

*Statement on Behalf of the  
Council of the Real Property Law Section  
of the State Bar of Michigan*

**JUDGMENT LIENS**

***House Bill 5381***

The Real Property Law Section of the State Bar of Michigan is a non-profit, voluntary association of Michigan attorneys who specialize in real estate law.

THIS IS A POLICY POSITION TAKEN BY THE COUNCIL OF THE REAL PROPERTY LAW SECTION OF THE STATE BAR OF MICHIGAN. THIS POSITION DOES NOT NECESSARILY REPRESENT THE POLICY OF THE STATE BAR OF MICHIGAN.

The Council of the Real Property Section considered House Bill 5381 at its meetings on January 10, 2004. The Council voted by a unanimous vote to oppose the House Bill based on its view that existing law already provides a mechanism for judgment creditors to obtain liens on a debtor's real property and the procedure set forth in House Bill 4131 would interfere with the existing real property recording system.

Remedies available under Michigan law to a judgment creditor include creditor's examinations, injunctive relief, garnishment, execution against personal property owned by the judgment debtor, levy on real property owned by the judgment debtor, and proceedings to set aside fraudulent conveyances.

Michigan law requires a judgment creditor to first exhaust collection efforts against the debtor's personal property prior to seeking collection from realty owned by the judgment debtor. MCL 600.6004. A judgment creditor seeking to levy against real property owned by the judgment debtor must first obtain issuance of a writ of execution directed to the sheriff or other court officer, who is obligated to first seek to enforce the writ of execution against the personal property of the judgment debtor that is not otherwise exempt from execution. MCL 600.6004.

Once the writ of execution is returned unsatisfied, the judgment creditor may obtain issuance of a levy against any real estate owned by the judgment debtor, which is not otherwise exempt. This is accomplished by preparation of a Notice of Levy that is signed by the court officer or sheriff and delivered to the Register of Deeds for recording. The notice of levy is required to be in recordable form and must include a legal description of the parcel of real estate to which the levy will attach.

The levy will expire unless it is foreclosed through an execution sale within five years of the date of recording. MCL 600.6051(2). The priority of the levy over other interests claimed in the subject real estate is determined as of the date of the recording of the notice of levy. MCL 600.6051(1). Sale of the subject real estate on execution is accomplished through publication and posting followed by a sheriff or court officer's sale. MCL 600.6052. The procedure for foreclosure of a levy is the same as for judicial foreclosure of a mortgage. MCL 600.3125; MCL 600.6091.

Judgment creditors have voiced a number of meritorious concerns regarding deficiencies in the procedures applicable to the ability to collect a judgment from real property owned by the judgment debtor.

First, the statute requires judgment creditors to seek satisfaction of the judgment from personal property of the judgment debtor prior to filing a levy on real property owned by the judgment debtor. This can result in unnecessary delay and expense as in many instances the court officer will conclude that no personal property exists. Moreover, if the sheriff does seize personal property, the procedure for sale can be time consuming, complex, and expensive relative to the proceeds realized. MCL 600.6004 and MCR 3.106.

Second, the fees on a levy on real estate include a fee payable to the sheriff or court officer for conducting the execution sale in an amount equal to 7% of the \$5,000 of proceeds received and 3% of proceeds received in excess of \$5,000. MCL 600.2559(j). These amounts are taxable as costs and must be paid by the debtor if the property is redeemed from the execution sale. MCL 00.2405. The fees are also typically collected if the judgment debtor voluntarily makes payment of the levy. Judgment creditors argue that the imposition of these fees imposes an unfair burden on judgment debtors.

In Michigan, judgment creditors have proposed HB 5381, which would permit the filing of a judgment lien against real estate owned by a judgment debtor. This lien would attach to any real property owned by the judgment debtor at the time of recording the lien as well as any later-acquired real property of the judgment debtor. Significantly, the judgment creditor would not be required to include a legal description of the property against which the creditor acquires a lien. The proposed lien would also attach to after acquired property of the judgment debtor without the need for any further action on the part of the judgment creditor. The granting of a lien on real estate enforceable against later acquired interests without requiring a legal description is not allowed to any class of consensual or non-consensual creditor under Michigan law, with the exception of liens filed by taxing authorities.

With the exception of taxing authorities, any other party seeking to acquire an interest in real estate is required to include in the instrument recorded with the Register of Deeds a legal description of the subject property. Under existing levy procedure, a

judgment creditor must include in the notice of levy a legal description of the property against which the judgment creditor is seeking to levy. Such a legal description can be obtained through a search of the grantor-grantee index maintained by the register of deeds. A legal description will also typically be available from the tax billing information on file with the local unit of government that assesses property taxes. In some instances, a legal description may also be available through an on-line computer database. It is anticipated that such on-line availability will increase with expanded electronic recording procedures likely to be used in the future.

Other creditors, such as construction lien claimants, are permitted to acquire an interest in real estate as security for the obligations owed to them, but must include in their claim of lien a legal description of the property that is subject to the lien.

In proposed pending judgment lien legislation, judgment creditors seek the right to acquire liens against real estate without the need to identify the subject real estate on the grounds that it is unfair burden, as a matter of public policy, to require judgment creditors to bear the expense of securing this information from the available public records. In many instances, the credit files of the judgment creditor will include the address of the debtor. The judgment creditor is able to easily ascertain, as set forth above, a legal description of the subject property.

A procedure to grant judgment liens without requiring a legal description of the property, and the additional granting of a lien on after-acquired property by the debtor, may have the undesirable effect of increasing real estate transaction costs. Title companies will be required, as part of their underwriting, to search for judgment liens. Title insurers will incur additional expense in expanding the scope of title searches and will have increased exposure resulting from insuring against judgment liens. The costs of expanded searches and increased liability may be shifted to lenders and/or borrowers who may ultimately be asked to bear the increased expense of the additional search as well as additional risks being assumed by the title insurer.

In addition there are presently delays being experienced by various county registrars of deeds in the recording of real estate instruments. It appears that some of these delays are the result of the current high level of mortgage refinancing. The delay in recording has resulted in the existence of a "gap period" between the date that the instrument is presented to the register of deeds for recording and the actual date of recording. During this gap period, the recorded instrument will not appear in the chain of title for a title insurer or other person conducting a title search. In order to accommodate their clients, title insurers are often required to insure a lender for any instrument that might have been recorded in the gap period and to assume the risk of such a filing. The establishment of a procedure to record judgment liens can be expected to cause further delays and increased risk to title insurers as a result of insuring lenders and owners for instruments which may have been recorded in the gap period.

A procedure that enables a judgment creditor to require a judgment lien may also interfere with the rights of a mortgage lender to realize on its real estate collateral in the event of default. One remedy available to a mortgagee is to accept a deed-in-lieu of foreclosure. This permits the borrower to convey his or her interest in the mortgaged real estate to the lender without requiring the lender to proceed forward with foreclosure proceedings, allows the parties to save the expense of a foreclosure proceeding, and minimize potential embarrassment to the defaulting debtor.

A deed in lieu of foreclosure, however, is effective only in those instances where there are no subordinate liens on the mortgaged property. The existence of a subordinate lien will require the mortgage lender to proceed with foreclosure of the mortgage in order to terminate the subordinate lien. If the judgment creditor is able to easily acquire a judgment lien against all of the debtor's real property merely by recording a notice of the judgment, it is to be anticipated that all judgment creditors will use this expeditious and inexpensive remedy. The existing procedure does discourage the filing of a levy against real estate in those instances where the creditor determines that the debtor likely has no equity.

A judgment creditor holding a judgment lien may impair the ability of a lender to accept a deed-in-lieu and require the lender to engage in the more costly and time-consuming process of foreclosure of its mortgage. The creditor may do by refusing to discharge its judgment lien, even if the debtor has no equity in the property or lacks sufficient equity to satisfy the lien. Similarly, the judgment lien creditor may be able to interfere with refinancing of the property by the debtor by insisting upon payment of its lien even in the absence of any sufficient equity in the property to satisfy the lien. The judgment lien legislation seeks to avoid this problem by providing that the judgment lien will attach only to the judgment debtor's "equity" in the property. However, the proposed legislation does not describe the method by which the amount of the debtor's equity is to be determined, the identity of the person who will make such a determination, or the recourse available to the parties if they are not in agreement with the determination as to the debtor's equity. Moreover, the time delays associated with employing some process to determine the debtor's equity will impair timely closing of real estate transactions.

There are further concerns that a judgment lien could prime the interest of a home equity lender or other lender who advances funds secured by a non-purchase money mortgage on the judgment debtor's property.

Under existing procedures, the judgment lien creditor is required to obtain a legal description of the property. There is a cost associated with the judgment creditor securing a legal description for the debtor's property. The effect of the proposed legislation may be to shift the cost from the judgment creditor to the real estate industry,

including title insurers, sellers and purchasers of real estate, banks and other lenders, construction lien claimants, and condominium associations. The proposed legislation will also impose costs upon court clerks who will be required to provide certifications regarding outstanding judgments. In addition, the proposed legislation will impair the timely closing of real estate transactions in those instances where there is some need to determine the amount of the judgment debtor's equity in the property.

The proposed judgment lien legislation does not include any procedure for foreclosure of the proposed judgment liens nor is there any intent or that the liens be foreclosed. Judgment creditors are seeking an expeditious manner (at the expense of other parties) to utilize the recording system as a mechanism for collecting judgments. Judgment creditors have identified a number of deficiencies in the existing procedures to realize upon real estate owned by the judgment debtor. These objections can be resolved with less adverse impact on third parties than through the proposed judgment lien legislation. For example, the fees payable to the sheriff on an execution sale could be reduced. The requirement in existing legislation that the sheriff first attempt execution against personal property could be eliminated. Amendment of the existing legislation would achieve the desired result of making it easier for judgment creditors to enforce their judgments while at the same time maintaining the integrity of the recording system and not permitting judgment creditors to shift the cost of collecting judgments to third parties.

The Section objects to the concept of the ability of a judgment creditor to obtain liens outside of compliance with the regular recording process.

While the Section has no objection in principal to modernizing the process for enforcement of judgment levies on real estate, the proposed bill is not a good means of doing so.

**Adoption of Policy Position:**

This policy position was approved the Council of the Real Property Law Section on January 10, 2004, by the unanimous vote of the Council. Written notice of the position was given to Council members in the manner required by the Section bylaws prior to the adoption of the policy position.

FOR FURTHER INFORMATION CONTACT:

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