

MEMORANDUM

TO: All attorneys with bankruptcy cases assigned to my docket

FROM: Pat E. Morgenstern-Clarren, Chief United States Bankruptcy Judge, N.D. Ohio

DATE: 9 May 2012

SUBJECT: Tips re Motions to Avoid Liens (11 U.S.C. § 522(f))

A motion to avoid a lien on the debtor's real estate can be an effective part of the debtor's fresh start. Conversely, such a motion seeks to deprive a creditor of a form of security for payment of a debt. For both of those reasons, it is important that a motion to avoid a lien state a *prima facie* case for relief and that it be served properly. When filing these motions, please consider these points:

1. A motion to avoid a lien is a contested matter. *See* FED. R. BANKR. P. 4003(d) and 9014. The motion must be served in the "manner provided for service of a summons and complaint by Rule 7004." FED. R. BANKR. P. 9014(b). Please review Rule 7004, particularly as it regulates service on a corporation or partnership.

2. A motion to avoid a lien must state a *prima facie* case for relief, regardless of whether it is ultimately opposed. At a minimum, the motion should include:

- a. A statement of the property's fair market value, including identifying the source of the value;
- b. Identification of each lien by lien holder, amount, and date and place of recording; and
- c. The calculation contemplated by the Sixth Circuit case of *Brinley v. LLP Mortgage Ltd. (In re Brinley)*, 403 F.3d 415 (6th Cir. 2005).

3. The motion should not include a request that this court order the state court (either directly or through the state court clerk) to act. Absent unusual circumstances, federal courts do not issue that kind of directive to state courts. If those circumstances exist, the movant should provide legal authority to support the request.

4. This court's practice is that, if the motion is granted, the lien will not be released immediately but will only be released when the debtor receives a discharge. If the debtor seeks a different result, the motion should include legal authority to support that result. Absent that, the motion should acknowledge that the lien will be released only when the debtor receives a discharge. This will save the creditor from having to file a document in opposition to clarify this point.

Thank you for your anticipated attention to this issue.