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A recent ruling in the Bankruptcy Appellate Panel for the Tenth Circuit limiting remedies in lien avoidance actions may have a significant impact on bankruptcy trustees, as well as on secured lenders, especially consumer lenders. The ruling rejects a remedy sometimes granted by bankruptcy courts that heavily favored bankruptcy trustees. Now, the interpretation of remedies will favor the secured creditors whose liens are challenged.

In a reported case of first impression in the Circuit, the Bankruptcy Appellate Panel for the Tenth Circuit has rejected an interpretation of the Bankruptcy Code that would have had the effect of providing bankruptcy trustees a double remedy (and imposing a double loss on creditors) in lien avoidance actions. Section 547 of the Bankruptcy Code allows a trustee to set aside certain transfers made within 90 days before bankruptcy as preferences. Other sections provide similar relief for fraudulent transfers, unauthorized post-petition transfers, and certain other transfers. Under section 551, those avoided transfers are "preserved for the benefit of the estate." When the avoided transfer is a lien, this means that the trustee can stand in the creditor's shoes to the extent of the lien, putting the estate's interest ahead of all junior liens. Section 550 of the Code allows the trustee to recover the property transferred, or, if the court orders, the value of the property from the transferee. Taken literally, this could mean that the trustee could deprive the creditor of its lien, take over the lien for the benefit of the estate (and therefore liquidate the property up to the value of the avoided lien free of the interests of all junior lienors), and *also* recover the monetary *value* of the lien from the creditor.

Trustees in bankruptcies in the District of Colorado, as well as other districts, had begun taking just that position – i.e., that the lien is avoided and preserved for the benefit of the estate and that the trustee is also entitled to a money judgment in the amount of the value of the lien as of the bankruptcy petition date. This position had met with some success, having been accepted by bankruptcy judges in a number of cases. The unfortunate result for the secured creditor that was the target of avoidance actions was that in most cases the creditor had made a loan that was not paid back (the first loss), lost its lien securing the loan, and was also required to pay the trustee, in cash, the value of the lien (i.e., the amount of the secured debt, up to the value of the collateral – the second

loss). On the other side, the trustee was able to sell the property free of the creditor's lien (and ahead of junior liens) and also get payment of the lien value in cash. While trustees argued that this was not a double recovery, it is difficult to see it any other way.

In *In re Bremer*, --- B.R. ----, 2009 WL 1845561, 10th Cir.BAP (Colo.), June 29, 2009, in which Jack Smith and Rochelle Rabeler of Holland & Hart LLP represented one of the creditor defendants, the Bankruptcy Appellate Panel rejected the trustee's argument and held that, at least in most cases, when a trustee successfully avoids a lien, that avoidance alone is a sufficient remedy and the trustee is not entitled to a money judgment for the value of the lien. The Panel carefully analyzed the language of the Code sections involved and concluded that the preservation of a lien is essentially the same as recovery of the transferred interest by the trustee. The Panel held that the statutory language allowing the court to award the trustee the monetary value of the lien is not mandatory and that in most lien situations avoidance and preservation of the lien provides the trustee with complete relief, making an additional money judgment unnecessary and inappropriate. Although the Panel held open the possibility that in some circumstances a money judgment might be proper, it made it clear that the money judgment remedy should not be routinely granted.

The *Bremer* decision is very significant for all secured creditors that might be the targets of lien avoidance actions. It is especially important for consumer lenders, such as auto lenders, who frequently face avoidance actions in loan transactions in which lien perfection may have been delayed for any of a variety of reasons. To the extent the *Bremer* decision is followed, in the Tenth Circuit or elsewhere, secured lenders will have an effective means of avoiding the double loss that they might otherwise suffer.

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