

Lou Jones Breakfast Club Presentation
Avoiding Judgment Liens Under 11 U.S.C. §522 and Obtaining Satisfactions of Judgments
under Section 806.19 of the Wisconsin Statutes

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Prepared and presented by:

Dayten P. Hanson, Esq.

Joseph M. Engl, Esq.

Hanson & Payne, LLC

1841 N. Prospect Ave.

Milwaukee, WI 53202

phone - (414) 271-4550

fax - (414) 271-7731

web: www.hansonpayne.com

I. Judgment Liens under Chapter 806 of the Wisconsin Statutes

A. Judgments liens addressed in Chapter 806 of the Wisconsin Statutes.

1. Wis. Stats. § 806.15 - Creation of lien:

- a. “Every judgment properly entered in the judgment and lien docket showing the judgment debtor’s place of residence shall, for 10 years from the date of entry, be a lien on all real property of every person against whom the judgment is entered which is in the county where the judgment is rendered, except homestead property that is exempt from execution under section 815.20, and which the person has at the time of entry **or which the person acquires thereafter within the 10-year period.**” (Emphasis added.)
- b. A properly docketed judgment attaches to after-acquired real property.
- c. **Practice Pointer:** advise your client of this in your disengagement letter if you have not agreed to satisfy the judgment as a component of your bankruptcy fee agreement.
- d. **Practice Pointer:** it is generally a good idea to run a judgment search before filing a chapter 7 bankruptcy. It makes it a lot easier to satisfy the judgment if the debt has been properly listed in the schedules.

2. Wis. Stat. § 806.13 - Judgments entered in other counties:
 - a. When a judgment is entered as provided in sections 806.10, 806.12, and 806.24, or a warrant is entered as provided in section 108.22 (2) (a), it may be entered in any other county, upon filing with the clerk of court of that county, a transcript from the original judgment and lien docket, certified to be a true copy by the clerk of the original circuit court.”
 - b. Need certified copy of original judgment.
 - c. Check with clerk of court for each county for different procedures. You will need to pay the docketing fee to docket the judgment.
3. Letter request for release of judgment lien against homestead:
 - a. Wis. Stat. § 815.20 - “Any owner of an exempt homestead against whom a judgment has been rendered and entered in the judgment and lien docket, and any heir, devisee or grantee of the owner, or any mortgagee of the homestead, may proceed under section 806.04 for declaratory relief if the homestead is less than \$40,000.00 in value and the owner of the judgment shall fail, for 10 days after demand, to execute a recordable release of the homestead from the judgment owner’s judgment lien.”

B. Multiple liens under Wisconsin law.

1. Judgment holder is not a good faith purchaser for value, so judgment is junior to unrecorded mortgage.
2. *IFC Collateral Corp. v. Commercial Units, Inc.*, 51 Wis. 2d 41, 186 N.W.2d 214 (1971).
 - i. A judgment creditor who obtains a lien on land by docketing a judgment is not a purchaser for value, and the fact that a judgment creditor may be without notice of a prior equitable interest when the judgment is docketed is not sufficient to give the lien priority over that of a prior equitable mortgagee.
 - ii. The failure of notice does not inure to the benefit of a subsequent judgment creditor as he or she does not part with any value in reliance on the misleading state of the debtor’s title.

C. Mortgages and statutory liens -vs- judgments and homestead exemption.

1. Judgment liens do not attach to exempt equity in homestead.

- a. *Rumage v. Gullberg*, 2000 WI 53, 235 Wis. 2d 279, 611 N.W.2d 458.
 - i. When equity in a homestead exceeds \$40,000.00, the homestead is partially exempt, and a docketed judgment is a lien on the debtor's equity in excess of the \$40,000.00.
 - ii. If a debtor has less than \$40,000.00 in equity, the homestead is fully exempt, and the debtor has no interest to which a judgment lien may attach.
 - iii. Accordingly a debtor-seller can give clear title to the purchaser of fully-exempt property.

2. Tax liens

- a. Wisconsin case law.
 - i. *CVW, Ltd. v. Stress*, 230 Wis. 2d 450, 602 N.W.2d 162 (Ct. App. 1999).
 - a. Because a judgment lien was subject to the homestead exemption while a federal tax lien was not, the operation of the homestead exemption effectively subordinated the otherwise superior judgment lien to the status of a junior lien, which was discharged by operation of federal law by the execution of the IRS's quit claim deed after judicial sale.
 - ii. *Anchor Savings & Loan Ass'n v. Week*, 62 Wis. 2d 169, 174, 213 N.W.2d 737 (1974).
 - a. "In the instant case, once the foreclosure judgment was entered, the claim of the respondent David Hansen was subordinate to that portion of the surplus which was statutorily exempt as homestead and subordinate to the tax liens to which the homestead exemption does not apply."

b. Federal case law.

- ii. *In re Hazard*, 116 B.R. 668 (Bankr. W.D. Wis. 1989) (Martin), *rev'd on other grounds*, *In re Hazard*, 113 B.R. 494, 1990 U.S. Dist. LEXIS 4988 (W.D. Wis. 1990) (Crabb).
 - a. "A Wisconsin judgment lien encumbers only the surplus over and above all prior liens and the statutory limit of the homestead exemption." *Id.* at 670 (citations omitted).
 - b. "A homestead is not exempt as to, *inter alia*, consensual mortgages or tax liens." *Id.* (citations omitted).
 - c. "The tax lien can be enforced against even the exempt portion of the property; the judgment lien cannot. Thus, it would appear that a judgment lien is superior to a subsequently recorded federal tax lien unless the subject property is a homestead. The case law, such that it is, suggests that the IRS lien gains priority over the previously docketed judgment because the latter, but not the former, is subject to the homestead exemption." *Id.*

II. 11 U.S.C. 522(f)(1).

- A. Generally speaking, there are different types of liens: statutory liens, security interests or consensual liens, and judicial liens.
1. **Lien** - defined as a “charge against or interest in property to secure payment of a debt or performance of an obligation.” 11 U.S.C. §101(37).
 2. **Statutory Lien** - defined as a “lien arising 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 for by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.” 11 U.S.C. §101(53).
 3. **Security Interest** - defined as a “lien created by an agreement.” 11 U.S.C. §101(51).
 4. **Judicial Lien** - defined as a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” 11 U.S.C. §101(36).
- B. Internal Revenue Service liens, Wisconsin Department of Revenue liens, Unemployment Compensation liens, and statutory contractor liens, are not judgment liens.
1. *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).
 - a. Petitioner appealed a judgment from the United States Court of Appeals for the Seventh Circuit affirming the district court's ruling that under 11 U.S.C. §522(f)(1), respondent former spouse could use a state homestead exemption in bankruptcy to avoid a lien created by the divorce decree on the marital home.
 - b. The U.S. Supreme Court reversed because the debtor can only avoid the “fixing” of a lien to the property. Because the divorce decree created the parties’ interests in the marital home at the same time it created the lien against the property, the debtor could not avoid the lien.

C. Judicial Liens.

1. Common judicial liens are attachment, execution, and judgment liens.
2. Garnishment liens are also judicial liens.
3. 11 U.S.C. §522(f)(1)(A) applies only to judicial liens.
4. 11 U.S.C. §522(f)(1)(B) applies to security interests. However, because of the strong consumer protection laws, it is not an issue that comes up a lot. This statute may be of benefit in the occasional circumstance were there is a non-purchase money security interest in tools of the trade.

D. 11 U.S.C. § 522(f)(1)

1. “[A] 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...if such lien is a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5) [domestic support obligation as defined in §101(14A).”
2. Section 522(f)(2)(A) and (B) provide a formula for whether an exemption is impaired:
 - (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.

E. 11 U.S.C. § 522(f)(2) on multiple liens – sandwiched liens

1. Three circuits have addressed and all come to the same conclusion: In situations where mortgage and statutory liens that post date judgment, the debtor can still avoid judgment lien to extent of exemptions under

522(f)(1) and (f)(2). *In re Brinley*, 403 F.3d 415 (6th Cir. 2004); *In re Tarasm*, 131 Fed. Appx 167 (11th Cir. 2005); *In re Kolich*, 328 F.3d 406 (8th Cir. 2003).

2. *In re Kolich*, 328 F.3d 406 (8th Cir. 2003).
 - i. A hospital obtained a \$134,000.00 judgment against the debtors, which it recorded as a judicial lien against their homestead. When the hospital began proceedings to collect its junior lien, the debtors commenced a Chapter 7 proceeding.
 - ii. At that time, the homestead's fair market value was \$275,000.00, the first mortgage had an outstanding balance of \$219,000.00, and both the hospital's judgment of \$134,000.00 and a junior second mortgage for \$80,000.00 were unpaid.
 - iii. On appeal from the BAP's finding that the debtors' homestead exemption was impaired and avoided the hospital lien in its entirety, the hospital argued that the BAP's "mechanical application" of the statutory formula under 11 U.S.C. § 522(f)(2)(A) produced an absurd result and an unjust windfall to a junior secured creditor.
 - iv. The appellate court found that there was no sufficient basis for concluding that literal application of the term "all other liens" in the statutory formula under § 522(f)(2)(A) produced a result demonstrably at odds with the intentions of its drafters. The task of the courts was simply to apply 11 U.S.C. § 522(f)(2)(A) as Congress wrote it. Thus, BAP's literal application of the statutory formula was proper.
3. You can pick and chose the judgments you want to avoid. Thus, if you have several judgments, you may want to avoid those liens of the creditors with whom it would be difficult to negotiate.

F. 11 U.S.C. § 522(f) can change priority of liens in state court proceedings.

1. Example:

Debtor owns homestead property worth \$100,000.00.

Debtor has three judgments against him, all for \$1 million each.

Debtor has \$100,000.00 non-dischargeable tax lien against him that post dates the judgments. Tax lien has priority over the judgments, but possibly only to the extent of the homestead exemption.

Debtor can file Chapter 7, claim property as exempt.

Debtor can now avoid all three judgment liens, and the only lien remaining will be the tax lien.

The debtor could then probably seek a discharge of the federal tax lien against the property, refinance the property, and pay off the tax lien, at a discounted rate.

Plus, debtor can actually sell property. In state court, it would be practically impossible to sell the property because of the competing liens on the property and the unwillingness of a buyer to purchase property that may be subject to various liens.

2. Property must be claimed as exempt in order to avoid the lien. It does not have to be homestead, wild card is sufficient. However, if you plan to avoid the lien, there should at least be some exemption associated with the property.

G. 11 U.S.C. §522(c) - With limited exceptions, property that is exempt in the bankruptcy is not liable for a debt, even if the debt is determined to be not dischargeable.

H. 522(f) can be used to avoid a judgment, even if the debt has been determined to be non-dischargeable.

III. Satisfaction Judgment Under Wisconsin Law

A. Wis. Stat. § 806.19(4). "Any person who has secured a discharge of a judgment debt in bankruptcy and any person interested in real property to which the judgment attaches may submit an application for an order of satisfaction of the judgment and an attached order of satisfaction to the clerk of the court in which the judgment was entered."

1. One can satisfy a judgement after bankruptcy discharge is entered - *Megal Dev. Corp. v. Craig Shadorf, d/b/a Spectrum Investments, and Susan Shadorf*, 2005 WI 151, 286 Wis. 2d 105, 705 N.W.2d 645.

- i. Plaintiff corporation obtained a judgment for eviction against defendants, and the judgment subsequently became a lien upon defendant's homestead property. Coming out of their Chapter 7 Bankruptcy, the defendants' homestead equity exceeded the \$40,000.00 homestead exemption.
 - ii. The Wisconsin Supreme Court reversed the Wisconsin Court of appeals ruling and held the Court of Appeals erred in refusing to satisfy the judgment debt pursuant to § 806.19.
 - iii. The Wisconsin Supreme Court found the language of § 806.19(4)(a) unambiguously supported defendants' position that § 806.19(4) provided a mechanism through the operation of state law for a debtor to obtain satisfaction of a judgment and a judgment lien when the underlying judgment had been discharged in bankruptcy, whether or not the debtor first obtained a lien avoidance.
 - iii. The Court further found that § 806.19(4) was not preempted by federal bankruptcy law under the Supremacy Clause because it did not conflict with federal bankruptcy law. While § 806.19(4) was particular to the bankruptcy proceeding, in that it required the discharge of judgments in bankruptcy before it could operate, it did not create an exemption. Nor did it limit the powers of the trustee.
2. If judgment is not satisfied, then it remains a lien on any property then owned by the debtor.
3. *In re Tillman Produce Co.*, 396 F. Supp. 500 (W.D. Wis. 1975).
 - i. The satisfaction of judgment by the debtor did not affect the lien on the property of the bankruptcy estate. Thus, the filing of the satisfaction did not change the secured claim in the bankruptcy case.
4. *In re Houtakker*, 01-C-377 (Shabaz, affirming Judge Martin's decision) (not published)
 - i. Secured claims are fixed as of the date of filing.
 - ii. The judgment creditor was a secured claimant as to the property regardless of whether the trustee had filed an application and order for satisfaction of judgment after the bankruptcy filing.

B. Procedure.

1. Prepare application. Form provided in statute.
2. Include copy of schedule listing creditor (circle).
3. Send to Clerk of Courts with check for \$5.00.
4. 5 day notice to other party.
 - a. Milwaukee County requires an Affidavit of Service.
5. Check each county clerk for variations on procedure.
 - a. Milwaukee County can take weeks to enter satisfaction, other counties only take days.
 - b. If you have an imminent real estate closing or refinance, make sure you account for time it takes to get the satisfactions entered.
 - c. Some title companies and financiers will closing on the strength of a properly submitted application before the order is entered.

C. Transcript judgments. Wis. Stat. § 806.13.

1. Get certified copy of satisfaction from county where original judgment was docketed and send with \$5.00 for satisfaction.
2. Check with each county for variations on procedure.