

MEMO

TO: Commission

FROM: John M. Cannel,

DATED: March 10, 2014

RE: Judgments and Enforcement – Perfection of Statutory Liens and Level of Statutory Exemptions

1. Perfection of Statutory Liens

An issue was raised at the February meeting as to whether it would be possible to make a judgment that was recorded in the Statewide Judgment Lien Index into a perfected lien and what the implications of that action would be. As the issue was framed, at present, a judgment lien that is not perfected by levy can be avoided by a trustee in bankruptcy using the power of a hypothetical levying judicial lien creditor. As a result, to protect priority, the holder of a judgment lien must levy on real estate even if it is not clear that that action is otherwise in the holder's interest.

It is clear that, under current law, a judgment lien is not a perfected lien. See e.g. *In the Matter of Blease*, 605 F.2d 97, (3d Cir. 1979). While the lien is publicly recorded and specifically applies to all real property, its priority is not established completely by filing in the Statewide Judicial Lien Index. If there is more than one judgment, the first to levy has priority over the others. *Burg v. Edmondson*, 111 N.J.Super. 82, 85, 267 A.2d 545 (1970). The statute establishing this priority is:

2A:17-39 Sale of real estate free of lien of judgments or recognizances on which executions not issued

Whereas, other judgments, and recognizances, besides those, or some of those, by virtue whereof the sale aforesaid was made, might affect the real estate so sold, if no provision be made to remedy the same, and whereas, the persons who have not taken, or will not take out executions upon their judgments, or recognizances, ought not to hinder or prevent such as do take out executions from having the proper effect and fruits thereof, therefore, in any such case, the purchaser, his heirs and assigns, shall hold the lands, tenements, hereditaments, and real estate by him or her purchased as aforesaid, free and

clear of all other judgments and recognizances, whatsoever, on or by virtue of which no execution has been taken out and executed on the real estate so purchased.

The statute is old; it has not changed in any appreciable way since it was enacted by the colonial legislature in 1743. The detailed history through 1862 is set out in *Clement v. Kaighn*, 15 N.J.Eq. 47, 54-56 (Ch. 1862). After that time, the statute continued unchanged through compilation in 1877, recompilation in 1937 and revision in 1951. It has been applied consistently in judicial decisions. See cases gathered by *Burg v. Edmondson*, supra at 85. The statute has a purpose, to give a benefit to the creditor who has the interest and energy to enforce a judgment over other creditors who “have not taken, or will not take out executions”. While that purpose has some continuing validity, it must be recognized that it is now ordinary to obtain a judgment lien and wait for it to be satisfied when the property is transferred or encumbered. In those circumstances, the priority of liens is determined by age. In addition, it may be relevant that when the statute was enacted, judgments became liens when entered in the minutes of the court, *Clement v. Kaighn*, supra at 56, a record much less accessible and searchable than the current Statewide Index.

An approach that a recorded judgment is a perfected lien against all real property of the debtor is possible. *U.S. v. McDermott*, 507 U.S. 447, 113 S.Ct. 1526, 123 L.Ed.2d 128 (1993) holds that the lien can be considered perfected against all realty that a person owns from the time of filing against an argument that it was not perfected because it did not identify particular property. See also, *United States v. Vermont*, 377 U.S. 351, 84 S.Ct. 1267, 12 L.Ed.2d 370 (1964), *U.S. v. McDermott* involved a question of priority between a judgment lien and a more recent federal tax lien. However, because both liens were filed before the property was acquired, both became perfected on the date of acquisition, and the tax lien had priority.

A rule that judgment liens were perfected would treat judgment liens more like mortgages or like all liens are when sale is voluntary or as the result of foreclosure. Priority would be determined solely by the date of the lien. Such a rule is simpler, but it removes the benefit, the incentive, given to the creditor who identifies and moves against a particular parcel of realty.

An automatic perfection rule also broadens the distinction between creditors' rights as to realty and as to personalty. A judgment lien is not in itself a lien against personalty. As a result, the first creditor to seek a levy (under current law) or seek a levy with instructions as to the item (under the proposed draft) has priority. Other creditors, including those with older judgments, have only subsidiary rights. However, there are many other differences between the effect of a judgment lien on realty and the effect of a judgment on personalty. Since there is no judgment lien of personalty, in the absence of creditor action, a debtor can give good title on transfer of personalty. In contrast, the judgment lien on realty makes the creditor's claim more powerful as to realty.

A fifty-state statutory search produced only limited results. Unfortunately, many states do not have a statute that indicates or implies priority. A fifty-state search of court decisions might fill in some of the blanks. Most, but not all, states have a recording provision like New Jersey's Statewide Lien Index that makes a judgment a lien on real estate. However, only New Jersey and Maryland seem to make that lien statewide. Others that I have been able to identify have the judgment recorded in the county (or district in Alaska) land records, and the lien affects realty in the county.

New Jersey is not alone in giving the levying judgment priority over other judgment liens. At least California (Civ.Pro. 701.810) and Oklahoma (12-737) seem to apply the same rule. On the other hand, there are a number of states where a judgment lien is perfected without levy. At least Nebraska (25-1504), Kansas (60-2406), Kentucky (426.020), Utah (12sec.2688) and Wyoming (1-17-302 and 337) seem to fall into this category. There is a third approach but it is not clear what its effect is in bankruptcy. In New York (CPLR 5203) and South Carolina (15-38-810 and 15-39-880), a levying creditor must give notice to other judicial lien creditors. If the creditor intervenes, priority is determined by the date of the liens; if the creditor does not, his lien is subordinated to that of the levying creditor.

Whatever rule is chosen, the current section on disposition of proceeds of sale is insufficiently specific. If the old rule of priority for the levying creditor is to be retained, that section should so indicate. If a rule that priority among judgment liens is to be based solely of

time of filing, that too should be specified. As a result, I have set out drafts for both courses of action.

[Current NJ Rule] C-23. Priorities in Distribution of proceeds

a. The proceeds of real property, ~~real or personal~~, which has been levied against to collect a judgment shall be distributed in the following order:

~~a.~~ (1) to the judgment creditor for whom the property was levied against and sold;

~~b.~~ (2) ~~if the sale is of personal property~~, to other judgment creditors and to junior lienholders whose liens are extinguished by the sale; who have levied against the proceeds of the sale;

~~c.~~ ~~to junior lienholders whose liens are extinguished by the sale;~~

~~d.~~ (3) to the debtor.

b. The proceeds of personal property which has been levied against to collect a judgment shall be distributed in the following order:

(1) to the judgment creditor for whom the property was levied against and sold;

(2) to other judgment creditors who have levied against the proceeds of the sale;

(3) to junior lienholders whose liens are extinguished by the sale;

(4) to the debtor.

c. Sale of the property shall extinguish all judgment liens against the property and all other liens against the property that are junior to the levying judgment lien.

[Lien Perfected without Levy Rule] C-23. Priorities in Distribution of proceeds

a. The proceeds of property, real or personal, which has been levied against to collect a judgment shall be distributed in the following order:

~~a.~~ (1) to the judgment creditor for whom the property was levied against and sold;

~~b.~~ (2) if the sale is of personal property, to other judgment creditors who have levied against the proceeds of the sale;

~~c.~~ (3) to junior lienholders whose liens are extinguished by the sale;

~~d.~~ (4) to the debtor.

b. Sale of the property shall extinguish all liens against the that are junior to the levying judgment lien.

2. Statutory Exemptions

At the last meeting, the Commissioners present received copies of the National Consumer Law Center's Model Family Financial Protection Act with its appendixes outlining the levels of exemptions in each state and received relevant provisions of the Uniform Law Commission's Model Act. Copies will be distributed to other Commissioners with this mailing. What follows is an attempt to summarize those materials.

Homestead Exemption

New Jersey is one of three states that provide no, or almost no, homestead exemption. Eight jurisdictions have a homestead exemption with no dollar limit. Others vary from \$15,000 to \$550,000. The median limit is about \$75,000. The Uniform Law Commission's 1979 Model Act sets the limit at \$10,000 for an individual and \$20,000 for jointly held property.

Exemption for car

Only 7 states including New Jersey provide no protection for a car. Most do it with a specific exemption ranging from about \$2500 to \$12,000. The median is about \$4600. Twelve jurisdictions have a substantial exemption for combined household goods and car. The Uniform Law Commission's Model Act has no exemption for a car.

Exemption for household goods

New Jersey provides a \$1000 exemption for household goods. Five other states have a similar or lesser limit. Eight jurisdictions exempt household goods without limit. The range in other states is from \$30,000 to \$1,500, with a median of about \$4,500. The Uniform Law Commission's Model Act sets the limit for each household item at \$500 but no limit for all household goods.

Exemption for bank account

It is difficult to see any pattern in this kind of exemption. New Jersey has a wild card exemption of \$1000 that can be used to protect a bank account. The Uniform Law Commission's Model

Act has an exemption for “liquid assets” of \$1,500 if the debtor does not claim a homestead exemption and \$500 if he does.

Limitation on Wage Garnishment

New Jersey is one of five states that limit wage garnishment to 10%. Four others forbid wage garnishment altogether. Seven states protect 80 or 85% of wages. Twenty-nine states protect 75%. The rest base protection solely on the minimum wage or the federal poverty level. That protection may be more or less than a percentage limit in particular cases. The Uniform Law Commission's Model Act does not deal with this subject.

Cost of Living Adjustments

The current New Jersey exemptions were enacted in 1973. To adjust these exemptions for inflation from 1973 to the present, multiply by 5.28. The Uniform Law Commission's Model Act was approved in 1979. To adjust its exemptions for inflation from 1979 to the present, multiply by 3.08