



## A Step-By-Step Guide to Enforcement of Money Judgments Against a Judgment Debtor's "Homestead" Property/Residence Under Arizona's New Laws to Become Effective on January 1, 2022

By Larry O. Folks

### Introduction

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Legislation to protect "homestead" property – historically the family farm and now personal residences – from loss to judgment creditors is traceable in the United States to a statute enacted in Texas in 1839.<sup>1</sup> Legislatures across the United States have enacted such laws for the primary purpose of serving the public interest to allow judgment debtors to avoid a complete loss of the value of their "homestead" property to judgment creditors through forced judgment execution sales.

In Arizona, the "homestead" exemption and related judgment lien and judgment enforcement laws have evolved over time. As an example, in 1977, the dollar amount of the "homestead" exemption was increased from \$15,000 to \$20,000, and it has steadily been increased over time through ongoing statutory amendments.<sup>2</sup>

More changes to these laws are on the immediate horizon.

**Arizona HB 2617.** Specifically, on May 19, 2021, Governor Ducey signed into law Arizona House Bill 2617 ("HB 2617"), which shall implement wide-sweeping changes to the Arizona judgment lien, judgment execution and "homestead" exemption statutes effective on January 1, 2022.<sup>3</sup>

HB 2617 will specifically implement significant amendments to Arizona's:

- judgment lien statute located at A.R.S. § 33-964 (the "Judgment Lien Statute");
- judgment execution statute located at A.R.S. § 12-1551 (the "Judgment Execution Statute"); and
- "homestead" exemption statutes located at A.R.S. §§ 33-1101 and 33-1103 (collectively, the "Homestead Exemption Statutes").<sup>4</sup>

The most significant of these amendments for judgment creditors shall be:

- the imposition of a judgment lien upon "homestead" property upon the recordation of a money judgment in the county where the real property is located; and
- an increase of the "homestead" exemption amount allowed for judgment debtors from \$150,000 to \$250,000.

This article is a step-by-step practical guide to help judgment creditors to understand the coming changes to this area of the law to be implemented by HB 2617 and evaluate enforcement of a money judgment against a "homestead" property on or after January 1, 2022, pursuant to the revised Judgment Lien Statute, Judgment Execution Statute and Homestead Exemption Statutes.

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<sup>1</sup> "Preserving the Family Farm in an Urban Age," 34-SEP Ariz. Att'y 18 (Kathi Mann Sandweiss and Roger L. Cohen) *citing* Act of January 26, 1839, Laws of Republic of Texas, 3d Cong., 1<sup>st</sup> Sess. 113.

<sup>2</sup> *Id.*

<sup>3</sup> Section 5 of Chapter 368, House Bill 2617, Fifty-fifth Legislature, State of Arizona (2021).

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<sup>4</sup> *Id.*

## Step 1: Confirm that the Judgment Has Not Expired

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In 2018, the Arizona Judgment Execution Statute was amended to extend the validity of civil money judgments from five years to ten.<sup>5</sup>

HB 2617 confirmed the validity of money judgments for ten years that:

- were entered on or after August 3, 2013; or
- were entered on or before August 2, 2013, and that were renewed on or before August 2, 2018.<sup>6</sup>

If a civil money judgment has expired, it is no longer enforceable. As a result, the first step to enforcement of a money judgment against “homestead” property is for the judgment creditor to review the court docket and/or face of the judgment to determine the date of entry and/or renewal of the judgment, if applicable. That will allow the judgment creditor to make the decision concerning whether, or not, the judgment in hand remains enforceable.

## Step 2: Determine Whether the Real Property at Issue Qualifies for the Homestead Exemption and the Amount of the Exemption that Applies

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HB 2617 includes revisions to the Homestead Exemption Statute located at A.R.S. § 33-1101(A) which provide that any person eighteen (18) years of age who resides in Arizona and is married or single may hold a “homestead” exemption for the following types of real property (hereinafter, a “Homestead Property”):

- the person’s interest in real property in one compact body on which exists a dwelling house in which the person resides;
- the person’s interest in one condominium or cooperative in which the person resides;

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<sup>5</sup> A.R.S. § 12-1551(A).

<sup>6</sup> See, A.R.S. § 12-1551(D) as revised by Chapter 368, House Bill 2617, Fifty-fifth Legislature, State of Arizona (2021).

- a mobile home in which the person resides; or
- a mobile home in which the person resides plus the land on which that mobile home is located.<sup>7</sup>

For the most part, the analysis is very straightforward to determine whether the real property subject to collection is a Homestead Property. The main exception to be aware of as a judgment creditor is to determine whether the property is a rental property that the judgment debtor cannot claim as a Homestead Property.

HB 2617 shall also implement the major change to the Homestead Exemption Statute of increasing the dollar amount of the exemption from \$150,000 to \$250,000.<sup>8</sup>

## Step 3: Determine Whether the Judgment Is a Lien Upon the Homestead Property

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For many years, the Arizona Judgment Lien Statute has included:

- the general rule that a recorded money judgment creates a statutory judgment lien on all real property then owned by a judgment debtor, or acquired by the judgment debtor in the future, in the county where the judgment is recorded; and
- the exception to the general rule that a recorded money judgment is *not a lien* upon real property that qualifies under the definition of a Homestead Property, which is typically the judgment debtor’s personal residence, whether it be a single-family home, condominium or mobile home.<sup>9</sup>

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<sup>7</sup> See, A.R.S. § 33-1101 as revised by Chapter 368, House Bill 2617, Fifty-fifth Legislature, State of Arizona (2021). Judgment creditors should also be advised that the homestead exemption amount is the same for an individual or a married couple.

<sup>8</sup> A.R.S. § 33-1101(A) as revised.

<sup>9</sup> See, the Judgment Lien Statute located A.R.S. § 33-964 (A) and (B) and the definition of “homestead” property located at A.R.S. § 33-1101(A) and *Pacific Western Bank v. Castleton*, 434 P.3d 1187,1189-1190, 246 Ariz. 108, 110-111 (AZ App. 2018)(which includes a comprehensive analysis of a judgment creditor’s rights with respect to collecting upon a recorded money judgment against a debtor’s homestead property under Arizona law prior to the

Under the current statute effective through December 31, 2021, even though the judgment creditor does not have a lien on the Homestead Property, the judgment creditor is given the legal remedy to force a Sheriff's execution sale of the Homestead Property, if there is equity in the property above all consensual liens on the property and the \$150,000 homestead exemption available to the judgment debtor.<sup>10</sup>

HB 2617 repeals the exception to the general rule by revising the Arizona Judgment Lien Statute.<sup>11</sup> As a result, as of January 1, 2022, *all civil money judgments recorded with a county recorder shall become a lien upon:*

- all real property, including Homestead Property, owned by the subject judgment debtor in that county on the date that the judgment is recorded; and
- all real property that may be acquired by the subject judgment debtor in that county in the future.<sup>12</sup>

The practical requirements for a judgment creditor to obtain a valid recorded judgment lien have not been changed by HB 2617 and will continue to be that:

- a certified copy of the judgment will need to be obtained for recordation; and
- a judgment information sheet must be recorded with the judgment.<sup>13</sup>

The Judgment Lien Statute also includes certain transitional rules in new A.R.S. § 33-964(G)<sup>14</sup>

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enactment of House Bill 2617).

<sup>10</sup> *Pacific Western Bank v. Castleton*, 434 P.3d 1187, 1190, 246 Ariz. 108, 111 (AZ App. 2018).

<sup>11</sup> See, A.R.S. § 33-964(A) as revised by House Bill 2617.

<sup>12</sup> *Id.*

<sup>13</sup> See, A.R.S. § 33-961(judgment recording requirements) and A.R.S. § 33-967(D)(which provides that the priority of a recorded judgment is established on the date that the judgment is recorded with the required judgment information sheet attached). These practical requirements have not been changed by House Bill 2617.

<sup>14</sup> See, A.R.S. § 33-964(G) as revised by House Bill 2617

concerning when a judgment lien is imposed by the new statutes. The transitional rules are:

1. If a sale, transfer or refinance of the judgment debtor's Homestead Property is completed prior to January 1, 2022, then the judgment creditor does not have a judgment lien upon the Homestead Property.<sup>15</sup>
2. If the judgment debtor receives a bankruptcy discharge prior to January 1, 2022, then the judgment creditor does not have a judgment lien upon the Homestead Property.
3. If the judgment debtor has filed for bankruptcy protection prior to January 1, 2022, and ultimately receives a discharge, then the judgment creditor does not have a judgment lien upon the Homestead Property.
4. For any sale, transfer or refinance that is completed on or after January 1, 2022, judgments that are recorded before January 1, 2022, and that are still valid attach to the homestead property, are enforceable, and create judgment liens pursuant to the priority rules listed in the statute.

#### **Step 4: Determine What Collection Rights the Judgment Creditor Has Under the Circumstances as a Result of Its Judgment Lien Upon the Homestead Property**

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Judgment creditors must evaluate their collection rights granted by the new statutes under the particular circumstances of their case. Several recurring scenarios faced by creditors when collecting upon money judgments secured by real property are specifically addressed by HB 2617 and discussed below.

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<sup>15</sup> *Id.*

### **“Cash Out” Refinance Transaction by the Judgment Debtor Concerning a Homestead Property Secured by a Judgment Lien**

HB 2617 grants judgment creditors a new collection right when a judgment debtor refinances a mortgage loan on a Homestead Property and there are “cash out” proceeds available from the refinance transaction.

In particular, A.R.S. § 33-964(C) has been added to the Judgment Lien Statute *to provide that the judgment creditor’s judgment lien balance must be paid in full from the refinance “cash out” proceeds before the judgment debtor or any other person receives any of the proceeds.*<sup>16</sup> The new text of A.R.S. § 33-964(C) is as follows:

C. If the judgment debtor receives cash proceeds from refinancing the homestead property that is subject to a judgment lien, the judgment creditor must be paid in full from those proceeds before the judgment debtor or other person receives any proceeds, except that monies used to pay direct costs associated with the refinance or to satisfy liens with priority over a judgment lien on a homestead property do not constitute cash proceeds. In subsequent refinance transactions on the homestead property that is subject to a judgment lien, the judgment lien is subordinated by operation of law to the new lender’s interest in the homestead property. A notice of subordination may be recorded by any person who is a party to that refinance.<sup>17</sup>

HB 2617 makes a conforming change to the Homestead Exemption Statute, located at A.R.S. § 33-1101(C), to provide that “the homestead exemption does not attach to the person’s interest in identifiable cash proceeds from refinancing the homestead property.”<sup>18</sup>

HB 2617 also added the following new subsection A.R.S. § 33-1101(D), which gives the parties’ guidance concerning how to determine whether there is equity in a Homestead Property for the purpose of complying with several provisions of the Judgment Lien Statute, Judgment Execution Statutes, and

Homestead Exemption Statutes as revised. The new section provides as follows:

D. For the purposes of determining the amount of equity in a homestead property that is sold or for determining whether the property owner is receiving cash back from refinancing the homestead property, the parties may rely on the valuation of the property in the final closing document disclosure that is used for that transaction<sup>19</sup>

The effect of the above revisions to the Judgment Lien Statute and Homestead Exemption Statute is to grant judgment creditors a very significant new substantive collection legal right to enforce their judgment lien by executing upon the “cash out” refinance proceeds that did not exist prior to enactment of HB 2617.

Stated alternatively, the new amended statutes will close the loophole that existed to allow judgment debtors to strip the equity out of their Homestead Properties and not pay the refinance “cash out” proceeds to judgment creditors, because the proceeds by definition under current law are not encumbered by a lien in favor of the judgment creditors.

### **Voluntary Sale of Homestead Property Subject to a Judgment Lien by the Judgment Debtor**

HB 2617 has added to the Judgment Lien Statute a new section, A.R.S. § 33-964(B). This new section grants a judgment creditor rights with respect to payment of its judgment lien balance upon a judgment debtor’s voluntary sale of a Homestead Property as follows:<sup>20</sup>

B. On the sale of homestead property that is subject to a judgment lien, the judgment creditor shall be paid from the proceeds of the sale after the homestead exemption amount is paid to the judgment debtor as prescribed in section 33-1101 and after payment of any liens on the property that have priority over the judgment lien[.]<sup>21</sup>

This change is a codification of the judgment creditor’s substantive right to payment under existing

<sup>16</sup> See, A.R.S. § 33-964(C) added by House Bill 2617.

<sup>17</sup> *Id.*

<sup>18</sup> See, A.R.S. § 33-1101(C) added by House Bill 2617.

<sup>19</sup> See, A.R.S. § 33-1101(D) added by House Bill 2617.

<sup>20</sup> See, A.R.S. § 33-964(B) added by House Bill 2617.

<sup>21</sup> *Id.*

lien priority and Homestead Exemption Statutes now that the judgment creditor's recorded judgment is recognized as a statutory judgment lien upon the Homestead Property.

The primary effect of this new law will be to expand judgment creditors' rights to sale proceeds without having to take other enforcement steps that were previously necessary as a result of the judgment creditor not having an actual lien upon the sale proceeds.

New A.R.S. § 33-964(B) also grants title companies the right to record a partial release of the judgment creditor's judgment under certain circumstances. If the title company makes a determination that the payment to the judgment debtor from the proceeds of the sale of the Homestead Property shall total less than 80% of the amount of the \$250,000 homestead exemption (i.e., less than \$200,000), then the title company may record the partial release of the judgment *without prior notice to the judgment creditor*.

Alternatively, if the title company determines that the sales proceeds to be paid to the judgment debtor will exceed the \$200,000 threshold, then the judgment creditor's lien upon the Homestead Property will be extinguished if:

- the title company mails a notice (including certain specific information listed in the statute) to the judgment creditor by certified mail, return receipt, which informs the judgment creditor of the title company's position that its judgment lien will be extinguished by the sale transaction; and
- the judgment creditor fails to object within the required 20-day statutory notice and objection period.<sup>22</sup>

If the judgment creditor sends the title company an objection, prior to expiration of the 20-day statutory objection time period, which provides that the judgment creditor has good cause for its judgment lien not to be extinguished by the sale

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<sup>22</sup> *Id.*

transaction, then the title company may not record the partial release of the judgment lien.<sup>23</sup>

If a court subsequently determines that the judgment creditor did not have good cause to object, then the prevailing party is entitled to a court order extinguishing the judgment lien on the Homestead Property and an award of actual damages, court costs and attorneys' fees and costs.<sup>24</sup>

If a title company records a notice of a partial release of judgment lien wrongfully, then the title company is liable to any party for the actual damages, including attorney's fees and costs, that are caused by wrongfully recording the release.<sup>25</sup>

### **Involuntary Sheriff's Execution Sale of the Homestead Property Forced by the Judgment Creditor**

HB 2617 has been revised *to expressly authorize a judgment creditor to force an involuntary Sheriff's execution sale of a Homestead Property* (with equity in it that exceeds the homestead exemption amount) encumbered by its judgment lien by amending A.R.S. § 33-1103(A) to provide as follows:<sup>26</sup>

A. Real property that is subject to the homestead exemption provided for in section 33-1101, subsection A is exempt from involuntary sale under a judgment or lien, *except in connection with:*

.....

4. *A recorded civil judgment* or other nonconsensual lien that is not otherwise prescribed in this subsection *if the debtor's equity in the real property exceeds the homestead exemption* under section 33-1101 (*emphasis added*).

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See, A.R.S. § 33-1103(A) as revised by House Bill 2617.

The example of the Maricopa County Sheriff's forced execution sale requirements discussed below is useful to understand the requirements and collection rights of a judgment creditor to pursue this collection remedy.<sup>27</sup>

Judgment creditor (the "Judgment Creditor") obtains a money judgment (the "Judgment") against an individual judgment debtor (the "Judgment Debtor"). The Judgment is recorded with the Maricopa County Recorder ("County Recorder") while Judgment Debtor owns a residence located in Maricopa County that is the Judgment Debtor's Homestead Property.<sup>28</sup>

Judgment Creditor obtains a Writ of General Execution from the Clerk of the Superior Court to direct the Sheriff of Maricopa County, Arizona ("Sheriff"), to schedule a Sheriff's execution sale of the Homestead Property. This is a straightforward application process; it does not require a hearing, and the Writ of General Execution is summarily issued by the Clerk of the Superior Court. The Writ of General Execution is delivered to the Civil Enforcement Division of the Sheriff's Department along with an initial \$200 fee deposit. The Sheriff will schedule an execution sale of the Homestead Property to enforce the Judgment only if all of the legal requirements discussed below are satisfied ("Sheriff's Execution Sale").

The Sheriff's Execution Sale of the Judgment Debtor's Homestead Property will be scheduled by the Sheriff after:

- it is determined that the legal requirements of A.R.S. §§ 33-1103(A) and 33-1105(A) are met, which is that the value of the Homestead Property exceeds the total of any senior liens upon the property plus the \$250,000 statutory homestead exemption amount due to the Judgment Debtor pursuant to revised A.R.S. §

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<sup>27</sup> Maricopa County is Arizona's most populous county. The procedures of the Sheriffs of other counties differ in small respects, but the process is generally the same in all Arizona counties.

<sup>28</sup> The requirements for real property to qualify as a Judgment Debtor's "homestead" property and for the \$250,000 homestead exemption to apply are set forth at A.R.S. § 33-1101 *et seq.* as revised by House Bill 2617.

33-1101(A) (the "Homestead Exemption Amount");

- the Sheriff makes demand upon the Judgment Debtor to pay the Judgment, and the Judgment Debtor fails to pay the Judgment balance; and
- the Sheriff determines that the Judgment balance cannot be collected by selling the Judgment Debtor's personal property.

The Sheriff initially enforces the Writ of General Execution by recording it with the Maricopa County Recorder as the act of levying upon the property. In addition, the Sheriff must publish the Notice of Sale for three weeks prior to the date of sale and post the Notice of Sale at three designated public places at least 15 days prior to the date of the Sheriff's Execution Sale. The Sheriff will mail a copy of the Notice of Sale to the Judgment Creditor well in advance of the Sheriff's Execution Sale date.

Once the Sheriff's execution sale of the Homestead Property is scheduled, Judgment Creditor will have to comply with the Sheriff's bidding requirements to prepare for and participate in the Sheriff's execution sale of the Homestead Property. The statutes relevant to and specific bidding requirements of the Sheriff are discussed below.

The Arizona statute, which includes the conditions that must be complied with before the Sheriff will even schedule a Sheriff's Execution Sale of a Homestead Property, is set forth in full below.<sup>29</sup>

**33-1105. Sale by judgment creditor of property subject to homestead exemption.**

A judgment creditor other than a mortgagee or beneficiary under a trust deed may elect to sell by judicial sale as specified in title 12 the property in which the judgment debtor has a homestead under section 33-1101, subsection A, provided that the judgment debtor's interest in the property shall exceed the sum of the judgment debtor's homestead plus the amount of any consensual liens on the property having priority to the judgment. A bid shall not be accepted by the officer in charge of a sale under this section which does not exceed the amount

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<sup>29</sup> A.R.S. § 33-1105.

of the judgment debtor's homestead plus the amount of any consensual liens on the property having a priority to the judgment plus the costs of the sale allowable under title 12. After receipt of a sufficient bid, the officer shall sell the property. From the proceeds, the officer shall first pay the amount of the homestead to the judgment debtor plus the amount of any consensual liens on the property having a priority to the judgment and then pay the costs of the sale. The remaining proceeds shall be applied in accordance with the provisions of section 12-1562, subsection A.

The Sheriff's interpretation and implementation of A.R.S. § 33-1105 to schedule a Sheriff's Execution Sale of a Homestead Property and accept a Judgment Creditor's bid are set forth below:

- In advance of the Sheriff's Execution Sale date, the Judgment Creditor must provide the Sheriff with the dollar amount of unpaid real property taxes upon the Homestead Property to be paid to the Maricopa County Treasurer upon completion of the sale, good through two weeks and one day after the scheduled date of the Sheriff's Execution Sale ("Senior Real Property Tax Lien Amount").
- In advance of the Sheriff's Execution Sale date, the Judgment Creditor must provide the Sheriff with payoff amounts of all Deeds of Trust and other liens of record senior upon the Homestead Property that are senior to the money Judgment being enforced good through two weeks and one day after the scheduled date of the Sheriff's Execution Sale (the "Senior Lien Payoff Amount").
- The Judgment Creditor is required by the Sheriff to bid \$1.00 over the total amount of the Senior Real Property Tax Lien Amount + the Senior Lien Payoff Amount + the \$250,000 Homestead Exemption Amount as its opening credit bid at the Sheriff's Execution Sale.<sup>30</sup>

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<sup>30</sup> If the Sheriff's Execution Sale is of real property that is not a homestead property, then the Judgment Creditor does not have to pay cash to pay off the senior liens on the property and is only responsible for paying the Sheriff's fees to schedule and conduct the sale. Also, under this circumstance,

The Judgment Creditor must have a representative physically present at the Sheriff's office to attend the Sheriff's Execution Sale, which is a public auction. The representative must fully understand the bidding process and make the Judgment Creditor's opening credit bid and any additional higher bids during the auction sale.

At the beginning of the public auction Sheriff's Execution Sale, the Sheriff will announce the total judgment principal amount, interest accrued upon the judgment amount until the date of sale, and the Sheriff's sale commission and other hard costs. This is known as the Judgment, Interest and Costs ("JIC") announced amount for informational purposes.

For a Homestead Property execution sale, the actual bidding begins at \$1.00 over the total amount of the Senior Real Property Tax Lien Amount + the Senior Lien Payoff Amount + the \$250,000 Homestead Exemption Amount as the Judgment Creditor's opening credit bid at the Sheriff's Execution Sale.

If the Judgment Creditor is the successful bidder for the Homestead Property, the Judgment Creditor is responsible for paying the \$250,000 Homestead Exemption Amount, the prior unpaid real property taxes, the prior consensual liens, and the Sheriff's costs of sale *in cash* within five days after the date of the Sheriff's Execution Sale.

Any additional amount over the foregoing sums generated by the bidding process would go toward satisfying the Judgment. (When the homestead exemption does not apply, the Judgment Creditor is responsible for paying only the Sheriff's fees for the sale of the property.)

Should the property be more valuable than the homestead exemption, prior consensual liens, Judgment amount, and Sheriff's costs of sale, any bid over that amount is sent to the Clerk of the Superior Court as excess proceeds. (If the Judgment Creditor

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the Sheriff's procedure is to have the Judgment Creditor bid \$1.00 as its opening bid. The Judgment Creditor and other bidders must do their due diligence to understand what liens will have to be paid off if they are the successful bidder and plan their bidding strategy accordingly. In addition, the Sheriff's hard costs and sale commission must be verified with the Sheriff and taken into account by any bidder at a Sheriff's Execution Sale.

was the high bidder, the Judgment Creditor would be responsible dollar-for-dollar for any amount over the satisfaction of the Judgment, homestead exemption, prior consensual liens, and Sheriff's fees).

## Conclusion

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Effective as of January 1, 2022, judgment creditors should be prepared to comply with the sweeping new changes that HB 2617 imposes on the current judgment enforcement process in Arizona. Failure to understand these changes and implement policies to address them may result in the judgment creditor's rights being prejudiced.

In addition, the changes to Arizona law imposed by HB 2617 will have multiple bankruptcy law implications that will certainly be litigated once the laws become effective.

Several major bankruptcy law implications will include, without limitation, that:

- judgment creditors will be secured creditors on the petition date and have the rights of a secured creditor in bankruptcy proceedings;
- unless set aside by the Bankruptcy Court, judgment liens should now pass through the bankruptcy and remain enforceable post-discharge *in rem* against the Homestead Property through a forced Sheriff's execution sale or otherwise; and
- bankruptcy debtors will likely pursue avoidance actions when the circumstances apply pursuant to Bankruptcy Code Section 522(f)<sup>31</sup> (to avoid the judgment lien as impairing the debtor's homestead exemption) or Bankruptcy Code Section 506(d) and various Bankruptcy Rules to attempt to strip the judgment lien from the Homestead Property.

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<sup>31</sup> The United States Bankruptcy Code is located at 11 U.S.C. § 101 *et seq.*