).

71. Federal Deposit Ins. Corp. v. Finn (*In re* Finn), 211 B.R. 780, 782 (B.A.P. 1st Cir. 1997); *In re* Ryan, 210 B.R. 7, 10 (Bankr. D. Mass. 1997).

72. 149 B.R. 9 (Bankr. D. Mass. 1993).

73. 992 F.2d 891 (9th Cir. 1993).

74. 11 U.S.C. § 522(f)(2)(A) (1994).

75. *Finn*, 211 B.R. at 780; Choice v. Copelco Capital, Inc. (*In re* Choice), Nos. 97-15868DAS, 97-0852, 1997 WL 599577 (Bankr. E.D. Pa. Sept. 23, 1997); *In re* Gostian, No. 96-3532-APG, 1997 WL 589466 (Bankr. M.D. Ala. July 29, 1997); Cannelos v. Mignini (*In re* Cannelos), 212 B.R. 249 (Bankr. D. Md. 1997); *In re* Ryan, 210 B.R. 7 (Bankr. D. Mass. 1997); *In re* Kerbs, 207 B.R. 211 (Bankr. D. Mont. 1997); Corson v. Fidelity and Guar. Ins. Co. (*In re* Corson), 206 B.R. 17 (Bankr. D. Conn. 1997); *In re* Todd, 194 B.R. 893 (Bankr. D. Mont. 1996); *In re* Moe, 199 B.R. 737 (Bankr. D. Mont. 1995); *In re* Johnson, 184 B.R. 141 (Bankr. D. Wyo. 1995); *In re* Thomsen, 181 B.R. 1013 (Bankr. M.D. Ga. 1995).

avoided in its entirety and will not thereafter attach to any post-bankruptcy increase in the value of the exempt property.[76]

With the extent of the avoidability of a judgment lien being dependent upon the value of the debtor's property, the new § 522(f)(2)(A) formula appears deceptively similar to the § 506(d) lien stripping analysis. However, it must be noted that while § 506 provides for *claim* bifurcation, § 522(f) allows the avoidance of a *lien* only to the extent that an exemption is impaired. Lien is defined in the Bankruptcy Code as a "charge against or interest in property to secure payment of a debt or performance of an obligation."[77] When there is no value to support the lien, § 506 allows the debtor to convert a putative secured claim into an unsecured claim which is then discharged in bankruptcy, extinguishing the judgment creditor's right to payment. On the other hand, § 522(f) focuses on the protection of the debtor's exemption rights in certain property. At least one court has characterized the concept of the "bifurcation of the lien, rather than the debt which it secures," as a "heretofore unknown" concept.[78] Nevertheless, it is clear from the post-1994 reported decisions construing § 522(f)(2)(A) that, to the extent that a lien is avoided, a judgment creditor's right to payment is extinguished.

VII. CONCLUSION

Return once again to our scenario. The Chapter 7 discharge relieves the homeowner from any further *personal liability* on the judgment. If nothing more is done during the course of the bankruptcy case to address the judicial lien, it remains valid and enforceable to the extent allowed by state law against the property that has passed through the bankruptcy estate. Prior to *Dewsnup v. Timm*,[79] the Chapter 7 debtor's attorney could have employed § 506(a) and § 506(d) to bifurcate the claim into secured and unsecured portions. If it was determined that the claim was totally unsecured because no unencumbered equity existed to which the judicial lien could attach as of the date of the bankruptcy filing, an order could have been entered voiding the judgment lien and authorizing the appropriate state court official to fully cancel the lien on the judgment roll book. As to claims *not* secured exclusively by a *security interest* encumbering the debtor's residential real property, this tactic can still be used in Chapter 13 cases.

If the new § 522(f)(2)(A) was employed to fully avoid a judicial lien as impairing the debtor's homestead exemption, a well-crafted order should state that the lien is effectively extinguished and should be canceled of record as to the homestead property. Although the concept is very similar to the use of § 506(d), it is more restrictive since it can be applied only to the particular exempt property, not expansively to all of the debtor's property.

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76. Zeigler Eng'g Sales, Inc. v. Cozad (*In re* Cozad), 208 B.R. 495 (B.A.P. 10th Cir. 1997); *In re* Cavenaugh, No. 95-4408, 1995 WL 602487 (E.D. Pa. Oct. 11, 1995); *In re* VanZant, 210 B.R. 1011 (Bankr. S.D. Ill. 1997); Lashley v. Fuhrer (*In re* Lashley), 206 B.R. 950 (Bankr. E.D. Mo. 1997); Marshall v. Suntrust Bank, Savannah, N.A. (*In re* Marshall), 204 B.R. 838 (Bankr. S.D. Ga. 1997); *In re* Jakubowski, 198 B.R. 262 (Bankr. N.D. Ohio 1996); *In re* Allard, 196 B.R. 402 (Bankr. N.D. Ill. 1996); Butler v. Southern O Corp. (*In re* Butler), 196 B.R. 329 (Bankr. W.D. Va. 1996); Jones v. Mellon Bank (*In re* Jones), 183 B.R. 93 (Bankr. W.D. Pa. 1995).

77. 11 U.S.C. § 101(37) (1994).

78. *In re* Thomsen, 181 B.R. 1013, 1016 n.2 (Bankr. M.D. Ga. 1995).

79. 502 U.S. 410 (1992).

In order to best protect the debtor's interest, a prudent attorney should draft the lien avoidance order so that it incorporates an itemization of the exempt property being protected and includes language, if appropriate, stating that the judicial lien is unenforceable against any present or future value in the enumerated property.

Endorsement of the judgment roll book becomes more problematic when the lien is only partially avoided under § 522(f). In such a situation, both the debtor and the judgment creditor have an interest in insuring that the outcome of the lien avoidance motion is properly documented in the state court records. The debtor wants to take advantage of at least the partial reduction in the enforceable amount of the lien. Conversely, the judgment creditor wants to provide notice to all subsequent title examiners that the judgment lien was not wholly extinguished by the avoidance proceeding. Again, a concise, well-drafted order should be submitted to the bankruptcy court and a copy of the order, following its entry, should be placed in the record of the state court action which produced the judgment. The order should specifically state that the judgment lien has been reduced to a fixed amount and is enforceable only against the current existing equity and any post-bankruptcy increase in value in the specific property involved in the proceeding. A notation that the lien has been modified should be made in the judgment roll book with instructions directing interested parties to view a copy of the order located in the state court case file. By fully documenting the effect that the bankruptcy case has had on a judgment lien, the debtor's attorney prevents any confusion regarding the enforceability of the lien if the debtor sells or refinances his or her property years later.