

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT  
CHIEF BANKRUPTCY JUDGE

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November 14, 1997

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Subject: *In re David R. and Peggy J. Hamann,*  
Chapter 7; Bankr. No. 97-10069

Dear Counsel:

The matter before the Court is Debtors' MOTION TO REMOVE LIEN ON EXEMPT PROPERTY and Avco Financial Services' response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying ORDER shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes Avco's purchase money security interest and lien on Debtors' furniture cannot be removed under 11 U.S.C. § 522(f).

SUMMARY. Before Debtors filed their Chapter 7 petition, they bought a sofa and loveseat and financed the purchase through Avco. Avco took a consensual purchase money security interest on the furniture. Avco perfected its security interest pre-petition and later obtained a money judgment — not a lien foreclosure judgment -- against Debtors for the amount due in small claims court. Avco did not intend to waive its security interest in the collateral when it obtained the money judgment.<sup>1</sup> Avco did not execute on the money judgment.

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<sup>1</sup> The parties stipulated to most of the material facts. The rest were gleaned from the file and counsels' arguments. After the hearing, Attorney Wein also provided the Court with a copy of the pleadings and judgment from Avco's small claims action, as had been requested.

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Debtors filed a Chapter 7 petition on March 20, 1997. They scheduled Avco as an unsecured creditor holding a fixed, liquidated claim for \$7,340.08. Debtors declared exempt their living room furniture, which presumably included the furniture financed by Avco. No objections to Debtors' claimed exemptions were filed and the case was closed as a no-asset case. On September 2, 1997, Debtors filed a MOTION TO REMOVE LIEN ON EXEMPT PROPERTY. Therein, Debtors asked that Avco's lien on the sofa and loveseat be removed because it impaired their exemptions. Avco responded on September 12, 1997 that its secured interest could not be avoided under 11 U.S.C. § 522(f)<sup>2</sup> because it was a purchase money security interest. The parties filed stipulated facts. A hearing was held September 16, 1997. The parties presented brief arguments and the matter was then taken under advisement.

DISCUSSION. Section 522(f) of the Bankruptcy Code applies when a lien against exempt property is sought to be removed by a debtor because the lien impairs the exemption. As amended in 1994, a mathematical calculation must be made to determine whether the exemption is impaired. Under the formula, certain liens will remain in place only if there is value left to support the lien after the mortgage and other liens are subtracted from the market value of the property. Even if the debtor does not have equity in the property to support the exemption, he may have the lien removed. A purchase money security interest in household furniture, however, may not be avoided. 11 U.S.C. § 522(f)(1).

The issue presented is whether Avco lost its purchase money security interest when it obtained a money judgment against Debtors for the unpaid sums due on the sofa and loveseat.<sup>3</sup>

As discussed in *In re Hogg*, 76 B.R. 735, 741-42 (Bankr. D.S.D. 1987), *aff'd on other grounds*, *Hogg v. Norwest Bank (In re Hogg)*, 877 F.2d 691 (8th Cir. 1989), a creditor does not lose its security interest in personalty when the creditor obtains a money judgment on the underlying promissory note. Instead, the judgment and security interest co-exist. The creditor may enforce only one at a time, however. *Id.* Eventually, the creditor's security interest is foreclosed when there is a judicial sale of property that has been levied under any lien obtained through the judgment. S.D.C.L. § 57(A)-9-501(5).

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<sup>2</sup> The pleading apparently contains a typographical error. The correct Code reference appears to be 11 U.S.C. § 522(f).

<sup>3</sup> While earlier decisions on related issues had been made, this Court had not previously ruled on this issue.

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When this law is applied here, the Court concludes that Avco did not lose its purchase money security interest when it obtained the money judgment because Avco did not execute on any judgment lien before Debtors filed their petition. Since Avco retains its purchase money security interest, Debtors cannot avoid the lien under § 522(f).

An order denying Debtor's MOTION TO REMOVE LIEN ON EXEMPT PROPERTY will be entered.

Sincerely,



Irvin N. Hoyt  
Chief Bankruptcy Judge

INH:sh

CC: case file (docket original; serve copies on parties in interest)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
District of South Dakota

By:     CN      
Date:     11-14-97    

**NOTICE OF ENTRY**  
Under F.R. Bankr.P. 9022(a)  
**Entered**

NOV 14 1997

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
District of South Dakota

Case: 97-10069 Form id: 122 Ntc Date: 11/14/97 Off: 3 Page : 1  
Total notices mailed: 6

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