Odd Liens: Judicial Liens; Tax Liens; Condo Liens; Execution Liens; Statutory Liens; Possessory Liens

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Odd Liens:
Judicial Liens; Tax Liens; Execution Liens; Statutory Liens; Possessory Liens and Priorities for Competing Claims

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I. General Categories of Liens 3-1
II. Basic Issues 3-2
III. Conflicts Among Liens 3-5

I. General Categories of Liens

There appears to be an endless list of liens available to private parties and various agencies and branches of government to secure both personal as well as real property. This discussion involves many of the common liens, a list of which follows:

A. Construction Liens (MCLA 500.1111)
B. Garage Keeper Liens (MCLA 570.301 et.seq.)
C. Common Law Liens (many, including MCLA 570.521 et.seq.)
D. Special Tools Liens (MCLA 570.563 et.seq.)
E. Garnishment Liens (MCR 3.101/Mary v. Lewis, 399 Mich 401)
F. Judgment Liens (MCLA 600.2801)
G. Execution (Writ of Attachment) Liens (MCLA 600.6051)
H. Divorce Judgment Liens (MCLA 440.9101 et.seq.)
I. State and Federal Tax Liens (MCLA 2051.1 et.seq. and IRS)
J. County Personal Property Tax (MCLA 211.40 et.seq.)
K. UCC Purchase Money Liens (MCLA 440.9203 et.seq.)
L. UCC Blanket Liens (MCLA 440.9203 et.seq.)
M. Mortgage
N. Motor Vehicle Liens through Secretary of State
O. Bankruptcy Liens through the Trustee in Bankruptcy
P. Natural Resources and Environmental Protection (MCLA 324.20138 et.seq.)
Q. Storage Lien Law of Michigan (MCLA 570.521)

II. Basic Issues

A. First in Time Is First in Right

Personal property:

Typically, liens are recognized and prioritized in the order in which they are filed. For example, a note and mortgage on a piece of real property filed January 1, 2008 will be considered to be of higher priority than a mortgage filed against that same property January 2, 2008. The second lien may commonly be referred to as a second mortgage. There may be many mortgages filed on a piece of property and they are generally recognized as being prioritized in the order of the dates they were filed.

However, first in time is not always first in right.

When it comes to personal property, for example, a city, state or county personal property tax lien may take priority over all other liens on that personal property, regardless of the dates they are filed. See discussion elsewhere in this Outline concerning power of these personal property tax liens vested by virtue of MCLA 211.40 in the cases thereunder. Similarly, even competing liens filed under the Uniform Commercial Code will not necessarily follow "first in time is first in right". An example of this occurs when a bank takes a blanket lien for general security purposes for a loan granted to a debtor. For example, a bank loans a debtor $100,000.00 and takes a blanket security interest in all property of the debtor including inventory, accounts receivable, fixtures, equipment, etc. Then, along comes a creditor who sells a particular machine to that same debtor and finances that through a purchase money loan, securing it with a UCC lien which is filed with the Secretary of State later then the blanket lien of the bank. Who has priority? The purchase money security lien has priority over the blanket lien.

There are many other examples. A garage keepers lien has priority even over a purchase money security lien where the machine referred to in the previous paragraph went in for repair to a repair facility. Once those repair services are performed, the repair facility gets to keep the machine (a possessory lien) until the repair costs are paid. This places a purchase money security lender in jeopardy and it certainly places a blanket lien lender in jeopardy because the blanket holder is now third in line. They filed first but they are now third.

If you add a personal property tax lien filed by the city or county to that mix in the above paragraphs, the purchase money lender and the blanket lender are now in third and fourth spot respectively.

Thus, we find many exceptions to the rule of "first in time is first in right."
Example: 2008 Jeep purchased for $40,000, now worth $20,000. Creditors:

- Bank, loan of 12/03/07, balance due $18,000 including costs
- Personal property tax due of $2,000 from 12/07
- Car given to wife as part of divorce decree, no title transferred. Order 01/02/08
- Car picked up by judgment creditor, having no lien. Pick up 02/01/08
- IRS lien on assets 02/15/08
- Car taken to a storage and repair garage, $500 worth of work 03/01/08

Who gets paid when the car is sold off for $20,000?

• Personal property tax, always paid first, date irrelevant
• Garage lien, keeps his $500
• Bank gets rest: $15, 500
• Wife beats judgment creditor, who relied on Secretary of State records, but both wife and creditor get zero
• IRS gets Zero.

Real Property:

When it comes to real estate, first-in-time is generally followed, except for state property tax liens and IRS liens on the property. The IRS has, after foreclosure, 120 days to redeem if there is equity.

The state, however, comes first, regardless of date of filing!

Example (at www.foreclosureuniversity.com):

Lien	Date recorded	Amount
1st Mortgage $250m	Recorded 6/20/1999	$250m plus $15m costs
2nd Mortgage $60m	Recorded 7/21/1999	$5,000 balance
State tax lien $6m	Recorded 5/5/04	$6,000 balance
IRS tax lien $6m	Recorded 10/20/04	$6,000 balance
Property tax $5m	Recorded 1/05/08	$5,000 balance

Who wins?

1. State

2. IRS (these are last to record, but priority granted by statute).

All other liens above follow first-in-time.

So, if there was a foreclosure and bid is enough to cover $250m+$15m+$5m=$270m, then the 1st mortgage and costs and the State property tax lien are paid, no one else gets paid…property tax filed dead last wins over all other liens including priority liens IRS and state tax lien.

B. Unperfected Liens in Bankruptcy

Once bankruptcy is filed, a new set of rules comes into play, namely, the bankruptcy rules. Once a trustee is appointed, this individual is sometimes called a "super creditor"

because he or she has the power and indeed the responsibility to void all unperfected liens and to bring sums of money back into the estate which would not otherwise be brought back in such as preference payments (payments made to creditors in the same class within 90 days of the filing of bankruptcy).

Under this circumstance, even a purchase money lender may find itself with no higher priority than other unsecured creditors. This can happen in several ways:

1st Mortgage $250m Recorded 6/20/1999 $250m plus $15m costs
2nd Mortgage $60m Recorded 7/21/1999 $5,000 balance
State tax lien $6m Recorded 5/5/04 $6,000 balance
IRS tax lien $6m Recorded 10/20/04 $6,000 balance
Property tax $5m Recorded 1/05/08 $5,000 balance

• If the purchase money lender fails to perfect which usually means taking possession of the collateral or filing a UCC 1 financing statement (or allowing it to go beyond 5 years without renewing it) then the lien is unperfected and the trustee in bankruptcy has an absolute right and obligation to void that lien thus ruing the lenders priority.

• The second way that the purchase money lender may end up with at least a portion of its claim being considered unsecured is to liquidate the asset which is secured by the lien, receive the proceeds for that liquidation and then be treated as an unsecured creditor for any remaining balance (deficiency balance) on the contract. Of course, this particular element would be true regardless of whether the debtor filed for bankruptcy or not. A deficiency balance is an unsecured claim.

C. Right to Foreclose

Right to foreclose, some liens have it some don't: Whether liens are perfected simply by filing notices (city, state, county, village, personal property tax liens for example) or whether many hoops are jumped through to perfect (a security agreement followed by a UCC 1 financing statement followed by the perfection through filing of that UCC 1 financing statement) may result in different ramifications. Most of these liens do have a basic right to foreclose. In other words, if the debtor fails to pay, the very existence of the lien allows that lender or secured creditor to proceed forward with some kind of action to reclaim that property and sell it off at an auction or otherwise dispose of it in order to pay off the debt.

At least one lien, however, has no right of foreclosure. Creditors should be aware of that. Although it is a powerful lien since it affects all real estate in the hands of a debtor, may impact any refinancing of those parcels of property owned by a debtor, and even may reach out and lien property later acquired by that debtor, there is no right to foreclose on it. This lien is commonly referred to as a judgment lien and the statute which created it is the judgment lien statute. 600.2801 et seq.

The lien is perfected through filing of a judgment lien notice which is a form promulgated by the Michigan Supreme Court. The form requires certain information and then process requires filing the lien with the court, then filing it through the

Register of Deeds Office and giving the defendant notice of same. Again, there is no right of foreclosure to this lien A judgment lien requires prior entry of a money judgment. A lien is created by law, MCLA. The lien also has no impact on properties owned as tenants by the entirety and takes a back seat to certain other liens such as a purchase money mortgage, a non purchase money mortgage prior to the judgment lien, liens which require priority through operation of law and certain other liens such as state or federal tax liens and the like.

A judgment lien remains in existence for 5 years after it is recorded. It may be rerecorded once for an additional 5 years.

III. Conflicts Among Liens

A. Fixtures Through a UCC Purchase Money Lien vs. Mortgage on Real Property

Under the general rule, items which are permanently attached to real estate become part of the real estate and therefore they are fixtures. They lose their identify as personal property. Thus, the typical application of the Uniform Commercial Code would preclude the application of most provisions under the UCC because the UCC has to do with goods which are by definition, personal property.

However, there are some exceptions. Foremost among the exceptions are the secured fixtures under the UCC.

Article 9 of the UCC allows for creditors who secure fixtures and then repossess them if there is a default in payments. A good example of this would be a commercial washing machine installed in a restaurant. The washing machine is permanently fixed to the real estate by bolts, by hardwaring 220 volts service, and through a vent which goes to the outside of the building. Normally, then, as a fixture, this item would lose its identity as a piece of personal property and therefore the UCC would not apply.

However, if that item was sold pursuant to a lien secured under Article 9 of the Uniform Commercial Code (MCLA 440.9203 et. seq.), the secured creditor would have priority relating to that particular item.

If the unit was a purchase money loan, the secured creditor of that purchase money loan could repossess the commercial washing machine despite the fact that there was a general mortgage on the building for the purchase of the building. The UCC lien would have priority. See MCLA 440.9604(1) and in re: Cliff's Ridge Skiing Corporation 123 BR 753 (1991). By the way, the repossession of the fixtures can be done with self help as long as there is no breach of the peace. If a breach occurs, the secured creditor has to back off and file an action in the court. See MCR 3.105 and MCLA 440.9503, and Hill vs. Michigan National Bank, 58 Mich App 430 (1975). Also, should the building incur damage as a result of the removal of the fixture, the secured creditor is liable "for the cost of repair of any physical injury caused by the removal." MCLA 440.9604(4). The secured party is not however liable for any reduction in the value of the real property caused by the absence of those items.

The general procedure to enforce liens under the UCC must be conducted under the "commercially reasonable" rule however. MCLA 440.9607(3) requires that unless the

secured party does not have a right of recourse against the debtor (and with certain other exceptions).

B. Blanket Security Interest Under the UCC vs. Purchase Money Liens

As a general rule, first in time is first and right with regarding to filing UCC liens. However, there are exceptions. MCLA 440.9322 sets forth general rules of the concept of "first in time is first in right".

Note that filing financing statements if not always required. Possession of the collateral, particularly in the instance of a deposit account or investment property can control.

Typically a purchase money lien will have priorities established over blanket security interests, assuming financing statements are filed before or within 20 days after the debtor receives delivery of the collateral. MCL 440.9317(5). See also National Bank of Detroit vs. Ritter, 437 Mich 354 (1991).

In connection with UCC liens, it is strongly recommended that the reader purchase an excellent volume called Michigan's Revised Article 9 of the UCC by Patrick E. Meers and Scott Dales, an ICLE publication.

C. UCC Purchase Money Liens vs. Lien on Title of Motor Vehicle

There should not be a conflict. However, we should point out that a lien on a vehicle such as a car, motorcycle, travel trailer/rec. vehicle, or even a mobile home should be filed against the title, since these are titled items. Sometimes, however, a UCC lien is taken on a described vehicle. The priority would favor the title. Michigan DMV records are relied upon in this regard. However, see the discussion on divorce, in D below.

Note that divorce judgment can include the language of a security agreement. When it is followed up with a simple UCC-1 financing statement, the lien attaches and becomes perfected! The divorce judgment is the security agreement assuming, again, that the proper security agreement language is included in it. Have the security agreement provisions be signed separately by the spouse, as a debtor. Schaefer v Schaefer, 106 Mich App 452, 308 NW2d 226 (1981); MCLA 600.611; MCLA 440.9102

D. Divorce Liens v Title to Vehicles and Liens on Real Property

We should have the right to rely on DMV title records to determine title, however, you may find a divorce decree holding the upper hand. In situations where a vehicle is awarded to wife, and wife fails to file title in her name, she will still end up with the car if a creditor of husband picks the car up on a writ of execution or other enforcement action…even though that creditor relied upon DMV records.

When a divorce judgment granted a first lien on real property, as first priority, a bank refused to loan money to a spouse using the property as collateral, because the bank considering the loan wanted a first lien….even though the proceeds were to be used to pay off the first lien! Be careful what you wish for…Slota v Slota, (9/13/2007, Court of Appeals docket 269640)

For assets other that titled items (titled assets are liened on the title, itself whereas other assets of personal property are generally liened via a security agreement and financing

statement): Note that divorce judgment can include the language of a security agreement.

When it is followed up with a simple UCC-1 financing statement, the lien attaches and becomes perfected! The divorce judgment is the security agreement assuming, again, that the proper security agreement language is included in it. Have the security agreement provisions be signed separately by the spouse, as a debtor. Schaefer v Schaefer, 106 Mich App 452, 308 NW2d 226 (1981); MCLA 600.611; MCLA 440.9102

E. Writ of Attachment vs. Blanket Security Interest Lien, (Marshaling Assets)

You can use the doctrine of marshaling assets to force a secured creditor of the debtor to pursue assets other than those on which you need to levy to satisfy your judgment. 16 *Michigan Law and Practice Encyclopedia* 124 (1957) gives a simple definition of this doctrine.

> The doctrine of marshalling assets is that where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them, chancery, on the application of the latter, will compel the former to take his debt out of that fund to which the latter cannot resort.

For example, say you have a judgment against a barbershop but a bank holds a security interest in its inventory and equipment. The barbershop is a corporation, and the bank has personal guaranties from the owners as well as liens on their homes. The owners have enough equity in their homes to fully cover the balance owed to the bank. Since corporations are not entitled to exemptions and the bank's lien can be satisfied by assets your client cannot reach, you can levy your writ of execution on the barbershop's inventory and equipment. This strategy is also supported by MCL 600.6017(3).

Marshaling assets can be effective, but it does require persistence and effort. The key is to stand your ground against a secured creditor that tries to tell you that you cannot touch assets secured by its lien. If the court officer insists on a bond, provide it.

Even without marshaling, there are other instances in which you may levy on and sell assets that are subject to a lien. For example, say the debtor is a corporation with annual sales of$l million and assets of$250,000. All the assets ofthe corporation are pledged as security for a bank loan with a balance of $200,000. If you have a judgment against the debtor for $1,000, levying a writ of execution on $2,000 or $3,000 of the debtor's assets is not going to jeopardize the secured creditor's interests.

F. Garage Keeper Lien vs. Purchase Money Security Lien

The Garage Keeper Lien is generally considered a common law lien which comes into play when a vehicle is brought into a facility for purposes of storage, diagnostics, repair estimates, servicing, etc. at the request of the owner.

If the charges are not paid by the vehicle owner, a facility can detain the vehicle and file for a Garage Keepers Lien under Michigan Law. This applies to vehicles except mobile homes. In the case of mobile homes, a court order or surety bond is required.

To apply for a Garage Keepers Lien, the facility:

a. must be in possession of the vehicle;

b. must be a licensed facility;
c. must have performed repairs or diagnostics, or;
d. must have stored the vehicle but there must be a formal, signed agreement for storage.

To apply for the Garage Keepers Lien, the facility shall send in an application to the Michigan Department of State, Office of Customer Services/OSRS Unit at 7064 Crowner Dr, Lansing, MI 48918.

The vehicle cannot be detained for more than 225 days after last labor or last supplies prior to applying for this lien.

Once the application is complete, a Garage Keepers Lien case number will be assigned and the Secretary of State will mail out a TR 42 form allowing foreclosure. The

TR 42 will have an issue date and will list all recorded owners and lien holders. Within 30
days after the issue date, the Garage Keeper must send a certified letter, return receipt requested to all owners, lien holders and the Bureau of Regulatory Services. The letter must contain the following:
a. notice of claim of lien against the vehicle;
b. vehicle identification number;
c. vehicle description;
d. itemized statement of the account;
e. time limit;
f. statement that all lien holders are being notified;
g. date, time and manner that the sale will take place at least 75 days after the TR 42 issue date.

The sale can be conducted and the sale proceeds are to be distributed in accordance with Michigan Law. For a complete description, contact the Michigan Department of State or go to www.michigan.gov and search for Garage Keeper Lien.

The Garage Keeper Lien is generally considered to have higher priority then other liens. It is a possessory lien. For example, when the vehicle is brought into the facility, the vehicle may be subject to a purchase money lien for its purchase price; a general bank lien for loans to the owner or the company that owns the vehicle; tax liens; personal property liens, etc.

Although all other lien holders must be notified prior to the sale, proceeds would have to be distributed in the order of priority assuming that the proceeds exceeded the Garage Keepers Lien. If the proceeds do not exceed the Garage Keepers Lien or the vehicle fails to sell at the auction, the Garage Keeper can buy the vehicle for the amount of his bill and the lien is thereby extinguished.

G. Garage Keepers Lien and Special Tools Liens vs. All Other Liens

Pursuant to the discussion in F above, the Garage Keepers Lien and Special Tools liens are examples of highly specialized liens created by statutes to provide top priority positions (“possession is 9/10ths of the law”). These liens apply, as you might guess, for the special situations the laws are named after. Although I had never really studied, or even read, these laws before, I found all of them to be very aggressive in creating a top priority. MCLA 570.520

A storage facility, for example, may claim liens on stored items for up to four months rent, and this includes perfected UCC purchase money lien holders! The storage lien law is quite detailed and should be read in its entiretyat MCLA 570.521
A special tool builder may record its name and address on tools it builds. Then, by filing a UCC-1 financing statement under MCLA 440.9502, a lien may be perfected in the tools….these are probably going to come in second to personal property tax liens, but prior to bank, blanket liens I would think.

The amount of the lien is the amount owed by the customer for the fabrication, repair or modification of the tool.

The special tools lien is generally going to follow first-in-time principals.

H. County Personal Property v. Writ to Seize Assets

In a recent scenario, a court officer levied upon assets, secured them in a locked building and was about to take inventory and post a sale notice. Suddenly, Oakland County came in with a personal property tax lien and claimed priority to all of the assets levied upon. Although the Internal Revenue Service normally takes a "back seat" to situations such as this, the Oakland County Sales Tax Collectors were not about to.

MCLA 211.40 discusses priority of tax liens in this situation. The statute states, in part, that General Property Tax Liens amount to a debt on property and "shall become a lien on the real property" shortly after they become due. Similarly, personal property tax liens assessed for state, county, village, or township taxes: "Are also a first lien, prior, superior, and paramount on all personal property of the persons assessed on December 1, on the day provided for by the charter of a city, village, or in day provided for in section 40A. The lien for those amounts, and for all interest and charges on those amounts, shall continue until paid. The tax liens take precedence over all other claims, encumbrances, and liens on that personal property, whether created by chattel mortgage, title retaining contract, execution, any final process of a court, attachment, replevin, judgment, or otherwise.

The transfer of personal property assessed for taxes does not divest or destroy the lien, except where the personal property is actually sold in the regular course of retail trade."

An attorney general opinion from 1937 stated: "Personal property tax lien attaches only to property subject to such tax levy, and chattel mortgage on after-award personal property is subject to levy for previously assessed personal property tax."

This compares with a federal tax lien which take a back seat to a mortgagee, pledgee, purchaser or judgment creditor until notice of that lien have been filed by the collector in accordance with In re Ann Arbor Brewing Company, Eastern District of Michigan, 1951.
For further clarification, a cities personal property tax lien was held to be superior to a security interest of a tax payers lender, even though the security agreement was perfected before the assessment of the taxes. Michigan National Bank vs. City of Auburn Hills (1992) 483 NW2d 436.

I. Mortgage Creditor v. Writ to Seize Assets

A writ of execution can be levied subject to lien, but gains no priority over the lien.

J. Personal Property Tax Lien v. UCC Lien

Please see discussion on the topic of County Personal Property Taxes vs. A Writ of Execution. The personal property tax lien takes priority even over liens which were previously recorded. This breaks "first in time as first and right" rule and this form of lien may even be superior to a garage keepers lien where possession is maintained until the work for which the unit was brought into the garage is paid for.

K. Federal Tax Lien v. State Tax Lien

In the area of the priority of a federal tax lien vs. a lien under state law, we turn to United States vs. Kimbell Foods Inc., 440 US 715 (1979). Prior to that case, there was a conflict of authority as to the priority of liens.

The Kimbell Foods case dealt with issues where federal programs such as Housing and Urban Development (Hudd) Small Business Administration loans and the Farmers Home Administration (FHA) loans have priority. In the area of the priority of a federal tax lien vs. a lien under state law, we turn to United States Construction liens filed under state law have priority over Hudd, SBA and FHA. Chicago Title Insurance Company vs. Sherred Village Association, 708 Fed 2d 804 (1st Circuit 1983).
Consensual liens such as Hudd, FHA and SBA may have direct competition with other federal liens including tax liens. Priorities of a tax lien vs. a Consensual federal program lien is uncertain. Kimbell Foods does not respond to that. State tax liens may have priority, even though filed after federal mortgages (Consensual liens under such organizations as Hudd, FHA and SBA) but the state liens cannot act to destroy the preexisting federal liens.

In Michigan v. the United States, a United States Supreme Court opinion at 317 US 338 (1943), it became clear that federal liens filed prior to any form of state tax lien has priority. That court refused to deal with any other issue, such as when the state lien is filed first in time.

It is generally accepted that purchase money liens have priority over other liens. This applies both in matters of personal property (Uniform Commercial Code Consensual liens), and is at least in some states such as Pennsylvania, applicable even in mortgages where there are competing mortgages on the property rather than simply first in time is first and right.

Purchase money mortgages are, by definition, a lien on property to secure payment of the purchase price.

In situations where the federal lien is in the form of the powers of the US Trustee in bankruptcy, the trustee is given "super powers" to void all unperfected state liens:
A bankruptcy trustee is obligated to attempt to void all unperfected liens. In this instance, the bankruptcy trustee will attempt to void the unrecorded lien and will win.
The case came up in the matter of Frederick Allen Stankus vs. Countrywide Home Loan Inc., in a chapter 13 bankruptcy, case number SG0410024 heard in the Western District Bankruptcy Court Adversary Proceeding 05-80738.
In that case, Countrywide had the debtor sign a first mortgage on their home for $125,600.00 and a second mortgage on the same property for $23,550.00. The first mortgage was recorded, the second mortgage was never recorded.

A third mortgage was actually assigned to another creditor, Capital One and that was recorded.

The issue came down to whether the trustee should void the second mortgage of Countrywide for $23,550.00 which would effectively put Capital One as second mortgage holder. Since the property appraised low, it was important for Capital One to get that priority. The court ruled that the trustee could void the unrecorded mortgage. The court relied on 11 US Code Section 544 (A)(3) which states in part that the trustee "shall have, as of the commencement of the case, and without regard to any knowledge of the trustee of any creditor the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable."

L. Federal Tax Lien v. Writ of Execution

If the IRS files a tax lien against the property of a judgment debtor before you levy a writ of execution on the debtor's property, the tax lien has priority. 31 USC 3713 (appendix D); *see also Illinois ex reI Gordon v Campbell*, 329 US 362 (1946); *Illinois ex reI Gordon v United States*, 328 US 8 (1946); *United States v Texas*, 314 US 480 (1941); *United States v Emory*, 314 US 423 (1941). A writ of execution may be levied even though tax liens exist. MCL 600.6017. MCL 205.25 governs levy and execution of state tax liens. The most efficient way to discover tax liens is to file a UCC investigation request with the Michigan Department of State (form 2.4).

If a tax lien has not been filed but you have reason to think that the debtor might be insolvent or that a tax lien might be filed, you should act quickly to have a writ of execution issued and to levy it on the assets. A judgment creditor cannot gain priority over the United States for any assets of an insolvent debtor unless those assets have been seized from the debtor by levy and are in the possession of the judgment creditor. *Kentucky, Dep't of Revenue v United States*, 383 F2d 13 (6th Cir 1967); *see also United States v Waddill, Holland & Flinn, Inc*, 323 US 353 (1945); *Texas; Nesbitt v United States*, 445 F Supp 824 (ND Call978), *aff'd*, 622 F2d 433 (9th Cir 1980), *cert denied*, 451 US 984 (1981). In *United States v Estate of Romani*, 523 US 517 (1998), the Supreme Court ruled that the federal priority statute, 31 USC 3713, does not require that a federal tax claim be given priority over a judgment creditor's perfected lien on real property. In an earlier decision, *United States v Kimbell Foods, Inc*, 440 US 715 (1979), the court noted that the Tax Lien Act of 1966, IRC 6321 et seq., had modified the federal government's preferred position and recognized the priority of many state claims over federal tax liens. *See* IRC 6323(a). In *United States v Craft*, 535 US 274 (2002), the U.S. Supreme Court granted the IRS the right to place a lien on the property held by the entireties by Mr. Craft and his wife. The opinion was limited to federal tax liens and not the claims of other creditors. Although the opinion looked to the federal law on the subject of tax liens, the court also had to examine the law of the State of Michigan on the topic of entireties property. The majority concluded that, under Michigan law, one spouse did have the right to use the property, exclude others, enjoy a share of the income, and, if the other spouse agreed, to alienate the rights to the property. The court also noted that Michigan entireties law allows for the property to be held as tenants in common upon divorce and allows for full ownership by survivorship on death of the spouse.

Therefore, the majority in *Craft* concluded an IRS tax lien could be placed on Mr.

Craft's interest as a tenant by the entireties. The court specifically decided this despite a finding that "Michigan makes a different choice with respect to state law creditors," 535 US at 288, making it clear that the law in Michigan has not changed: state law creditors may not attach liens to property held by the entireties where the judgment is against only one of the spouses.

The IRS can intervene in any action in order to assert a tax lien. IRC 7424 (appendix E). It must apply to the court to intervene and give written notice to all parties. MCR 2.209(C); *see also* 28 USC 2410 (appendix C); MCL 600.2932.
Even if the IRS is successful in asserting the priority of a tax lien over your judgment, do not give up. Marshaling assets may yet offer relief (see §10.28).

M. Judgment Liens in General

600.2801 et seq. The lien is perfected through filing of a judgment lien notice which is a form promulgated by the Michigan Supreme Court. The form requires certain information and then process requires filing the lien with the court, then filing it through the Register of Deeds Office and giving the defendant notice of same. Again, there is no right of foreclosure to this lien A judgment lien requires prior entry of a money judgment. A lien is created by law, MCLA. The lien also has no impact on properties owned as tenants by the entirety and takes a back seat to certain other liens such as a purchase money mortgage, a non purchase money mortgage prior to the judgment lien, liens which require priority through operation of law and certain other liens such as state or federal tax liens and the like.

A judgment lien remains in existence for 5 years after it is recorded. It may be rerecorded once for an additional 5 years

N. General Comments Concerning Executions

1. Property Held by the Entirety

Real property

In Michigan, a tenancy by the entirety is presumptively created when a husband and a wife take title to real estate as co-owners. *See generally* MCL 554.44.45; Michigan Land Title Standard 6.5. Unless a conveyance to a husband and a wife includes an explicit phrase like "as joint tenants and not as tenants by the entirety" or "as tenants in common and not as tenants by the entirety," it creates a tenancy by the entirety. *DeYoung v Mesler*, 373 Mich 499, 503–504, 130 NW2d 38 (1964); *Hoyt v Winstanley*, 221 Mich 515, 191 NW 213 (1922); *Manwaring v Powell*, 40 Mich 371 (1879). Unlike a joint tenant, the interest of a tenant by the entirety is not separable from that of the other. Therefore, neither tenant can encumber or convey real estate held in the entirety without the consent of the other tenant. *Long v Earle*, 277 Mich 505,269 NW 577 (1936).

Creditors of both a husband and a wife can levy on property held by them as tenants by the entirety, but such property is not ordinarily liable for the individual debts of either party. *Rossman v Hutchinson*, 289 Mich 577, 286 NW 835 (1939); *Kolakowski v Cyman*, 285 Mich 585, 281 NW 332 (1938). Likewise, rent from property owned by a husband and

a wife as tenants by the entirety is not ordinarily subject to garnishment by individual creditors of either party. *American State Trust Co v Rosenthal*, 255 Mich 157,237 NW 534 (1931). In *United States v Craft*, 535 US 274 (2002) the U.S. Supreme Court ruled that a federal tax lien could attach to the entireties interest of one spouse. This ruling does not change the law as to non-IRS creditors having claims against one spouse in an entireties property situation.

The practical implication for creditors is that a judgment against one spouse does not allow a creditor to levy a judgment on real estate owned by a husband and a wife as tenants in the entirety. *In re Farmers' & Merchants' Bank*, 221 Mich 243, 190 NW 698 (1922). If you have a judgment against one spouse and the couple owns a $4 million house in Bloomfield Hills, the odds are that you will not be able to obtain a writ of execution against that house to satisfy the judgment. Note that a receivership might be possible under these circumstances (see §§ 11.9–11.13).

However, a debtor may not place his or her assets beyond the reach of creditors by investing individual funds in an estate by the entirety. *Dunn v Minnema*, 323 Mich 687,36 NW2d 182 (1949); *McCaslin v Schouten*, 294 Mich 180, 292 NW 696 (1940). For example, if a debtor were to use money from an individual account to make payments on a mortgage for a house owned by the entirety with his or her spouse, the court would view this as constructive fraud against the debtor's creditor and would allow the creditor to place a lien against the property for the amount that the mortgagor's equity was increased by the debtor's individual funds.

Personal Property

In contrast to real property, personal property is generally not held by the entirety, and a right of survivorship in personal property may not be created except by an express act. *Scholten v Scholten*, 238 Mich 679, 214 NW 320 (1927). However, all bonds, stock certificates, mortgages, promissory notes, debentures, and the like that are made payable to husband and wife are held as tenants by the entireties unless a phrase like "as joint tenants and not as tenants by the entirety" is used. MCL 557.151; *DeYoung v Mesler*, 373 Mich 499,503–504,130 NW2d 38 (1964). Ifa tenancy by the entirety has been created, the creditor cannot execute on the property. *Id*

However, if joint personal property is derived directly from property held in the entirety, the courts are sometimes unwilling to subject the property to levy by creditors of only one of the owners. In *Dickey v Converse*, 117 Mich 449, 76 NW 80 (1898), the court held that crops grown on an estate by the entirety are also held in the entirety and are thus not subject to execution on the obligation unless a judgment is obtained against both the husband and the wife. Likewise, in *Muskegon Lumber & Fuel Co v Johnson*, 338 Mich 655,62 NW2d 619 (1954), funds from the sale of property held by the entirety, though deposited in a bank account in the husband's name, could not be reached by creditors of only the husband.

If you have a writ of execution against such assets as a car or a boat and the title is held by both the husband and the wife, you need to determine whether there is a right of survivorship. If the title does not specify such a right, the property is not held as tenants by the entirety. The only problem with executing against such property is that a spouse who has made payments from personal funds might be able to obtain a court order allowing

that spouse to receive whatever portion he or she contributed from the sale proceeds. The best way to avoid this problem is to try to establish liability against both spouses at the outset. See §§2.l2–2.l8.

2. Quick Sales

Some circumstances require the quick sale of property. An obvious example would be a levy on a florist's shop. The problem is that the life span of the inventory is so short that it is difficult to obtain a reasonable recovery at an execution sale if you have to wait 10 days before selling the goods as required by MCL 600.6026(1). MCL 600.6035 provides for an order allowing the quick sale of perishable goods. However, local practice may vary, since the statute does not specify how to obtain this written court order. Form 10.27 is a sample order. The court must direct that the defendant be given notice of the time and place of the sale and must also direct how notice must be given. MCL 600.6035(2).

3. Leasehold Interests

Assume you have a judgment for $2,500 against a doctor. This doctor appears to be making lots of money, lives in a large home on a private lake, and drives an expensive foreign automobile. You might think it would be easy to collect from such a debtor, but guess again. The home on the private lake is owned as tenants by the entirety (see §10.29); the vehicle is leased; the equipment used in the doctor's private practice is also leased; and since the doctor is self-employed, wage garnishment is not possible. A receivership might be one possible solution (see §§11.9–11.13). Another possibility is to sell the leasehold interest that the doctor has in the premises or the equipment ofthe practice. *See* MCL 600.6057.

A leasehold interest is sold in the same fashion as other personal property under an execution writ. It should be clear that the interest being transferred is a leasehold rather than ownership. Some leases contain nonassignability clauses; no statutes or appellate cases address this issue. It is difficult to evaluate what a leasehold interest is worth. Leasehold interests are not common subjects of execution.

The purchaser of a leasehold interest may immediately assume possession and is entitled to all the rights that the debtor had in the leasehold property. MCL 600.6057(1). It can be difficult to find an execution purchaser interested in only a leasehold interest. Nonetheless, the threat of losing the leasehold can be effective in getting the debtor to pay the obligation.

O. Environmental Cleanup Liens

The State of Michigan may impose a lien on personal or real property of a person or a business where there is environmental "response activity" resulting in loss and damages incurred by the state. MCLA 324.20138.

The lien has priority by its terms over any liens filed after the environmental lien is filed. There are exceptions to assets which are not covered under the lien, such as qualified pension plans or IRA's, money in trust for a dependant's college education, and up to $25,000 in cash and $500,000 non cash assets enumerated.