

LIEN THIS WAY OR THAT: THE TROUBLE WITH CATEGORIZING A LIEN AS JUDICIAL OR STATUTORY

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I. INTRODUCTION

Section 522(f) of the United States Bankruptcy Code, (the “Code”), allows avoidance of liens in certain circumstances. Where possible, the Code should have consistent treatment, especially with similarly situated unemployment state agencies. The Code and liens imposed by state agencies are two items far from public view as the country experiences unemployment dropping. In fact, the 3.6 percent unemployment rate in May of 2019 was the lowest since 1969, and as of July 2019 was at 3.7 percent.¹ Visions of unemployment rates in the double-digit percentage points are like cargo ships miles out to sea: large, but distant in Americans’ memories, having happened last in 2008 and 2009, almost ten years ago.² So why suggest images of bankruptcies and liens demanding payment? While similar to unemployment rates, bankruptcy rates were low in 2018,³ then bankruptcy filings rose in 2019, both for debt-loaded individuals and business bankruptcies, which had corresponding lay-offs.⁴ In fact, American household

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¹ *Labor Force Statistics from the Current Population Survey*, U.S. DEP’T LABOR, <https://data.bls.gov/timeseries/LNS14000000> [<https://perma.cc/PJ6J-BVE7>] (using table and graph 1969 to 2019).

² *Id.*

³ Andrew Keshner, *Bankruptcy Filings are At a 10-year Low, but not For the Reasons You Might Think*, MARKET WATCH (Jan. 8, 2019, 9:55 AM), <https://www.marketwatch.com/story/bankruptcy-filings-are-at-a-10-year-low-but-thats-not-necessarily-good-news-2019-01-07> [<https://perma.cc/77XJ-LZ76>].

⁴ John A. Byrne, *Bankruptcy Filings Rising Across the Country and It Could Get Worse*, N.Y. POST (Aug. 11, 2019, 5:48 AM), <https://nypost.com/2019/08/11/bankruptcy-filings-rising-across-the-country-and-it-could-get-worse/> [<https://perma.cc/BW9D-AAC4>].

debt—encompassing mortgages and student loans—and credit card debt were higher in 2019 than during the Great Recession of 2008.⁵ With bankruptcy filings rising, clear bankruptcy law interpretations are crucial.

When an issue with the operation of the Code surfaces, Congress should fix the infrastructure ahead of a meltdown to facilitate smooth proceedings. While other issues exist in differing interpretations of the Code, the crux of this analysis pertains to administrative agencies' liens empowered by state statute, largely focusing on state unemployment agencies' enforcement of liens from overpaid unemployment benefits as empowered by state law in individual bankruptcy proceedings.

The Code recognizes three kinds of liens—judicial, statutory, and consensual—⁶ and courts sometimes disagree on the scope and meaning of those labels.⁷ This paper focuses on the inconsistent treatment between judicial and statutory liens in different jurisdictions in a narrow context—even where the impetus for the lien is remarkably similar. Specifically, section 522(f) allows debtors to avoid judicial but not statutory liens. Given that a lien's categorization makes a material difference in bankruptcy, consistent treatment by the Code, where helpful and possible, is necessary.

This paper analyzes how courts, debtors, and state unemployment agencies employ subsection 522(f) of the Code in fighting over state unemployment agencies' liens. Every state has a labor department that handles unemployment claims.⁸ Each state may have different requirements on how an individual qualifies for unemployment benefits.⁹ In fact, the best argument opposing uniform treatment of these liens by state agencies under the Code is that nonuniform state laws create the liens so treatment under the Code would naturally differ. State statutes imposing liens for unpaid unemployment benefits, however, must comply with the Department of Labor's narrow specification; as a result, the statutes have nearly identical language and

⁵ *Id.*

⁶ *Thompson v. Unruh (In re Thompson)*, 240 B.R. 776, 781 (B.A.P. 10th Cir. 1999) (citing *In re Sanders*, 61 B.R. 381, 383 (Bankr. D. Kan. 1986)).

⁷ *See, e.g., Ark. Dep't of Workforce Servs. v. Leaks (Leaks II)*, No. 5:16CV00267 JLH, 2017 WL 2577546, at *1 (E.D. Ark. June 14, 2017) (distinguishing the multiple courts' opinions about judicial versus statutory liens).

⁸ *Contacts for State UI Tax Information and Assistance*, U.S. DEP'T LABOR, <https://oui.doleta.gov/unemploy/agencies.asp/Contacts-for-State-UI-Tax-Information-and-Assistance-Employment-> [https://perma.cc/6AAE-TG9M].

⁹ *State Unemployment Insurance Benefits*, U.S. DEP'T LABOR, <https://oui.doleta.gov/unemploy/uifactsheet.asp> [https://perma.cc/4722-TUNQ].

procedures in place.¹⁰ Although the states employ analogous language and procedure, current case law shows inconsistent categorization of statutory and judicial liens in this context.¹¹ This inconsistent treatment illustrates that courts need federal legislative guidance—either by Congressional amendment or an advisory comment—on distinguishing judicial from statutory liens: especially where state statutes impose the lien, but administrative agencies afford an administrative due process¹² to individuals by enforcing the lien.

Many researchers focus on the classification of statutory versus judicial liens in the context of attorneys' fees or support payments.¹³ Some researchers focus on the scope of what constitutes an impairment under section 522(f).¹⁴ Other researchers concentrate on the treatment of statutory liens regarding perfection and voidability of transfers by the trustee in bankruptcy.¹⁵ While the pertinence of the difference in lien classification is important for bankruptcy in general, this piece instead focuses on liens created by state statute and imposed on individuals by state agencies in the overpaid unemployment benefit context.

Part II of this article provides necessary background information on bankruptcy in general and the congressional history of statutory liens. Armed

¹⁰ See *infra* Section III.D.

¹¹ *Id.*

¹² When used in this paper, administrative due process is not intended as a term of art; instead, it simply means the process of appeals an administrative agency affords individuals. This process is sufficient to meet constitutional due process. U.S. DEP'T OF LABOR EMP. & TRAINING ADMIN. OFF. OF UNEMPLOYMENT INS., HANDBOOK FOR MEASURING UNEMPLOYMENT INSURANCE LOWER AUTHORITY APPEALS QUALITY 3 (2011), https://wdr.doleta.gov/directives/attach/ETAH/ET_Hanbook_No_382_3rd_Edition.pdf [<https://perma.cc/NK8W-ALRK>].

¹³ See Karen M. Gebbia, *The Keepers of the Code: Evolution of the Bankruptcy Community*, 91 AM. BANKR. L.J. 183, 185 (2017); see also Richard H.W. Maloy, "She'll Be Able to Keep Her Home Won't She?" *The Plight of a Homeowner in Bankruptcy*, 2003 MICH. ST. DCL L. REV. 315, 329–30 (2003); George L. Blum, *Avoidance Under § 522(f)(1) of Bankruptcy Code (11 U.S.C.A. § 522(f)(1)) of Judicial Lien on Debtor's Exempt Real Property*, 14 A.L.R. Fed. 2d 593, at § 2 (highlighting the Bankruptcy Reform Act of 1994 amended the subsection to note the provision could not be used to avoid judicial liens of support nor does it turn a consensual lien such as a mortgage into a judicial lien just because the debtor seeks enforcement).

¹⁴ Blum, *supra* note 13; David W. Houston, III & David J. Puddister, *The Effect of a Pre-Bankruptcy Judicial Lien on the Post-Bankruptcy Accrual in Value of Exempt Property*, 18 MISS. C. L. REV. 497, 505–06 (1998) (detailing the difficulty in defining impairment with a lien before the 1994 Amendment clarified the definition in some instances).

¹⁵ John C. McCoid, II, *Statutory Liens in Bankruptcy*, 68 AM. BANKR. L.J. 269, 283–90 (1994) (noting the commenters after the implementation of the Bankruptcy Code advocated for doing away with statutory lien procedural preferences under § 505); see generally Houston, III & Puddister, *supra* note 14, at 505–06 (detailing the operation of 11 U.S.C.A. § 506 and lien stripping in Mississippi).

with context, this article analyzes why the categorization between judicial and statutory liens matters. Part III looks at the relevant case law regarding how courts are interpreting applicable liens and assesses the main two approaches courts utilize and how they compare with the general treatment of another lien imposed by state statute and enforced by state agencies using administrative due process: tax liens.

Because the Code is federal law and the states' overpayment of unemployment laws mirror federal mandates to comply with the Department of Labor, the categorization of liens for overpayments of unemployment benefits imposed by state agencies should be consistent. Because consistent application of the Code is preferable, the courts need more legislative guidance than a few examples featured in old legislative history¹⁶ and broad definitions¹⁷ on differentiating between judicial and statutory liens imposed by state statute and enforced by state unemployment agencies.

II. BACKGROUND

A. Purposes of Bankruptcy and General Background

Bankruptcy law has several purposes, which mainly include efficient, equitable treatment among competing creditors and giving the “honest but unfortunate debtor” a fresh start.¹⁸ When the unfortunate debtor, such as an individual, files a petition for bankruptcy, the filing creates an estate encompassing all the debtor's legal and equitable interests in property located everywhere and held by everyone.¹⁹ After commencement of the case, an automatic stay goes into effect that halts creditors from collection efforts and protects property of the debtor and of the estate.²⁰ From a creditor's perspective, bankruptcy's purpose is to equitably distribute the estate property among competing creditors.²¹ Thus, the system must identify what property to distribute and to whom.²² Section 522 of the Code, on the other hand, protects

¹⁶ See *infra* note 65 and accompanying text.

¹⁷ See *infra* notes 30–36 and accompanying text.

¹⁸ 1 COLLIER ON BANKRUPTCY ¶ 1.01 (16th ed. 2019) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)); *Internal Revenue Manual 5.17.8: General Provisions of Bankruptcy*, INTERNAL REVENUE SERV. (Oct. 6, 2016), https://www.irs.gov/irm/part5/irm_05-017-008 [<https://perma.cc/TVE4-LPC5>].

¹⁹ 1 COLLIER ON BANKRUPTCY ¶ 1.03 (16th ed. 2019); see 11 U.S.C.A. § 541 (West 2014).

²⁰ 1 COLLIER ON BANKRUPTCY ¶ 6.01 (16th ed. 2019).

²¹ 1 COLLIER ON BANKRUPTCY ¶ 1.03 (16th ed. 2019).

²² *Id.*

a debtor's fresh start by housing federal exemptions that exempt certain items of a debtor's property from the bankruptcy estate and thus from distribution to creditors.²³ As part of protecting a debtor's property, section 522(f) allows the debtor to avoid the fixing of certain liens²⁴ to applicably exempt property.

B. Why Liens and Their Categorization Matter

When a creditor has a lien—an interest in a debtor's property—the creditor will collect more of its outstanding debts compared to an unsecured creditor.²⁵ Specifically, creditors with fixed²⁶ liens on property may receive the underlying property or its value during the bankruptcy proceeding.²⁷ Simply, once attached, a lien is a way for a creditor to receive a larger payout than an ordinary, unsecured creditor in a bankruptcy proceeding.²⁸ Even if the creditor has a lien, however, the creditor's type of lien is important; not all liens are the same. While liens benefit a creditor, we see preferential treatment between liens, especially between judicial and statutory liens.²⁹

In the context of section 522(f), the type of lien matters because the debtor's power to avoid the fixing of a lien only applies to judicial and consensual liens.³⁰

²³ *Id.*; but see James Lockhart, *What Constitutes State or Local Law That is Applicable on Date of Filing of Bankruptcy Petition for Purposes of Applying 11 U.S.C.A. § 522(b)(3)(A) or Its Predecessor in Opt-Out States*, 76 A.L.R. Fed. 2d 333, at § 20 (explaining debtors may elect either state or federal exemptions where states have not opted out of using federal exemptions, or may use state exemptions in states opting out).

²⁴ 11 U.S.C.A. § 101(37) (West 2016) (defining a lien as a “charge against or interest in property to secure payment of a debt or performance of an obligation”).

²⁵ Compare 1 COLLIER ON BANKRUPTCY ¶ 1.03 (16th ed. 2019) (highlighting that a secured creditor may collect its outstanding debt or value of its collateral) with LYNN M. LOPUCKI ET AL., SECURED TRANSACTIONS: A SYSTEMS APPROACH 120 (8th ed. 2016) (stating that in ninety-three percent of Chapter 7 bankruptcy cases, unsecured creditors receive nothing and in Chapter 11 plans involving public company debtors, only fifty-six percent of the unsecured creditors got paid in full in a study between 1991 through 1996).

²⁶ “Fixing” of a lien is not defined in the Code, but courts hold the term means when the lien attaches to the bankruptcy estate's property, or perfection. 3 JENNIFER L. HERTZ ET AL., BANKR. LITIG. § 16:41, n. 3 (2018) (citing *In re Ramba, Inc.*, 416 F.3d 394, 401 (5th Cir. 2005)).

²⁷ 1 COLLIER ON BANKRUPTCY ¶ 1.03 (16th ed. 2019).

²⁸ David A. Skeel, Jr., *What Is A Lien? Lessons from Municipal Bankruptcy*, 2015 U. ILL. L. REV. 675, 677–78 (2015).

²⁹ H.R. REP. NO. 95-595, at 314 (1977), as reprinted in 1978 U.S.C.C.A.N 5963, 6271.

³⁰ The Code recognizes three mutually exclusive types of liens: statutory, judicial, and consensual. *Id.* A consensual lien is synonymous with a security interest. *Thompson v. Unruh (In re Thompson)*, 240 B.R. 776, 781 (B.A.P. 10th Cir. 1999) (citing *In re Sanders*, 61 B.R. 381, 383 (Bankr. D. Kan. 1986)). The Code defines a security interest lien as a “lien created by an agreement.” 11 U.S.C.A. § 101(51) (West 2014).

Under section 522(f), a debtor may avoid a creditor's ability to fix its debt as a lien against property if the lien is a judicial lien and impairs one of the debtor's exemptions³¹ or if the lien is a consensual lien in certain goods.³² Liens imposed by state unemployment agencies do not stem from agreements and thus are not consensual liens.³³ Instead, courts choose between categorizing the liens as either judicial or statutory when categorizing liens that state statutes impose for overpayment of unemployment benefits.³⁴ Therefore, this article concentrates on the differences between the Code's treatment of statutory and judicial liens. A statutory lien

aris[es] solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.³⁵

By contrast, a judicial lien is "obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."³⁶

Administrative agencies and other parties may prefer statutory lien categorization over judicial for multiple reasons. Simply by effect of the statute's language, some statutory liens, like tax liens, attach to a debtor's property automatically, making the effort of the creditor much less than with a judicial lien, which requires a longer process.³⁷ Statutory liens also enjoy preferential transfer treatment over judicial liens.³⁸ The other main reason—avoidance of liens impairing exemptions—requires additional explanation.³⁹

1. Avoidance of Liens

In a bankruptcy, the Code adds an additional hoop for the trustee to jump

³¹ 11 U.S.C.A. § 522(f)(1)(A) (West 2014).

³² See *id.* at § 522(f)(1)(B); *In re Thompson*, 240 B.R. at 781 (stating a nonpossessory, nonpurchase-money security interest lien in 11 U.S.C.A. § 522(f)(1)(B) is a consensual lien).

³³ Cf. *In re Schick (Schick II)*, 418 F.3d 321, 323 (3d Cir. 2005) (stating an administrative agency's lien for unpaid motor vehicle surcharges was not created by consent and thus must either be statutory or judicial).

³⁴ See *infra* Section III.

³⁵ 11 U.S.C.A. § 101(53) (West 2014).

³⁶ *Id.* at § 101(36).

³⁷ Rebecca M. Burns, *Killing Them With Kindness: How Congress Imperils Women and Children in Bankruptcy Under the Façade of Protection*, 76 AM. BANKR. L.J. 203, 231–32 (2002).

³⁸ McCoid, II, *supra* note 15, at 269.

³⁹ Houston, III & Puddister, *supra* note 14, at 501–04.

through when avoiding the fixing of statutory liens, making them harder to avoid. The timing of fixing the lien is important because, while some liens attach automatically, others, such as judicial liens, need additional action to attach.⁴⁰

To an individual going through bankruptcy, the most important concern is discharge of debt: the mechanism in bankruptcy relieving a debtor of her debt and providing her with a fresh start.⁴¹ This same mechanism from the creditor's view, conversely, is a scary prospect as a creditor may get little or nothing from their debt, if discharged.

This mechanism of discharge, however, does not apply where a creditor has a lien attached to undisposed property during the bankruptcy case.⁴² Instead, the creditor may be paid from the sale proceeds of the specific property on which it attaches.⁴³ Lien stripping and lien avoidance, however, eliminate the attachment benefit for judicial liens⁴⁴ but not statutory liens.⁴⁵ Simply, lien stripping allows modification of a judicial lien holder to go from status as a lien creditor to unsecured status.⁴⁶ However, because lien stripping is a complicated matter, it is not fully addressed here.

Trustees may strip judicial liens, and, where not stripped, debtors may inhibit judicial liens through lien avoidance under two requirements in section 522(f). First, the lien must impair an exemption the debtor would otherwise have.⁴⁷ Second, the lien must be either a judicial lien or "a nonpossessory, nonpurchase-money security interest in" certain assets.⁴⁸ Thus, for comparison between judicial and statutory liens, avoidance applies to judicial liens and not statutory liens.⁴⁹

Considering preferential transfers, lien stripping, and lien avoidance, statutory liens created by state legislatures create preferences of certain creditors. In fact, proponents of various causes advocate supplicating state legislatures to create liens in favor of their own causes.⁵⁰ The current treatment of statutory liens has evolved over several rewritings and amendments of the

⁴⁰ McCoid, II, *supra* note 15, at 272.

⁴¹ 1 COLLIER ON BANKRUPTCY ¶ 1.02 (16th ed. 2018).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Houston, III & Puddister, *supra* note 14, at 499–504; *e.g.* 11 U.S.C.A. § 1322(b)(2) (West 2016).

⁴⁵ Houston, III & Puddister, *supra* note 14, at 499–504; *e.g.* 11 U.S.C.A. § 1322(b)(2) (West 2016).

⁴⁶ *E.g.*, 11 U.S.C.A. § 1322(b)(2) (West 2016).

⁴⁷ 11 U.S.C.A. § 522(f)(1) (West 2005).

⁴⁸ 11 U.S.C.A. § 522(f)(1) (West 2005).

⁴⁹ 4 COLLIER ON BANKRUPTCY ¶ 522.11 (16th ed. 2019).

⁵⁰ *See generally* Burns, *supra* note 38, at 231–32.

Code.⁵¹

2. Federal Congressional Treatment of Statutory Liens

The first modern Bankruptcy Act of 1898 provided no power to avoid statutory liens.⁵² Until 1935, all valid, statutory liens were valid inside and outside of bankruptcy.⁵³ The 1938 amendments started to change the treatment of statutory liens by imposing subordination and restrictions in the amounts the liens could secure.⁵⁴ States started effectuating their own priorities by separately written state laws through statutory liens, so Congress tried to eliminate this scheme.⁵⁵ In the legislative history of the 1938 amendments, policy writers explained that the state created priorities through these statutory liens were “going too far afield . . . and unnecessarily burdening estates.”⁵⁶ The legislators highlighted the need for more uniformity in the treatment of claims, stating

there can't be any uniform system worthy of the name when it's recognized that in one state 90% of the estate may be used in payment of priority claims, whereas, in another state and due to the failure of its legislature to act, priority payments may amount to 10% or less of the estate.⁵⁷

Congress wanted to limit the state's power to usurp the federal system, so it eliminated explicit state-created priorities.⁵⁸

With the 1952 amendments, Congress imposed greater restrictions on statutory liens but then decreased its hostility towards the liens with the 1966 amendments.⁵⁹ Congress then replaced the Bankruptcy Act and amendments, with the Bankruptcy Code of 1978.⁶⁰ The commentary leading up to the adoption of the Code included the Report of the Commission on the Bankruptcy Laws of the United States in 1973, which proposed invalidating all statutory

⁵¹ *Schick II*, 418 F.3d at 324 (citing *In re A & R Wholesale Distrib., Inc.*, 232 B.R. 616, 620 (Bankr. D.N.J. 1999) (noting except for statutory liens of contractors' liens, mechanics' liens, and tax liens, the distinction between statutory and judicial liens “has proven more troublesome,” and notes the lack of assistance by the Code in resolving the dispute).

⁵² 1-5 KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 5.2 (2008).

⁵³ *Id.*

⁵⁴ *McCoid, II*, *supra* note 15, at 276.

⁵⁵ *Id.* at 277.

⁵⁶ *Id.* at 279 n.50 (quoting Reuben Hunt, a legislator at the time).

⁵⁷ *Id.* at 279–80 (citing the Papers of James A. MacLachlan, Box 2, folder 1, at 24).

⁵⁸ *Id.*

⁵⁹ *Id.* at 281–82.

⁶⁰ *See generally* 11 U.S.C.A. §§ 101–1532 (West 1978).

liens with only four exceptions: manufactures' liens, tax liens, special assessment for public improvement liens, and liens for attorneys' fees.⁶¹

While the Commission did not state its rationale for the invalidation of statutory liens with the four exceptions, the general idea was that the state laws, as written, frustrated national uniformity in bankruptcy law.⁶² Congress rejected the invalidation and, instead, largely incorporated the 1966 Act into the Code.⁶³ The 1978 Code involved few differences regarding statutory liens compared with the 1966 Act, in large part, statutory liens continued to enjoy priority inside and outside of bankruptcy.⁶⁴ The legislative history surrounding the Code and definitions of statutory liens specifies four examples of statutory liens: mechanic's, materialmen's, warehousemen's, and tax liens.⁶⁵ Congress again amended the Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.⁶⁶ After the amendment, the Code's treatment of statutory liens still allows a state legislature to grant special protection through certain claimants inside and outside of bankruptcy through statutory liens.⁶⁷

III. DISPARATE TREATMENT BY THE JUDICIARY IN CATEGORIZING LIENS IMPOSED BY STATE LAW AND ENFORCED BY STATE AGENCIES NECESSITATES CONGRESSIONAL REMEDY WHEN CONSIDERING TAX LIEN TREATMENT AND FEDERAL LAW MANDATES ON STATE UNEMPLOYMENT LAW

A. Case Law

The Congressional treatment of statutory liens swayed both toward and against a narrow definition, making legislative intent difficult to pin down for courts looking to define the ambiguous definitions of statutory and judicial liens.⁶⁸ Courts recognize the sparse guidance on categorizing a lien as either

⁶¹ McCoid, II, *supra* note 15, at 285 (citing EXECUTIVE DIRECTOR, H.R. DOC. NO. 137, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES 164–66 (1973)).

⁶² *Id.*

⁶³ *Id.* at 283.

⁶⁴ *Id.*

⁶⁵ H.R. REP. NO. 95-595, at 314 (1977), *as reprinted in* 1978 U.S.C.C.A.N 5963, 6271 (including three examples of the same liens as the Report of the Commission on the Bankruptcy Laws of the United States in 1973 singled out as the only statutory liens that should not be invalidated); *see supra* note 612 and accompanying text.

⁶⁶ *Zachary v. California Bank & Tr.*, 811 F.3d 1191, 1193 (9th Cir. 2016).

⁶⁷ 4 William L. Norton, III, Norton Bankr. L. & Prac. § 64:1 (3d ed. 2019).

⁶⁸ *See supra* Part I.B.2.

statutory or judicial generally.⁶⁹ One Court of Appeals for the Third Circuit case analyzed avoidance of unemployment agency liens: *Gardner v. Pennsylvania Department of Public Welfare*.⁷⁰ The same court later set a contrasting rule on distinguishing judicial and statutory liens by administrative agencies.⁷¹ Because no other United States Court of Appeals addresses the statutory versus judicial lien distinction for avoidance of unemployment agency liens, this paper uses the heavily cited Third Circuit Courts of Appeals cases on administrative agency liens empowered by state statute generally to illuminate the context in which courts analyze the issue and progresses to the district courts' analyses of the specific issue.

1. Landmark Cases – *Graffen v. Philadelphia and In re Schick*

In *Gardner*, the Court of Appeals for the Third Circuit ruled a lien imposed by a Pennsylvania unemployment agency was a judicial, and not a statutory lien because the agency's lien, while empowered by state statute, needed to be filed with the Prothonotary as a judgment before it attached to property.⁷² The court found the act of filing was a judicial process, so the resulting lien created by a judicial process and was thus judicial.⁷³ Later, in 1992, however, the same court found simply filing without further proceedings, was not a judicial process sufficient to create a judicial lien.⁷⁴ The court in *Graffen v. Philadelphia* analyzed a Pennsylvania law imposing a lien for an unpaid water bill by a city where debtors contended the lien was a judicial lien and, thus, subject to avoidance.⁷⁵ The debtors argued the lien arose upon filing with the clerk and not at the time the agency assessed the charges, which made the lien not arise solely by statute.⁷⁶ The court disagreed, holding that the amount was determined by the administrative agency, not the clerk.⁷⁷ Thus, filing with the clerk was not

⁶⁹ See *In re Aikens*, 87 B.R. 350, 353–56 (Bankr. E.D. Pa. 1988).

⁷⁰ *Gardner v. Pa. Dep't of Pub. Welfare*, 685 F.2d 106 (3d Cir. 1982).

⁷¹ *Id.*; but see *Graffen v. Philadelphia*, 984 F.2d 91, 96 (3d Cir. 1992).

⁷² *Gardner*, 685 F.2d at 108–09.

⁷³ *Id.*

⁷⁴ *Graffen*, 984 F.2d at 93; see also *In re Mozingo (Mozingo I)*, 222 B.R. 475, 479 (Bankr. E.D. Pa. 1998) (questioning the validity of *Gardner* after *Graffen* held “that a governmental entity’s use of a judicial process does not necessarily create a judicial lien.”); *Mozingo v. Pa. Dep't of Labor & Indus. Bureau of Unemployment Benefits & Allowances (Mozingo II)*, 234 B.R. 867, 871 (Bankr. E.D. Pa. 1999) (agreeing with the bankruptcy court’s analysis of the holding in *Graffen* and vacating the opinion because of a perfection issue).

⁷⁵ *Graffen*, 984 F.2d at 93 (subject to avoidance under 11 U.S.C.A. § 522(f)).

⁷⁶ *Id.* at 96.

⁷⁷ *Id.* at 96–97.

a judicial process.⁷⁸ Continuing, the court found the agency's lien was valid even if not perfected, and that, by nature, a lien valid before perfection cannot be a judicial lien.⁷⁹ Because the filing was only a specified circumstance and not sufficient process to make the lien judicial, the court held the lien was a statutory lien.⁸⁰

Subsequently, the same court determined in *Schick* that an unpaid motor vehicle surcharge lien filed by the New Jersey Motor Vehicles Commission was a statutory lien.⁸¹ The New Jersey statutes and administrative regulations created a rating plan setting surcharges for drivers based on the number and type of violations.⁸² The court held that, even without explicit lien-creating language such as "shall be a lien," the lien was statutory because it required no judicial action.⁸³

After these two Court of Appeals for the Third Circuit cases, succeeding case law involving both section 522(f) and state unemployment agency overpayments established a trend toward labeling liens imposed by state statute and enforced by agencies for overpaid unemployment as statutory.⁸⁴ In *In re Mozingo*, Pennsylvania's unemployment agency sought repayment from a debtor for overpaid unemployment benefits.⁸⁵ The state's laws provided that the agency could seek action against individuals owing the agency in the same mode as imposed on employers.⁸⁶ In the employer statute, the law provided the amount determined by the agency "shall be a lien" on the person's personal and real property.⁸⁷ The district court compared the statute creating the lien with the statute in *Graffen* and found that, even though the determination procedure afforded a process to appeal the determination, it did not turn the lien empowered by state statute into a judicial lien.⁸⁸ Additionally, the lien was automatic when

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Schick II*, 418 F.3d at 329.

⁸² *Id.* at 324.

⁸³ *Id.* at 328.

⁸⁴ See generally *Mozingo v. Pa. Dep't of Labor & Indus. Bureau of Unemployment Benefits & Allowances (Mozingo II)*, 234 B.R. 867 (Bankr. E.D. Pa. 1999); *Braxton v. Bureau of Unemployment Comp. Benefits & Allowances (In re Braxton)*, 224 B.R. 564 (Bankr. W.D. Pa. 1998); but see *In re Downey*, 261 B.R. 124, 127 (Bankr. D.N.J. 2001) (ruling a lien enforced by statute was judicial because it was a docketed judgment). Note that *Downey* was decided before *Schick*.

⁸⁵ *Mozingo II*, 234 B.R. at 868–69.

⁸⁶ *Id.* at 870–71.

⁸⁷ *Id.* at 871.

⁸⁸ *Id.* at 871–72.

filed, thus the court held the lien was statutory.⁸⁹

Similarly, in *In re Braxton*, the court looked at a debtor who had a lien for overpayment of unemployment benefits.⁹⁰ Similar to *Mozingo*, the bankruptcy court looked at the state law imposing the lien and only lightly considered the process the agency followed to make the determination.⁹¹ The bankruptcy court found the lien imposed on the individual's property by the state's unemployment department was a statutory lien because the state law created it, and the agency completely determined the amount without the judiciary.⁹² Thus, the determination process fell under "set circumstances" within the definition of a statutory lien.⁹³

2. Recent Cases Outside the Third District – *Leaks*⁹⁴ and *Beck*⁹⁵

While the Court of Appeals for the Third Circuit has the most case law addressing liens by state unemployment agencies for overpaid unemployment benefits as provided by state law, district courts in other circuits recently addressed the problem. These courts cited the Court of Appeals for the Third Circuit cases but analyzed the issue under different states' laws. The United States Bankruptcy Court for the Eastern District of Wisconsin recently analyzed a lien imposed under Wisconsin law. In *Beck*, the bankruptcy court outlined the process in Wisconsin that the state unemployment agency used to obtain a lien against the debtors for benefits erroneously paid.⁹⁶ The agency determined the amount overpaid and notified the claimant of the amount owed and their appeal rights.⁹⁷ By state statute, the claimant could appeal to a tribunal, then to a review commission, and then to the circuit court.⁹⁸ If the claimant still wished to appeal, she could appeal a decision by the Commission to the circuit court.⁹⁹ The bankruptcy court, in its opinion, focused on the appeals process as a quasi-judicial process to hold the lien was judicial.¹⁰⁰

⁸⁹ *Id.*

⁹⁰ *Braxton*, 224 B.R. at 566–68.

⁹¹ *Id.* at 566.

⁹² *Id.* at 567–69.

⁹³ *Id.*

⁹⁴ *In re Leaks (Leaks I)*, 552 B.R. 741 (Bankr. E.D. Ark. 2016), *aff'd*, Ark. Dep't of Workforce Servs. v. *Leaks (Leaks II)*, No. 5:16CV00267 JLH, 2017 WL 2577546, at *1 (E.D. Ark. June 14, 2017).

⁹⁵ *In re Beck*, No. 15-29541-SVK, 2016 WL 489892, at *3 (Bankr. E.D. Wis. Feb. 5, 2016).

⁹⁶ *Id.* at *1–2.

⁹⁷ *Id.*

⁹⁸ *Id.* at *1.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at *3–4.

The United States Bankruptcy Court for the Eastern District of Arkansas followed *Beck*.¹⁰¹ In *Leaks*, the debtor sought to avoid a lien imposed by the state's unemployment agency, as empowered by state statute, from an overpayment of unemployment benefits.¹⁰² The court viewed the appeals process afforded to individuals under Arkansas law as a quasi-judicial process that did not meet the standard of being a condition, or specified circumstance, upon imposing a statutory lien and was instead a judicial lien.¹⁰³ The court outlined the appeals process; first, the individual could appeal to an impartial tribunal where the individual could offer evidence.¹⁰⁴ The tribunal had the power to affirm, modify, reverse, dismiss, or remand the determination by the agency.¹⁰⁵ Then, the individual could appeal to the agency's Board of Review and again to the Arkansas Court of Appeals.¹⁰⁶

The case law surrounding categorization of state laws creating liens from amounts determined by administrative agencies centers around two, primary considerations. The first consideration is to what extent we look at the statutory language imposing the lien versus the entire process. The second consideration involves distinguishing between processes wholly within an agency falling under specified circumstances, up to the point the process becomes judicial in nature, and thus the state statute-created lien is a judicial lien.

B. The Plain Language Interpretation of State Statutes Creating the Liens

1. Automatic or Self-Effectuating Liens: Where the State Statute has Explicit Lien-Creating Language

As the Court of Appeals for the Third Circuit noted, the statutes imposing statutory liens for tax liens, materialmen's, and warehousemen's liens have explicit lien-creating language such as "shall be a lien" or "is entitled to a lien . . ."¹⁰⁷ With this explicit lien-creating language, there is some difference in the

¹⁰¹ *In re Leaks (Leaks I)*, 552 B.R. 745–50 (Bankr. E.D. Ark. 2016); Ark. Dep't of Workforce Servs. v. *Leaks (Leaks II)*, No. 5:16CV00267 JLH, 2017 WL 2577546, at *1 (E.D. Ark. June 14, 2017) (following *In re Beck*, No. 15-29541-SVK, 2016 WL 489892, at *1–4 (Bankr. E.D. Wis. Feb. 5, 2016) as well and explaining that, although *Beck* was vacated due to mootness, it was consolidated and affirmed for the same reasoning in *Wisconsin Dept. Workforce Dev. v. Boyd*, 2:16-CV-00202-LA (E.D. Wis. 2017)).

¹⁰² See generally *Leaks I*, 552 B.R. at 742.

¹⁰³ *Leaks II*, 2017 WL 2577546, at *2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Schick II*, 418 F.3d at 328–29.

state statutes creating liens for overpaid unemployment benefits. In *Braxton*, the statute had similar lien-creating language, and the court found the lien was statutory.¹⁰⁸ *Beck* analyzed Wisconsin law and agreed with the *Braxton* analysis, noting that the Pennsylvania statute was particularly strong and singular.¹⁰⁹ Then, the court distinguished the language of Wisconsin's statute, noting the Wisconsin statute had no language automatically creating liens.¹¹⁰

Pennsylvania and Wisconsin looked to the self-effectuating statutes for guidance. But not all courts agree on the weight of automatic lien-creating language in categorizing a lien as either statutory or judicial. The Court of Appeals for the Third Circuit rejected the idea that automatic lien-creating language was dispositive in *Schick*: “[w]e do believe that a statute that lacks express lien-creating language may confer a judicial lien where there is accompanying judicial process or proceeding. However, the surcharge statute, while lacking express lien-creating language, requires no such judicial action.”¹¹¹

Thus, courts do not agree on whether state statutory language creating a lien is dispositive in distinguishing a statutory lien from judicial. The ambiguous definition of a statutory lien as one “arising solely by force of statute on specified circumstances or conditions . . .”¹¹² gives courts different scopes and spectrums to consider.

Where a lien arises by statute, the court then considers whether the lien comes from the statute alone, or whether the lien comes from the statute only when paired with a process that rises to the level of a judicial process or other proceeding. In some cases resulting in statutory lien analysis, the courts looked to the statute and found the agency determined the amount, then the statute provided the foundation for the lien, and only required filing with the local clerk.¹¹³ These courts found the agency determination and filing with the clerk were not sufficient to classify the lien as stemming from a judicial or other legal or equitable proceeding.¹¹⁴

¹⁰⁸ See generally *Braxton v. Bureau of Unemployment Comp. Benefits & Allowances (In re Braxton)*, 224 B.R. 564 (Bankr. W.D. Pa. 1998).

¹⁰⁹ *In re Beck*, No. 15-29541-SVK, 2016 WL 489892, at *4 (Bankr. E.D. Wis. Feb. 5, 2016).

¹¹⁰ *Id.*

¹¹¹ *In re Schick (Schick II)*, 418 F.3d 321, 329 (3d Cir. 2005).

¹¹² 11 U.S.C.A. § 101(53) (West 2016).

¹¹³ *E.g.*, *Graffen v. Philadelphia*, 984 F.2d 91, 96 (3d Cir. 1992); *Schick II*, 418 F.3d at 328–29; *Mozingo v. Pa. Dep’t of Labor & Indus. Bureau of Unemployment Benefits & Allowances (Mozingo II)*, 234 B.R. 867 (Bankr. E.D. Pa. 1999); *Braxton*, 224 B.R. at 567.

¹¹⁴ *Graffen*, 984 F.2d at 97; *Schick II*, 418 F.3d at 329; *Mozingo II*, 234 B.R. at 872–73; *Braxton*, 224 B.R. at 569.

2. No Judicial Intervention

When concluding that a lien is a statutory lien, courts also use a second source of reasoning: the lack of interaction with a court. Here, although the imposition of the lien involved some process, the courts do not consider this process sufficient judicial intervention necessary to meet that of a judicial lien. In analyzing the distinction between judicial and statutory liens, the Court of Appeals for the Third Circuit held the agency's lien was not a judicial lien because the definition of judicial lien "inherently relate[s] to court procedures or perhaps similar administrative proceedings."¹¹⁵ The court postulated that even if the agency had to inform a resident of its calculation and service of the lien, the process would fall under the specified circumstances definition of a statutory lien.¹¹⁶ The court continued by stating that liens "requiring some administrative action to be perfected" do not become judicial liens.¹¹⁷ Instead, "such a requirement would be consistent with the definition of a statutory lien."¹¹⁸

Schick employs a similar analysis, resulting in a statutory lien.¹¹⁹ The same court in *Schick* stated its rationale for distinguishing a statutory lien as following: "for a lien to be judicial, there must be some judicial or administrative process or proceeding that ultimately results in the obtaining of the lien."¹²⁰ The court looked at the statutory language controlling the lien attachment and found that, because the agency administratively determined the amount of overpayment then simply filed the lien, the lien arose solely by force of statute and thus was statutory.¹²¹

In both situations, the court found that when the administrative agency calculated the amount owed and then filed it, the actions were not a judicial process. The statutes provided the agencies with power to collect calculated amounts, and notice to the debtors of those amounts did not reach the definition of a judicial process.¹²² Instead, the notice was simply a condition the agency needed to meet before the lien could attach, which is provided in the definition of a statutory lien.

The Court of Appeals for the Third Circuit in *Schick* and *Graffen* analyzed

¹¹⁵ *Graffen*, 984 F.2d at 96.

¹¹⁶ *Id.* at 96–97.

¹¹⁷ *Id.* at 97.

¹¹⁸ *Id.* at 96.

¹¹⁹ *In re Schick (Schick I)*, 308 B.R. 189, 191 (D.N.J. 2004), *aff'd*, *In re Schick (Schick II)*, 418 F.3d 321 (3d Cir. 2005).

¹²⁰ *Schick II*, 418 F.3d at 328–29.

¹²¹ *Id.*

¹²² Compare *supra* notes 115–121 and accompanying text with 11 U.S.C.A. § 101(36) (West 2016).

different but similar issues to those in *Braxton*. *Schick* involved a lien largely dependent on the number and type of violations, then an automatic calculation and filing of the lien, which in most cases would not fit an ordinary understanding of judicial or other proceeding.¹²³ In *Graffen*, the process closely resembled the case of unemployment claimants.¹²⁴ The city water company calculated the amount, may have given notice to the individual, and then imposed a lien.¹²⁵ After the agency determined the amount owed, state statute allowed the agency to seek a lien, so the court determined the lien was a statutory lien.¹²⁶

The cases involving overpayment of unemployment cases have similar fact patterns.¹²⁷ The unemployment agencies paid an amount to the individual, then after an investigation or mismatching of reported numbers, found the amount should not have been paid.¹²⁸ Generally, the amounts are set; the only determination is whether the individual wrongly received the amount.¹²⁹ The agencies notified the individual of her payment obligation, and if she never responded, the agency waited a certain number of days, depending on the language of the statute, then filed a lien with the applicable clerk for outstanding amounts.¹³⁰

Where the only judicial intervention is the filing of a lien for a predetermined amount that the claimant owes, how can courts claim the process is judicial or quasi-judicial? The process additionally allows the possibility for a claimant to appeal all the way to a circuit court. Where the claimant does not appeal, however, the agency only needs to wait a certain number of days to seek a lien, that if filed by another person or party, would not become a lien. Because the agency gets this power from the state statute, the lien is arguably statutory.

¹²³ See generally *Schick II*, 418 F.3d 321.

¹²⁴ See generally *Graffen*, 984 F.2d 91.

¹²⁵ *Id.* at 96.

¹²⁶ *Id.*

¹²⁷ See generally *Mozingo v. Pa. Dep't of Labor & Indus. Bureau of Unemployment Benefits & Allowances (Mozingo II)*, 234 B.R. 867 (Bankr. E.D. Pa. 1999); *In re Leaks (Leaks I)*, 552 B.R. 741 (Bankr. E.D. Ark. 2016); *In re Beck*, No. 15-29541-SVK, 2016 WL 489892 (Bankr. E.D. Wis. Feb. 5, 2016); *Braxton v. Bureau of Unemployment Comp. Benefits & Allowances (In re Braxton)*, 224 B.R. 564 (Bankr. W.D. Pa. 1998).

¹²⁸ *Mozingo II*, 234 B.R. at 868; *Leaks I*, 552 B.R. at 742; *In re Beck*, 2016 WL 489892, at *1; *Braxton*, 224 B.R. at 566.

¹²⁹ *Mozingo II*, 234 B.R. at 870-72; see *Leaks I*, 552 B.R. at 743; *In re Beck*, 2016 WL 489892, at *1-2; *Braxton*, 224 B.R. at 567.

¹³⁰ *Mozingo II*, 234 B.R. at 868; *Leaks I*, 552 B.R. at 743; *In re Beck*, 2016 WL 489892, at *1-2; *Braxton*, 224 B.R. at 567-68.

Other courts concentrated on the above process available to a claimant to appeal and the process behind an agency's determining amount owed. These courts look at the statutes and regulations the agency must follow in determining the amount owed and compare the administrative process to due process, and by extension, a judicial proceeding.¹³¹

C. Opposing Analysis: Weigh and Consider the Process Behind the Imposition of the Lien

When courts conclude that a lien imposed on individuals for overpayment of unemployment benefits is a judicial lien, they narrowly analyze the scope of a statutory lien and consider the phrase "other proceeding" in the definition of a judicial lien as naturally broadening the scope of judicial liens. These courts also determine the administrative process behind the agency's determination of amounts owed and claimants' opportunity to appeal the determination is a necessary and inseparable part of the statute creating the lien.

1. Where Statutory Lien Definition is Narrow

Because the analysis categorizing a lien as either judicial or statutory is by process of elimination, where a court defines statutory lien narrowly, the court is more likely to find a lien is judicial. Exemplifying the effect of this scope in the analysis, the United States Bankruptcy Court for the Eastern District of Wisconsin in *Leaks* summarized the following:

Simply stated, does the lien arise upon the mere occurrence of specific events. A statutory lien is limited and quantified; if certain events or circumstances occur as articulated in the statute, a lien arises that is statutory in nature and unavoidable. Conversely, if the statutory scheme contemplates a legal process or proceeding that could, or could not result in a judgment or a lien enforceable as a judgment, then it is judicial and avoidable.¹³²

With this analysis, the court could distance itself from the same outcome as *Schick* and *Graffen* that classified the connected agency processes as specified circumstances. By focusing on the specified circumstances and interpreting statutory lien narrowly, the statutory lien could not encompass the administrative due process that allowed individual claimants to appeal an agency's determination of overpayments. By focusing on this administrative due process,

¹³¹ See generally *In re Beck*, 2016 WL 489892; *Leaks I*, 552 B.R. 741.

¹³² *Leaks I*, 552 B.R. at 745–46.

the bankruptcy court in *Leaks* interpreted the process carried out by the agency as an administrative proceeding falling under the broad definition of judicial or other proceeding.

The court in *Leaks* interpreted a judicial proceeding broadly.¹³³ In holding that the statutory lien was narrow and judicial lien definition broader, the court also had to distinguish its opinion from that in *Braxton*, which looked at almost identical agency determinations and found the resulting lien was statutory.¹³⁴ The opposing analyses in both *Beck* and *Leaks* noted “the definition of a judicial lien is not so restrictive [as the court participation emphasized in *Braxton*].”¹³⁵ By finding the definition of a statutory lien is narrow, the courts then could expound on additional reasoning of why the judicial lien would encompass a lien against an individual for overpayment of unemployment benefits.

2. The Larger Scope of “Other Proceedings”

Where courts narrowly define statutory liens, the judicial lien then becomes the main categorization in this context. The definition itself encompasses judicial and other proceedings. Courts struggle with the scope of the “other proceedings” portion of the judicial lien definition. In *Graffen*, the Court of Appeals for the Third Circuit postulated the scope of the judicial lien definition: “. . . there was no legal process or proceeding in this case. Those terms inherently relate to court procedures or perhaps similar *administrative proceedings*.”¹³⁶ Similarly, the same court in *Schick* noted an *administrative process could create a judicial lien*.¹³⁷

The expansiveness of the definition coupled with the explicit allowance from the Court of Appeals for the Third Circuit for administrative proceedings allows some courts to examine the process behind the imposition of the liens. In all the cases cited above regarding agencies imposing liens on individuals with overpaid unemployment benefits, the unemployment agency notified claimants of an overpayment determination and appeal rights.¹³⁸ The claimant could appeal to a tribunal then to a review board.¹³⁹ If the claimant still wished to appeal, she could appeal a decision by the review board, generally to the circuit

¹³³ *Id.*

¹³⁴ *Id.* (differentiating the process provided in Pennsylvania statutes as truncated in comparison to the process provided debtors in Arkansas in referencing *Braxton*, 224 B.R. 564).

¹³⁵ *Id.* at 746.

¹³⁶ *Graffen v. Philadelphia*, 984 F.2d 91, 96 (3d Cir. 1992) (emphasis added).

¹³⁷ *In re Schick (Schick II)*, 418 F.3d 321, 328 (3d Cir. 2005).

¹³⁸ *See, e.g., In re Beck*, No. 15-29541-SVK, 2016 WL 489892, at *1–2 (Bankr. E.D. Wis. Feb. 5, 2016); *see also Leaks I*, 552 B.R. at 747–49 (quoting various Arkansas statutes).

¹³⁹ *See, e.g., In re Beck*, 2016 WL 489892, at *1–2; *Leaks I*, 552 B.R. at 747–49.

court.¹⁴⁰ The applicable state statutes allowed for expiration of time for an appeal, then the agency could file a warrant for a lien or file a lien.¹⁴¹ The applicable state statute, however, did not always have automatic lien-creating language.¹⁴²

When the Court of Appeals for the Third Circuit noted in dicta that administrative proceedings may fall within the scope of an “other proceeding,” *Leaks* and *Beck* took an expansive view of administrative proceedings. Both courts in *Leaks* and *Beck* concluded the mere possibility of an administrative proceeding or a telephone hearing met the “other proceeding” definition.¹⁴³ Thus, even where the debtor did not appeal, simply because the debtor had the option to appeal, the process was an administrative proceeding sufficient to fit the “other proceeding” definition of a statutory lien. Ambiguous terms such as “other proceeding” leave too much room to argue and interpret differently, only harming debtors and creditors with uncertainty. This process-oriented analysis raises other questions and issues in comparing similar processes.

3. Comparison to the Statutory Tax Lien

An example in the legislative history of statutory liens is the tax lien.¹⁴⁴ The tax lien, like the liens for overpayment of unemployment benefits, involves an appeals process before the agency may impose a lien.¹⁴⁵ Kansas law for example, provides that after sixty days without payment, the secretary may file a warrant with the Sheriff of any county upon the real and personal property of the offending individual taxpayer.¹⁴⁶ The sheriff must file the warrant with the clerk, and the “amount of such warrant so docketed *shall thereupon become a lien* upon the title and interest in the real property of the taxpayer against whom it is issued.”¹⁴⁷

The statute imposing the lien does not reference an appeals process.

¹⁴⁰ See, e.g., *In re Beck*, 2016 WL 489892, at *1–2; *Leaks I*, 552 B.R. at 747–49.

¹⁴¹ See, e.g., *In re Beck*, 2016 WL 489892, at *1–2; *Leaks I*, 552 B.R. at 747–49.

¹⁴² *In re Beck*, 2016 WL 489892, at *4 (noting *Braxton* was different because the language of the statute in that case explicitly created a lien).

¹⁴³ See *id.* (noting that even though the claimant did not appeal the agency’s determination, the appeal process was available and thus supported that the resulting lien was a judicial lien); see also *Leaks I*, 552 B.R. at 742 (stating the claimant recalled participating in a hearing over the phone to appeal the agency’s determination, but the court mentioned no further appeals).

¹⁴⁴ See H.R. REP. NO. 95-595, at 314 (1977), as reprinted in 1978 U.S.C.C.A.N 5963, 6271.

¹⁴⁵ *Cf. Leaks I*, 552 B.R. at 748–49; ARK. CODE ANN. § 26-18-806 (West 2017); ARK. CODE ANN. § 26-18-811 (West 2019).

¹⁴⁶ KAN. STAT. ANN. § 79-3235 (West 2005).

¹⁴⁷ *Id.* (emphasis added).

However, the process exists in other statutes. The Taxpayer Bill of Rights and Privileges mandates the director of the Kansas Department of Revenue notify offending taxpayers of their right to appeal the agency's decision.¹⁴⁸ Then, the Kansas Code provides for an appeals process: first, with an informal conference, then the director's final determination.¹⁴⁹ After the final determination, the taxpayer can appeal to the state board of tax appeals.¹⁵⁰ The appeal to the board involves a hearing subject to the Kansas Administrative Procedure Act.¹⁵¹

Thus, the Kansas tax process, like the overpaid unemployment benefits lien process, allows for the ability to appeal within a certain time frame, in a similar process, then imposes a lien where the party does not appeal and the agency files the lien. Both the tax lien and the lien for unemployment benefits employ determination by a state agency followed by an ability to appeal to a review board who hears evidence and has the power to overturn the agency's decision. This administrative, quasi-judicial process coupled with the tax lien singled out in legislative history as a statutory lien conflicts with the analysis that the administrative process behind the lien creates a judicial lien.

With a phrase as broad as other proceedings, the extension of courts to administrative due process encompassed within the judicial lien categorization is natural. Thus, we need Congressional authority to choose whether liens imposed by state agencies, much like tax liens, with explicit lien creating language are special, and regardless of administrative process, are statutory. Alternatively, whether administrative due process allowing for multiple levels of appeals results in a judicial lien from which the tax lien is a special exception.

D. *Similar Facts and Circumstances - 42 U.S.C. § 503 State Laws*

Courts generally recognize state legislatures as having power to create unavoidable statutory liens under section 522(f).¹⁵² Thus, the courts face a problem. The lien comes from a state statute, but then the analysis continues to whether it comes *solely* from a state statute. Even if some process is involved, the court must ask whether the process is a judicial, legal, or other proceeding, or merely a specified circumstance. These phrases have natural overlap.

On appeal, the agency in *Leaks* argued that their law was constructed per federal directives mandating due process and that, because of this mandate, the

¹⁴⁸ KAN. STAT. ANN. § 79-3268 (West 1997).

¹⁴⁹ KAN. STAT. ANN. § 79-3226(a) (West 2014).

¹⁵⁰ *Id.*

¹⁵¹ KAN. STAT. ANN. § 74-2438(b) (West 2016).

¹⁵² Norton, III, *supra* note 67.

process was simply a condition precedent for the statutory lien.¹⁵³ While the court disagreed in interpreting Arkansas law, the argument raises a question. Where federal law mandates a specific process, why would states have different outcomes in bankruptcy court rulings on the classification of a lien stemming from similar, if not identical statutes?

Unemployment agencies seeking funding from the federal government, must submit their states' laws for approval at the federal level.¹⁵⁴ One requirement for funding is that individual claimants be afforded an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied"¹⁵⁵ The Secretary of Labor, by statute, must stop payments to states where the Secretary finds the administration of the law fails to substantially comply with the statutory requirements, such as providing a fair hearing.¹⁵⁶ Therefore, state laws withholding benefits or seeking repayment must follow specific federal directives and then receive Secretary of Labor approval. Laws going through this review process should substantially operate the same.

The federal mandate results in similar laws all offering fairly identical appeals processes that mandate the opportunity to a fair hearing in front of an impartial tribunal. This approval process renders the reason to have different treatment under the Code in different states moot. Where the court considers the appeals process behind the imposition of the lien a judicial process, all states would likely have judicial liens. However, when courts look at the ability to appeal as only a set circumstance, and the plain language of the statute automatically attaches the lien, the outcome would be a statutory lien. Each process is reasonable, which means the controlling law is too ambiguous to create synthesized results. These separate analyses resulting in opposing answers does not conform to the ideal of a uniform Bankruptcy Code, and thus the federal guidance needs revision, or clarification.

While statutory and judicial lien classifications often rely on nonuniform state law, Congress needs to offer guidance on or amendments classifying between statutory and judicial liens in this context because administrative agencies, such as unemployment agencies offering administrative due process, have substantially similar laws which we would expect the Code to treat

¹⁵³ Ark. Dep't of Workforce Servs. v. Leaks (*Leaks II*), No. 5:16CV00267 JLH, 2017 WL 2577546, at *3 (E.D. Ark. June 14, 2017).

¹⁵⁴ 42 U.S.C.A. § 503(a) (West 2013) (requiring the Secretary of Labor to withhold payment until the state law is approved by the Secretary of Labor under a series of requirements).

¹⁵⁵ 42 U.S.C.A. § 503(a)(3) (West 2013).

¹⁵⁶ 42 U.S.C.A. § 503(b)(2) (West 2013).

uniformly. The legislative history may encourage a narrow interpretation of statutory liens, but the amendments and the Code may have dealt with previous state priority issues sufficiently to allow states to legislate statutory liens without intervention. More importantly, the legislative history clearly states Congress's intent to have a uniform Code.¹⁵⁷ Treating similar creditors with similar facts and circumstances differently depending on the state of residence goes against the ideal of a uniform federal code.

IV. CONCLUSION

Federal guidance or congressional amendment on the effect of administrative due process on liens, empowered by state statutes, is necessary because creditors and debtors alike require consistent treatment where possible. The courts cannot agree on how to analyze the issue, whether by statutory interpretation of specific state laws or by categorizing the process behind the lien as a specified circumstance or an "other" judicial proceeding. The unemployment overpayment context is one example showing the definitional guidance analyzing judicial and statutory lien distinctions with administrative due process needs attention. As the United States District Court for the Eastern District of Arkansas, Pine Bluff Division states: "[w]hile it may seem unfair that federal law requires the Department to afford due process before issuing a certificate of overpayment but then allows the overpayment to be avoided in bankruptcy because due process has been afforded, that is an issue to present to Congress."¹⁵⁸

¹⁵⁷ McCoid, II, *supra* note 15, at 279–80 (citing Papers of James A. MacLachlan, Box 2, folder 1, at 24).

¹⁵⁸ *Leaks II*, 2017 WL 2577546, at *9.