



## HERRING LAW GROUP

Certified Specialist, Family Law, The California Board  
of Legal Specialization of the State Bar of California

Fellow of the American Academy of Matrimonial Lawyers  
Fellow of the International Academy of Family Lawyers

Writer's direct email: [gherring@theherringlawgroup.com](mailto:gherring@theherringlawgroup.com)

### **Can a California FLARPL be Avoided by a Debtor in Bankruptcy under 11 U.S.C. § 522(f)?**

*by Gregory W. Herring*

California attorneys should not abandon a Family Law Attorneys' Real Property Lien that gets caught up in a complicated and unfamiliar bankruptcy proceeding. This is especially true when the issue confronted is whether a debtor can avoid the lien because it impairs an exemption to which the debtor is entitled. Family law attorneys, take heart. By definition and nature, a California FLARPL is a statutory lien that the bankruptcy court should not avoid as impairing a debtor's exemption.<sup>1</sup>

Section 522(f) of the bankruptcy code allows a debtor to avoid certain liens on exempt property such as the former marital residence. The motivations behind the statute are to protect the debtor's exemptions and facilitate the debtor's "fresh start."<sup>2</sup> Notwithstanding the fundamental importance of section 522(f) in the bankruptcy process, it only applies to "judicial liens." Therefore, the threshold inquiry for purposes of the 522(f) analysis is how a particular lien was created.<sup>3</sup> Judicial liens are created "by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). Statutory liens on the other hand, arise "solely by force of a statute on specified circumstances or conditions" and are not avoidable by section 522(f).<sup>4</sup>

While there are no published cases deciding whether a California FLARPL is a statutory lien or a judicial lien, the statutory text of the Cal. Fam. Code and analogous cases signal that a FLARPL is a statutory lien that cannot be avoided by section 522(f). Cal. Fam. Code § 2033 governs the creation of California Family Law Real Property Liens and describes specific requirements that

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<sup>1</sup> See generally 11 U.S.C. § 522(f).

<sup>2</sup> 11 U.S.C. § 522(f) (See Historical and Statutory Notes).

<sup>3</sup> *In re Felizardo* 255 B.R. 85, 88 (Bkrtcy. S.D. Fla., 2000).

<sup>4</sup> See *In re King*, 208 B.R. 376, 379 (Bankr. D. Md. 1997); 11 U.S.C § 522(f)(1)(A).



must be met in order for an attorney to obtain a FLARPL.<sup>5</sup> Other than meeting these requirements, no subsequent action by the family law court is required for the lien to be valid. Thus, the FLARPL arises “solely by force of a statute [Cal. Fam. Code § 2033] on specified circumstances or conditions.” Accordingly, by bankruptcy code definition the FLARPL is a statutory lien that cannot be avoided by a debtor who claims that the lien impairs an exemption.

Further, liens similar to the California FLARPL have been held to be statutory liens within the meaning of the bankruptcy code and therefore not avoidable under section 522(f). For example, a pre-petition attorneys’ charging lien, “arises solely out of the statute, which creates the lien,” is like a mechanic’s lien in terms of its manner of creation, and should be deemed “statutory” for purposes of section 522(f).<sup>6</sup> This “statutory” characteristic remains even when the lien must be enforced by a judgment.<sup>78</sup> Other courts have likewise held that attorneys’ liens, allowed and created by statute, are not avoidable as impairing a debtor’s homestead exemption.<sup>8</sup> Attorneys should take care to not disregard, mistakenly or otherwise, their California FLARPLs in bankruptcy proceedings. And when such liens are challenged as impairing an exemption available to the debtor, counsel should rely on the plain language of the bankruptcy code, the purely statutory requirements of the Family Code, and analogous cases in defending their lien. Each of which points to the same conclusion, California FLARPLs are statutory liens that are not avoidable by section 522(f).

### **What if the Property Subject to the FLARPL is Transferred to the Other Spouse in a Marital Settlement Agreement?**

Attorneys must not give up on their FLARPLs even when the property securing the FLARPL is transferred to an opposing spouse in a dissolution proceeding. In addition to the above “statutory” classification argument, section 522(f) provides attorneys holding California FLARPLs an additional protection, which may become particularly relevant in marital dissolution proceedings. That is, section 522(f) only allows a debtor to avoid the “fixing of a lien on an interest of the debtor.”<sup>9</sup> A debtor may only avoid a lien on property in which the debtor had an interest if the debtor held the interest at the time the lien attached to the property.<sup>10</sup>

Significantly, Cal. Fam. Code § 2033 provides that a FLARPL “attaches only to the encumbering party’s interest in the community real property.” At the time of creation, it does not attach to the other spouse’s interest in the community property. Thus, a spouse receiving property in a marital settlement agreement that is subject to the other spouse’s FLARPL, will likely not be able to

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<sup>5</sup> Cal. Fam. Code § 522(f).

<sup>6</sup> *In re Mary E. O’Connell*, 167 B.R. 928, 930 (Bankr. D. Mon. 1994).

<sup>7</sup> *Id.* at 931.

<sup>8</sup> *Weed v. Washington*, 242 F. 3d 1320 (11th Cir. 2001); *In re Dubois*, (Bankr. D. N.H. 2004), 2004 WL 343984.

<sup>9</sup> 11 U.S.C. § 522(f)(1) (emphasis added).

<sup>10</sup> *See generally Farrey v. Sanderfoot*, 500 U.S. 291, 299 (1991).



avoid the FLARPL because at the time it was created, the FLARPL did not attach to the receiving party's original interest in the community asset.<sup>11</sup> Such a FLARPL should not be avoidable under section 522(f) in a subsequent bankruptcy because it will not have "fixed" to an interest of the debtor.

The pre-interest "fixing" requirements of section 522(f), make the timing and substance of marital settlements critical to the avoidability of liens determination.<sup>12</sup>

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<sup>11</sup> As pointed out in *In re Stoneking*, 225 B.R. 690 (B.A.P. 9th Cir. 1998), the only facts that change this result are when the lien sought to be avoided attached to the entire community asset.

<sup>12</sup> The necessity of having to make this secondary "fixing" argument assumes that the FLARPL has been deemed a "judicial" lien. While there are no cases holding that a FLARPL is a "judicial" lien and the statutes and case law support that FLARPLs are purely and unchangeably "statutory", the analysis is important as a secondary argument given the countless outcomes that may occur in dissolution proceedings and marital settlement agreements.