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Consolidating Judgment Liens

By Charles Shafer

Winning a money judgment is often just the beginning of the lawyer's job in helping the client. The law places the burden on the judgment creditor to find and obtain sufficient assets to satisfy the judgment. There is no penalty (other than accruing interest) for a debtor's failure to pay a judgment creditor. For example, debtors do not have to fear jail in the vast majority of cases.

But in attempting to satisfy judgments a lawyer in Maryland, as in other states, faces a thicket of statutes, court rules and case law that have grown up over the last two centuries. Unless our goal is to protect debtors by preserving obstacles in the creditor's path or to give law professors something to consume many classroom hours, the time has come to streamline and rationalize the system of judicial liens.

We can shed the fat of unnecessary complications and antiquated rules which are debilitating to the financial health of creditors by enacting a *Maryland Consolidated Lien* statute, "MacLien" for short. And since the statute will cover all forms of creditor

liens, I call it "MacLien Deluxe."

MacLien would require the state to create a single filing system to contain a record of all suits filed, judgments (and renewal of judgments), lis pendens notices, and prejudgment attachments in all courts throughout the state. All state and federal tax liens should be recorded in this system. Court clerks would provide the necessary data for each case. Any person could search these records at terminals in any court throughout the state. A judgment would become a lien, effective on the date rendered, throughout the state on any personal or real property of the judgment debtor.

Since the statute of limitations on judgments is twelve years (unless renewed), due process might require that creditors with judgments that arose before legislation is passed providing for the establishment of the system would maintain their liens on real property for the balance of the judgments' twelve year life.

The rules for priority among various judgment liens as well as other interests in the debtor's property would be set forth by statute. Although in this article I can not thoroughly explore all of the ramifications of this proposal, I will discuss some of the interests in property that particular creditors have and suggest how those interests might be handled.

Statewide Liens

One of the most significant distinctions between the present system and MacLien is the statewide nature of judgment liens. Currently a money judgment obtained in the district court of Baltimore City or a money judgment obtained in any circuit court is a lien on real property in the county (including Baltimore City) in which the judgment is rendered. The lien arises on the date the judgment is entered. A creditor may obtain a lien on property in other counties by recording the judgment in the various circuit courts. A creditor with a judgment in the district court must record the judgment in the county's circuit court. Md. Cts. & Jud. Proc. Ann. § 11-402 (1989); Md. Ct. R. 2-621, 2-623, 3-622 (1990). The basis for the territorial limitation on judgment liens is probably that it would be unfair for someone buying land in one county to have to check the court records in other counties. However, if the records were available at any location in the state there would no longer be a reason to limit the judgment lien to the county in which the judgment is rendered. Similarly there would be no reason to limit the judgment lien to circuit courts since it will be possible to include judgments from all courts in one recording system.

Although it is open to some dispute, I believe that judgments of the federal

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district court or bankruptcy court sitting in Baltimore create liens only on land in Baltimore. 28 U.S.C. § 1962 (1988); See *Wirtz v. Phillips*, 251 F. Supp. 789 (W.D. Pa, 1965); But See *U.S. v. Harpoottian*, 24 F.2d 646 (2d. Cir. 1928). A lien can be obtained in other counties by recording in the various circuit courts. Md. Ct. R. 2-623 (1990). Judgments of Maryland federal courts would be subject to the proposed recording system only if Maryland law continues to treat those judgments exactly like state court judgments. Therefore, if the clerks of each Maryland court enter judgments directly into the system, federal court clerks in Maryland must be able to do so as well. Judgments of federal courts outside the state would be imported into the state for purposes of creating judgment liens by recordation in the proposed system.

There would be little change for the treatment of judgments from sister states. Currently, to create a lien, they need only be recorded in each county where the debtor might have property. Md. Cts. & Jud. Proc. Ann. § 11-804 (1989). Under MacLien, such judgments would merely be recorded in the statewide records.

Judgments of foreign countries, however, must be considered more carefully. Maryland has adopted the Uniform Foreign [Country] Money Judgments Recognition Act. Md. Cts. & Jud. Proc. Ann. §§ 10-701 – 10-709 (1989). It provides that judgments of foreign countries should be treated the same as judgments of sister states. However, at the time that statute was adopted, the procedure regarding judgments of sister states was different. Such judgments could not be simply recorded in Maryland as they can be today. Judgment creditors with out of state judgments had to bring a new suit in Maryland. Of course, that lawsuit was based on the sister state judgment. Since the Constitution requires that judgments of sister states be given full faith and credit the defendant had available very few defenses (e.g., satisfaction, discharge in bankruptcy, lack of finality, expiration of the statute of limitations on judgments, the types of fraud that could be used to collaterally attack a judgment). In 1988, however, Maryland adopted the Uniform Enforcement of Foreign [States] Judgments Act that replaced the procedure of suing on the judgment with the procedure of

merely recording judgments. However, Maryland did not change the statute concerning judgments of foreign countries. Since that statute provides that foreign country judgments should be treated like sister state judgments, foreign country judgments can now be simply recorded to create a lien. But foreign country judgments are not entitled to full faith and credit and, in fact, the Uniform Foreign [Country] Money Judgments Recognition Act provides grounds for refusing to recognize foreign country judgments. The grounds involve procedural unfairness or substantive impropriety. But there is currently no procedure built into the system requiring court review of the foreign country judgment before recording. At least one court has held that unconstitutional. *Detamore v. Sullivan*, 731 S.W.2d 122 (Tex. Ct. Ap. 14th Dist., 1987). Therefore, in adopting a new procedure for the creation of liens, Maryland should provide for adequate notice and hearing before recording foreign country judgments.

The proposed statewide filing system should accommodate the interest in real property which protects construction workers, the mechanic's lien. In Maryland, unlike many states, the mechanic's lien statute does not provide for a lien that arises at the commencement of construction. See Md. Real Prop. Ann. § 9-106 (1989). Instead the mechanic's lien statute provides a procedure helpful for proceeding against owners who cannot be brought under the court's jurisdiction and for distributing the proceeds of the sale of the property. Therefore, the mechanic's lien could be easily incorporated into MacLien by requiring that a notice be filed under the name of the record owner of the property.

The application of the doctrine of *lis pendens* would need to be altered slightly. *Lis pendens* functions similarly to a pre judgment attachment of land. The doctrine provides that if the pleadings explicitly place title to land at issue, any interests in the land that arise after the initiation of the law suit are subject to the court's decision in that law suit. In many states a notice must be filed in the land records to enforce the doctrine. See, e.g., N.J.Stat. Ann. § 2A:15-7 (1987). In Maryland that must only be done if the land is not in the same county as the court hearing the case. See Md. Ct. R. BD2 (1990). The doctrine could survive

under the proposed system, but it would be necessary to require that a specific notice be filed.

Personal Property

In addition to the statewide filing system, the application of the judgment lien to personal property would also be a significant departure from the present system. The procedure for the actual sale of personal property to satisfy the claims of judgment lien creditors would remain the same. That procedure, called execution, consists of the following: The creditor obtains a writ of execution from the court clerk and delivers that writ to the sheriff. The sheriff then goes to where the property is located and levys on it. Levy involves either seizing the property or leaving it where located and attaching a notice on or near the property (and could include taking other steps to secure the property). The sheriff then sells the property. Md. Ct. R. 2-641 – 2-644 (1990).

For personal property, the creditor must now execute on the property to have a lien on that property. The lien (called an "execution lien") arises when the sheriff levys. Md. Cts. & Jud. Proc. Ann. s. 11-403 (1989). The date on which the lien arises is significant for ranking the priority of the judgment creditor with secured creditors, purchasers of the property and other judgment creditors. Maryland is among the vast majority of states in limiting the judgment lien to real property and requiring execution for a lien on personal property. However, this policy is rooted in a past where it was too onerous a burden on third parties to make their right to personal property depend on records in a court house in the county seat. Nevertheless, in three states (Georgia, Alabama and Mississippi) judgment liens already bind personal property. See, e.g., Ga. Stat. Ann. § 9-12-80 (1982). Several states already have statewide filing systems for judicial liens on personal property. See, e.g., Cal. Code Civ. Proc. s 697.510 (1987). Moreover all states now impose that burden on third parties by employing the filing system for security interests in personal property under Article 9 of the Uniform Commercial Code.

There are, of course, many transactions in personal property that should be shielded from the effect of a judgment lien that arises by virtue of judg-

ment alone. For example, a good faith purchaser of personal property at retail should not purchase subject to the judgment lien. Although it is reasonable to require a purchaser of real property to check court records to locate defects in a seller's title, it would be unreasonable to expect most purchasers of personal property to research court records. This policy is reflected in the Uniform Commercial Code protection of the "buyer in the ordinary course" of personal property from prior perfected security interests. Likewise, MacLien would protect such buyers from judgment liens. Similarly, consumer buyers of personal property from most other non-merchant consumers (e.g., yard sales) should be protected from judgment liens under MacLien as they are now from perfected security interests.

In Maryland an "artisan" (e.g., repairer of the debtor's equipment or a dry cleaner) who retains possession of the debtor's property has priority over previously perfected security interests. Md. Comm. Code. Ann. §§ 9-310 & 16-302 (1975). It would be unfair to expect the repairer of equipment or the dry cleaner to conduct a search for a possible financing statement. Moreover, the repair presumably adds value to the property at least sufficient to cover the cost of repair. For the same reasons the judgment lien on personal property under MacLien also should be subject to artisan's liens. Finally, the proposed system should take into account the certificate of titles for motor vehicles by protecting good faith purchasers who rely on such certificates.

All of the interests in personal property that are superior to judgment liens would not have that protection if they arise after the sheriff executes on the property. Execution would render the property either unavailable for inspection (and therefore for reasonable reliance on good title) or clearly labeled as subject to the judgment lien.

However, a judgment lien on personal property would have priority over subsequently perfected security interests. Secured creditors can be expected to check the court filing system since they are already expected to check Article 9 filings. A judgment lien on personal property also would have priority over subsequent judgment liens.

Basing priority to personal property on the date of judgment instead of exe-

cution reverses the current rule of priority. For example, assume A obtains a judgment against the Debtor in 1985 for \$10,000; B obtains a judgment in 1990 for \$10,000, and B discovers personal property that the debtor has worth \$9,000. If B gets a writ and has the sheriff seize the property before A does, the result in Maryland (as in most other states) is that the proceeds of the sale will go to B. The proceeds would go to A under MacLien. Presumably the current rule rewards diligence by creditors. Nevertheless, under my proposal B still has an incentive to inform A of the property because B will then be closer to being able to satisfy her judgment. It is also unlikely that a creditor in A's position would not proceed against the property since A has no guarantee that the Debtor will have any property in the future. Moreover, the Uniform Commercial Code dictates a similar result for competing security interests and even present Maryland law would lead to the same result if the property were land.

Providing a recording system for judgment liens on personal property will prevent the confusion that arises whenever an executing creditor shows some leniency toward the debtor. Currently, if a creditor wishes to secure her position vis a vis the debtor and other creditors, she should act speedily to execute on the debtor's personal property assets. Even after executing, the creditor takes some risk if, to give the debtor a chance to satisfy the judgment voluntarily, the creditor does not have the property sold quickly. Maryland rules enable the debtor to have the lien lifted. See Md. Ct. R. 2-643(c) (1990). But more importantly where the creditor refrains from selling property, subsequent creditors may be able to strip the original creditor of priority due to the failure to execute promptly. See *Illi v. Margolis*, 267 Md. 30, 296 A.2d 412 (1972) and the cases referred to therein. MacLien would allow judgment creditors to maintain property to personal property in the same way that currently judgment lien creditors can for real property and secured creditors can for personal property.

Personal property includes not only tangible property but also intangibles such as, bank accounts and wages. Creditors currently reach such property through garnishment. The gar-

nishment procedure and the exemptions regarding wage attachment can be left unchanged. But the lien for purposes of priority between creditors would arise at the date of judgment. In the case of intangibles governed by federal law (e.g., copyrights and patents), federal law regarding the transfer of interests in such property would prevail. Therefore federal filing systems probably would need to be used.

Revision of Priority Rules

In outlining the major changes I envision concerning the statewide nature of liens and the inclusion of personal property in the judgment lien, I have discussed how various priority rules might be changed. However, the substance of the rules regarding the priority of various creditors is less important than that the rules be clearly established and based on consideration of public policy instead of historical accident. The adoption of MacLien would provide an opportunity to review the entire array of debtor creditor rules and to make those decisions. For example, presently the judgment lien covers not only property owned by the debtor at the time the lien arises but all after acquired property as well. In Maryland, if there are two judgment liens in effect when the debtor acquires additional real property, the older lien has priority to such after acquired property. *Messinger v. Eckenrode*, 162 Md. 63, 158 A. 357 (1932). This is a minority rule. Other states would grant the two liens equal priority to the after acquired property. The Maryland rule, however, is consistent with the Uniform Commercial Code general "default" rule of 9-312(5). However, the majority rule encourages diligence by judgment lien creditors in finding and executing on property before the debtor conveys it away. The majority rule is also consistent with the Maryland procedure for mechanic's liens. Adoption of MacLien provides the opportunity to make a principled choice rather than merely rely on a 1932 case.

Adoption of MacLien also might provide an opportunity to reexamine state law regarding prejudgment attachments. Prejudgment attachment is an extraordinary remedy through which the plaintiff may deprive the defendant of property before any

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court has found liability on any grounds. Maryland law limits both the procedural and the substantive grounds available for its use. Md. Cts. & Jud. Proc. Ann. 3-303 & 3-304 (1989). It appears, therefore, that the most recent Supreme Court decision limiting this remedy does not affect Maryland. See, *Connecticut v. Doehr*, 59 U.S.L.W. 4587 (U.S. 1991). Nevertheless, along with granting the plaintiff the security that the property will be available to satisfy the judgment, prejudgment attachment provides the plaintiff with considerable leverage over the defendant. The defendant, denied the use of some essential item of property, is more likely to settle on favorable terms with the plaintiff. Maryland might consider providing for a more limited form of prejudgment attachment. This would be accomplished by recording prejudgment attachments of specific property in the statewide system. So doing would give the plaintiff priority over many intervening parties who obtain an interest in the property. Where the plaintiff can establish that this is not sufficient protection, the court could enter a protective order that enjoins the defendant from conveying away or misusing the property or, if necessary, the court could authorize seizure of the property. See, *Zaretsky, Attachment Without Seizure: A Proposal for a New Creditors' Remedy*, 1978 U. ILL. L.F. 819, 825.

Conclusion

It is an academic's prerogative to confine to one brief concluding paragraph consideration of whether the system proposed is practical either financially or technologically. However, the technological aspects of the system I am proposing are not as significant as the changes in the law regarding judgment liens. Jurisdictions in Maryland and elsewhere are already beginning to store case records by computer. Where that has already been done it should be easy to include such records into the statewide system. Users of Lexis are familiar with UCC records and court docket records on computer. I am proposing no technological leap forward, but instead proposing that the law be consistent with the realities of our times. ■

Walter R. Calvert
and Stuart Levine

created a second class of stock.

For practitioners providing opinions as to the tax-exempt status under Maryland income tax law of various types of pass-through type entities, clarification of the exempt status of those entities is now provided in the corporate income tax statute. This is done by specifically exempting investment conduits (defined to include regulated investment companies, real estate investment trusts and real estate mortgage investment conduits) and special exempt entities (defined to include a farmer's cooperative, a political organization and a homeowner's association) from Maryland corporate income tax. Additional amendments recognize that such entities should be subject to Maryland corporate income tax under those circumstances in which they are subject to tax under federal income tax law.

In the recordation tax area, the definition of purchase money mortgage (and purchase money deed of trust) is modified to make it easier to insure that an instrument qualifies under the definition. Under current law a purchase money mortgage is exempt from recordation tax. Among the definitional requirements under prior law for an instrument to qualify as a purchase money mortgage had been that the mortgage or deed of trust be recorded no later than 30 days after the instrument of writing that actually transferred title to the property had been fully executed. In order to ease the application of the exemption in practice, this requirement is changed as of July 1, 1991 to require that the purchase money mortgage be recorded no later than 30 days after the date that the conveyance document is duly recorded. Accordingly, a purchase money instrument can now qualify for exemption even though it may have been held for some period after execution of the related deed so long as it is recorded at the same time

(or within 30 days) as the related deed is filed.

In the sales and use tax area, changes have been enacted to the hearing process that now consolidate the informal and formal hearings into a single informal hearing held within the Sales and Use Tax Division. The revised hearing procedure is prospective only, applying only with respect to assessments levied on or after July 1, 1991. The change is intended to speed up the State's collection process while reducing the cost to taxpayers of contesting sales and use tax assessments. For assessments subject to the new procedure, if the taxpayer is not satisfied with the result reached in the new informal hearing process, appeal may then be taken directly to the Maryland Tax Court.

Other changes have been made with respect to the application of the sales tax on cigarettes and food. The exemption for cigarettes has been repealed and the sales tax will now be computed on the entire purchase price of the cigarettes including the amount of the tobacco tax imposed. With respect to food sales, the tax on carry-out food is expanded to cover all sales of food and all sales through vending machines by carry-out vendors who do not operate substantial grocery or market businesses. A business will be treated as a substantial grocery or market business if at least 10% of its sales of food are sales of grocery or market food items. If prepared for consumption off premises, sales of seafood that is not prepared for immediate consumption and of crabs remain exempt from the sales tax. Additionally, soft drinks sold in cups will no longer be treated as food and thus will be subject to sales tax. Finally, the exemption for taxable sales of food of less than \$1.00 has been repealed.