

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

ERLA JEAN LULUE,

CASE NO. 99-10330-WSS

Debtor.

Chapter 7

ORDER ON MOTION OF OSTER & WEGENER, P.L.C.
TO DETERMINE VALIDITY OF LIEN

This matter is before the Court on the motion of Oster & Wegener to determine the validity of its lien. James M. Orr, Jr. appeared for the Debtor, and Larry C. Moorer appeared for Oster & Wegener, P.L.C. (hereinafter "Oster"). Oster represented the Debtor in a divorce action in Louisiana. A divorce judgment was entered in the Debtor's divorce action on May 2, 1995. At the time of the filing of the Debtor's Chapter 7 petition on January 27, 1999, the Debtor owed Oster approximately \$5,756.75 for attorney fees related to the divorce action. Under the divorce judgment, the Debtor receives a percentage interest in her former husband's military retirement pay, and will continue to receive this percentage until she or her former husband dies. Section 5001 of the Louisiana Revised Statutes, Title 9, (West 1999) provides a "privilege" for attorneys for their "professional fees on all judgments obtained by them, and on the property recovered thereby, . . . to take rank as a first privilege thereon." Oster seeks to collect its attorney fees from the Debtor's share of her former husband's military retirement benefit.

The Debtor maintains that because the debt to Oster is dischargeable in the bankruptcy proceeding, Oster's privilege has been extinguished. As a result, Oster cannot assert the privilege against the funds that the Debtor receives from her former husband's military retirement. Oster counters that although the Debtor's discharge will prohibit it from pursuing the Debtor personally for the debt, the discharge will not prevent the enforcement of a lien on property, in this case the military

retirement benefit.

The Debtor has not cited any case law that supports her theory that a discharge in bankruptcy is the equivalent to the “extinction of debt” as set forth in La. Civ. Code, Article 3277. Oster cited the case of Pounds v. Chicago Insurance Co., 298 So.2d 134 (La. Ct. App. 1974). The Pounds court first noted that a privilege was equivalent to a mortgage in this context. Pounds, 298 So.2d at 136. The court went on to hold that “[e]ven though the discharge in bankruptcy discharges the bankrupt from his debts, the creditor with a preference over a matter disclaimed and abandoned by the trustee in bankruptcy retains his preference over the rights of the bankrupt.” Based on the foregoing, this Court finds that Oster’s privilege is not extinguished by the Debtor’s discharge. The Court further finds that the parties should submit, within 14 days of the date of this order, a copy of the divorce judgment and additional briefs on the issue of whether the military retirement benefit which the Debtor receives from her former husband is exempt under federal or state law. It is hereby

ORDERED that the motion of Oster & Wegener P.L.C. to determine the validity of its lien is **GRANTED**, and the privilege of Oster & Wegener, P.L.C. is valid; and it is further

ORDERED that the parties shall submit, within 14 days of the date of this order, a copy of the divorce judgment and additional briefs on the issue of whether the military retirement benefit which the Debtor receives from her former husband is exempt under federal or state law.

DATED: August ____, 1999

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE