

LOU JONES BREAKFAST CLUB

OUTLINE FOR JULY 9, 2013

LIEN AVOIDANCE AND EXEMPTIONS

- Under the Bankruptcy code, Debtors can avoid certain liens on property, if those liens “impair” an exemption to which the Debtor would otherwise be entitled. Only certain types of liens may be avoided under this Section, and it is important to know what they are, and the limits imposed by the statute. It is also important to know the equation that used to determine how much can be avoided.

IMPORTANT STATUTES:

- 11 U.S.C. §522(f)
 - o Section 522(f)(1) – Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is –
 - (A) – a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or...
 - (B) – a nonpossessory, nonpurchase-money security interest in any
 - (i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
 - (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
 - (iii) professionally prescribed health aids for the debtor or a dependent of the debtor. *everything in the house!]*

- Section 522(f)(2)(A) – For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of –
 - (i) the lien;
 - (ii) all other liens on the property; and
 - (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

Exceeds the value that the debtor’s interest in the property would have in the absence of any liens.
- (B) – In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.
- (C) – This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

JUDICIAL LIENS

- Judicial Liens are liens created after a final judgment for money is docketed against a debtor. In Wisconsin, Wis Stat §806.15 governs judgment liens. Such liens, in this State, are only applicable against real property of the debtor.
- Other states may allow judgment or judicial liens against personal property of the debtor.
- The real property must be located in the county in which the judgment has been docketed.
- A judgment lien can be attached to property purchased by the debtor in the ten years after the entry of judgment.

NONPOSSESSORY, NONPURCHASE-MONEY SECURITY INTERESTS

- Nonpossessory, nonpurchase-money security interests are a very specific type of lien.
 - Nonpossessory – the creditor does not have possession of the collateral; the debtor retains possession, the collateral merely has a lien filed against it. This is in

contrast to something like a pawn brokerage or mechanic's lien, where the creditor holds the collateral until the underlying debt is paid.

- Nonpurchase-money – the money which was borrowed was not used to purchase the collateral. The debtor pledges collateral that he/she already owns in exchange for the loan.
 - Security Interest – a voluntary agreement between the creditor and debtor which creates a lien.
- Often referred to as NPMSI's, or NPNPMSI's.
 - Debtors often assign NPMSI liens to get monetary loans, as they may not qualify for standard bank loans.

AVOIDING LIENS UNDER SECTION 522(f)

- Rule 4003(d) – must be made by motion in accordance with Rule 9014; creditors may object to the validity of the exemption said to be impaired, even if it is more than 30 days after the Meeting of Creditors is concluded or after the schedules have been amended.
- Rule 9014 – provide reasonable notice and opportunity for a hearing; must be served properly under Rule 7004 (proper service is very important, especially when avoiding liens!).
- Properly work through the equation in §522(f)(2)(A). The amount of the exemption + the amount of all other liens + the allowable exemption must exceed the proper value of the collateral.
- Can avoid entire liens, or partial liens in the amount that they exceed the value of the exemption.
- NPMSI liens can be avoided because they give the creditor excessive leverage over the debtor. The threat of taking household goods or trade equipment that is necessary for the debtor to receive a true fresh start puts unfair pressure on the debtor to pay. Especially as

the amount of the loan is often much more than the value of the pledged property, and after the sale of such property, it is likely that the majority of the debt will still remain to be collected, while the debtor will be out items needed for everyday living.

- Judicial liens can be avoided even if they are attached to homestead real estate, partially or in full; normally, only mortgages that do not attach at all to the value of the homestead real estate can be avoided. HOWEVER:
- Cannot avoid judicial liens arising from foreclosure judgments. 11 U.S.C. §522(f)(2)(C)
- If applicable state law allows a debtor to waive certain exemptions or prohibits those exemptions, then you can't avoid NPMSI liens on property with a value in excess of \$5,475.00.
- Pay specific attention to §522(f)(4)(A) and (B), as these sections define household goods. That term does not simply mean anything in the debtor's house!