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SOUTHERN DISTRICT OF CALIFORNIA
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5 **FOR PUBLICATION**
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8 **UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 In re) Case No: 95-13380-A7
12 TIME F. SALANOVA and)
13 ELLEN S. SALANOVA,) MEMORANDUM DECISION
14 Debtors.)
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17 **I.**

18 **INTRODUCTION**

19 Time F. Salanova and Ellen S. Salanova (“Debtors”) move to avoid the
20 judicial lien of Murray M. Lampert Company, Inc. (“Lampert”) pursuant to 11 U.S.C.
21 § 522(f). At issue is the operative date to value the liens for purposes of calculating
22 whether Lampert’s lien can be avoided. The Debtors contend the operative date is the
23 petition date; Lampert contends it is the date of the hearing. The operative date
24 determines the Debtors’ ability to avoid the lien.

25 After considering all the evidence and the arguments of counsel, the
26 Court holds the petition date is the operative date for all § 522(f) determinations.
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II.

FACTUAL BACKGROUND

The Debtors filed their chapter 7 bankruptcy petition on December 5, 1995 and received their discharge on March 15, 1996. Their bankruptcy schedules listed Lampert as a general unsecured creditor in the amount of \$5,000.

In February 2001, the Debtors attempted to refinance their residence and learned of Lampert's lien. Consequently, on March 15, 2001, they filed a motion to reopen the case and avoid the lien. Lampert did not oppose reopening the case, but it opposes avoidance of the lien.

The Debtors' motion relies upon the valuations in their bankruptcy schedules, which they reaffirm were correct as of the date of filing their petition. [See Declaration of Tina Salanoa filed March 15, 2001] These schedules valued the residence at \$130,000 on the petition date, subject to the following liens:

First Trust Deed:	\$ 12,000
Second Trust Deed:	<u>\$ 118,600</u>
	\$ 130,600

Additionally, Debtors scheduled a homestead exemption of \$14,000 pursuant to California Civil Procedure Code § 703.140(b)(5).

The parties agree Lampert's judicial lien is \$8,087 even though the Debtors listed the debt on their schedules as \$5,000. The abstract of judgment confirms the judgment was entered in the amount of \$8,087.54. [See Debtors' Exh. "D"]

Lampert opines the Debtors' residence was worth \$137,673 on the petition date. However, Lampert's valuation is based solely upon the declaration of its attorney who does not appear to have any qualifications to appraise real property. Specifically, the attorney compiled a list of what she believed were comparable sales

1 in the Debtors' neighborhood at around the petition date, which in her opinion tended
2 to support a claim that the residence was worth \$137,673. Lampert values the liens
3 *as of the hearing date* as follows:

4	Judicial Lien:	\$ 8,087
5	First Trust Deed:	\$ -0-
	Second Trust Deed:	\$ 112,000

6 It is undisputed the First Trust Deed was fully paid post-petition.
7 Lampert's counsel determined the amount of the Second Trust Deed by relying on an
8 examination of the originally recorded documents. Although she questions how the
9 present balance of the Second Trust Deed could be more than the original principal
10 balance, she submitted no evidence establishing it was other than as declared by the
11 Debtors. If Lampert's higher property valuation is used and the liens are valued as
12 of the hearing date, at best the lien is only partially avoidable.

13 **III.**
14 **ISSUES**

- 15 1. What is the operative date to value the liens on the residence?
- 16 2. Can the lien be avoided?

17 **IV.**
18 **LEGAL ANALYSIS**

19 **1. What is The Operative Date to Value the Liens on the Residence?**

20 Section 522(f)(1)(A) provides that a debtor may avoid the fixing of a lien
21 "on an interest of the debtor in property to the extent that such lien impairs an
22 exemption to which the debtor would have been entitled under subsection (b) of this
23 section," if such lien is a judicial lien. Subsection 522(a) specifies that the term
24 "value" in § 522 means the fair market value *as of the date of filing of the petition.*

25 Section § 522(f)(1)(A) does not refer to "value." Nevertheless, it is well
26 settled the petition date is the operative date to value the debtor's residence and the

1 homestead exemption. *See BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537
2 (1994)(for purposes of § 522, “value” means fair market value on the petition date);
3 *see also In re Bruton*, 167 B.R. 923, 925 (Bankr. S.D. Cal. 1994)(nature and extent of
4 debtor’s homestead exemption rights are determined as of the petition date).

5 In contrast, there is a split of authority concerning the operative date to
6 value the liens for avoidance under § 522(f). One line of cases holds the operative
7 date is the petition date. *In re Waldman*, 81 B.R. 313, 318 (Bankr. E.D. Pa. 1987)
8 (*citing In re Chandler*, 77 B.R. 513, 516-17 (Bankr. E.D. Pa. 1987)). A contrary line
9 holds the operative date is date of the hearing. *In re Mangold*, 244 B.R. 901, 905
10 (Bankr. S.D. Oh. 2000)(recognizing a split of authority and adopting the date of the
11 hearing as the operative date to value the liens).¹

12 Neither line of cases explains their holdings; nor do the parties provide
13 a satisfactory explanation. Lampert proffered no explanation for adopting the hearing
14 date. The Debtors’ explanation for adopting the petition date is based upon *In re*
15 *Chandler*, 77 B.R. at 516. The Debtors acknowledge *Chandler* does not explain its
16 holding, but it refers readers to *In re Tanner*, 14 B.R. 933 (Bankr. W.D. Pa.1981),
17 which provides the rationale for valuing the liens on the petition date. [See Reply
18 at 4]

19 The Court has reviewed *Tanner* and is not persuaded its rationale.
20 *Tanner* is a case decided under § 506(d) and did not consider avoidance of a judicial
21 lien under § 522(f). It held § 506(d) allows a debtor to avoid a consensual lien
22 securing real property to the extent the lien is unsecured. *Id.* at 937. The court
23 reasoned this result is consistent with § 506(a) which limits a secured claim to the
24 value of the property as of the petition date. *Id.* at 936-37. Further, it reasoned that

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26 ¹ The parties do not cite any cases within this Circuit, and our research has revealed none.
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1 if the unsecured portion is not avoided, the partially secured creditor will partake in
2 the appreciation of the property or the increase in equity due to reduction of debt,
3 which are attributable to the debtor's post-bankruptcy efforts. *Id.* Pursuant to this
4 rationale, Debtors argue the liens must be valued as of the petition date to limit
5 Lampert to its § 506(a) secured claim and protect their post-bankruptcy reduction of
6 the First Trust Deed.

7 Apparently, Debtors are unaware that *Tanner* was reversed by the United
8 States Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992). Specifically, the
9 Supreme Court rejected the reasoning of *Tanner*, and held § 506(d) does not allow a
10 chapter 7 debtor to “strip down” a lien to the extent it is unsecured. *Id.* at 417. The
11 Court confirmed the pre-Code rule that liens pass through bankruptcy unaffected, and
12 any increase in the value of the property accrues to the benefit of the creditor and not
13 the debtor. *Id.* at 417-18. Accordingly, *Dewsnup* instructs that Lampert's lien passed
14 through bankruptcy unaffected. Any post-bankruptcy reduction of the First Trust
15 Deed accrued to Lampert, unless Lampert's lien is avoided.²

16 Although not argued, the Court has considered whether § 522(f)(2)(A)
17 supplies the operative date to value the liens. This section sets forth the mathematical
18 formula to determine whether a lien “impairs” an exemption. But it does not specify
19 the operative date for purposes of applying the formula. The legislative history for this
20 section is also silent concerning the operative date. Accordingly, § 522(f)(2)(A) is not
21 helpful.

22 The Court holds the petition date is the operative date to make all § 522(f)
23 determinations. This approach is consistent with *Dewsnup* because it allows a lien
24 creditor to enjoy the increase in value if the lien is not avoided. However, it also

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26 ² *Dewsnup* involved the “strip down” of a consensual mortgage. Nevertheless, it
27 affirms the basic premise that a lien passes through bankruptcy unaffected unless it is avoided
under § 522(f) or another appropriate section of the Bankruptcy Code.

1 preserves the parties' rights as they existed on the petition date to the extent the lien
2 is avoidable under § 522(f). Further, the petition date is also the most logical date.
3 The Court must value the residence and the Debtor's entitlement to an exemption on
4 the petition date. As the amount of the liens is relevant to these determinations, it
5 makes sense to value the liens on the same date.

6 The only possible exception would be where the debtor moves to avoid
7 a judicial lien post-discharge and the creditor shows prejudicial delay. In that
8 situation, the debtor's post-discharge motion to avoid the lien should be time-barred.
9 Alternatively, if the motion were allowed to proceed, the injured creditor could argue
10 the liens should be valued as of the hearing date. *See e.g. In re Ricks*, 62 B.R. 681,
11 682-83 (Bankr. S.D. Cal. 1986)(holding a post-discharge lien avoidance motion is
12 time-barred if the creditor shows it detrimentally relied upon the debtor's inaction in
13 avoiding the lien).

14 In this case, Lampert has demonstrated no prejudice by the Court's use
15 of the petition date to value the liens. As more fully set forth below, the schedules
16 showed its lien was worthless and avoidable even if the residence were worth
17 \$137,673 as it contends. Lampert did nothing to clarify its rights; nor does it claim it
18 took any other actions that would constitute detrimental reliance. In the absence of
19 detrimental reliance, the parties should have the same rights that they had on the
20 petition date.

21 **2. Can the Lien be Avoided?**

22 Section 522(f)(2)(A) provides a lien shall be considered to "impair" an
23 exemption to the extent that the sum of:

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1	1.	The judgment lien:	\$ 8,087
2	2.	All "other" liens on the property:	\$ 12,000
3			\$ <u>118,600</u>
			\$ <u>130,600</u>
4	3.	The allowed exemption amount if there were no liens on the property:	\$ 14,000
5	4.	TOTAL OF 1, 2 and 3 ABOVE:	<u>\$ 152,687</u>
6			
7	5.	(Subtract the property value from the total of 1, 2 and 3 above)	\$ 152,687
8			<u>-\$ 130,000</u>
			\$ <u>22,687</u>

9
10 The total of the judgment lien, the other liens and the exemption exceeds
11 the value of the Debtors' interest in the property in the absence of any liens by
12 \$22,687. Accordingly, Lampert's lien is avoidable in full.³

13 Lampert contends the property was actually worth \$137,673 on the
14 petition date, but its attorney is not competent to value the residence. *See* Fed. R.
15 Evid. 702 (setting forth the criteria to qualify as an expert witness). Further, its
16 contention that the Second Trust Deed should not have increased, is pure speculation.
17 It is quite plausible the balance increased because the Debtors fell behind on their
18 payments. The Debtors' figures are the only competent evidence of value. The
19 calculation using Debtors' figures is set forth in the preceding paragraph.⁴

20 Finally, even if the Court adopted Lampert's valuations as correct, the
21 lien is still avoidable if the liens are valued *as of the petition date*. Subtracting the

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23 ³ Lampert's lien would remain only to the extent it exceeds \$22,687. *See In re Hanger*,
24 217 B.R. 592, 595 (9th Cir. BAP 1997)(explaining *to what extent* a lien impairs an exemption and
must be avoided).

25 ⁴ The Advisory Committee Notes to Fed. R. Evid. 702 recognizes a landowner's
26 competence to testify to land values. Additionally, the Debtors can give their lay opinion of
27 value based upon "typical landowner type testimony" such as the condition of the property and
the purchase price. Russell, Bankruptcy Evidence Manual, 2001 Ed., § 701.2 at 755-56.

1 higher property value of \$137,673 from \$146,087 (\$8,087 + \$12,000 + \$112,000
2 + \$14,000) results in \$8,414. Thus, Lampert can prevail only if the \$12,000 First
3 Trust Deed paid off post-bankruptcy is excluded from the calculation.

4 **IV**

5 **CONCLUSION**

6 The petition date is the operative date to make all § 522(f) determinations.
7 Based upon the uncontroverted evidence of value in the Debtors' schedules and
8 declaration, the Debtors' motion to avoid the judicial lien is granted. This
9 Memorandum Decision is in lieu of findings of fact and conclusions of law. Counsel
10 for the Debtors is directed to prepare and lodge an order in accordance with this
11 Memorandum Decision within ten days of the date of its entry.

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14 Dated: 16 May 01


LOUISE DECARL ADLER, Judge