GARNISHMENT, BANKRUPTCY AND FAIR DEBT COLLECTION PRACTICES IN THE UNITED STATES ©

Alexander A Wodi[1]

Abstract

In the United States your wages can be garnished if you owe child support, alimony, student loans, or back taxes, or a court judgment has been entered against you. This paper is on the law and practice of Wage Garnishment, The exemptions that may be claimed and options available, including filing for Bankruptcy (Chapters 7, 11 and 13 et al) and the protections and restriction under the Fair Debts Collection Practices Act. The paper discusses the relevant law and principles with case law and references in a clear and concise manner.

Keywords: Bankruptcy, Bankruptcy Code, Chapter 7, 11 and 13, 18 USC 3205, Wage Garnishment, Fair Debts Collection Practices Act, Child Support, Alimony, Student loans, Unpaid Taxes

---

[1] Alex Wodi (JD/LLB, BL, LLM, CIPP/US, ACIArb, UK, Member ICMC) is a lawyer and a certified data privacy professional, CIPP/US. He has a background in banking and commercial law, regulatory compliance, international law, and comparative law. He is also a chartered arbitrator, mediator, and conciliator. He has written many scholarly articles and is the author of *Garnishment Law and Practice in Nigeria, UK, and US* (Amazon, and Barnes & Noble, 2023) ISBN 9798987288306 and *The Most Expensive Real Estate and Other Works: An Anthology of Essays, Poems and Artworks on the Cusp of a Pandemic* (Amazon, 2021) ISBN 9798706781880. He may be contacted via email – aawodi21@yahoo.com, or alexwodi@wodiandwodi.com.

Contents

I. GARNISHMENT

Your wages can be garnished if you owe child support, alimony, student loans, or back taxes, or a court judgment has been entered against you. The implication of a **wage garnishment**, also referred to as "wage attachment," is that the employer can hold back a portion of a debtor's wages and give it directly to the creditor.

Title 28 US Code § 3205 governs the federal regime of wage garnishment. The NYCPLR § 5231 also provides for garnishment referred to as "income execution" in the state of New York. Other States throughout the United States also provide for wage garnishment for the settlement of judgment debts.

In most cases, a creditor cannot garnish a debtor's wages without first obtaining a money judgment against the debtor in the sum owed. The creditor sends the judgment or relevant documentation to the judgment debtor's employer (now garnishee), typically through the local sheriff. The documents direct the employer to take a specific amount of the judgment debtor's paycheck and send it directly to the creditor until the debt is paid off.

However, in respect of unpaid taxes, federal student loans, child support, or alimony the creditor does not have to go through the court system to get a wage garnishment.

The Judgment debtor can take measures to stop the garnishment which will continue until it is terminated, by an order quashing the writ of garnishment[1]; exhaustion of the property in possession, custody, or control of the garnishee; or until the debt is paid in full. Such measures include claiming an **exemption**[2] with the court or filing for **bankruptcy**.[3]

---

[1] See *United States v. Manning* US Dist. Ct. SD Ohio., West. Div., Case No. 1:03-CR-009, (Judgment delivered Dec. 14, 2012).

[2] 2s. 303 of the Consumer Credit Protection Act provides limits to what portion of non-exempt disposable earnings may be subject to garnishment, with exceptions for unpaid child and spousal support. The NYCPLR § 5231 and other state laws also provide limits to wage garnishment.

[3] It is important to determine whether a debtor is "judgment proof" or would not file for bankruptcy before deploying time and resources on judgment enforcement. The phrase "judgment proof" describes a debtor who has a judgment against him, but has no assets to pay that judgment, and will not in the foreseeable future. See *In Re Zwirn,* 2005 WL 1978510 the debtor transferred $600,000 to a newly created New York Corp. which he controlled and filed chapter 7 Bankruptcy thereby making himself "judgment proof". The court overruled the creditors objection to the debtor's discharge. See also In *Re Ruskin,* (Bankr. M.D. Fla 1983).

II. FILING FOR BANKRUPTCY[4]

It is important to determine whether a debtor is "judgment proof" or would not file for bankruptcy before deploying time and resources on judgment enforcement. The phrase "judgment proof" describes a debtor who has a judgment against him, but has no assets to pay that judgment, and will not in the foreseeable future. One veritable tool for investigating and determining the financial status of a judgment debtor is discovery methods[5] which are available to parties to civil litigation. These include submitting an interrogatory, a written list of questions that one party sends to another, are used to determine the location of assets, such as bank accounts, personal property, real property, or income. The second method of discovery is by deposition, which is a sworn oral interview which shall be recorded. These discovery processes[6] are crucial because they lay the groundwork for debt collection and provide a creditor with a better picture of a debtor's finances.

Title 11 of the United States Code, also known as the **United States Bankruptcy Code**,[7] is the source of bankruptcy law in the United States Code.[8] The most common type of personal bankruptcy for individuals are Chapter 7 and Chapter 13. Chapter 7, known as a "straight bankruptcy", involves the discharge of certain debts without repayment. Chapter 13 involves a plan of repayment of debts over a period of years. Whether a person qualifies for Chapter 7 or Chapter 13 is in part determined by income. As many as 65% of all US consumer bankruptcy filings are Chapter 7 cases.[9]

Before a consumer may obtain bankruptcy relief under either Chapter 7 or Chapter 13, the debtor is to undertake credit counselling with approved counselling agencies prior to filing a bankruptcy petition and to undertake education in personal financial management from approved agencies prior to being granted a discharge of debts under either Chapter 7 or Chapter 13.

Corporations and other business forms normally file under Chapters 7 or 11.[10]

Commencement of a bankruptcy case creates an "estate".[11] Generally, the debtor's creditors must look to the assets of the estate for satisfaction of their claims. The estate is comprised of all property interests of the debtor at the time of case commencement, subject to certain exclusions and exemptions.

---

[4] See Tuovila, A., Brock, T., and Kvilhaug, S., *Bankruptcy Explained: Types and How it Works,* Investopedia Website, Bankruptcy Explained: Types and How It Works (investopedia.com) accessed 4 November 2022.

[5] See Title V. Disclosure and Discovery, Fed. R. Civ. P. rr 26 – 37.

[6] 6 Others include requests for admission; and production of documents. See Fed. R. Civ. P., rr. 34 and 36.

[7] See *"U.S. Code: Title 11 - Bankruptcy".* Legal Information Institute. Cornell Law School.

[8] See Bankruptcy Reform Act of 1978, as amended, codified in Title 11 of the United States Code and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

[9] United States Courts Website, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (Accessed 3 October 2022).

[10] ibid.

[11] 11 U.S.C. § 541. Except in chapter 9 bankruptcy cases.

The administration of bankruptcy cases is usually undertaken by a trustee,[12] an officer appointed by the United States Trustee Program of the Department of Justice, to represent the debtor's estate in the proceeding.

i. **Definition**

Bankruptcy is a financial safety net established by federal law that helps people escape debt. It is a legal proceeding initiated when a person or business is unable to repay outstanding debts or obligations.

Bankruptcy works as a safety net for individuals, families, and businesses by helping them get back on their feet financially when overwhelmed by debt. For many, filing bankruptcy is a natural step after an unexpected event like a job loss, illness, or divorce. Bankruptcy relieves the stress associated with medical bills, foreclosure, credit card balances,[13] and more.

Upon the successful completion of bankruptcy proceedings, the debtor is relieved of the debt obligations that were incurred prior to filing for bankruptcy.[14]

ii. **Types of Bankruptcy**

There are three popular types of Bankruptcy: Chapter 7 Bankruptcy, Chapter 13 Bankruptcy, and Chapter 11 Bankruptcy. There are factors that inform choice of chapter an individual may decide file. Most individuals file for bankruptcy under Chapter 7 or Chapter 13, while businesses can file under Chapter 11 or Chapter 13. Each of these types of bankruptcy have certain advantages and disadvantages.[15]

1. **Chapter 7 bankruptcy takes about four months to finish**: basic liquidation for individuals and businesses; also known as straight bankruptcy; it is the simplest and quickest form of bankruptcy available.

---

[12] See The Court in *Re In re Waldvogel*, 125 B.R. 13, 15 (Bankr. E.D. Wis. 1991), held – "In a chapter 7 case, a chapter 7 trustee is appointed to protect the interests of creditors and the estate, and to balance those interests against those of the debtor."

[13] Credit cards have been identified as one of the reasons for rising numbers of Elders filing bankruptcy. See Pottow, J., The Rise in Elder Bankruptcy Filings and Failure of US Bankruptcy Law, 2010, University of Michigan Legal Working Paper Series, pp. 223-225, Academia Website, The Rise in Elder Bankruptcy Filings and Failure of US Bankruptcy Law | John Pottow - Academia.edu (Accessed 1 Oct. 2022).

[14] See *Reliant Energy Serv's., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825, (5th Cir.2003); *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716, (5th Cir.1985).

[15] Studies have shown that chapter choice can be dominated by attorney recommendation which is tied to "local legal culture". See Braucher et al, Race, Attorney Influence and Bankruptcy Chapter Choice, Journal of Empirical Legal Studies, Vol. 9, Issue 3, 393-429, Sept. 2012, Academia Website, Race, Attorney Influence, and Bankruptcy Chapter Choice | Dov Cohen - Academia. (Accessed 3 November 2022). See also Lefgren, L., & McIntyre, F. (2009). Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates. The Journal of Law & Economics, 52(2), 367–393. JSTOR, https://doi.org/10.1086/596561; and Mann, L. S. (2015). 'TIL DEBT DO US PART: The Interplay Between Bankruptcy and Divorce. GP Solo, 32(4), 46–50. http://www.jstor.org/stable/24634261

.

Bankruptcy filers do not repay creditors but can lose property in this type of bankruptcy. This is the fastest type of Bankruptcy, and it facilitates the

"discharge"[16] or wipe out qualified debt, such as credit card balances, medical bills, and personal loans.[17] It does not solve any other financial problems.

Chapter 7 bankruptcy works best for people who do not have much money left after paying monthly expenses and do not have more property than their state lets them protect or "exempt" with a bankruptcy exemption. Filers lose property they cannot protect with a bankruptcy exemption. Individuals and businesses can file this type of bankruptcy.

Having more assets means there is more to protect by filing Chapter 13, whereas having more debt, especially unsecured debt such as credit card debt, means that the discharge of Chapter 7 is more advantageous.

2. Chapter 13 bankruptcy takes three to five years to complete: rehabilitation with a payment plan for individuals with a regular source of income; enables individuals with regular income to develop a plan to repay all or part of their debts; also known as Wage Earner Bankruptcy. Bankruptcy filers repay some or all of what they owe creditors and do not lose property in this type of bankruptcy.[18] Chapter 13 allows the filer to repay secured debt (debt secured by collateral) and priority debt (such as child support and certain taxes, which are also nondischargeable) ahead of other debts, and so more secured and priority debt should be associated with greater Chapter 13 filing.[19]

3. Chapter 11 bankruptcy varies in length: rehabilitation or reorganization, used primarily by business debtors but sometimes by individuals with substantial debts and assets; known as corporate bankruptcy, it is a form of

corporate financial reorganization that typically allows companies to continue to function while they follow debt repayment plans.

Everyone involved works to restructure the filer's finances, and the filer usually pays creditors less. The filer might or might not sell property to facilitate a workable plan. The Most Expensive Type

[16] Discharge means you are no longer responsible for repaying the debt, and the creditor can no longer attempt to collect from you.

[17] See *Werner v. Hofmann* (1993) 5 F.3d 1170, In a dispute arising from a dairy cattle lease agreement, the court held the debt dischargeable in chapter 7 bankruptcy petition, in the absence of fraud, larceny or embezzlement. The court further noted that *"[t]he Statutory exceptions to discharge in bankruptcy are narrowly construed, and the creditor opposing discharge must prove the debt falls within an exception to discharge." Werner v. Hoffman, 5 F.3d 1170 at 1172, (8th Cir. 1993) citing Belfry v. Cardoza (In re Belfry), 862 F.2d 661, 662, (8th Cir. 1988). 11 U.S.C. § 523(a)(4)."*

[18] Homeownership and threatened foreclosure have a greater likelihood to be associated with filing Chapter 13 Bankruptcy.

[19] Braucher, ibid 23.

of Bankruptcy because it is complicated, expensive, and usually filed by large and small businesses needing financial help from creditors.[20]

Once a debtor files for bankruptcy, an **automatic stay**[21] will come into effect. Congress has described the automatic stay thus:

> *"The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassments, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy."*[22]

The automatic stay means that the mere request for bankruptcy protection automatically halts most lawsuits, repossessions, foreclosures, evictions, garnishments, attachments, utility shut offs, and debt collection activity, as long as the stay is in effect. The court will notify the creditors of the stay, but if the creditors are not alerted on time to stop wage garnishment, the debtor/employee can give notice of the bankruptcy to his/her employer's payroll department, as well as the levying officer handling the wage garnishment (in most cases, the sheriff).

It should be noted that an automatic stay will not affect child support or alimony, since these are priority debts that are non-dischargeable.[23] When any creditor that is affected by the stay wants to continue its collection efforts, it must prove to the court there is good cause to lift the stay.

[20] See *Toibb v. Radloff,* 501 US 157; 111 S. Ct. 2197 (1991) where the debtor seeking to protect some shares and stock found to be of substantial value after filing for bankruptcy had sought to convert from a Chapter 7 to Chapter 11, but the court denied the application because did not have an ongoing business. The court held that Chapter 11 relief is limited to business debtors and went further to noted that Chapter 11 is a more complex process and will almost certainly consume more time and resources than the simpler Chapter 7 procedures.

[21] *The filing of a bankruptcy petition imposes an automatic stay against the debtor's property. 11 U.S.C. § 362(a) (2012). In LN Management LLC Series 5105 Portraits Place v. Green Tree Loan Servicing LLC, we recognized that "a sale conducted during an automatic stay in bankruptcy proceedings is invalid."133 Nev. 394, 395, 399 P.3d 359, 359 (2017). However, we did not address the impact on a sale where the bankruptcy court later issues a retroactive annulment of the stay. This type of relief from a stay "ratif[ies] retroactively any violation of the automatic stay which would otherwise be void." In re Schwartz, 954 F.2d 569, 573 (9th Cir. 1992) (discussing the bankruptcy court's power under 11 U.S.C. § 362(d) and explaining that "[i]f a creditor obtains retroactive relief under section 362(d), there is no violation of the automatic stay"). Therefore, the effect of SFR obtaining a retroactive annulment of the stay is that the otherwise void HOA sale, which violated the stay at the time it was made, is now valid.*

[22] H.R. Rep No. 595, 95th Cong., 1st Sess. 340 (1978), Reprinted in 1978 USC Cong., Admin. News 5787, 5963, 6296-97. See *also In re Schwartz,* 954 F.2d 569, 573 (9th Cir. 1992).

[23] The U.S. Bankruptcy Code lists 19 different categories of debts that cannot be discharged in:

- Alimony and child support
- Certain unpaid taxes, such as tax liens. However, some federal, state, and local taxes may be eligible for discharge if they date back several years.
- Debts for willful and malicious injury to another person or property ("Willful and malicious" here means deliberate and without just cause. In Chapter 13 bankruptcy, this applies only to injury to people; debts for property damage may be discharged.)
- Debts for death or personal injury caused by the debtor's operation of a motor vehicle while intoxicated from alcohol or impaired by other substances.
- Debts that you failed to list in your bankruptcy filing.
- Common/maintenance fees for condo association (or similar).

Generally, unsecured creditors that want to continue garnishing wages cannot present good cause to get a stay lifted.

iii. **Alternatives to Bankruptcy**

Before filing for bankruptcy, it should be noted that although declaring bankruptcy has the advantage of helping the debtor relieve the legal obligation to pay debts and save the debtor's home, business, or ability to function financially, depending on which type of bankruptcy filed, the downside is that it also can lower credit rating, making it more difficult to get a loan, mortgage, credit card, buy a home or business, or rent an apartment.

Sometimes, people or companies may want to avoid bankruptcy, and there are several alternatives that may be able to reduce debt obligations.

Negotiating with creditors without involving the courts can sometimes work to the benefit of both sides. Rather than risk receiving nothing if the debtor files for bankruptcy, a creditor might find it more appealing to agree to a repayment plan that reduces debt or spreads payments over a longer period of time.

Personal loans and mortgages can be restructured and modified. While in the case of unpaid taxes the IRS may offer a monthly payment plan if the tax obligations cannot be paid all at once.

III. THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

Federal law provides some protection to debtors where a third-party debt collector[24]24 is involved. Credit card debt, medical bills, student loans, mortgages, and other kinds of household debt are covered by the law.

The Fair Debt Collection Practices Act (FDCPA) is a federal law that regulates the conduct of third-party debt collectors engaged in the collection of debts on behalf of another person or entity. The law restricts the mode of contact between collectors and debtors as well as the time of day and number of times that contact can be made, the type of language they may use, and how they represent themselves. If the FDCPA is contravened, the debtor may submit a complaint with the Consumer Financial Protection Bureau or sue the debt collection company as well as the individual debt collector for damages and attorney fees.[25]

---

[24] A debt collector is a company or agency that is in the business of recovering money owed on delinquent accounts. They are used by lenders and creditors to recover funds that are past due, or from accounts that are in default.

[25] See *Marx v. General Revenue Corp.,*133 S. Ct. 1166, 1171 n.1, (2013) where the US Supreme Court Held – *"The Fair Debt Collection Practices Act is a consumer protection statute that prohibits certain abusive, deceptive, and unfair debt collection practices," and it "authorizes any aggrieved person to recover damages from 'any debt collector who fails to comply with any provision' of the [Act]."*

The FDCPA does not protect debtors from those who are attempting to collect a personal debt.[26] The FDCPA only applies to third-party debt collectors, such as employees of a debt collection agency.

IV. CONCLUSION

Garnishment is an effective mode of judgment enforcement which affords the judgment creditor access to funds due and accruing to the judgment debtor from a

third party. It could be through attachment of wages or property made available for the satisfaction of a judgment debt. The process may however be automatically stayed if the debt arose from unpaid child support or alimony, since these are priority debts that are non-dischargeable. We also noted that the FDCPA protects the debtor from harassment and unprofessional conduct by debt collectors and provides a channel for redress complaints of and sanctions of violations of the FDCPA.

[26] If you owe money to the local hardware store, for example, and the owner of the store calls you to collect that debt, that person is not a debt collector under the terms of the FDCPA.