

Legislative Analysis



JUDGMENT LIENS

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House Bill 5381 as enrolled
Public Act 136 of 2004
Sponsor: Rep. Charles LaSata
House Committee: Judiciary
Senate Committee: Judiciary

First Analysis (1-14-05)

BRIEF SUMMARY: The bill would create a procedure for filing a judgment lien.

FISCAL IMPACT: The bill would have an indeterminate fiscal impact on the judiciary.

THE APPARENT PROBLEM:

Some people believe Michigan has a very cumbersome and expensive process to follow when a creditor tries to collect on a judgment that has not been paid. In general, a "judgment debt" refers to the amount that a court decides is owed by a judgment debtor to a judgment creditor in a civil action. If the judgment debtor does not pay the judgment in full, the judgment creditor, before going after any real estate owned by the judgment debtor, must first file a writ of execution with the court. The writ allows a sheriff or court officer to seize the personal property of the judgment debtor and sell it.

Only if the proceeds of the sale of the personal property do not satisfy the amount of the judgment debt can the judgment creditor obtain issuance of a levy against the debtor's real estate. To do so, a Notice of Levy must be signed by a court officer or sheriff and filed with the county Register of Deeds; the notice must include a legal description of the real estate in question. Similar to a foreclosure sale for failure to pay a mortgage, the sheriff or court officer can sell the real estate with the proceeds going to satisfy the judgment debt.

Judgment creditors maintain that this current procedure results in unnecessary delays in collecting on the debt, increased costs to the judgment debtors, and an unnecessary intrusion in the personal lives of the debtors when their personal belongings are seized and auctioned. Forty-four other states have a procedure in statute allowing judgment creditors to place a judgment lien on a debtor's real estate without having to first seize and sell his or her personal possessions. Some feel that Michigan should create a similar procedure.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to add a new chapter, Chapter 28, specifying procedures for filing a judgment lien. "Judgment lien" would mean an encumbrance in favor of a judgment creditor against a judgment debtor's interest in real

property. This would include, but not be limited to, property acquired after the judgment lien was filed. A judgment lien would be in addition to and separate from any other remedy or interest created by law or contract. (A judgment lien is, generally speaking, a lien on the property of a debtor resulting from the decree of a court resulting from a lawsuit.)

Under the bill, a judgment lien would attach to a judgment debtor's interest in real property if a notice of judgment lien was recorded in accordance with the bill's provisions in the land title records of the register of deeds for the county where the property was located. The judgment lien would attach at the time the notice of judgment lien was recorded. For acquired property, the judgment lien would attach at the time the judgment debtor acquired the interest in the property.

With a few exceptions, a judgment lien would expire five years after it was recorded. The time period in which a judgment lien is effective would not be tolled or suspended by the filing of a state or federal insolvency (i.e., bankruptcy) proceeding by the judgment debtor. The clerk of a court that entered a judgment would have to certify a notice of judgment lien that included information specified in the bill, including the last four digits of the judgment debtor's social security or tax identification number. The bill would establish criteria for extinguishing a judgment lien and create a mechanism by which a person with the same name as a judgment debtor could have the misidentified judgment lien discharged in a timely manner.

A notice of judgment lien would not have to include a legal description of the debtor's interest in real property. A copy of a certified notice of judgment lien would have to be served by certified mail on the judgment debtor at his or her last known address; proof of service would have to be filed with the issuing court. However, if the judgment that was the basis for the judgment lien was \$25,000 or more, the notice would have to be personally served on the judgment debtor and proof of service filed with the court.

A judgment lien would not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment was entered against both the husband and wife. After the notice of judgment of lien was recorded, it would have priority over a lien recorded with the register of deeds. However, the bill would list a number of exceptions for which a judgment would not have priority, such as a purchase money mortgage or a claim of lien recorded with the register of deeds under provisions of the Construction Lien Act, as well as a state or federal tax lien.

In addition, the proceeds of the sale or refinancing of property subject to a judgment lien due to a judgment creditor would be limited to the judgment debtor's equity in the property at the time of the transaction after all liens senior to the judgment lien, property taxes, and costs and fees necessary to close the transaction were paid or extinguished. There would be no right to foreclose a judgment lien created under the bill, meaning that a judgment debtor could not be forced to sell his or her real property in order to pay the judgment lien.

Further, a discharge of judgment lien would have to be filed within 28 days after payment in full was made on the judgment that was the basis for a judgment lien. A partial discharge of judgment lien could be recorded if a partial payment was made from equity in property that was sold or refinanced. If a judgment creditor did not record a discharge of judgment in the required time period, he or she would have to do so within 14 days of receiving a written request from the judgment debtor. A judgment creditor who failed to comply with these requirements would be liable to the judgment debtor for \$300 plus actual damages and costs arising from the failure to record the discharge of judgment lien. The bill would also create a process to be followed by a judgment debtor who, after paying the judgment in full or in part, cannot locate the judgment creditor who failed to record the discharge of judgment.

The bill has an effective date of September 1, 2004

MCL 600.2801

ARGUMENTS:

For:

The bill represents efforts over the last four years by the Michigan Creditors Bar Association to create a legal mechanism by which judgment creditors could attach a lien to the real estate holdings of a judgment debtor without first seizing and selling the debtor's personal possessions. It is believed that such a procedure would be beneficial to both creditors and debtors. For creditors, it would eliminate delays caused by waiting for a local sheriff or court officer to go to a debtor's home, collect personal property, arrange for a public sale, etc., and then having to file a Notice of Levy to attach to the real estate if money were still owed after the sale of the personal belongings. In addition, costs associated with the filing fees and the procedure for the sale can be expensive in relation to the amount of proceeds generated by the sale of the personal property.

For debtors, a judgment lien would eliminate the stress of suddenly having someone appear at the door, enter the premises uninvited, and begin removing personal objects – some of which may be family heirlooms or have significant sentimental attachments. Moreover, if the sale of the debtor's personal possessions does not satisfy the amount of the judgment, the debtor's home can be forcibly sold. The fees associated with a levy on real estate can be considerable: 7 percent of the first \$5,000 of proceeds and 3 percent of the proceeds over \$5,000 must be paid to the sheriff or court officer conducting the sale. These amounts are taxable as costs and must be paid even if the judgment debtor pays the levy. Such a system, it is argued, puts an even heavier burden on a person who may have fallen on hard times and is striving to pay past debts.

House Bill 5381 would create a simpler, less expensive procedure by allowing a judgment creditor to attach a lien to the real estate owned by a debtor without first having to seize and sell personal property. Unlike the current Notice of Levy, a judgment lien could not force the sale of the real estate; it would merely allow a judgment creditor to receive payment from proceeds generated if the real estate were sold or refinanced during

the time the judgment lien was in effect. If a husband and wife jointly owned their home or other real estate (tenants in entirety), and the judgment debt was against only one of them, a judgment lien could not attach to their property. Only if the judgment debt was owed by both the husband and the wife (i.e., a credit card debt) could a judgment lien attach to their real estate property.

Though the bill eliminates the requirement that a legal description of the real estate be included with the judgment lien, it would require the last four digits of the person's social security number to be included. This requirement should alleviate the problems encountered when several persons with the same or similar name reside in the area.

Furthermore, the bill clearly establishes the priority of a judgment lien in relation to other types of liens and mortgages. It also creates a legal mechanism by which a person who erroneously had a judgment lien attached to property could have it lifted; a judgment creditor who did not discharge an erroneous lien or a lien paid in full within the bill's timeframes would be liable for actual damages and costs incurred by the debtor or the person who was victim of an erroneous lien.

Going to a judgment lien system should lower costs to both creditors and debtors, and should lighten the burden placed on courts since there would be little need for writs of execution. Forty-four other states have had a system of judgment liens for years with few problems. It is time for Michigan to also establish a system utilizing judgment liens.

Against:

Not all are enamored with judgment liens. In particular, opponents are concerned that the lack of including a legal description to be filed with the judgment lien will increase the likelihood that persons with identical or similar names will be confused with the true judgment debtor. People could then face unnecessary delays when seeking credit or selling their homes plus incur initial expenses in contacting the judgment creditor to have the lien removed. It would also leave a permanent mark on the property's title history, even if the lien was a mistake.

Other concerns that were raised are as follows:

- Identity theft. The enrolled version requires service of process to be made personally on the judgment debtor for debts of \$25,000 or more. This is a good start, but since identity thieves often send in change-of-address forms, it is conceivable that even a certified letter could be delivered to the identity thief – leaving the true property owner in the dark about a lien being placed on his or her home. To ensure accurate notification to all judgment debtors, service of process should be made personally for all judgment liens regardless of the amount due.
- Increased real estate transaction costs. Without requiring a legal description of the property, title companies may incur increased real estate transaction costs due to needing to expand the scope of title searches and increased liability resulting from insuring against judgment liens.

- Increased work loads for county clerks. Some county clerks have voiced concern that using the last four digits of a person's social security number instead of a legal description of the parcel of real estate will result in confusion and more work for the county clerks to straighten out. Reportedly, similar problems happen with tax liens, which also do not include a legal description. According to a person working in a county register of deeds office, title insurance companies do not always check the last four digits of the SSN when they pull a name, thus erroneously attaching a lien to the wrong person (and therefore wrong property). Getting a false lien off one's credit report can be a difficult and time consuming process, and often reappear on a credit report months or years later. Further, court clerks may spend more time under the bill certifying outstanding judgments.
- Deed-in-lieu of foreclosure. According to information supplied by the Real Property Section of the State Bar of Michigan, under a deed-in-lieu of foreclosure, the borrower can convey his or her interest in the mortgaged real estate to the lender and thus save the expense and embarrassment of foreclosure proceedings. However, it can only be used if there are no subordinate liens on the mortgaged property; under the bill's provisions, a mortgage takes priority over a judgment lien. Further, the judgment creditor could interfere with the judgment debtor's ability to refinance his or her mortgage by insisting on payment of the judgment lien even there is insufficient equity to satisfy the lien. This could hamper a person's ability to reduce his or her monthly payments needed to free up money with which to pay down the judgment debt.

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