LIEN AVOIDANCE AND TITLE TRAPS

Malissa L. Giles, Helen Spence and Nancy Schlichting

PART 1: PRACTICAL SOLUTIONS[1]

Consumer bankruptcy attorneys often encounter clients with judgments against their real estate and must advise debtors of the impact of the judgments, the options to resolve (if even possible), and of the long-term consequences.

Attorneys who have been practicing for years are likely to also find themselves addressing judicial lien issues for former clients of which the client and the counsel were unaware during the prior representation, or that arise in relationship to after-acquired real estate. While the process of avoiding judicial liens seems fairly straightforward, sometimes actions to avoid liens are not necessary and there are alternatives to reopening a case. However, if the bankruptcy needs to be reopened or action is needed to avoid a judicial lien in a present case, then drafting a motion the Court can clearly review, attaching appropriate exhibits to prove balances, and having proper service are essential to success.

WHEN DO JUDGMENTS BECOME JUDICIAL LIENS

1. Judicial Lien Staying Power. Judicial liens in the Commonwealth of Virginia are valid for either 10 or 20 years from the date recorded, based on the date of judgment and can be renewed or extended for limited time periods. See the attached Virginia Limitations Periods and Curative Statutes**,** which highlights recent changes to the timelines.

> **Practice Pointer:** *In the Western District of Virginia, the standing Chapter 13 fee requires a title search be done to assure all liens are being addressed. But, attorneys filing Chapter 7 cases are under no such requirement. If a Chapter 7 debtor owns real estate, the best practice recommendation is to have a title search done. If counsel chooses to not do so, there should be a written*

[1] The Part 1: Practical Solutions Materials were provided by Malissa Giles and the Part 2: Virginia Limitations Periods and Curative Statutes, Title Insurance Underwriting Issues When Insuring Bankruptcy Sales "Free and Clear" of Existing Liens, along with The Bankruptcy Discharge, a view of bankruptcy from the title company perspective was provided by Helen Spence.

acknowledgement maintained in the file that the debtor declined to have such search done.

2. **What Liens Attach: Apples to Apples.** In determining which docketed judgments may attach as a lien to your prospective client's interest in real estate, it is important to carefully review all names, prior names, and whether the debtor is married, to review how the real estate is titled. Be sure to compare the debtor's name to father or son, and compare addresses, especially when there are suffixes.

A. Tenants by the Entities. If real estate is titled as Tenants by the Entireties, the docketed judgment is just against one spouse and both spouses remain alive and married to each other, the bankruptcy will discharge the personal liability upon the judgement, but there is no "lien" to avoid. Judge Krumm declined to avoid a judgment against one spouse recorded as a "lien" against property deeded as entireties by a married couple, as there was no "lien" to avoid. In re James and Virginia Smith, Case 10-50687 (W.D. Va. Bankr. 2010).

B. Doctrine of Necessaries. Medical care providers often sue both spouses for care provided to one spouse under the Doctrine of Necessaries as it existed at common law. But, a judgment created under Doctrine of Necessaries liability shall not attach to the debtors' principal residence deeded as TbyE or that was held by TbyE prior to the death of either spouse where the tenancy is terminated as a result of the death. VA Code § 5.1-202.

Practice Pointer: *How to you determine if the liability is created under Doctrine of Necessaries? Ask the clients if they recall signing any admission papers for their spouse. Obtain the underlying general district court pleadings. Also consider a declaratory action asserting the docketed judgement is not a lien and asking the court for an order based on your client's testimony. That order can then be recorded in the Circuit Court records to clean up any title issues.*

B. After Acquired Real Estate. If the debtor did not own real estate at the time of his or her bankruptcy, a docketed judgment does not "attach" as there is no real estate ownership. Once personal liability is discharged, the judgment creditor cannot assert the judgment attaches to after acquired real estate without violating the permanent injunction against collections. In re Clowney, 19 B.R. 349, 1982 Bankr. LEXIS 4383 (NC Bankr. 1982), In re Glover, 2010 Bankr. LEXIS 3165 (NC Bankr. 2010).

> **Practice Pointer:** *These issues almost always arise when the debtor has decided to sell after acquired real estate, closing is 24-48 hours away, and the issue is being raised by the title company. Sample letters are attached as exhibits at the end of the materials which demonstrate options this author has used to assert a lien has not attached to after acquired real estate and to assert or question liability under the Doctrine of Necessaries. Often these letters clean up issues and allow the title company to proceed. But, if the creditor is actually asking for the debtor to pay a debt that was discharged and counsel knows the lien is not valid, remember to use the violation of the permanent injunction as a leverage point in helping to expedite the resolution of the issue.*

3. **Options to Address Actual or Disputed Liens:**

A. Do Nothing. This actually may be an appropriate answer if the lien will expire soon and the debtor is not planning on selling. Also for some older prospective clients with fixed incomes which are judgment proof, the filing of a bankruptcy may be cost prohibitive or the debtor may have equity which he or she cannot protect. In Virginia, a creditor cannot enforce a sale for a judgment of less than $25,000 on the debtor's principal residence so letting the judgment remain in the property may not "harm" the debtor in the present time. See VA Code sec. 8.10-463. But, be sure to explain (preferably in writing) the consequences of the judgment as to future transfers, or when the debtor dies.

B. Letter to Title Company/Creditor. If there is really no valid lien as the real estate is after-acquired or another exception applies, a letter to the title company may simply solve the issue. See copies of sample letters at the end of the materials.

C. Complaint for Order on Validity and Extent of Lien. While a complaint may seem extreme, on occasion it may be merited. I have used this method to have the court declare a medical judgment is not a lien when I was unable to get affirmative communication from the creditor in regards to the nature of the underlying debt. That results in an order that can be recorded at the Circuit Court which cleans up the title. Note, this may be an option when you cannot do a Motion to Avoid due to excess equity.

D. Motion to Avoid under 11 USC 522(f). For current cases, simply file the motion prior to the entry of the Discharge Order and closing of the case. See discussion below of the procedure. If the motion to avoid is in an older case, you will have to first determine if the Court will reopen the case to allow the filing. In In re Mammen, No. 10-16378-BFK (Bankr. E.D. Va. June 27, 2019), Judge Kenney allowed the case to be reopened over objection of the creditor, citing Hawkins v. Landmark Fin. Co., 727 F.2nd 324, 326 (4th Cir. 1984). Hawkins clearly puts the decision to reopen within the Court's discretion, but notes cases should be reopened only when relief can be granted. In this instance, the creditor argued first that the judicial lien resulting from a foreclosure was not avoidable under 11 § USC. 522(f), and second, raised the issues of laches given the motion to reopen was filed almost eight years after the discharge. Judge Kenny sided with the majority of other courts holding that the mortgage deficiency lien is not within the "ambit of judgments arising out of mortgage foreclosure" as provided in § 522 9(f). He allowed the case to be reopened, ruling the laches argument was best considered in response to the actual Motion to Avoid. The creditor did not raise the issue once the case was reopened, and an order avoiding the lien was entered with no opposition.

AVOIDING JUDICIAL LIENS UNDER 11 § USC 522(f)

1. **Understanding the Statutory Formula:** The Code was amended in 1994 to provide the current statutory formula set forth in section § 522(f)(2)(A). This mathematical formula determines whether a judgment lien impairs the debtor's exemptions**.** In re Mammen, No. 10-16378-BFK (Bankr. E.D. Va. June 27, 2019). See also In re Genevicz, 2010 Bankr. LEXIS 822 (Bankr. M.D.N.C. 2010).

11 USC § 522(f) provides:

> **f)(1)** Notwithstanding any waiver of exemptions but subject to paragraph (3), 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--
>
> **(A)** a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or
>
> **(B)** a nonpossessory, nonpurchase-money security interest in any--
>
> > **(i)** household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
> >
> > **(ii)** implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
> >
> > **(iii)** professionally prescribed health aids for the debtor or a dependent of the debtor.
>
> **(2)(A)** 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 property; 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.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

In applying the formula set out, you have to consider if the debtor owns all of the property or has only a portion, and apply the formula accordingly. In Genevicz, the Court followed a long line of cases that limits a debtor to using his or her proportional interest compared with a proportional amount of the debt when the debtor only had a one-half interest in the real estate. See also Jefferson v Midland Funding, LLC and Andrew Goldstein, Chapter 7 Trustee, Case 13-62618 (2014, W.D. Bankr.). Judge Black held that when a debtor is a joint owner of property, the liens on the property should be allocated proportionally to the fractional interests prior to determining whether to avoid the judicial lien. See examples at the end of the materials.

2. What if There is No Equity? In re Nguyen, 2011 WL 4915885 (Bankr. E.D. Va. 2011). In this case, the Court found that the absence of equity in light of the language of § 522(f)(2) and the Fourth Circuit ruling in Botkin v. DuPont Community Credit Union (In re Botkin), 650 F.3d 396, 400 (4th Cir. 2011) did not preclude the debtor from avoiding the lien of the credit union.

3. Pleading by Motion, Plan or Complaint: In a Chapter 7, relief under 11 USC § 522(f) should be made by motion, not complaint. The National Form Plan as adopted for the Western District of Virginia includes lien avoidance in Section 3.4. But in using the form plan, the confirmation order is the confirming order which grants the lien avoidance upon discharge. This can be problematic given that a record of the avoidance needs to be made in the Circuit Court land records. Using the national plan means the plan, the confirmation order (a certified copy), and the discharge order (again a certified copy) will all need to be recorded in the Circuit Court land records at the successful conclusion of the Chapter 13.

A. **Service:** Whether filing a separate motion or using the form plan, either pleading must be served in accordance with Federal Bankruptcy Rule 7004 and Rule 9014. It is critical that counsel makes sure he or she is serving the correct entity, its registered agent, or in the case of a FDIC insured financial institution a bank officer via certified mail.

B. **Due Diligence:** Many of these motions may be uncontested, but that does not mean the Court will automatically enter an order without the case being properly pled and sufficient proof of the numbers being provided. Counsel suggests that the Movant consider submitting the following as exhibits to the motion:

1. **Proof of Value of Real Estate.** This can be an appraisal, a comparative market analysis, a city or county tax assessment, or other records. The Movant can also refer the Court to Schedule A, which was sworn to under oath by the Debtor.

2. **Proof of Title and Ownership.** Attach a copy of the deed or other documentation showing ownership interest.

3. **Proof of Pre-Existing Liens and Amounts Owed:** Attach a copy of any and all deeds of trust and proof of the balances owed. This might be a redacted recent credit report or a recent statement.

4. **Proof of the Judgment Lien and Balance:** This is simply a copy of the recorded lien.

5. **Exemption:** For current cases filed after July 1, 2020, counsel may simply refer the Court to Schedule C. For cases filed prior to July 1, 2020, counsel must attach a copy of the recorded homestead deed timely filed in the correct Circuit Court.

6. **Affidavit:** It is useful to have the client sign an affidavit to file with the motion as to his or her testimony so that if no responsive pleading is filed,

counsel can rely upon the affidavit, obtain a default order and let the client avoid taking off from work to appear in Court.

C. Pre-Hearing Order: The court will issue a pre-hearing order setting forth a timeline for a responsive pleadings and deadlines for any supporting documents or affidavits to be filed. If no responsive pleading is filed, counsel may submit a default order. However, be sure the record and exhibits support the facts pled and the mathematical analysis, as the Court will carefully review the numbers and supporting exhibits.

D. Final Steps: Once an order avoiding the judicial liens is obtained, counsel (or the debtor) will need to request a certified copy of the order and the discharge order, as the order avoiding is only effective upon successful discharge of the case. These certified copies will then need to be recorded in the appropriate Circuit Court.

EXAMPLES

Example A (Debtor owns 100% of real estate):

Debtor individually owns real estate worth $200,000.00.

Mortgage Lien of $180,000.00 is attached to the property.

Judicial Lien was recorded for $32,000 prior to the filing of the petition.

Debtor claimed $25,000.00 as exempt on his Schedule C under 3404

Analysis:

$32,000 + $180,000 + $25,000 = $237,000

Debtor's Interest: $200,000.

Lien is fully avoided.

Example B (Debtor owns 100% of real estate):

Debtor individually owns real estate worth $220,000.00.

Mortgage Lien of $180,000.00 is attached to the property.

Judicial Lien was recorded for $32,000 prior to the filing of the petition.

Debtor claimed $25,000.00 as exempt on his Schedule C under 3404

Analysis:

$32,000 + $180,000 + $25,000 = $237,000

Debtor's Interest: $220,000.

Lien is only partially avoided, and will be reduced to $15,000. $17,000 of lien is avoided.

Example C (Debtor owns 1/6 of real estate):

Total Value of Real Estate: $56,000.00

Lien attaching to total Property: $25,000.00

Judgment lien against Debtor: $14,000.00

Debtor's interest: 1/6 ($9,333.33)

Debtor's claim exemption: $2,500.00

Analysis:

56,000 - 25,000 = $31,000 ÷ 6 = $5,666.67

Debtor's Interest: $5,666.67

Lien is only partially avoided, as he could only exempt $2,500 and his proportional equity and proportional share of the first lien, leaves $2,666.67 unprotected.

In this example, the Court deducts the entire non-judicial lien from the total value before reviewing the debtor's interest. If the total value is $56,000 and the lien of $25,000 attaches, the debtor has a 1/6 interest in $31,000 or an interest of $5,666.67. Once the exemption of $2,500 is applied to this sum, it leaves $2,666.67 which is secured by the lien. Therefore, the Court would avoid $11,333.33 of the lien, leaving a reduced balance attached to the real estate.

EXHIBITS:

Exhibit A: Sample Motion To Avoid Lien. (Note the exhibits such as the deed, the deed of trust, proof of the balance owed on the mortgage and the actual judicial lien are not attached but are available on Pacer.)

Exhibit B: Pre Hearing Order

Exhibit C: Affidavit

Exhibit D: Order Avoiding Lien

Exhibit E: Letters Showing Options to Resolve Alleged Liens

Exhibit A

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA

IN RE:	*	
Mary Wise Cook	*	
	*	Case No. 22-70623
Debtor	*	Chapter 7
	*	
	*	
Mary Wise Cook	*	
Plaintiff	*	
v.	*	
Discover Bank	*	
Defendant	*	

MOTION TO AVOID LIEN AS IMPAIRING HOMESTEAD EXEMPTION
AND NOTICE OF HEARING

Comes now, Mary Wise Cook, Debtor, by counsel, and moves this Court to avoid the judgment lien held by Discover Bank and as grounds therefore states:

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a).

2. This matter is a core proceeding under 28 U.S.C. §157(b)(2)(F).

3. The Debtor filed a Chapter 7 on October 20, 2022.

4. The Debtor owns a one-half interest in real estate located at 75 Rock Hill Lane, Roanoke, VA 24019, and located in Botetourt County. The Debtor owned this real estate when her Chapter 7 bankruptcy case was filed and stills owns this real estate at the time of filing the instant Motion to Avoid Lien. 75 Rock Hill Lane, Roanoke, VA 24019 is the Debtor's primary residence.

6. The above property is co-owned as joint tenants with right of survivorship. See Exhibit A – Deed.

7. The total and entire market value of the above-listed real estate was $98,700.00 at the time the Debtor's bankruptcy petition was filed. Counsel asks the Court to take judicial notice of Schedule A, which was sworn to under oath.

8. The Debtor, along with the co-owner of the real estate, owed Member One Federal Credit Union $28,197.00 on a home equity line of credit as of the date the petition was filed. The credit line note was and is secured by a credit line deed of trust. See Exhibit B – Credit Line Deed of Trust. See Exhibit C for an excerpt of the credit report showing the credit line note balance as of August 4, 2022, shortly before the date the Debtor's bankruptcy petition was filed.

9. There is one judicial lien docketed against the property.

10. On November 19, 2018, Discover Bank docketed an abstract of judgment in the Circuit Court of Botetourt County against the debtor in the amount of $5,130.41 with interest at 6%, and costs of $56.00. See Exhibit D.

11. The Debtor is over age 65, as she was born March 3, 1941.

12. The Debtor originally exempted $32,686.50 of equity in her real estate under Virginia Code §34-4 on Schedule C which was filed on October 20, 2022. On January 17, 2023, the Debtor amended her Schedule C to increase the claimed exemption under Virginia Code §34-4 to $34,344.48. Counsel asks the Court to take judicial notice of Schedule C as originally filed and as subsequently amended.

13. Discover Bank's lien impairs the exemption to which the Debtor is entitled under 11 U.S.C. §522(b) and Virginia Code §34-4, and which exemption the Debtor timely claimed and perfected.

14. As such, the Debtor may avoid the judicial lien of the defendant under 11 USC. §522(f).

15. 11 U.S.C. §522(f) provides, 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 property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value of that the debtor's interest in the property would have in the absence of any liens.

16. In the present case, the value of the Debtor's one-half portion of the property at the time the case was filed was $49,350.00.

17. If we add together all liens (including fees and costs on the judicial liens as of the date of the bankruptcy petition filing and the mortgage balances as of the date the bankruptcy was filed) and the Debtor's available exemption, we get a total of $67,671.48.

18. If the Court applies one-half of the outstanding mortgage balances against the debtor's one-half interest, the debtor's interest is still fully encumbered by the mortgages.

19. Thus the lien can be fully avoided.

Wherefore, Mary Wise Cook, by counsel, respectfully moves the court to enter an order avoiding the judicial lien of Discover Bank as impairing her exemption under 11

U.S.C. §522(f) and that the lien be marked as avoided and for such other relief as is just and necessary.

Respectfully Submitted:
MARY WISE COOK
By: _/s/ Heather R. Parsons___
Counsel

Heather R. Parsons, Esq.
GILES & LAMBERT, PC
P.O. Box 2780
Roanoke, VA 24001
540-981-9000

NOTICE OF HEARING
AND OPPORTUNITY FOR OBJECTION

Please take notice that the United States Bankruptcy Court, Western District of Virginia, Roanoke Division (210 Church Avenue, Roanoke VA 24011) will consider the attached MOTION TO AVOID LIEN AS IMPAIRING HOMESTEAD EXEMPTION on Monday, March 20, 2023, at 9:30 a.m.

MARY WISE COOK
BY: _/s/ Heather R. Parsons
Counsel

Heather R. Parsons, Esquire
GILES & LAMBERT, P.C.
P.O. Box 2780
Roanoke, VA 24001
hparsons@gileslambert.com

Certificate of Service

I, Heather Renae Parsons, hereby certify that a copy of this motion and notice of hearing was mailed today, January 17, 2023 via certified mail to

Discover Financial Services, Inc., d/b/a Discover Bank
Roger C. Hochschild, CEO and President

2500 Lake Cook Road
Riverwoods, IL 60015

And via regular mail to:
Discover Financial Services
P.O. Box 30943
Salt Lake City, UT 84130

PARTIES BEING SERVED ARE PUT ON NOTICE THAT ALL EXHIBITS ARE AVAILABLE BY REQUEST FROM DEBTOR'S COUNSEL OR VIA CM/ECF SYSTEM.

_/s/ Heather R. Parsons_____
Heather R. Parsons

Exhibit B

SIGNED January 18, 2023

THIS ORDER HAS BEEN ENTERED ON THE DOCKET. PLEASE SEE DOCKET FOR ENTRY DATE.

Paul M. Black
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE Western District of Virginia

In re: Mary Wise Cook **Debtor(s)**	**CASE NO. 22−70623** **CHAPTER 7**
Mary Wise Cook **MOVANTS(s)** **v.** **Discover Bank** **RESPONDENT(S)**	**MOTION TO AVOID LIEN**

PRE−HEARING ORDER

A Motion to Avoid Lien has been filed, therefore, it is

ORDERED

1. The Respondent(s) shall file such responsive pleading as is deemed appropriate within twenty−one (21) days from the date of docketing of the Pre−Hearing Order. As part of the responsive pleading, the Respondent(s) shall indicate whether controversy exists as to the authenticity of any documents involved in the motion and shall specify the disputed documents. Upon the filing of a responsive pleading, a "contested matter" shall exist.

   Failure to file a responsive pleading shall be deemed consent by the non−responding party to the relief requested by the Movant(s) and a waiver of any further notice or opportunity for hearing. Upon default, Movant(s) may prepare and file for entry a default judgement order and there will be no necessity for appearance of counsel as long as the order is filed with the Court prior to the hearing date.
2. To the extent that they are not attached as exhibits to the Motion, within **seven (7) days** from the date of this Pre−Hearing Order, the Movant(s) shall file with the Court and serve on each Respondent the following:
   a. A true copy of all documents upon which the Movant(s) will rely at the time of the hearing.
   b. Any affidavit in lieu of testimony which the Movant intends to rely upon at hearing.
3. In contested matters, the attorneys for the parties are directed to confer with respect to the issues raised by the Motion in advance of hearing for the purpose of determining whether a consent order may be entered and/or for the purpose of stipulating to relevant facts.
4. In contested matters, on the working day prior to hearing, counsel shall file with the Court three copies of all exhibits to be introduced at the hearing.
5. All counsel and the parties shall comply with this Order and failure to do so will result in imposition of appropriate sanctions and/or dismissal of the proceeding.

ola

END OF ORDER

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA

IN RE:	*	
Mary Wise Cook	*	
	*	Case No. 22-70623
Debtor	*	Chapter 7
	*	
	*	
Mary Wise Cook	*	
Plaintiff	*	
v.	*	
Discover Bank	*	
Defendant	*	

AFFIDAVIT IN SUPPORT
OF MOTION TO AVOID LIEN AS IMPAIRING HOMESTEAD EXEMPTION

I, Mary Wise Cook, having been sworn, hereby testify under oath to the following:

1. I, filed a Chapter 7 on October 20, 2022.

2. I own real property located at 75 Rock Hill Lane, Roanoke, VA 24019 and located in Botetourt County.

3. The above property is owned as a joint tenant.

5. I believe the current market value of the above-listed real estate is $98,700.00.

6. At the time my bankruptcy case was filed, I, along with the co-owner of the property, owed approximately $28,197.00 to Member One Federal Credit Union on a first mortgage note, which is secured by a first deed of trust.

8. There is one judicial lien docketed against my half of the property.

9. On November 19, 2018, Discover Bank docketed an abstract of judgment in the Botetourt County Circuit Court against me as Instrument Number 18-633 based on an underlying judgment entered by the Botetourt County General District Court in the amount of $5,130.41 with costs of $56.00 and 6% interest.

10. I exempted $34,344.48 under Virginia Code §34-4 on Schedule C which was amended on January 17, 2023.

11. This lien impairs the exemption to which I would have been entitled under 11 U.S.C. sec. 522(b) and Virginia Code 34-4, and which exemption I timely claimed and perfected.

12. As such, I believe I may avoid the judicial lien under 11 USC. Sec. 522(f) of the defendant.

Mary W. Cook
MARY WISE COOK

COMMONWEALTH OF VIRGINIA *
*
CITY/COUNTY OF Roanoke *

The foregoing document was subscribed, sworn to, and acknowledged before me, a Notary Public in and for the Commonwealth of Virginia, this the 16 day of March, 2023 by Mary Wise Cook.

Notary Public

My commission expires 10.31.25

Heather R. Parsons, Esquire
Giles & Lambert, P.C.
P.O. Box 2780
Roanoke, VA 24001
(540) 981-9000
hparsons@gileslambert.com

BETHANY ALICE BRUBAKER
COMMONWEALTH OF VIRGINIA
REGISTRATION NO. 7328413
MY COMM. EXPIRES 10/31/2025
NOTARY PUBLIC

Exhibit D

SIGNED THIS 17th day of March, 2023

THIS ORDER HAS BEEN ENTERED ON THE DOCKET. PLEASE SEE DOCKET FOR ENTRY DATE.

Paul M. Black
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA

IN RE:	*	
Mary Wise Cook	*	
	*	Case No. 22-70623
Debtor	*	Chapter 7
	*	
	*	
Mary Wise Cook	*	
Plaintiff	*	
v.	*	
Discover Bank	*	
Defendant	*	

DEFAULT ORDER PARTIALLY AVOIDING JUDICIAL LIEN AS IMPAIRING HOMESTEAD EXEMPTION

Upon motion filed by Debtor's counsel, proper service of the motion upon the Defendant, no response filed by any party and for good cause shown, it appears the the Plaintiff is entitled to entry of a default order.

It is therefore ORDERED, ADJUDGED and DECREED that judgment docketed by Discover Bank on November 19, 2018 in the Botetourt County Circuit Court as Instrument 18-633 in the amount of $5,130.41 plus accrued interest and costs of $56.00 shall be, and hereby is

partially avoided upon discharge of this case, and the balance of $907.32 remains secured and enforceable.

Upon entry of this Judgment, the Clerk shall forward copies to Heather R. Parsons, counsel for the Plaintiff, who shall forward a copy to the Defendant(s) or any interested parties unless those parties are served automatically by CM/ECF.

END OF ORDER

Submitted by:

/s/ Heather R. Parsons
Debtor's counsel
hparsons@gileslambert.com
540-981-9000
Giles & Lambert, PC
P.O. Box 2780
Roanoke VA 24001

Exhibit E-1

GILES
& LAMBERT, P.C.
ATTORNEYS AT LAW
P.O. BOX 2780 • ROANOKE, VA 24001

Sept. 20, 2019

RE: Chapter 7 bankruptcy

Issue of judicial lien and after-acquired real estate

You contacted and hired me to review whether a judicial lien attached to your subsequently acquired real estate following the Chapter 7 bankruptcy you and your former wife filed on 2003. In applying to refinance a loan on real estate you now own with your 2nd wife, the title company has raised an issue of whether the judgment on the property from when you filed the bankruptcy survives.

In my opinion, there is no valid docketed lien against the currently owned real estate and I will explain why. However, because of nuisances of this area of law, it may be necessary to provide this letter to the title examiner and insist the supervising attorney review it.

In some situations, if a creditor obtains a final judgment and records it in the Circuit Court where that individual owns real estate, the judgment becomes a lien against the real estate. But, you have to carefully examine how the real estate is titled or deeded and the names of the defendant(s) listed on the judgment to determine ***if*** it really is a lien under Virginia law ***and any subsequent intervening legal action that impacts future validity.***

The relevant events in this case:

1/9/2003	Judgment docketed in Botetourt County Circuit Court
8/4/2003	Chapter 13 case filed
11/6/2003	Chapter 13 case converted to Chapter 7 case and real estate "surrendered"
2/10/2004	Discharge Order issued
7/14/2014	Real estate owned when case filed foreclosed upon and deed transferred via substitute trustee to new owners

When you and filed a Chapter 13 bankruptcy on 2003, you were married and you individually owned a residence located at Blue Ridge, VA (Botetourt County, VA). Bank of Botetourt had obtained a judgement in the Botetourt County Circuit Court which was docketed on Jan. 9, 2003, prior to filing of the case and that judgment did attach to the real estate you owned then. However, in the bankruptcy case (which

you converted to a Chapter 7 on Nov. 6, 2003), you provided to surrender that real estate to the mortgage company and the Bank of Botetourt. The real estate was then foreclosed upon and effectively extinguished any lien on real estate in Botetourt County or elsewhere, as you owned no other real estate.

The combination of the personal discharge and the foreclosure extinguished any validity of the judicial lien and it cannot attach to subsequently acquired real property. Since the judgment recorded in the Circuit Court became an unsecured liability based on the foreclosure, it was discharged on December 28, 2010 and cannot be revived by future real property acquisition. See In re Clowney, 19 B.R. 349, 1982 Bankr. LEXIS 4383 (NC Bankr. 1982), In re Glover, 2010 Bankr. LEXIS 3165 (NC Bankr. 2010), and Williams-Mechling vs. Bonner County, (Idaho Bankr. 2002).

It is my legal opinion that the mortgage on your current owned individual real estate (acquired in 2008) has a first place position as lien holder and the Bank of Botetourt judgment does not attach. It is my legal opinion that the Bank of Botetourt judgment also does not attach to the property owned jointly with your current wife as this property was acquired in 2013. The judgment of Bank of Botetourt was discharged in the Chapter 7 and cannot attach as a lien to subsequently acquired real estate.

When any future title examiner reviews this, please make sure if there is a question remaining as to the lien that the examiner requests the supervising attorney review as he or she should understand the sequence of events and the legal implications. However, if there are any subsequent questions, please don't hesitate to contact me.

Sincerely,

Malissa L. Giles
Giles & Lambert, PC

Exhibit E-2

GILES
& LAMBERT, P.C.
ATTORNEYS AT LAW
P.O. BOX 2780 • ROANOKE, VA 24001

August 2, 2023

RE: Chapter 7 bankruptcy

Issue of judicial lien on after-acquired real e state

Dear

You contacted and hired us this week to review whether two judgements attached as liens to your subsequently acquired real estate following the Chapter 7 bankruptcy you filed on . It is my understanding that you later (in approximately 2016) purchased a home that you are trying to sell and the issue of two judgments in favor of PHC Hospital of Martinsville has arisen.

In my opinion, the two judgments recorded in the Martinsville Circuit Court do not operate as liens against the currently owned real estate and I will explain why. However, because of nuisances of this area of law, it may be necessary to provide this letter to the title examiner and insist the supervising attorney review it.

In some situations, if a creditor obtains a final judgment and records it in the Circuit Court where that individual owns real estate, the judgment becomes a lien against the real estate. If there is a valid lien, a Chapter 7 bankruptcy will discharge personal liability but does not automatically remove or void a lien. But, you have to carefully examine how the real estate is titled or deeded and the names of the defendant(s) listed on the judgment to determine ***if*** it really is a lien under Virginia law and any subsequent intervening legal action that impacts future validity.

You did not own any real estate at all when the Chapter 7 bankruptcy was filed on 2014 and then discharged on . 2014.

As you owned no real estate, the judgments recorded in the Martinsville County Circuit Court were extinguished and cannot attach to subsequently acquired real property. The judgments recorded by PHC-Martinsville, Inc., trading as Memorial Hospital of Martinsville and Henry County, were not secured liens as you did not own any real estate to which either attached when the bankruptcy was filed. Since the judgments recorded in the Martinsville Circuit Court were unsecured liabilities, the liability on each was discharged on August 11, 2010 and cannot be revived by future real property acquisition. See In re Clowney, 19 B.R. 349, 1982 Bankr. LEXIS 4383 (NC Bankr. 1982), In re Glover, 2010 Bankr. LEXIS 3165 (NC Bankr. 2010), and Williams-Mechling vs. Bonner County, (Idaho Bankr. 2002).

It is my legal opinion that the judgments of PHC-Martinsville, Inc., trading as Memorial Hospital of Martinsville and Henry County were discharged in the Chapter 7 and cannot attach as a lien to subsequently acquired real estate.

When the title examiner reviews, please make sure if there is a question remaining as the lien, that the examiner requests the supervising attorney review as he or she should understand the sequence of events and the legal implications. However, if there are any subsequent questions, please don't hesitate to contact me or have the PHC-Martinsville, Inc., trading as Memorial Hospital of Martinsville and Henry County representatives contact me.

Sincerely,

Heather R. Parsons, Esq.
Giles & Lambert, PC

Exhibit E-3

GILES
& LAMBERT, P.C.
ATTORNEYS AT LAW
P.O. BOX 2780 • ROANOKE, VA 24001

March 7, 2024

Carilion Medical Center
Nicholas Conte, Reg. Agent
213 S. Jefferson St.
Ste 1600
Roanoke, VA 24011

RE: Ch. 13 case number:

Dear Mr. Conte:

Our firm represented the in a now-discharged Chapter 13 case in the WDVA.

Carilion was listed as a creditor on the creditor mailing matrix and in the schedules in the Chapter 13 case; but, unbeknownst to the Debtors, Carilion appears to have docketed an abstract of a 2012 judgment in the Montgomery County Circuit Court land records in January 2013.

While the ' personal liability to Carilion was discharged, a question has arisen about the effect of the docketed abstract on the title of the Smiths' Montgomery Co. real estate.

The ' real estate is deeded to them as husband and wife, tenants by the entireties, and has been since a date preceding the docketing of the abstract of judgment in Montgomery County Circuit Court in January 2013. The own no other real estate in Montgomery County.

In analyzing the legal consequences of this docketed abstract, I write to inquire the basis of the original debt to Carilion Medical Center underlying the 1/4/2012 judgment. The Debtors do not recall ever having contractually agreed to pay for the medical care of the other; therefore, is Carilion relying upon the theory of the Doctrine of Necessaries in holding both debtors accountable for this debt?

It is my opinion that if Carilion is relying upon the Doctrine of Necessaries to assert joint liability against both spouses, the Code of Virginia § 55.1-202 is clear that "no lien arising out of a judgment under this section shall attach to the judgment debtors' principal residence held by them as tenants by the entirety" (cited in part).

Further, if the underlying judgment is based on the Doctrine of Necessaries and therefore does not legally attach (per §55.1-202 cited above), then such abstract would have remained an unsecured liability that was discharged in the Ch. 13 case. Therefore, any continued attempt to collect on said obligation would be a violation of the discharge injunction.

Given the above, I kindly ask that you provide us documentation showing the basis of the debt underlying the 2012 judgment so we can analyze the legal impact, if any, on a real estate closing.

Thank you,

Sincerely,
Heather R. Parsons, Esq.

w/ copy of docketed abstract

CC:

LIEN AVOIDANCE AND TITLE TRAPS

Malissa L. Giles, Helen Spence and Nancy Schlichting

PART 2:

Virginia Limitations Periods and Curative Statutes

Title Insurance Underwriting Issues When Insuring Bankruptcy Sales "Free and Clear" of Existing Liens

The Bankruptcy Discharge

VIRGINIA LIMITATIONS PERIODS and CURATIVE STATUTES

DEEDS OF TRUST:

8.01-241. DOT cannot be enforced after **ten (10) years from its maturity date** (plus 1 year from death of any party in interest who has died in interim)

8.01-242. DOT cannot be enforced after **20 years from the date of the DOT, if there is no maturity date** (plus 1 year from death of party in interest)

Credit line DOT cannot be enforced after **40 years from date**, if there is no maturity date given (plus 1 year from death of any party in interest)

Statute of Limitation on enforcement of deed of trust given to secure the federal government or one of its agencies: Please be reminded that Virginia′s statutes of limitation on enforcement of deeds of trust do not apply to deeds of trust given to secure the United States or one if its agencies. There is no limitation on enforcement of a deed of trust securing the Small Business Administration, the USDA, or any other federal agency. These deeds of trust are enforceable until paid and are not subject to Virginia′s 10, 20 and 40-year statutes of limitations.

JUDGMENTS:

8.01-251 A. Judgment cannot be enforced after **20 years from date** of judgment or date of domestication of judgment

Note: *The enforcement period was reduced from 20 years to 10 years from the date of a judgment,* ***but this only applies to judgments dated on or after July 1, 2021***.

B. Judgment can be extended for **additional** 20 year periods, by motion filed before initial period expires (**CHECK CIVIL ACTION INDICES)

Note: *For judgments dated on or after July 1, 2021, the judgments may be extended up to two additional 10-year-terms, by recordation of a certification prior to expiration of the current limitation period*

C. Judgment cannot be enforced after **5 years from recordation of deed to purchaser for value**

Note: *The limitation on enforcement of judgments after recordation of a deed from the judgment debtor to a purchaser for value has been shortened from 10 years to 5 years, as of* ***January 1, 2022***.

8.01-253 Creditor has 5 years from recordation of gift deed (no consideration) to bring suit to set aside the deed

8.01-460 Decrees for **current or future** child and spousal support judgments docketed as judgment liens (if ordered to be so docketed by the court in the decree) shall be a lien on obligor's real estate. The lien continues until the child is 19 or graduates from high school, whichever occurs first.

FEDERAL AND STATE LIENS:

IRC §6502 Lien for taxes due to the IRS cannot be enforced against real estate after 10 years from date of assessment (plus 1 year 30 day renewal/refiling period). **Rely on the "last date for refiling" shown on the IRS Notice of Lien to determine whether the lien has expired**. All other federal judgments and liens have a 20 year statute of limitations.

26 USC 7425(b)(2) Prior to foreclosure, when federal tax lien filed more than 30 days prior to foreclosure sale, IRS must be given 25 days prior written notice of sale by certified or registered mail. If no notice is given, the sale is subject to the lien. If notice is given, the IRS has 120 days from date of sale to redeem the property (unless released by them earlier)

28 USC 2410(c) For judgments and other liens, the US has a one year right of redemption after notice of foreclosure.

58.1-1805 No action against real estate to enforce lien for **income** taxes owed to **Commonwealth of Virginia** after 20 years from date

ESTATES:

8.01-254 No action against real estate to enforce specific bequest or legacy not paid after **20 years**from time it should have been paid, or if no time specified from death of testator

64.2-534 No action against real estate sold to a Bona Fide Purchaser from heirs or devisees after **1 year** from date of death

58.1-908 Lien for **estate taxes** owed to **federal government or Commonwealth of Virginia** cannot be enforced after 10 years from date of death

64.2-302 Spouse must claim elective share of augmented estate within six months of the date of admission of will to probate (for testate) or qualification of an administrator (for intestate).

Under old law of dower and curtsey (former 64.1-13, prior to January 1, 1991) the limitation period was one year from the admission of the will to probate for testate, and no limitation period for intestate estates.

64.2-308 Spouse's claim of augmented estate share is barred in the event surviving spouse willfully deserted or abandoned the deceased spouse.

DEFECTIVE ACKNOWLEDGEMENTS AND DEEDS:

55.1-627 Validates notarial acts of certain county officials since 1-1-89
55.1-628 Validates acknowledgements prior to 7-1-1995 with no seal
55.1-629 Validates acknowledgements of deeds of trust by named trustee prior to 3-23-1936
55.1-630 Validates acknowledgements of deeds of trust by notary who is named trustee prior to 7-1-1995
55.1-631 Validates acknowledgements prior to 7-1-1995 that omit date of instrument acknowledged, if otherwise clear or can be inferred
55.1-632 Validates acknowledgements prior to 7-1-1995 by justices of peace, mayors, etc.
55.1-633 Validates acknowledgements prior to 7-1-1995 by officers after their term has expired
55.1-634 Validates acknowledgements prior to 6-18-1920 by notaries in service during WWI
55.1-635 Validates acknowledgements prior to 7-1-1995 by foreign officials who fail to affix seals
55.1-636 Validates acknowledgements prior to 7-1-1995 by notaries residing in foreign countries
55.1-637 Validates acknowledgements prior to 7-1-1995 by spouse of grantee
55.1-638 Validates acknowledgements prior to 7-1-1995 where notary mistakes commission as expired when in fact it is not

55.1-639 Validates acknowledgements of a notary in a city or county which consolidated prior to normal expiration of notary commission

55.1-640 Validates acknowledgements prior to 3-22-1930 after commission of notary has expired

55.1-641 Validates acknowledgements prior to 7-1-1995 after commissioner of notary has expired

55.1-642 Validates acknowledgements prior to 7-1-1995 by notary appointed but not qualified

55.1-643 Validates acknowledgements prior to 7-1-1995 without name of city or county where notarial act performed

55.1-644 Validates deed executed in Virginia prior to 7-1-1995, where acknowledgement fails to state representative capacity of party signing on behalf of corporation

55.1-645 Validates deed where corporate seal is not affixed, or seal affixed but not attested to

55.1-646 Validates acknowledgement executed by a notary who is stockholder or officer of company executing document, or for the benefit of the company

55.1-602 All writings admitted to record shall be presumed to be in proper form for recording after having been recorded, and shall be **conclusively** presumed to be in proper form for recording after having been recorded for a period of three years, except in cases of fraud.

ENFORCEMENT OF MECHANIC'S LIENS:

43-17 A suit to enforce a mechanic's lien must be brought within 6 months from date of filing of lien, or 60 days from date of completion of structure, whichever is later.
BUT, this time limit is affected by bankruptcy filing of owner or general contractor. (BEWARE: Bankruptcy may not be filed locally, but stay is still effective.)

ENFORCEMENT OF HOA, CONDO and MISCELLANEOUS LIENS:

55.1-1966 Condo liens for assessments are subordinate to first mortgages or first deeds of trust securing institutional lenders, and recorded prior to the perfection of said lien for assessments. *Non-institutional lenders and second deeds of trust* DO NOT have priority.

Memorandum of condo lien must be filed within **90 days** from time the first assessment became due and payable. Suit to enforce the lien must be filed within **36 months** from time memorandum of lien recorded.

55.1-1833 Homeowners' Association liens recorded subsequent to ANY deed of trust are subordinate to, and extinguished by foreclosure of, such deeds of trust, if properly noticed by foreclosure trustee (§ 55.1-321).

Memorandum of HOA lien must be filed within **12 months** from the time the first assessment became due and payable. Suit to enforce the lien must be filed within **36 months** from time memorandum of lien recorded.

15.2-1215 Certain counties given the right to assess lien for expense of cutting grass on any occupied residential real estate, to be collected "*as taxes and levies are collected*".

15.2-901 Any locality may by ordinance provide for liens for removal of trash, nuisance, weeds or grass, on occupied or vacant developed or undeveloped real property, which are equivalent to liens for unpaid local real estate taxes.

15.2-5139 Water and sewer authority liens are equivalent to liens for unpaid *real estate* taxes.

58.1-3940 Real property taxes are enforceable for **20 years** after December 31 of the year for which they were assessed. All other local taxes are enforceable for **5 years** following December 31 of the year for which such taxes were assessed.

Title Insurance Underwriting Issues When Insuring Bankruptcy Sales "Free and Clear" of Existing Liens

Underwriters are often asked to insure sales pursuant to Bankruptcy Code §363, "free and clear of liens." A number of common problem scenarios may ensue. The customer may well cite the "power" of the bankruptcy court to approve such sales, and even the retention of court jurisdiction to "enforce" orders relating to existing liens. Unfortunately, claims history suggests caution in responding to such requests.

I- DUE PROCESS ISSUES.

A trustee in bankruptcy may sell the property of the debtor's estate. Section 363(b)(1) of the Code requires that before such a sale, interested parties must be given notice and an opportunity to be heard. We must be satisfied as to these requirements before we insure such a sale. A motion for authority to sell property *free and clear of liens* or other interests must be made, by Bankruptcy Rule, in accordance with procedures for an *adversary proceeding.* The notice must include the date that the hearing is to be held, and the time during which objections may be filed, and must be served on parties who have liens or other interests in the property to be sold (Bankruptcy Rules 6004(c) and 9014). Notice of a proposed sale must be given ***21*** days prior and must contain the time and place of any public sale and the terms and conditions of any private sale (Rules 6004(a) and 2002). Code § 102(1) defines "after notice and hearing" to mean after such notice and opportunity to be heard as is appropriate in the particular circumstances.

• NOTE: Any notice other than personal service and any court ordered shortening (even for cause) of the ***21*** days for a record interest holder must be considered extra-hazardous and requires approval.

II-ADEQUATE PROTECTION

Bankruptcy Code § 363 (f) provides that the trustee may sell property free and clear of liens [other than in the ordinary course] *only if* (1) applicable non-bankruptcy law permits sale such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and price at which the property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; *or* (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. Mortgages, which we may be asked to omit from the policy on the basis that the liens are transferred from the land to the proceeds, generally fall in category (5). Mechanic liens generally fall in category (4).

"Adequate protection" for parties who will be affected by such orders is covered by Code §363 (e). That section provides that "on request" of such a party, the court "shall prohibit or

condition such …sale…as is necessary to provide adequate protection of such interest." It is not uncommon for a court to address the above requirements by having its order "deem" notified parties who did not object or whose objections were withdrawn to have consented pursuant to 363(f)(2). Those who did object are commonly found by the order to be adequately protected by having their liens, claims, interests or obligations attach to the cash proceeds. For whether there can be adequate protection when the cash proceeds do not exceed the aggregate of all recorded liens, see next section.

III- CRAMMING DOWN EXISTING LIENHOLDERS

Lienholders whose liens may have initially been adequately secured by the value of the collateral, and have become undersecured either by reason of a decrease in the value of the property, or by the intervention of a prior interest, such as the administrative costs of the bankruptcy estate, are said to be "crammed down" by an order approving a sale which does not realize proceeds sufficient to pay all pre-petition lienholders. The lienholder's security can be "crammed down" into the new scenario of value and competing interests. If the value of the collateral is volatile, the timing of the valuation is critical to the lienholder. And, of course, the valuation itself will be an issue. The lienholder must attack the lack of adequate security in the bankruptcy proceeding, not in a collateral proceeding. What they must attack is the valuation. If a lienholder objects to a purchase price, they have the right under §363(k) to bid their lien as part of an overbid (unless the court for cause orders otherwise). The underwriter should be sure that lienholders are notified, have an opportunity to be heard, and that the appropriate appeal period has lapsed without one being filed. In addition, consider Section VI, infra, on insuring over unreleased liens.

•NOTE: Insuring a sale which generates proceeds less than the aggregate of all unreleased pre-petition liens is extra-hazardous, and requires approval after making certain that lienholders were notified and given an opportunity to be heard.

IV- PRE-PETITION REAL ESTATE TAXES.

Underwriters should be aware that although the bankruptcy court has the power to order real property to be sold free and clear of pre-petition real estate taxes, in reality tax collectors will often fail to appear or answer, and are notorious for proceeding to deal with the taxes without deference to the court order. They will continue to treat pre-petition taxes as accruing interest and penalties, and once the automatic stay in the case is lifted (e.g. by the discharge of the debtor) may proceed to sell the taxes. Assuming (a big assumption in many cases) that the proper party has been notified, are these actions in violation (and possibly "in contempt") of the bankruptcy court's order? Quite possibly they may be. Have we ever had to deal with a tax collector on a claim and pay our own money to get them to clear the tax lien from the records? Most definitely we have. Underwriters should never agree to insure over delinquent pre-petition taxes merely because proper notice was apparently given to the correct official and a default order approving the sale was entered. It is usually appropriate to consider asking the court to approve a holdback "escrow" of part of the proceeds while the estate negotiates with the taxing authority.

•NOTE: Agreeing to insure on the basis of default orders against real estate taxing authorities (i.e., no response from the collector) is extra-hazardous. Insurers must insist on an agreed order or some confirmation from the collector that they will accede to the court's treatment of pre-petition taxes.

Insurance over Pre-Petition Liens in favor of the State. Case law suggests caution in insuring on the basis that a bankruptcy court has the power to direct a sale free and clear of liens in favor of a State or one of its subdivisions. Look to the position, if any, that has been taken by the local Attorney General with respect to the bankruptcy court's power and jurisdiction with respect to state liens, such as income tax, unemployment tax or retail tax. While most states have, in recent years, officially agreed that the bankruptcy courts can deal with state interests, it is prudent to be sure what the policy is in your state. After ascertaining local law, confirm that notice was given to the correct official. Approval is required to insure with a default order (no response from state official, or claim filed).

V-COURT ORDERS THAT 363 SALES TO BE FREE OF ANY RECORDING TAX.

Local recorders may refuse to record a trustee's or debtor in possession's deed without payment of recording or transfer tax, notwithstanding a bankruptcy court order that purports to exempt the transaction by virtue of § 1146***(a)***. In many such cases, the appropriate official was not given notice of the order. Be wary of court orders, which purport to be binding and effective against recorders, title companies and the world generally without naming or notifying any such entities. Bankruptcy courts have great powers, but only with respect to these parties who are properly before them.

Orders which seek to exempt the transaction from transfer taxes or mortgage taxes even though the order was entered before confirmation of a plan. If the Order relates to a transaction occurring *before confirmation, you may not rely on the order as exempting the sale from transfer or mortgage tax.* We have seen a number of such orders. They appear to be based on an approach to Code § 1146***(a)*** taken by several District Court cases, but which approach has been ruled against in other cases, including a Federal Court of Appeals decision. The Code section allows the bankruptcy court to exempt transfers "under a plan confirmed [under Chapter 11]." The approach urged by a number of debtors is that certain sales "in contemplation of a plan" are so necessary to the implementation of a plan that they may be exempted so long as a plan is *eventually confirmed.* The reasoning of the court in those cases is that without such a sale as transfer tax exempted it would be impossible or at least difficult to pay creditors during the period before a plan can be proposed and confirmed. [1]

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[1] *In re: GST Telecom, Inc. 2002 U.S.Dist.LEXIS 4662 (March, 2002; Dist.Court for District of Delaware)* This case cites ***In re: Jacoby Bender, 758 F.2d 840 (2ndCir. 1985)***. However, the GST court cites a District Court in its own 3rd Circuit, In re: Hechinger Investments Co. 276 B.R. 43 (D.De.2002), which was REVERSED by the 3rd Circuit Court of Appeals in a 2-1 split decision with a written dissent: ***In re: Hechinger Investments Co., 335 F.3rd 243 (3rd Cir. 2003.*** A case in Illinois federal court follows the approach of the 3rd Circuit, that is that a court may NOT exempt a transfer occurring before confirmation: ***States of Illinois & Washington v. National Steel Corporation, 2003 U.S. Dist.LEXIS 15695 (Sept.2003, Dist.Ct. for Northern District of Illinois). The foregoing are the only reported cases as of Jan. 2004 RJK.***

In a recent District Court case that found that the Code does not permit such exemptions, the court stated that it was "not unsympathetic to the fact that [debtor] felt it had to sell its assets at the earliest possible moment because of rapidly declining [prices of items produced on property]. We understand that waiting until a plan had been fully confirmed could have cost [debtor] money and may have hindered its efforts to remain a going concern." Instead, the court favored the countering position that one of the goals of the Code is to encourage early confirmation, and that allowing early exemption would "refute that goal."[2]

•NOTE: Underwriters *must* treat pre-confirmed plan transfers as being taxable notwithstanding a court order that they are tax exempt.

VI-MARKETABILITY WHEN PRE-PETITION LIEN IS NOT RELEASED OF RECORD.

Marketability of title is a concern *even if* (1) an order is entered that the land be sold free and clear of a mortgage lien, (2) the lien holder is properly notified and given an opportunity to be heard and either fails to appear or has any objection overruled by the court, and (3) the appeal period runs without any being taken. There may be a marketability issue insofar as we are asked to insure the sale without getting a recordable release from the lienholder. Usually, the court order will direct the lienholder to execute a release and, likely, with additional time and effort, the lienholder could be forced to comply. More often than not, however, the deal will be presented to the underwriter with little or no time to get this done, often with the additional plaint that funds are not available for this extra step. Instead, the solution proffered is to record a certified copy of the order. The difficulty with this approach is that the court order generally fails to reference the affected lienholder with the specificity sufficient for marketability purposes. Better for such purposes would be a recitation in the order that the sale is to be "free and clear of the interest of [named record lienholder] by reason of deed of trust [or other document] recorded on [date] as document [number]." Unfortunately, instead, most frequently such orders state the sale is to be free and clear of all liens, without any specificity or description of any of them. The law of inquiry notice might deem third parties to be put on notice, by any document in the chain of title referencing the case, of the results of a review of the entire bankruptcy court file. That review, under the law of inquiry notice, might then reveal that the lienholder received proper notice and failed to object or appeal, etc.

•NOTE: The strength or weakness of inquiry notice law varies from jurisdiction to jurisdiction. For that reason, a recorded order which does not on its face specify liens affected may not be sufficient for marketability purposes, and must be approved. In this regard, it is not sufficient for our purposes if the motion for the sale adequately described the record lienholders, but the order that gets recorded does not so describe them.

Recordation of the Order for marketability purposes. The underwriter should be sure that what is recorded is a *certified copy of the final signed order.* Sometimes we are instead provided with photocopies or proposed or unsigned orders.

[2] *States of Illinois & Washington v. National Steel Corporation* case.

VII- ***FOURTEEN*** DAY RIGHT OF APPEAL

Bankruptcy Rule 8001 allows an interested party ***14*** days to appeal from the entry on the docket of a judgment, order or decree. Rule 8005 describes how an appellant might *stay* the judgment, order or decree. In order to safely insure that sales of property would not be subject to avoidance or attack by appellants, it has generally been required that ***14*** days elapse after entry of the authorizing court order on the docket, and a determination be made that no appeal was filed. Nonetheless, occasionally, with approval, we have insured such transactions during the ***14***-day period. Underwriters should be aware of the application of Rule 6004(***h***) and of Code § 363(m) to requests that we insure such sales during the ***14***-day period. Such insurance is to be considered extra-hazardous.

Code § 363(m) offers some limited protection against appeals for purchasers who acquire their interests "in good faith." [3] Case law does not provide much help in determining whether any given purchaser will qualify for that protection. It is probably helpful if the purchaser is at arms length from the estate and bids an amount near the appraised value of the property, or is the successful bidder at a commercially reasonable, well-advertised and attended auction sale, and has other characteristics likely to be deemed those of one "in good faith."

Bankruptcy Rule 6004(***h***) automatically stays orders for sales, "*unless the court orders otherwise.*" Most orders since the 1999 adoption of this rule have "lifted" this automatic stay. Nonetheless, while the order is thereby not automatically stayed, it remains appealable. Reliance on the protection of §363(m) for insurance of a sale before the expiration, without a filed appeal, of ***14*** days, must be approved.

[3] "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless authorization and sale or lease were STAYED PENDING APPEAL."(emphasis added)

The Bankruptcy Discharge

Michelle L. Statz, Underwriting Counsel
The FNF Family of Companies

I. Overview of Bankruptcy

At this point in your underwriting life, you have certainly encountered someone, or some entity, in your transaction that has been in a past or current bankruptcy. Bankruptcy is a federal court proceeding in which a debtor seeks court protection from claims of the debtor's creditors. There are several chapters of bankruptcy under which a debtor can file which are governed by Title 11 of the United States Code. The goal of a successful bankruptcy is to give the debtor a financial "fresh start."

Customarily, we see bankruptcy filings under Chapters 7, 11 and 13; however, there is also a Chapter 9, which is for municipalities. One recent famous example of a Chapter 9 bankruptcy filing is the City of Detroit, which filed for Chapter 9 bankruptcy protection on July 18, 2013 with debt estimated between $18 - $20 billion. By debt amount, it is the largest municipal bankruptcy in history.

Chapter 12 of the Bankruptcy Code is designed for "family farmers" or "family fishermen" with "regular annual income." It enables financially distressed family farmers and fishermen to propose and carry out a plan to repay all or part of their debts.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added a Chapter 15, which deals with debtors and parties involving more than one country. Per 11 U.S.C. § 1501, the goals of a Chapter 15 are: (1) to promote cooperation between the United States courts and parties of interest and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases; (2) to establish greater legal certainty for trade and investment; (3) to provide for the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; (4) to afford protection and maximization of the value of the debtor's assets; and (5) to facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

No matter the chapter under which the debtor files, the overall procedure has the same basic steps. A debtor initiates a bankruptcy case by filing a petition ("Petition") seeking protection from creditors. A filing can be made by an individual debtor, co-debtors or an entity, and can be voluntary or involuntary. For individual debtors or co-debtors, the Petition is filed in the United States District Court for the district in which the debtor has resided for most of the 180 days prior to the filing of the Petition. For an entity, the Petition is filed in the district in which its corporate or main office is located.

The Petition consists of the debtor's personal information, including employment and income information. The Petition also consists of "Schedules," which are lists of the debtor's creditors. The Schedules are broken up into "Secured Creditors" and "Unsecured

Creditors." Examples of a secured creditor would be a lender on a deed of trust, secured by property owned by the debtor, or a judgment creditor with a docketed judgment. An example of an unsecured creditor would be a credit card company, which is debt that is not secured by any property. All the creditors on the Schedules are then noticed of the debtor's Petition filing.

Generally, at the moment the Petition is filed, the "Automatic Stay" is imposed over the estate of the debtor. The Automatic Stay is like a temporary injunction; when the Stay is imposed, creditors cannot take any debt collection steps against the debtor.

A bankruptcy trustee ("Trustee") is appointed for each Petition that is filed. You may have heard the phrase "strong-arm powers of the Trustee" which means the Trustee has very broad powers to manage the property and creditors of the estate. Managing the property and creditors of the estate can include liquidating assets, abandoning assets and avoiding certain creditor liens.

At the end of a bankruptcy case, the debtor can either be discharged or the case can be dismissed. These terms are not synonymous with one another. A dismissal can be voluntary or involuntary and the debtor is not relieved from any liability for the debts owed to his creditors.

When a debtor is discharged, that means the bankruptcy court is satisfied that the debtor has paid his creditors the best he can, or that the debtor simply is unable to pay and should be relieved of those debts. A discharge releases individual debtors from personal liability for most debts and prevents the creditors owed those debts from taking any further collection actions against the debtor.

One very important thing to remember: what gets discharged in a bankruptcy is the debtor's obligation to pay. The debt itself is not discharged. It still exists, but is uncollectible from the creditor's standpoint. Customers like to say that a docketed judgment is not a valid lien because the debt was discharged in bankruptcy. Not true.

While the debtor is discharged from personal liability from the debts, any liens that have attached to the real property already owned by the debtor – such as a deed of trust or docketed judgment – are not released from the real property. For the real property to be released, a court order must be entered. It is also important to note that the debtor is only discharged from any of the debts listed in the Petition, or otherwise before the court.

After the debtor is discharged, the Trustee winds up any administrative duties, makes payments to creditors (if assets are collected) and then the case is closed.

There are certain debts that are non-dischargeable in bankruptcy, such as child support payments, certain income taxes and student loans, no matter if those liens are listed on the Schedules or not.

II. Bankruptcy Chapters and How Each Impacts Title Underwriting

i. Chapter 7 – Liquidation (11 U.S.C. § 701 *et seq.*)

1. What is a Chapter 7?
   a. This chapter of the Bankruptcy Code provides for "liquidation" - the sale of a debtor's nonexempt property and the distribution of the proceeds to creditors.

2. Taxes
   a. A sale of the real property free and clear of all liens will not extinguish county and municipal real estate taxes. All real estate taxes must be paid.

3. Property Inherited by or Gifted to a Debtor During a Pending Chapter 7
   a. If a debtor becomes entitled to inherit property, or is gifted property (whether by deed of gift or quitclaim deed), within 180 days of filing for bankruptcy, that inheritance or gift becomes part of the bankruptcy estate. The date of entitlement means the date of death of the deceased.

   b. If the inheritance or gift is after 180 days, the property does not become part of the bankruptcy estate.

4. Judgments and Liens
   a. Judgments Docketed Prior to the Bankruptcy Filing
   Unless the lien is non-dischargeable, the discharge of a debtor from a Chapter 7 discharges the debtor personally. A discharge from a Chapter 7 does not discharge a lien that has already attached to the real property, unless there is a specific court order entered in the bankruptcy in that regard.

   b. Judgments with respect to After-Acquired Property
   After-acquired property in this context means any property acquired by the debtors after being discharged from bankruptcy. The discharged debts from the bankruptcy are discharged as against the person of the debtor, and do not follow them to the newly acquired real property. The judgments, therefore, do not attach.

5. Orders Authorizing the Sale
   a. You must obtain and review a copy of the Order Authorizing the Sale of Real Property or Order of Sale Free and Clear of All Liens. This is usually an Order that allows the Trustee to sell the real property.

   b. In the case of foreclosing lender with a borrower in an active Chapter 7, you will require receipt and review of the Relief from Automatic Stay.

6. Refinances or Loans
    a. The same basic rules and requirements apply to the debtor's encumbering property as are applicable to selling property. You should require receipt and review of a copy of the Order authorizing the conveyance of the property as security for the loan.

    b. Note that the Order may contain important provisions concerning the relative priority of the new deed of trust with liens already existing on the property, as well as provisions concerning payment of existing liens.

    c. As with a sale, you should also add customary requirements about payment and release of existing liens at least until such time as information has been provided that will allow elimination of those requirements.

7. Appeal Period and Automatic Stay
    a. There is a 14-day appeal period from the entry of the Order Authorizing the Sale of Real Property or Order of Sale Free and Clear of All Liens. The 14-day period is to enable any creditor to object to the Order.

    b. Many Orders include language waiving the appeal period. You must read the Order carefully to confirm whether or not the appeal period has been waived.

    c. The Automatic Stay continues in effect, concurrent with the 14-day appeal period.

    d. If you are being asked to insure the transaction and the appeal period has not yet expired, you must contact Underwriting Counsel.

ii. Chapter 11 – Reorganization (11 U.S.C. § 1101 *et seq.*)

1. What is a Chapter 11?
    a. This chapter of the Bankruptcy Code generally provides for reorganization, usually involving a corporation or partnership. A Chapter 11 debtor usually proposes a plan of reorganization to keep its business alive and pay creditors over time. People in business or individuals can also seek relief in Chapter 11.

2. Taxes
    a. A sale of the real property free and clear of all liens will <u>not</u> extinguish county and municipal real estate taxes. All real estate taxes must be paid.

3. Judgments and Liens
    a. The disposition of liens in a Chapter 11 are determined by the court, so you must carefully read the Order that authorizes the sale. If the Order does not provide for the disposition of all liens against the real property, you should require receipt and review of a copy of the Plan to determine the disposition of those liens.

b. Judgments Docketed Prior to the Bankruptcy Filing
Unless the lien is non-dischargeable, the discharge of a debtor from a Chapter 11 discharges the debtor personally. A discharge from a Chapter 11 does not discharge a lien that has already attached to the real property, unless there is a specific court order entered in the bankruptcy in that regard.

c. Judgments with respect to After-Acquired Property
After-acquired property in this context means any property acquired by the debtors after being discharged from bankruptcy. The discharged debts from the bankruptcy are discharged as against the person of the debtor, and do not follow them to the newly acquired real property. The judgments, therefore, do not attach.

4. Orders Authorizing the Sale
   a. You must obtain and review a copy of the Order Authorizing the Sale of Real Property or Order of Sale Free and Clear of All Liens. This can be an Order that allows the Debtor in Possession or the Trustee to sell the real property.

   b. A Chapter 11 also allows for the Chapter 11 Plan to provide for the sale of the real property. In this case, if the Plan states that the property is to be sold (or surrendered), and the Plan is confirmed, you should require receipt and review of a copy of the Order confirming the Plan.

5. Encumbrance of Property
   a. The same basic rules and requirements apply to the debtor's encumbering property as are applicable to selling property. Generally, the debtor will file and the court will approve a Plan of Reorganization. Typically, the debtor will retain title to its property as a "Debtor in Possession," and the debtor will be authorized to continue activities in the "ordinary course of business."

   b. If the debtor is in the business of buying and selling real estate and the Plan does not restrict the ability of the debtor to transfer property, the debtor may be able to borrow money and transfer property as security for the loan without a specific court order. However, the court will still enter a general order allowing the debtor to engage in the business of selling real property, and you should require receipt and review of a copy of the general order.

   c. In most cases, the debtor will not be in the business of buying and selling real property, and you will need to confirm that either the Plan itself or a specific court order authorizes the encumbrance of property. If the debtor provides you with a specific court order authorizing the encumbrance, and if the Order does not provide for the disposition of all liens against the property, you should require receipt and review of a copy of the Plan to determine how liens are to be disposed of.

6. Appeal Period and Automatic Stay
    a. There is a 14-day appeal period from the entry of the above Orders.

    b. Many Orders include language waiving the appeal period. You must read the Order carefully to confirm whether or not the appeal period has been waived.

    c. The Automatic Stay continues in effect, concurrent with the 14-day appeal period.

    d. If you are being asked to insure the transaction and the appeal period has not yet expired, you must contact Underwriting Counsel.

iii. Chapter 13 – Wage Earner Plan (11 U.S.C. § 1301 *et seq.*)

1. What is a Chapter 13?
    a. This chapter of the Bankruptcy Code provides for adjustment of debts of an individual with regular income. Chapter 13 allows a debtor to keep property and pay debts over time, usually three to five years.

2. Taxes
    a. A sale of the real property free and clear of all liens will <u>not</u> extinguish county and municipal real estate taxes. All real estate taxes must be paid.

3. Property Inherited by or Gifted to During a Pending Chapter 13
    a. "A Chapter 13 debtor's inheritance, which postdated debtors' bankruptcy petition by more than 180 days, was part of the bankruptcy estate; the section of the Bankruptcy Code identifying property included in the bankruptcy estate generally encompasses inheritances, while the section of the Code governing property of the estate in Chapter 13 modifies the other section's 180-day temporal restriction, and so the inheritance, which was received before the case was closed, dismissed, or converted, was property of the estate, for purposes of trustee's motion to modify confirmed plan. 11 U.S.C.A. §§ 541(a)(5), 1306(a), 1329."
    Carroll v. Logan (735 F.3d 147 (4th Cir. 2013))

4. Judgments and Liens
    a. Judgments Docketed Prior to the Bankruptcy Filing
    Unless the lien is non-dischargeable, the discharge of a debtor from a Chapter 13 discharges the debtor <u>personally</u>. A discharge from a Chapter 13 does not discharge a lien that has already attached to the real property, unless there is a specific court order entered in the bankruptcy in that regard.

    b. Judgments with respect to After-Acquired Property
    After-acquired property in this context means any property acquired by the debtors after being discharged from bankruptcy. The discharged debts from the bankruptcy are discharged as against the person of the debtor, and do not follow

them to the newly acquired real property. The judgments, therefore, do not attach.

5. Orders Authorizing the Sale
    a. In any sale by a debtor under a Chapter 13, you should add the customary requirements for satisfaction and release of all liens against the property.

    b. You must obtain and review a copy of the Order Authorizing the Sale of Real Property or Order of Sale Free and Clear of All Liens. This can be an Order that allows the Debtor in Possession or the Trustee to sell the real property.

    c. A Chapter 13 also allows for the Chapter 13 Plan to provide for the sale of the real property. In this case, if the Plan states that the property is to be sold (or surrendered), and the Plan is confirmed, you should require receipt and review of a copy of the Order confirming the Plan.

6. Encumbrance of Property
    a. The same general rules and requirements apply to the debtor's encumbering property as are applicable to selling property. As the name implies, the Wage Earner Plan is only available to individual debtors. It is similar to a Chapter 11 proceeding in that the debtor files a Plan for the payment of creditors, but normally only future wages are subject to the Plan and the Court exercises no control over real property. However, it is still advisable to require receipt and review of a copy of the debtor's approved Plan to ensure that the Plan does not restrict the debtor's authority to borrow or to transfer real property.

    b. As with a sale under Chapter 13, if the debtor will receive substantial proceeds from the loan, the Trustee may require that some or all of the proceeds be paid over to the Trustee to fund the debtor's Plan. Consequently, in such cases you should require receipt and review of written approval from the Trustee.

    c. In any loan transaction involving a debtor under Chapter 13, you should also add your customary requirements for satisfaction and release of all liens against the property.

7. Appeal Period
    a. If the bankruptcy is filed in the Eastern or Western District of Virginia, a local rule requires that a Chapter 13 debtor who seeks a sale or refinance of real estate after confirmation of plan first give 21-days notice to the Trustee and all creditors. If no objection is filed within the 21-day period, the court will issue an Order approving the sale.

    b. There is a 14-day appeal period from the entry of the above Orders.

    c. Many Orders include language waiving the appeal period. You must read the Order carefully to confirm whether or not the appeal period has been waived.

d. The Automatic Stay continues in effect, concurrent with the 14-day appeal period.

e. If you are being asked to insure the transaction and the appeal period has not yet expired, you must contact Underwriting Counsel.

III. Liens Exempt from Discharge

i. 11 U.S.C. Section 523(a) of the Bankruptcy Code lists debts which are considered non-dischargeable. Some of these include:
   1. Taxes.
   2. Debts obtained by fraud, false pretenses, or false representation.
   3. Debts owed to a single creditor aggregating more than $500, for luxury goods or services, incurred on or within 90 days prior to the order for relief.
   4. Debts for cash advances aggregating more than $750, incurred on or within 70 days prior to the order for relief.
   5. Debts not scheduled in time for the creditor to timely file a proof of claim.
   6. Debts owed to a spouse, former spouse, or child, for alimony, maintenance, or support.
   7. Debts resulting from the willful and malicious injury to the creditor.
   8. Debts for fines and penalties to a governmental entity.
   9. Debts for educational benefits (student loans) made by a governmental unit or a nonprofit institution.
   10. Debts incurred due death or injury caused by the debtor's unlawful operation of a vehicle due to the use of alcohol, drugs, or another substance.

IV. Practice Tips

i. A recorded Homestead Deed indicates a possible bankruptcy. However, other than the red flag it provides, the deed itself means nothing for title insurance purposes, is not a defect in title, and need not appear as an Exception in the Policy.

ii. Liens against the real property do not automatically "go away" with bankruptcy. If the lien has already attached to the property, the lien continues to exist unless the court orders release from the real property.

iii. Real property purchased after discharge - because the debt has been discharged as against the debtor, the lien does not follow them to the after-acquired property.

iv. All liens must be released of record unless the Order of Sale Free and Clear of All Liens is entered by the bankruptcy court.

v. Remember the appeal period! You must review the Order carefully to confirm whether or not the appeal period has been waived. If you are being asked to insure the transaction and the appeal period has not yet expired, you must contact Underwriting Counsel.

vi. The Public Access to Court Electronic Records ("PACER") Service Center maintains an excellent website which can be a valuable source of information about current and closed cases. Their website can be found at http://pacer.psc.uscourts.gov.

vii. The United States Court system has an excellent website with bankruptcy basics. That website can be found here: https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics