

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**JUDICIAL LIEN AVOIDANCE UNDER
11 U.S.C. § 522(f)**

Summer

2021

OUTLINE

1. Introduction
2. Judicial Lien Creation
3. Judicial Lien Search
4. Bankruptcy Schedules
5. The Judicial Lien Avoidance Formula
6. When and How to Determine the Amount of Liens
7. Priority of Liens Vis-à-Vis the Lien to be Avoided
8. Order of Judicial Lien Avoidance
9. The Exemption
10. The Value of the Property
11. Concurrent Ownership Issues
12. The Fixing of the Judicial Lien
13. Timing of a Motion to Avoid a Judicial Lien
14. Avoiding Judicial Liens Held by Creditors with Non-Dischargeable Debts

1. Introduction

This is an overview of the judicial lien avoidance process under Section 522(f) of the Bankruptcy Code, and some common issues that arise in the adjudication of these motions. This overview is provided for informational and educational purposes only, is not intended to be legal advice, and does not purport represent the position of any one court or judge. These written materials support the YouTube video that is available here: https://youtu.be/Z_yIM51U8_8 and these written materials are provided at the request of the West Virginia Mandatory Continuing Legal Education section of the West Virginia State Bar to make the YouTube video eligible for one-hour of WVMCLE credit. The focus and scope of these materials, and the associated video, is on bankruptcy law and practice in the Northern District of West Virginia.

2. Judicial Lien Creation

Judicial liens are created when a party sues an individual, usually through a civil complaint in state court, and, as a result of that proceeding, obtains a money judgment, which is generally recorded in the county where the judgment debtor lives or has real property. That judgment can become a judicial lien on real property that the judgment debtor currently has or will acquire in the future. W. Va. Code § 38-3-6 (2021).

This is an example of a recorded judgment. It bears the date the judgment was recorded and the book and page number of the judgment book. See W. Va. Code § 38-3-5 (2021). A copy of this document should be attached to the motion in bankruptcy court to avoid the judicial lien.

DISCOVER BANK c/o Discover Products Inc.
6500 New Albany Road
New Albany, Ohio 43054

CASE NO.: 19-C-153

VS.

Wheeling, WV 26003

JUDGMENT AMOUNT \$7,750.88

TOTAL \$7,750.88

LLOYD & McDaniel P.C.
PO BOX 22200
LOUISVILLE KY 40225-0200

ON THE 15th DAY OF NOVEMBER 2019, A JUDGMENT WAS ENTERED IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA, IN FAVOR OF DISCOVER BANK C/O DISCOVER PRODUCTS INC. AGAINST [REDACTED] FOR THE SUM OF SEVEN THOUSAND SEVEN HUNDRED FIFTY DOLLARS AND EIGHTY-EIGHT CENTS (\$7,750.88).

Brenda L. Miller

DECEMBER 16, 2019

BRENDA L. MILLER, CIRCUIT CLERK
OHIO COUNTY, WEST VIRGINIA



Ohio County
Michael E. Kelly, Clerk
Instrument 19707995
12/17/2019 @ 10:07:52 AM
JUDGMENT LIEN
Book 109 @ Page 478
Pages Recorded 1
Recording Cost \$ 11.00

3. Judicial Lien Search

Regarding an attorney's due diligence in ascertaining the existence of judicial liens on behalf of a bankruptcy client, pay attention to the admonition of Bankruptcy Judge Russ Kendig from the Northern District of Ohio:

Debtors' failure to identify the lien at the time the case was filed is particularly troublesome. . . . Not only were the records available through a simple online search of county records, electronic services providing public record searches were also available.

. . .

The importance of an attorney's prepetition due diligence, including lien searches, cannot be understated. Per Bankruptcy Rule 9011(b), a petition presented to the court certifies the representations contained therein are presented "to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances." Failure to adhere to this duty may open counsel to sanctions. . . .

The failure to conduct a simple lien search, especially in light of knowledge of a lawsuit against a debtor who owns real estate, does not satisfy the "reasonable investigation" requirement. . . .

In re Horvath, No. 10-60520, 2021 Bankr. LEXIS 238 (Bankr. N.D. Ohio Feb. 2, 2021).

Most counties have online public records that make searching for judicial liens an easy process. If a county does not yet have online records, a physical trip may be necessary, or alternative, an attorney may consider calling the public records office or having the client visit the office to check for any judicial liens. The better practice is to determine if there are judicial liens in existence while the bankruptcy case is open.

4. The Bankruptcy Schedules

In evaluating whether the judicial lien shown previously is avoidable in a bankruptcy case under § 522(f), let's look at some pertinent information from the bankruptcy schedules in that case. The bankruptcy case was a joint petition filed by a married couple. The judgment is only against the husband, but the couple owns real property together and are both liable on consensually secured debts against the property.

On Schedule A/B, the debtors listed real property located in Ohio County West Virginia having a value of \$161,000.

Official Form 106A/B

Schedule A/B: Property

12/15

In each category, separately list and describe items. List an asset only once. If an asset fits in more than one category, list the asset in the category where you think it fits best. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In

1. Do you own or have any legal or equitable interest in any residence, building, land, or similar property?

☐ No. Go to Part 2.

☒ Yes. Where is the property?

1.1

Street address, if available, or other description

Wheeling WV 26003-0000
City State ZIP Code

Ohio

County

What is the property? Check all that apply.

- ☒ Single-family home
- ☐ Duplex or multi-unit building
- ☐ Condominium or cooperative
- ☐ Manufactured or mobile home
- ☐ Land
- ☐ Investment property
- ☐ Timeshare
- ☐ Other

Who has an interest in the property? Check one.

- ☐ Debtor 1 only
- ☐ Debtor 2 only
- ☒ Debtor 1 and Debtor 2 only
- ☐ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on Schedule D: Creditors Who Have Claims Secured by Property.

Current value of the entire property?	Current value of the portion you own?
\$161,000.00	\$161,000.00

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

Joint Tenants

☐ Check if this is community property (see instructions)

Other information you wish to add about this item, such as local property identification number:

Real estate located at [REDACTED] Wheeling, Ohio County, West Virginia Deed Book 854 at Page 750 Purchase Price: \$132,000
Purchased: April 15, 2013
Deed conveyed from [REDACTED] to [REDACTED] on August 30, 2016

Then on Schedule D, the debtors listed the debts secured by this property:

3/10/20

No. 5:20-bk-00213 Doc 1 Filed 03/10/20 Entered 03/10/20 11:35:32 Page 21 of 80

Debtor 1 [REDACTED] Case number (if known)

Debtor 2 [REDACTED]

2.2 **Pnc Mortgage**

Creditor's Name

Attn: Bankruptcy
3232 Newmark Drive
Miamisburg, OH 45342

Number, Street, City, State & Zip Code

Describe the property that secures the claim: **\$27,997.00** **\$161,000.00**

[REDACTED] Wheeling, WV
26003 Ohio County
Real estate located at [REDACTED]
[REDACTED] Wheeling, Ohio County, West
Virginia Deed Book 854 at Page 750
Purchase Price: \$132,000
Purchased: April 15, 2013
Deed conveyed from [REDACTED]

As of the date you file, the claim is: Check all that apply.

☒ Contingent
☒ Unliquidated
☐ Disputed

Nature of lien. Check all that apply.

☐ An agreement you made (such as mortgage or secured car loan)
☐ Statutory lien (such as tax lien, mechanic's lien)
☐ Judgment lien from a lawsuit
☒ Other (including a right to offset) **Second Deed of Trust**

Who owes the debt? Check one.

☐ Debtor 1 only
☐ Debtor 2 only
☒ Debtor 1 and Debtor 2 only
☐ At least one of the debtors and another
☐ Check if this claim relates to a community debt

Date debt was incurred **Opened 12/16** Last 4 digits of account number **0743**

2.3 **Wells Fargo Home Mortgage**

Creditor's Name

PO Box 10335
Des Moines, IA 50306

Number, Street, City, State & Zip Code

Describe the property that secures the claim: **\$107,445.00** **\$161,000.00**

[REDACTED] Wheeling, WV
26003 Ohio County
Real estate located at [REDACTED]
[REDACTED] Wheeling, Ohio County, West
Virginia Deed Book 854 at Page 750
Purchase Price: \$132,000
Purchased: April 15, 2013
Deed conveyed from [REDACTED]

As of the date you file, the claim is: Check all that apply.

☒ Contingent
☒ Unliquidated
☐ Disputed

Nature of lien. Check all that apply.

☐ An agreement you made (such as mortgage or secured car loan)
☐ Statutory lien (such as tax lien, mechanic's lien)
☐ Judgment lien from a lawsuit
☒ Other (including a right to offset) **Deed of Trust**

Who owes the debt? Check one.

☐ Debtor 1 only
☐ Debtor 2 only
☒ Debtor 1 and Debtor 2 only
☐ At least one of the debtors and another
☐ Check if this claim relates to a community debt

Date debt was incurred **Opened 4/15/13** Last Active **7/14/19** Last 4 digits of account number **7877**

Add the dollar value of your entries in Column A on this page. Write that number here: **\$147,061.00**

If this is the last page of your form, add the dollar value totals from all pages. Write that number here: **\$147,061.00**

With regard to the judgement lien in favor of Discover Bank, the attorney in this bankruptcy case chose to list it as an unsecured debt on Schedule E/F, presumably in anticipation of a successful motion to avoid Discover Bank's judicial lien under Section 522(f):

<div style="border: 1px solid black; padding: 2px; width: 30px; float: left; margin-right: 5px;">4.1 3</div> <div style="clear: both;"></div>	Discover Financial Nonpriority Creditor's Name Attn: Bankruptcy Department Po Box 15316 Wilmington, DE 19850 Number Street City State Zip Code Who incurred the debt? Check one. <input checked="" type="checkbox"/> Debtor 1 only <input type="checkbox"/> Debtor 2 only <input type="checkbox"/> Debtor 1 and Debtor 2 only <input type="checkbox"/> At least one of the debtors and another <input type="checkbox"/> Check if this claim is for a community debt Is the claim subject to offset? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	Last 4 digits of account number 0534 \$7,750.00 When was the debt incurred? Opened 02/12 Last Active 7/26/18 As of the date you file, the claim is: Check all that apply <input type="checkbox"/> Contingent <input checked="" type="checkbox"/> Unliquidated <input checked="" type="checkbox"/> Disputed Type of NONPRIORITY unsecured claim: <input type="checkbox"/> Student loans <input type="checkbox"/> Obligations arising out of a separation agreement or divorce that you did not report as priority claims <input type="checkbox"/> Debts to pension or profit-sharing plans, and other similar debts <input checked="" type="checkbox"/> Other. Specify Credit Card
---	---	---

Sometimes an attorney will not know if a judicial lien exists at the time the bankruptcy petition is filed, as Schedule E/F, the schedule of unsecured debts, is often populated by a debtor's credit report and the credit report likely includes the debt that was reduced to judgment. Of course, scheduling a judicial lien as an unsecured debt does not change the nature of the debt and sometimes a judicial lien that is not avoidable is mistakenly included on Schedule E/F. On the other hand, when an attorney knows about the existence of a judicial lien and believes that it is wholly avoidable, the attorney may choose to include the judicial lien on Schedule E/F instead of Schedule D to avoid making an inconsistent representation regarding the nature of the debt as being secured. In any case, when a judicial lien is known to be unavoidable, in whole or in part, it should be included on Schedule D. In practice, however, schedules are not amended to move a judicial lien from Schedule E/F to Schedule D, or vice versa, as the schedules are merely a representation of the Debtor's belief regarding the nature and extent of debts. Attorneys preparing bankruptcy schedules should try to be as accurate as possible.

5. The Judicial Lien Avoidance Formula

The requirements for avoiding a judicial lien are stated in § 522(f) of the Bankruptcy Code. The opening sentence tells us that:

First, it is the “fixing” of the judicial lien that is being avoided. This generally means that the judgment debtor has real property to which the judgment lien has attached under state law. At that time, the judicial lien is “fixed” to the property.

Second, the judicial lien must impair property in which the debtor has an interest.

Third, the judicial lien must impair an exemption to which the debtor would have been entitled. Note that the language of the sentence is hypothetical.

Fourth, the lien must be a judicial lien – not a consensual lien or a statutory lien.

Fifth, a judicial lien may only be avoided to the extent that the judicial lien, all other liens on the property, and the amount of the exemption that the debtor could have taken in the absence of the judicial lien, exceeds the value of the property.

The bankruptcy court has deciphered this mathematical formula for individual debtors and has a judicial lien avoidance form available on its website: www.wvnb.uscourts.gov

First let’s add all the liens together. This includes any consensual liens, statutory liens such as tax liens, and all judicial liens:

5. As of the petition date, the Property was subject to the following liens:

Creditor	Type of Lien	Balance owed as of petition date
Wells Fargo Home Mortgage	Deed of Trust	\$107,445.00
PNC Mortgage	Second Deed of Trust	\$27,997.00
Discover Bank	Judgment Lien	\$7,750.88

6. The Debtor states that the Respondent’s lien impairs the Debtor’s exemption following the formula set forth in 11 U.S.C. § 522(f)(2):

A. Enter the total of all liens listed in paragraph 5 \$ 143,192.88

Next, determine the exemption that could be claimed in the Property in the absence of any of the above liens. Remember that in this case the debtors listed an exemption in the amount of \$25,558 on Schedule C, and even though the exemption amount used in the formula is hypothetical, attorneys often use the actual exemption claimed on Schedule C in the judicial lien avoidance motion, at least when the actual exemption will not change the outcome of the motion. Add the amount of the hypothetical exemption to the total amount of the liens:

- A. Enter the total of all liens listed in paragraph 5: \$143,192.88
- B. Enter the amount of the exemption that could be claimed in the Property in the absence of any liens as stated in Paragraph 4 \$25,588.00
- C. Add paragraphs A and B and enter the total: \$168,750.88

The next step is to determine the value of the property. Remember that in Schedule A/B, this property had a value of \$161,000. Before addressing more advanced concurrent ownership issues, let's use this value of \$161,000 and see how it affect the lien avoidance formula.

The Judicial Lien Avoidance Formula:			
	A	B	C
1.	Enter the total of all liens (consensual, statutory and judicial liens)	Wells Fargo - \$107,455.00 PNC - \$27,997.00 Discover Bank - \$7,750.88	\$143,192.88
2.	Enter the exemption that could be claimed in the absence of any lien	See, e.g., W. Va. Code § 38-10-4(a)	\$25,558.00
3.	Add Lines 1C and 2C	The total of all liens and the exemption	\$168,750.88
4.	Enter the value of the property	See Schedule A/B	\$161,000.00
5.	Subtract Line 4C from Line 3C (<i>if the result is \$0 or a negative number, then STOP: the lien cannot be avoided</i>)	"The Extent of the Impairment"	\$7,750.88
6.	Insert the amount of the Discover Bank judicial lien	"The Lien to be Avoided"	\$7,750.88
7.	Is the "Extent of the Impairment" on line 5C, greater than or equal to the 'The Lien to be Avoided on Line 6C? (<i>if yes, then STOP: the judicial lien may be completely avoided</i>)	Full or partial avoidance for impairing the debtor's exemption	Yes.
8.	Subtract Line 5C from Line 6C	Amount of Judicial lien remaining in force and effect	\$0

As is evident from this chart, manipulating the numbers even by as little as \$1 can result in a different lien avoidance outcome.

In general, for purposes of the lien avoidance formula, debtors benefit from having a higher amount of liens secured by the property and a greater claim for an exemption, and at the same time, debtors benefit from having a lower value assigned to their real property. The judicial lien creditor benefits from the exact opposite. And this tension, which is usually centered around the value of the property, is the source for the majority of the litigation issues that arise in the context of judicial lien avoidance motions.

Now that we understand the basic mechanics of how the judicial lien avoidance formula works in a bankruptcy case let's look deeper into more specific issues that can arise in litigation.

6. When and How to Determine the Amount of the Liens

Liens against the bankruptcy debtor's property are determined and fixed as of the date of the filing of the bankruptcy petition. As stated in by the bankruptcy court in the case of *In re Salanoa*, 263 B.R. 120, 123 (Bankr. S.D. Cal. 2001):

[T]he petition date is the operative date to make all § 522(f) determinations. . . . it . . . preserves the parties' rights as they existed on the petition date to the extent the lien is avoidable under § 522(f). Further, the petition date is also the most logical date. The Court must value the residence and the Debtor's entitlement to an exemption on the petition date. As the amount of the liens is relevant to these determinations, it makes sense to value the liens on the same date.

Thus, for consensual liens such as mortgages, the amount owed as of the petition date is the applicable amount. And in the motion to avoid a judicial lien, the amount of the consensual liens should be as previously stated in Schedule D. Presumably a debtor will continue the debt service payments on a home mortgage after filing bankruptcy, and presumably there may be a period of time between the filing of the bankruptcy petition and the filing of the motion to avoid a judicial lien. However, a corresponding decrease (or increase) in the amount owed on a consensual lien should not affect the judicial lien avoidance formula when the amount of the liens is fixed as of the date of the bankruptcy filing. This point is particularly important in pre-bankruptcy planning as a debtor may want to consider the pros and cons of incurring a second or third mortgage in advance of filing for bankruptcy.

Unlike a consensual mortgage that is associated with regular debt service statements detailing the amount owed on a reoccurring basis, a judicial lien, under state law, is associated with a statutory interest rate. Often the applicable interest rate is stated on the abstract of judgment. Post-judgment interest in West Virginia state courts is governed by W. Va. Code § 56-6-31(c), and, with some limitations, it is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the judgment or decree is entered. If a person is unsure of the judgment rate in effect at the time of entry of judgment, the West Virginia Supreme Court of Appeals maintains this information:

CONGRESS & COURT

WEST VIRGINIA SUPREME COURT OF APPEALS: 2021 Interest Rate on Judgments and Decrees

West Virginia Record | 29d



West Virginia Supreme Court of Appeals issued the following announcement on Jan. 4. The Administrative Office of the Supreme Court of Appeals of West Virginia has set the interest rate at 4 percent for judgments and decrees entered during the 2021 calendar year. West Virginia Code §56-6-31 requires the Administrative Office annually to determine the interest rate to be paid upon judgments or decrees for the payment of money. It requires the pre-judgment and post-judgment interest rate to be two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered. The law also says the rate cannot exceed 9 percent per year or be less than 4 percent per year.

You may also like



GOVERNMENT

Attorney General asks Supreme Court to reject appeal in law

However, in the judicial lien avoidance formula, adding interest to the judgment from the date of its entry is not necessary step to filing the judicial lien avoidance motion because it has no effect on whether the judgment may be wholly or partially avoidable under the formula. Look at this example:

In this case the judgement was obtained on December 19, 2019 in the principal amount of \$7,750.88. According to the Supreme Court of Appeals for West Virginia, the 2019 judgment interest rate was 5.5%. Thus, if this debtor had filed bankruptcy on December 19, 2020, the amount of the judgment would be approximately \$8,177.18. But the net effect of the judicial lien avoidance formula is unchanged:

Liens Against the Property as of the Petition Date			
Without Adding Interest from the Date of the Judgment		Adding Interest from the Date of the Judgment	
Wells Fargo 1 st Mortgage	\$107,455.00	Wells Fargo 1 st Mortgage	\$107,455.00
PNC 2 nd Mortgage	\$27,997.00	PNC 2 nd Mortgage	\$27,997.00
Discover Bank Judicial Lien	\$7,750.88	Discover Bank Judicial Lien	\$8,177.18
Exemption	\$25,558.00	Exemption	\$25,558.00
TOTAL:	168,750.88	TOTAL	\$168,177.18
LESS VALUE	-\$161,000.00	LESS VALUE	-\$161,000.00
Extent of the Impairment	\$7,750.88	Extent of the Impairment	\$8,177.18
Amount of Judicial lien remaining in force and effect	\$0	Amount of Judicial lien remaining in force and effect	\$0

In either case, the result is the same, and for this reason, even in a case where a judicial lien is only partially avoided, the face amount of the judgment lien is generally used in the judicial lien avoidance formula.

7. Priority of Liens vis-a-vis the Judicial Lien to be Avoided

Let us turn now to the next requirement in the judicial lien avoidance formula which focuses on all other liens on the property. All other liens against the property means all consensual liens, such as mortgages or deeds of trust, and statutory liens, such as tax liens or mechanic's liens. And when a debtor has multiple judicial liens, it means all other judicial liens.

The general rule is that a lien that is validly recorded first, and which is otherwise "perfected," has priority over all subsequent liens against the property. Having a perfected senior lien means that the creditor gets paid from any property proceeds before a junior lien holder. Here is an example from a specific case dealing with the order of priority of liens

- | | | |
|----|-----------|--|
| 1. | \$219,000 | First Deed of Trust (first priority, senior lien) |
| 2. | \$134,000 | Judgment Lien (second priority, junior to the senior lien) |
| 3. | \$80,000 | Second Deed of Trust (third priority, most junior lien) |

In this case, if the property were sold outside of bankruptcy, for, say, \$275,000, the First Deed of Trust Holder would be paid in full, the Judgment Lien creditor would be paid \$56,000 and the remaining \$78,000 of the judgment would remain outstanding, and the Second Deed of Trust holder would not be paid anything.

When the debtor in this specific case filed a motion to avoid the judgment creditor's judicial lien, the debtor and the creditor had very different ideas regarding to how to value "all other liens" against the property. In the debtor's view, this term included both liens that were senior to, and junior to, the judicial lien to be avoided. In the creditor's view, only liens that were senior to the judicial lien to be avoided should be included as "all other liens" in the judicial lien avoidance formula.

Priority of Liens vis a vis the Judicial Lien to be Avoided			
Debtor's View: Including All Liens that are Senior to and Junior to the Judicial Lien to be Avoided		Creditor's View: Excluding All Liens that are Junior to the Judicial Lien to be Avoided	
First Deed of Trust	\$219,000.00	First Deed of Trust	\$219,000
Judicial Lien	\$134,000.00	Judicial Lien	\$134,000
Second Deed of Trust	\$80,000.00	Junior Lien not Included	NA
Exemption	\$ omitted	Exemption	\$ omitted
TOTAL:	\$433,000.00	TOTAL	\$353,000.00
LESS VALUE	-\$275,000.00	LESS VALUE	-\$275,000.00
Extent of the Impairment	\$158,000.00	Extent of the Impairment	\$78,000.00
Because the Extent of the Impairment (\$158,000) exceeds the Judicial Lien to be Avoided, the Judicial Lien (\$134,000) may be completely avoided.	Full Lien Avoidance	Because the Extent of the Impairment (\$78,000) is less than the Judicial Lien to be Avoided (\$134,000), \$78,000 of the Judicial Lien is Avoided and \$56,000 of the Judicial Lien remains in force and effect.	\$56,000.00 of the Judicial Lien remains.

This was the issue facing the court in *Kolich v. Antioch Laurel Veterinary Hosp. (In re Kolich)*, 328 F.3d 406 (8th Cir. 2003). In that case, the Eighth Circuit Court of Appeals determined that the phrase “all other liens” as used in the judicial lien avoidance formula included liens that were junior to the judicial lien being avoided. The debtor’s argument prevailed.

In deciding the case, the Eighth circuit noted that the outcome gave incentive to manipulative debtors to incur junior priority debt to wipe out priority judicial liens. As stated by the Court of Appeals for the Eighth Circuit:

We are not entirely comfortable with the equities of literally applying the statutory formula in this situation. It may give a debtor contemplating bankruptcy the ability to wipe out judicial liens by persuading a lender to take an otherwise junior consensual lien that renders the exempt property over-encumbered and therefore ripe for impairment. . . . [T]here may be times when self-interest or hard-to-detect collusion will lead to an abuse of § 522(f). On the other hand, refusing to apply the statutory formula as written may result in denying deserving debtors the fresh-start advantage § 522(f) was enacted to provide.

Kolich v. Antioch Laurel Veterinary Hosp. (In re Kolich), 328 F.3d 406 (8th Cir. 2003).

8. Order of Judicial Lien Avoidance

While *Kolich* and the Court of Appeals for the Eighth state that all other liens in the judicial lien avoidance formula include junior consensual liens, it did not cover what happens when there are multiple judicial liens. Can the debtor pick and choose what liens to avoid first, or must the debtor abide by the order of priority and seek to avoid the judicial liens from the most junior and the work towards the most senior judicial liens?

The language of § 522(f) is silent on the issue. Section 522(f) only speaks in terms of a single lien, and when the statute does recognize the possibility that multiple liens might exist, it only provides that a lien that has been avoided is not to be considered in applying the formula with respect to the remaining liens.

Because the statute is silent on the order in which judicial liens are to be avoided in relation to other judicial liens, resort is to be made to the statute's legislative history. But the legislative history of § 522(f)(2) is not instructive. Nothing in the 1978 Act that created § 522(f) addresses the order of avoidance of judicial liens. Likewise, when the § 522(f)(2)(A) formula was added in 1994, no legislative history exists that indicates the order in which judicial liens are to be avoided.

When both the statute and its legislative history are silent on an issue, resort is made to the structure and the purpose of the Bankruptcy Code. In the Bankruptcy Code, in the absence of any controlling federal law, what constitutes property and interests in property is determined by applicable state law. In West Virginia, a judicial lien is generally entitled to priority by the order in which it is recorded, and a recorded judgment lien likely has priority over an unrecorded judgment lien.

Consequently, as a rule of thumb, under applicable State law, those judicial liens that are otherwise subject to avoidance but which are entitled to priority under State law are the last liens that may be avoided under the formula of § 522(f)(2)(A).

Here is an example from an unpublished order from Bankruptcy Court for the Northern District of West Virginia that illustrates the problem. There are four judgment creditors that recorded judgments in the real property records and the total value of all the judicial liens is as follows:

Lien Avoidance of Multiple Judicial Liens		
1.	First Deed of Trust	\$44,603.83
2.	1 st Judicial Lien - Tri County Tool Rentals,	\$2,831.07
3.	2 nd Judicial Lien - Supreme Concrete Block, Inc.,	\$13,101.90
4.	3 rd Judicial Lien - Supreme Concrete Block, Inc.	\$7,373.00
5.	4 th Judicial Lien - Shoemaker	\$65,985.24
6.	Exemption – W. Va. Code § 38-10-4(a)*	\$25,000.00
7.	TOTAL (Lines 1-6):	\$158,895.04
8.	LESS VALUE of the Property Subject to the Liens	-\$85,000.00
9.	Extent of the Impairment	\$73,895.04
10.	<p>Because the Extent of the Impairment is less than the total of all judicial liens, only some judicial liens can be avoided:</p> <p>The 4th Priority Shoemaker Judicial Lien of \$65,985.24 is avoided first, leaving \$7,909.80 left over from the Extent of the impairment.</p> <p>The 3rd Priority Supreme Concrete Block Judicial Lien of \$7,373.00 is avoided second, leaving \$536.80 left over from the extent of the impairment.</p> <p>The 2nd Priority Supreme Concrete Block Judicial Lien of \$13,101.90 can be avoided to the extent of \$536.80, and the remaining \$12,565.10 remains in force and effect.</p> <p>The 1st Priority Tri County Tool Rental Judicial Lien cannot be avoided under the § 522(f) formula.</p> <p>*the amount of this exemption increased to \$35,000 in July 2021.</p>	

9. The Exemption

For the judicial lien avoidance formula to work, the judicial lien must impair an exemption to which the debtor would have been entitled if there were no liens on the property.

Federal exemptions are listed in § 522(b) of the Bankruptcy Code. As of July 2021, those federal exemptions are available to West Virginia residents, or a West Virginia resident may choose the West Virginia bankruptcy exemptions, which are found in W. Va. Code § 38-10-4. At the time of this video, § 38-10-4(a) provides a homestead exemption of \$35,000 for a single debtor, or \$70,000 for joint debtors that both have an interest in the property. Also, § 38-10-4(e) allows a “wild card” exemption in any property of \$800. Traditionally, in the Northern District of West Virginia these exemptions are stacked to afford a married couple a potential exemption in a homestead of \$71,600.

The statutory formula of judicial lien avoidance asks that the amount of the applicable exemption be determined as if there were no liens on the property. This means the amount of the exemption is calculated without regard to existing consensual liens, statutory liens, or judicial liens. Because the exemption amount is hypothetical, it does not need to be actually claimed on Schedule C, the debtor’s claims of exemption that accompany the bankruptcy petition, but it may nonetheless be a good practice to claim an exemption in a nominal amount even when the property is fully encumbered by consensual liens and to provide consistency between the exemption claimed on Scheduled C and the hypothetical exemption listed on the judicial lien avoidance motion, at least in those cases when the choice does not affect the outcome of the judicial lien avoidance motion.

Briefly, there are four other issues regarding exemptions that arise infrequently.

The first is the exemption by declaration. This is the result of a United States Supreme Court case called *Taylor v. Freeland & Krantz*, 503 U.S. 638, 642-44 (1992). In brief, if a debtor actually claims an exemption in excess of that allowed by statute, and if no party in interest timely objects, the debtor may use the claimed exemption. To date, in the Northern District of West Virginia, the court has never allowed a party to claim a hypothetical exemption by declaration when utilizing the judicial lien avoidance formula in 11 U.S.C. § 522(f).

The second issue concerns the “lost exemption.” This issue arises when: (1) the debtor owns property as of the bankruptcy petition upon which a judicial lien has attached, and (2) the debtor sells the property after having filed the bankruptcy petition. Usually, it is the closing agent who is holding funds in escrow pending a determination as to who is entitled to receive the funds: the seller/bankruptcy debtor or the judicial lien creditor.

The argument that a debtor somehow lost the right to claim a bankruptcy exemption in property, that was valid when the bankruptcy petition was filed, even though the property was subsequently transferred to a new owner was addressed by the Ninth Circuit Court of Appeals in *Culver, LLC v. Kai-Ming Chiu (In re Kai-Ming Chiu)*, 304 F.3d 905 (9th Cir. 2002). The Ninth Circuit held that the debtor only need to have had an ownership interest in the property at the time of the filing of the debtor’s bankruptcy petition and the sale of the property before the judicial lien motion was filed was deemed irrelevant.

Third, issues arise when an exemption statute is amended. For example, the amount of the federal exemptions listed in 11 U.S.C. § 522(d) are adjusted every three years to reflect changes in the

consumer price index. Similarly, a state may increase the amount of its homestead exemption from say, \$25,000 to \$35,000. And because judicial lien avoidance motions do not have to be filed contemporaneously with the bankruptcy petition, the applicable exemption statute may be amended to either increase (or decrease) the amount that may be claimed as exempt between the time of the filing of the debtor's bankruptcy petition and the time the judicial lien avoidance motion is filed.

The solution to this issue turns on whether the amendment to the exemption statute has retroactive effect to the date of the bankruptcy petition. The analysis of whether the amended exemption statute applies retroactively is lengthy and is therefore omitted in this video. As a general rule of thumb, a debtor's right to avoid a judicial lien is fixed as of the date of the bankruptcy petition and the amount of the exemption applicable on the petition date is the amount of the maximum amount of the hypothetical exemption to utilized in the judicial lien avoidance formula.

Fourth, and peculiar to West Virginia, when both spouses file a bankruptcy petition, and the judgment is only against one spouse, the West Virginia Supreme Court of Appeals determined in *Harris v. Crowder*, 322 S.E.2d 854 (W. Va. 1984), that a judgment creditor cannot execute on jointly owned property when (1) the judgment was against one spouse only, and (2) prejudice exists to the "innocent" spouse. To be clear, however, this is not a claim of an exemption by the judgment debtor, it is a state law prohibition, applicable in the right circumstances, that prevents the judgment credit from seizing and selling the jointly owned homestead to the detriment of the innocent spouse.

10. Value of the Property

Obviously, in the judicial lien avoidance formula, the value of the property subject to the judicial lien is of critical importance. As a rule of thumb, the bankruptcy debtor benefits from the lien avoidance formula when the value of the liens is high in comparison to the value of the property. The judicial lien creditor benefits from the exact opposite situation. Let's look briefly at an example of how the value of the property affects the judicial lien avoidance formula:

Value of the Property as of the Petition Date			
Low Valuation Asserted by Debtor		High Valuation Asserted by Judicial Lien Creditor	
Wells Fargo 1 st Mortgage	\$107,445.00	Wells Fargo 1 st Mortgage	\$107,455.00
PNC 2 nd Mortgage	\$27,997.00	PNC 2 nd Mortgage	\$27,997.00
Discover Bank Judicial Lien	\$7,750.88	Discover Bank Judicial Lien	\$7,750.88
Exemption	\$25,558.00	Exemption	\$25,558.00
TOTAL:	168,750.88	TOTAL	\$168,628.18
LESS VALUE	-\$161,000.00	LESS VALUE	-\$171,000
Extent of the Impairment	\$7,750.88	Extent of the Impairment	\$0.00
The Extent of the Impairment is Equal to the Lien to be Avoided.	Full Avoidance	The Judicial Lien does not impair the debtor's exemption under the formula.	The judicial lien cannot be avoided

In the above example, a \$10,000 difference in the value of the property is the difference between whether the judicial lien can be avoided or not avoided. Value, more frequently than any other issue, is the focus for in-court litigation.

From the debtor's perspective, most litigation concerns a fair market value of residential real property as of the date of the petition, and rarely does valuation concern a highest and best use value that is found in a commercial context. The owner of property is competent to testify as to the value of the owner's property, and this gives an advantage to the debtor over a creditor who must hire an expert to appraise value. A debtor/owner is in a unique position, therefore, to assess the quality of a creditor's valuation and the competency of the creditor's appraiser as a witness as it concerns the existing physical condition of the debtor's property.

Debtors also usually have relevant information regarding:

- When the property was purchased,
- The purchase price,
- The down-payment,
- Whether or not the purchase was an arm's length transaction,
- Whether there were substantial repairs done on the property, or additions to the property, after its purchase

In addition to information obtained directly from the debtor/owner, consider:

- Any recent refinancing for the property. Refinancing are usually for 70-80% of the property's presumed fair market value.
- Recent appraisals. Keep in mind that an appraisal is usually good for 1-2 years before the information becomes stale. Also, be wary of appraisals because they are often based on neighborhood and square-footage comparable properties and may not consider the unique circumstances (disrepair) of the debtor's property.
- Deeds of trust and deeds often provide a recitation of the consideration paid for the property.
- Tax appraisals in WV may vary by county, but tax values are generally 60% of a residential property's presumed fair market value. Most tax assessments are available online.
- Zillow and other online property website are also good indicators of a property's value.
- Local realtors are also a good source of information because they are both familiar with local market conditions, and they have access to the MLS database to pull in comparable values of property in the region.

Finally, when a property is in disrepair, and the appraised valuation of the property is too high for the debtor to reap an advantage through the judicial lien avoidance formula, it may be a good idea for the debtor to obtain cost estimates from certified contractors regarding the price of any needed repairs to the property.

From a creditor's perspective, fair market value is best established by a qualified appraiser who inspects the property. Creditors also look at the same sources of information that are available to the debtor, but the creditor often lacks the same intimate knowledge of the property's condition. Once in possession of the expert appraiser, the issue largely becomes a battle of opposing experts. Creditors

should also pay attention of the value of property that the debtor placed on it in the debtor's bankruptcy schedules, and how that value compares to previous refinancing or other transactions where the debtor had to provide an estimate of value. Inconsistent statements adversely affect a debtor's credibility.

A. Date for Valuing Property

The date for valuing the property is the date that the debtor filed the bankruptcy petition. This is for three reasons: (1) the bankruptcy exemption statute specifically defines value to be the "fair market value" of the property as of the petition date, (2) exemptions are determined as of the petition date, and (3) existing case law directs the bankruptcy judge to look to the petition date for the applicable date of valuation.

Accordingly, if a debtor reopens a 5-year old bankruptcy case for the purpose of avoiding a judicial lien, the debtor must establish what the value of the property was at the time of the bankruptcy filing – not at the time the lien avoidance motion is filed.

B. Standard of Valuation

A lot of different valuation methods and standards exist. For judicial lien avoidance motions filed under § 522(f), however, look at the "fair market value as of the date of the filing of the petition," which is the standard set forth in 11 U.S.C. § 522(a)(2) and which is the value from which the exemption is measured.

Bankruptcy case law exists stating that in deriving the "fair market value" for real property, no deduction is to be made for the hypothetical expenses or the costs that might be incurred in a sale of the property. *See Wolmer v. Bristol Gastroenterology Associates, PC. (In re Wolmer)*, 494 B.R. 783 (Bankr. D. Conn. 2013) (citing cases). A fair market value of the property is not a liquidation value based upon what a Chapter 7 trustee may receive based upon a hypothetical auction. As a general rule, there should be a correlation between the value of the property as listed on Schedule A/B and the value used in the judicial lien avoidance formula.

11. Concurrent Ownership Issues

As in shown in our first judicial lien avoidance example, sometimes a judicial lien exists that is effective against only one of two filing spouses who jointly own real property. When this situation arises, application of the judicial lien avoidance formula can be complicated.

Let's start with some common ways two people can hold title to the same piece of real property:

Life estate: A life estate can be single or joint, so long as the person is alive, that person has full use and enjoyment of the property consistent with the terms of the life estate.

Tenants in Common: Each tenant has a defined interest in the whole. For example, Joe has a 30% interest in Blackacre, and Mary has a 70% interest. Blackacre has a value of \$100,000, so Joe's interest is presumably worth \$30,000.

Joint Tenants: Each joint tenant has an undivided right to the whole of the property. If Joe and Mary in the above example owned the property as joint tenants, Joe and Mary each own 100% of the property. Joint tenancies are usually limited to spouses. *Michie's Jurisprudence of Virginia and West Virginia* explains the relationship:

One of them does not have a seisin of one half, and the other of the remaining half; neither can one be exclusively seised of one acre and his companion of another; each has an undivided moiety of the whole . . . From this, it follows that the possession and seisin of one joint tenant is the possession and seisin of the other.

Joint Tenants with Right of Survivorship: If Joe dies before Mary, Mary will be the 100% owner of the property. The beneficiaries of Joe's death estate (except for Mary) will not receive any value from the property.

Tenancy by the Entireties: this form of ownership is not recognized in every state. In general, this form of ownership has the same characteristics of a joint tenancy with a right of survivorship, with the added condition that the property can only be subject to the joint debts of the spouses. A debt of a single spouse cannot be the basis for a lien against the property unless the debt of the one spouse is also a community debt.

For a fractional interest of a tenant in common, nothing regarding the valuation of the debtor fractional interest in the property changes. For example, a creditor of Joe may be able to place a lien upon and foreclose upon Joe's interest up to the value of his 30% ownership interest in the real property, but Joe's judgment creditor would have no right to seize the value of Mary's 70% interest. Thus, in the case of *In re Piersol*, 244 B.R. 309 (Bankr. E.D. Pa. 2000), the court found that the debtor, who co-owned real property with his two sisters, could claim 1/3 of the total value of the property when seeking to avoid judicial liens under § 522(f).

Obviously, when Joe and Mary hold title as joint tenants, as opposed to being tenants in common, each has an undivided interest in the whole – not a defined interest in a part of the whole, and absent a court proceeding for partition, the joint tenancy is not severable.

Let's start the analysis of how to deal with joint tenancies with an examination of the effect of a bankruptcy petition upon the joint tenancy. The general rule as it exists in the Northern District of West

Virginia is that a joint tenancy is not severed by the filing of a bankruptcy petition. But case law on this point of law is conflict.

For example, in the case of *In re Lambert*, 34 B.R. 41 (Bankr. D. Colo. 1983), a brother and sister held property as joint tenants with a right of survivorship. The brother filed bankruptcy but died during his bankruptcy case and the sister claimed full ownership as the surviving joint tenant to the exclusion of the bankruptcy trustee who wanted to sell the debtor/brother's interest in the property. The bankruptcy court held, under Colorado law, that the filing of a petition in bankruptcy effects a severance of any joint tenancy the debtor may have had in property and that the Trustee and the other former joint tenants of the debtor became tenants in common.

On the other hand, and more important for cases filed in the Northern District of West Virginia, in the case of *In re DeMarco*, 114 B.R. 121 (Bankr. N.D.W. Va. 1990), a daughter was a joint tenant in a bank account with her father, who filed bankruptcy, and then died during the bankruptcy case. The court held that the filing of a bankruptcy petition did not sever the joint tenancy and the funds in the account belonged solely to the daughter.

For tenancies by the entireties property, the Fourth Circuit Court of Appeals held in *Greenblatt v. Ford*, 638 F.2d 14 (4th Cir. 1981), that a bankruptcy petition filed solely by the husband did not sever the estate of tenancy by the entirety in either real or personal property.

Consequently, in West Virginia, following the cases of *DeMarco* and *Greenblatt*, if we assume that a bankruptcy filing does not sever a joint tenancy, then we are left with the question of how to value the underlying property, and concomitantly, how to value the joint liens against the property, such as a mortgage, where both spouses signed the note and are jointly and severally liable for the entirety of the mortgage debt. In most cases, a consensual mortgage debt secured by property held in a joint tenancy will have language substantially similar to this:

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

Thus, based on this language, each person who signs the note, is 100% responsible for paying the full amount of the debt to the secured creditor, even if the other person who signed the note refuses to make further payments. Both the spouses signing the note are jointly and severally liable for repayment.

The easiest situation is when a judgment lien is entered against both joint tenants. In such a case it makes sense to use the full value of the property and the full value of all the liens against the property. After this point, however, there is disagreement on how the § 522(f) formula operates.

Method 1

One line of cases has adopted a strict interpretation of § 522(f)'s language, concluding that the plain meaning of the statute requires that the lien to be avoided, and all other liens on the property, be added to the exemption and deducted from the value of the debtor's interest in the property absent any

liens. The calculation utilizes the full amount of the liens on the property as a whole, while subtracting from that figure only the value of the debtor's presumed partial ownership interest. Such an application greatly benefits the debtor. Courts taking this view state that it is not for the court to rewrite plain, unambiguous statutory language. *In re Cozad*, 208 B.R. 495 (B.A.P. 10th Cir. 1997). For example, in *Cozad*, only the husband filed bankruptcy, he jointly owned real property with his spouse, and the property was subject to the following liens. The parties disagreed on how to allocate the value of the entire property, which was \$96,329:

Method 1: Use ½ the Value of the Jointly Owned Property and 100% of the Value of the Liens Secured by the Property			
Debtor's Argument		Judicial Lien Creditor's Argument	
1 st Mortgage	\$42,223.47	1 st Mortgage	\$42,223.47
IRS Statutory Lien	\$3,888.00	IRS Statutory Lien	\$3,888.00
Judicial Lien	\$76,972.75	Judicial Lien	\$76,972.75
Exemption	\$11,000.00	Exemption	\$11,000.00
TOTAL:	\$134,084.22	TOTAL	\$134,084.22
LESS VALUE	-\$48,164.50	LESS VALUE	-\$96,329.00
Extent of the Impairment	\$85,919.72	Extent of the Impairment	\$37,755.22
Because the Extent of the Impairment is greater than the amount of the lien to be avoided, the judicial lien may be wholly avoided under § 522(f)	The judicial lien is wholly avoided	Because the Extent of the Impairment is less than the judicial lien to be avoided, \$37,755.22 of the judicial lien may be avoided under § 522(f) and the remaining amount of \$39,217.53 remains in effect.	The judicial lien is partially avoided

The Bankruptcy Appellate Panel for the Eighth Circuit stated that § 522(f) plainly provides that all liens are to be deducted from the debtor's interest in the absence of any liens and that it was correct for the bankruptcy court to use one-half of the fair market value of the property when the debtor was a joint owner with his non-filing spouse.

Method 2

On the other hand, the Court of Appeals for the Tenth Circuit, in *William F. Sandoval Irrevocable Trust v. Taylor (In re Taylor)*, 899 F.3d 1126 (10th Cir. 2018), rather than focusing on the value of the debtor's interest in co-owned property, the court focused on how to determine the amount of the applicable liens that were secured by the debtor's interest in the property. The entire property had an appraised value of \$962,000, however, the debtor listed the total value of \$560,000 in his bankruptcy schedules and claimed that his undivided interest was worth, one-half, or \$280,000. The judicial lien creditor argued that the total value of \$962,000 and that the debtor's ownership interest was \$481,000.00. The parties did not dispute the fact that the total value of all the liens was \$485,345.12, but they disagreed on whether the debtor should use 100% or 50% of the value of the liens.

Method 2: Use ½ the Value of the Jointly Owned Property and ½ the Value of the Liens Secured by the Property			
Debtor's Argument		Judicial Lien Creditor's Argument	
All Other Liens	\$485,345.12	All Other Liens	\$242,672.56
Judicial Lien	\$461,472.86	Judicial Lien	\$461,472.86
Exemption	\$37,500.00	Exemption	\$37,500.00
TOTAL:	\$984,317.98	TOTAL	\$734,268.43
LESS VALUE	-\$280,000.00	LESS VALUE	-\$481,000.00
Extent of the Impairment	\$704,317.98	Extent of the Impairment	\$253,268.43
Because the Extent of the Impairment is greater than the amount of the lien to be avoided, the judicial lien may be wholly avoided under § 522(f)	The judicial lien is wholly avoided	Because the Extent of the Impairment is less than the judicial lien to be avoided, \$253,268.43 of the judicial lien may be avoided under § 522(f) and the remaining amount of \$208,204.43 remains in effect.	The judicial lien is partially avoided

The Tenth Circuit reasoned that only liens that interfere with the debtor's exemption are subject to avoidance, and ostensibly, by including liens owed by this non-filing spouse, the debtor was including liens that did not impair his exemption. In the view of the Tenth Circuit, the debtor only had a 50% ownership interest in the real property upon which he claimed an exemption, and allowing 100% of the liens to be included in the formula under such a circumstance would unduly extend the protection that Congress sought to provide in § 522(f) and distort priorities between creditors. Even if the debtor may have been personally liable on the entire debt, a portion of that debt should "realistically be regarded" as the debt of the joint owner, to hold otherwise would create an "unwarranted incongruity."

The Tenth Circuit never reached the valuation issue on appeal and it remanded the case for further proceedings. The Court of Appeals for the Third Circuit also adopted this approach in *Miller v. Okmi Sul* (*In re Miller*), 299 F.3d 183 (3d Cir. 2002).

Method 3

In *Brinley v. LPP Mortg., Ltd. (In re Brinley)*, 403 F.3d 415 (6th Cir. 2005), the Court utilized a slightly different methodology in applying the judicial avoidance formula, one which recognized that the debtor was fully liable on the mortgages, but which also treated the debtor as the 100% owners of the property.

Method 3: Use 100% of the Value of the Jointly Owned Property and 100% of the Consensual Liens			
Debtor's Argument		Court Imposed Formula	
First Mortgage	\$180,000.00	First Mortgage	\$180,000.00
Second Mortgage	\$80,345.09	Second Mortgage	\$80,345.09
Judicial Lien	\$112,418.35	Judicial Lien	\$112,418.35
Exemption	\$6,000.00	Exemption	\$6,000.00
TOTAL:	\$378,763.44	TOTAL	\$378,763.44
LESS VALUE	-\$140,000.00	Less Value	-\$280,000.00
Extent of the Impairment	\$238,763.44	Extent of the Impairment	\$98,763.44
Because the Extent of the Impairment is greater than the amount of the lien to be avoided, the judicial lien may be wholly avoided under § 522(f)	The judicial lien is wholly avoided	Because the Extent of the Impairment is less than the judicial lien to be avoided, \$98,763.44 of the judicial lien is avoided and the remaining amount of \$13,654.19 remains in effect.	The judicial lien is partially avoided

The Sixth Circuit reasoned that, even though the debtor joint tenant shared a joint tenancy with a right of survivorship with this spouse, who was not liable on the judgment lien, the debtor would be entitled, if he survived his spouse, to full fee simple ownership and it recognized that each co-owner of the joint tenancy is entitled to the whole of the property. Consequently, the Sixth Circuit treated the debtor as owning the entire estate and refused to allow the debtor to use ½ of the value of the real property.

Method 4

The Court of Appeals for the Eleventh Circuit took a different approach in the case of *In re Lehman*, 205 F.3d 1255 (11th Cir. 2000)

Method 4: Determine ½ the Equity, Subtract the Exemption, and any Amount Remaining Secures the Judicial Lien			
Debtor's Argument		Court Imposed Formula	
First Mortgage	\$165,000.00	Whole Value of the Property	\$225,000.00
Judicial Lien	\$53,878.19	Less Consensual Secured Debt	\$165,000.00
Exemption	\$5,312.00	= Equity	\$60,000.00
		Debtor's ½ Equity Interest	\$30,000.00
TOTAL:	\$224,190.19	Less Debtor's Exemption	\$5,312.00
LESS VALUE	-\$112,500.00	Remaining Value	\$24,688.00
Extent of the Impairment	\$111,690.19	Extent of the Impairment (The debtor has \$24,688 in non-exempt equity, which can be used to satisfy the judicial lien, thus the remaining \$29,190.19 of the \$53,878.19 judicial lien is impaired under the formula)	\$29,190.19
Because the Extent of the Impairment is greater than the amount of the lien to be avoided, the judicial lien may be wholly avoided under § 522(f)	The judicial lien is wholly avoided	Because there exists \$24,688.00 in non-exempt equity, this amount of the judicial lien remains in effect. The remaining amount \$29,109.19 is avoided.	The judicial lien is partially avoided

The Eleventh Circuit recognized that the Debtor's methodology followed the language of § 522(f), however, it found that the result it produced was absurd, and it therefore approved the bankruptcy court's deviation from the statutory formula for cases of jointly owned property when the judicial lien is enforceable against only one of the joint tenants. The court noted that the same result would be produced if the bankruptcy court applied the formula strictly, as advocated by the debtor, but only used one-half of the amount for the consensual mortgage debt, which would be the same result that is produced by Method 2, above.

12. The Fixing of the Judicial Lien

In § 522(f), the Bankruptcy Code instructs that a debtor may avoid the “fixing” of a judicial lien. What does this term, “fixing” mean, and under what circumstances might this requirement be an impediment to avoiding a judicial lien?

In *Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991), the United States Supreme Court attempted to answer this question. The Court stated that “unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien . . .”

In the specific context of the *Farrey* case, the Supreme Court denied the debtor’s attempt to avoid a judicial lien held by the debtor’s spouse on the ground that the lien arose out of a divorce decree, and this judgment did not occur subsequent to the creation of an ownership interest in the property subject to the judicial lien.

In other words, as interpreted by some, if the judicial lien was obtained before a debtor obtained an interest in property, then § 522(f) cannot be used to avoid the judicial lien. Following this interpretation of *Farrey*, an individual who is a judgment debtor on a civil monetary debt, who does not currently own real property, but who plans to purchase real property in the future to which the judgment lien may attach pursuant to an after-acquired property statute, should consider filing bankruptcy before purchasing the property.

However, this factual scenario has not been a deterrent to the filing of motions to avoid judicial liens under § 522(f). For example, in the case of *In re Anderson*, 496 B.R. 812 (Bankr. E.D. La. 2013), the judgement creditor recorded the judgement on June 22, 2010, and the judgement debtor purchased property in October of that same year. Under the applicable state’s after acquired property statute, the judgment lien attached to the real property. The bankruptcy court however, distinguished *Farrey* as a domestic relations case and relied on a well-respected Bankruptcy Law treatise to allow the debtor to avoid the judicial lien under § 522(f), notwithstanding the fact that the judgment lien attached at the same moment that the debtor acquired the real property. Other courts have distinguished *Farrey* on the grounds that the debtor took title to the property and the lien at the same time, just as if someone had purchased an already encumbered estate from a third party, *In re Perez*, 391 B.R. 190, 192 (Bankr. S.D. Fla. June 5, 2008), and on the grounds that the domestic relations lien in *Farrey* was a consensual judgment lien as opposed to a non-consensual judgment lien. *In re Baehr*, No. 15-10452, 2015 Bankr. LEXIS 3916 (Bankr. E.D. La., Nov. 16, 2015). In analyzing *Farrey*, *Collier on Bankruptcy* ¶ 522.11 (2021), calls the Supreme Court’s reasoning “flawed.”

13. Timing of the Motion to Avoid a Judicial Lien

Obviously, a motion to avoid a judicial lien under Section 522(f) of the Bankruptcy Code can only be filed after an individual has filed a bankruptcy petition. There is currently no statute or rule that governs when the motion to avoid the judicial lien is to be filed after a debtor files a bankruptcy petition.

Sometimes an individual debtor fails to avoid a judicial lien before the debtor's bankruptcy case is closed. Years later, when avoiding the judicial lien become important to the debtor, the old bankruptcy case may be reopened under section 350(b) of the Bankruptcy Code to seek to lien avoidance.

This is exactly what happened in a Ninth Circuit Court of Appeals case named, *Culver, LLC, v. Kai-Ming Chiu*. There, the individual debtor filed a Chapter 7 bankruptcy in 1995, and five years later, sold real property. At the time of sale, the debtor realized that there was a \$48,000 judicial lien encumbering the property. Fortunately, the sale was able to move forward as sufficient proceeds existed to escrow an amount sufficient to pay the judicial lien pending resolution of the debtor's attempt to avoid the judicial lien by reopening the debtor's bankruptcy case and filing a judicial lien avoidance motion with the bankruptcy court.

The Ninth Circuit stated that that judicial liens are avoided retroactively to the time the lien attached – the “fixing” of the lien. Because the debtor met the other requirements of § 522(f) to avoid the creditor's lien, the debtor was able to keep the \$48,000 in sale proceeds notwithstanding the five-year passage of time between filing bankruptcy and selling the property. Note, however, that establishing a legal right to judicial lien avoidance requires proving the existence of certain facts. If too much time elapses, a debtor may have difficulty establishing entitlement to relief.

For example, in the case of *In re Horvath*, No. 10-60520, 2021 Bankr. LEXIS 238 (Bankr. N.D. Ohio Feb. 2, 2021), the creditor obtained a its judicial lien in 2009, and the debtor filed bankruptcy in 2010. Ten years later, after the creditor had renewed its judgment lien in 2014 and 2019, the debtor reopened the bankruptcy case to avoid the creditor's judicial lien. In addition to berating counsel for counsel's failure to act at the time of the original bankruptcy filing, the court noted that the judicial lien creditor was prejudiced by the passage of time: it incurred costs in maintaining the lien and renewing it, and to appropriately respond to the debtor's tardy lien avoidance motion, it would have to incur expenses establishing the value of the property as the property existed ten years ago, and it would also have difficulty establishing the value of the liens against the property. The undue passage of time, or laches, was the basis for the denial of the debtor's lien avoidance motion.

14. Avoiding Judicial Liens Held by Creditors with Non-Dischargeable Debts

When a creditor holds a debt secured by a judicial lien, and the debt is also excepted from discharge under § 523(a) of the Bankruptcy Code, then § 522(c)(1-4) provides the applicable guidance. In general, § 522(c)(1) provides that exempt property remains subject to tax debts and domestic support obligations as defined in § 523(a)(1) and (5). Exempt property is not subject to other types of non-dischargeable debts. *See Harmon v. Pa. Nat'l Ins. Co. (In re Harmon)*, No. 09-22905, 2009 Bankr. LEXIS 5554 (Bankr. W.D. Pa. Nov. 13, 2009) (“The language of § 522(c)(2)(A)(i) unquestionably is convoluted. After untangling it, we understand it as effectively providing that if a debt secured by a judicial lien is avoidable in accordance with § 522(f), property in which a debtor has taken an exemption is not liable for the debt underlying the lien.”)

Also, under the express language of § 522(f)(1)(A), the judicial lien avoidance formula does not apply to a creditor holding a judicial lien that secures a domestic support obligation of the type specified in 11 U.S.C. § 523(a)(5).

15. Conclusion

These educational materials, and the accompanying video on YouTube, https://youtu.be/Z_yIM51U8_8 were created by the Bankruptcy Clerk’s Office of the Northern District of West Virginia to address many common issues that we see arise in judicial lien avoidance motions and litigation. If you are a pro se party watching the video or reading these materials, it should be plainly obvious that you should seek to consult with an attorney before attempting to avoid a judicial lien on your own. If you are a new-to-bankruptcy attorney, or an experienced one, we hope that you found the video and this accompanying written material helpful. As always, the Bankruptcy Court is not available to offer advisory opinions regarding specific questions that you might have regarding a case, and while the Bankruptcy Clerk’s Office can inform you about routine case processing procedures, the Bankruptcy Clerk’s Office cannot provide any you with any legal advice.

The Bankruptcy Clerk’s Office acknowledges the work of our student summer intern, Alexandria Behm, in creating the YouTube video, and thanks the attorneys who agreed to participate and be filmed in this educational outreach endeavor.