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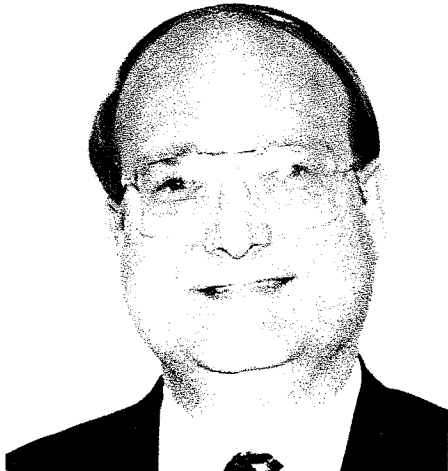
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Federal Money Judgment Liens Under the Federal Debt Collection Procedure Act: A 40-Year Super-Lien

By Kraettli Q. Epperson



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I. Introduction

The good news for creditors, real property attorneys, and title companies, who wondered how state and federal money judgment lien statutes interacted, is that the feds must follow state judgment lien recording practices. However, the bad news is that certain money judgments and money judgment liens thought to have expired may have been reinstated, and that such judgments and judgment liens which were about to expire may have been granted a substantial extension on life. Consequently, "woe be upon" any creditors or title professionals who recently agreed to waive a requirement to get a release of an about-to-expire federal

court money judgment lien in favor of the United States. This situation has been brought about by the enactment of the Federal Debt Collection Procedure Act ("FDCPA"), effective May 28, 1991,¹ which is *not* to be confused with the Fair Debt Collection *Practices Act*.²

II. The Debt Collection Procedure Act

This FDCPA only affected the lien creation process for a narrow range of judgments; it "provides the exclusive civil procedures for the United States . . . to recover a judgment on a debt." For the "judgment on a debt" to be covered by this Act, it must be from a federal court for a debt which is either:

- (A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or
- (B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States.

What is especially intriguing about the FDCPA is that it ties the procedure for the creation of the lien of federal-debt-related money judgments -- issued by federal courts

-- to state land records recording procedures. Judgment liens did not exist at common law and are therefore by their nature dependent on strict adherence to the federal or, now, state statutory procedures for them to be able to come into existence at all.

This FDCPA stands at the end of a long road consisting of a series of older as well as fairly recent federal statutes that have provided requirements for (a) giving *Lis Pendens* notice of pending cases in federal court attempting to affect real property titles, (b) recording federal court money judgments to create a lien on real property, and (c) filing federal tax liens to create liens on real property. The result, as discussed below, is that state real estate records have become the means to perfect a lien under federal law.

Since 1958, 28 U.S.C. section 1964 has provided that if a state's law both *requires* that a notice of a pending real property-related action in a state court be recorded in the local land records, and *authorizes* the recording of such a notice of a similar type of action pending in a federal court, then the state's procedure must be followed.³

In addition, since 1948, 28 U.S.C. section 1962 (like its pre-1948 predecessors) has mandated that if a state's law both *requires* that a state court money judgment be recorded in a specific set of records in order to create a lien, and also *authorizes* a federal court money judgment to be received and recorded in such local records, then such state procedure must be strictly followed to create a lien

3. 28 U.S.C. § 1964:

Where the law of a State requires a notice of an action concerning real property pending in a court of a State to be . . . recorded . . . in a particular manner, or in a certain office or county . . . in order to give constructive notice of the action as it relates to the real property, and such law authorizes a notice of an action concerning real property pending in a United States district court to be . . . recorded . . . in the same manner, or in the same place, those requirements of the State law must be complied with in order to give constructive notice of such an action pending in a United States district court as it relates to real property in such State.

1. 28 U.S.C. §§ 3001-3308, effective 180 days after November 29, 1990.

2. 15 U.S.C. §§ 1692-1692o.

for the federal court judgment.⁴ It must be noted, however, that there has been an express exclusion in this section 1962 for "judgments entered in favor of the United States."

The exception for "judgments entered in favor of the United States," carved out of the coverage of 28 U.S.C. section 1962, has been eliminated by the enactment of the FDCPA as of May 1991. As noted above, this FDCPA "provides the exclusive civil procedures for the United States -- (1) to recover a judgment on a debt; . . ." except ". . . to the extent that another federal law specifies procedures for recovering on a claim or a judgment for a debt arising under such law . . ."

Under section 3201 of the FDCPA, "a judgment in a civil action shall create a lien on all real property of a judgment debtor on filing a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of [Title 26 U.S.C.] section 6323(f) of the Internal Revenue Code of 1986." The judgment lien takes its priority from the date of its recording and shall last as a lien for an initial 20 year period with the possibility of an additional twenty year extension for a total of forty years.⁶

As provided in section 3201 of the FDCPA, one must look to section 6323(f) of the Internal Revenue Code of 1986, to determine the manner for creating these judgment liens. 26 U.S.C. section 6323(f)(1)(A)(i) of the Code states: "The notice referred to in subsection (a) shall be filed -- in the case of real property, in one office within the state (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; . . ."

By way of example, the Oklahoma legislature adopted its version of the Uniform Federal Lien Registration Act, 68 O.S. sec-

tion 3401 *et seq.*, as of November 1, 1988 (the "Lien Registration Act"). Section 3403(B) of the Lien Registration Act provides: "notices of liens upon real property for obligations payable to the United States . . . shall be filed in the office of the county clerk of the county in which the real property subject to the liens is situated." Within the office of each of Oklahoma's 77 County Clerks an alphabetical judgment lien index is maintained listing both the debtor and creditor.

III. Unresolved Issues

While adoption of the FDCPA ends speculation on how to handle "judgments entered in favor of the United States," the language of the FDCPA leaves the following intriguing questions unanswered:

1. *Reinstating Expired Liens.* The FDCPA provides in section 3005: "This chapter shall not apply with respect to a judgment on a debt if such judgment is entered more than 10 years before the effective date of this chapter." If a state law provided that all judgments, and the related judgment liens, expired (*i.e.*, became unenforceable) after the lapse of a specified period of time which is less than 10 years (such as Oklahoma's five-year expiration rule, found at Title 12 section 735), then a serious problem could arise from judgments over five years old, but less than 10. For instance, Oklahoma's expiration statute specifically provides that "if execution is not issued or a garnishment summons issued . . . within five (5) years after the date of any judgment. . . such judgment shall become unenforceable and of no effect, and shall cease to operate as a lien on the real estate of the judgment debtor."⁷

Does this new federal statute reinstate an otherwise unenforceable judgment and its lien? Subsequent purchasers, lenders and title examiners will be unpleasantly surprised if they have acted as if such judgment liens were defunct and are now told that the federal

government is knocking on their door to give notice of an intention to enforce such liens.

2. *Future Expiration.* There is a provision of 28 U.S.C. section 3201(c) which provides: "a lien created under subsection (a) is effective, unless satisfied, for a period of 20 years." If this 20 year lien period is longer than a state's expiration law (such as Oklahoma's five-year expiration rule, discussed *supra*), anyone dealing with any federal court judgment liens for a debt owed to the United States, which have not yet expired under the shorter state statutes, may discover that such judgment liens have longer lives than expected. 28 U.S.C. section 3003(d) specifically provides: "This chapter [*i.e.*, Chapter 176 - Federal Debt Collection Procedure: sections 3001 *et seq.*] shall preempt State law to the extent such law is inconsistent with a provision of this chapter." Such preemption language appears to reinforce the idea that we will be facing 20 year liens.

3. *Priority Preserved by Collection Efforts.* State laws might require that a judgment creditor undertake affirmative collection efforts (*i.e.*, general execution and/or garnishment) within certain time periods in order to preserve the priority of a money judgment lien. For instance, in Oklahoma the priority of a judgment lien perfected ahead of other money judgment liens is lost, under Title 12 section 801, if some collection effort is not undertaken within one year of the judgment's initial creation.⁸ However, 28 U.S.C. section 3201(b) of the FDCPA provides that "A lien created under subsection (a) shall have priority over any other lien or encumbrance which is perfected later in time." Is this another federal preemption question? If so, the question is already answered by the federal preemption language of 28 U.S.C. section 3003(d). But perhaps the federal statute's simple adoption of the universal recording axiom, "first in time, first in right," is subject to later changes in priority caused by actions, or inactions, of the judgment creditor -- in this instance, the federal government's failure to execute on the judgment within the state's one-year time frame.

4. *Collection Efforts to Preserve a Lien.* Similarly, state statutes may allow a money judgment to have enough extensions to have

4. 28 U.S.C. § 1962:

Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. This section does not apply to judgments entered in favor of the United States. Whenever the law of any State requires a judgment of a State court to be . . . recorded . . . in a particular manner, in a certain office or county . . . before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be recorded.

5. 28 U.S.C. § 3001.

6. 28 U.S.C. § 3201(b) and (c).

7. OKLA. STAT. tit. 12 § 735:

If execution is not issued and filed or a garnishment summons issued as provided in section 759 of this title within five (5) years after the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five (5) years has intervened between the date that the last execution on such judgment was filed or the date that the last garnishment summons was issued as provided by section 759 of this title, and the date that writ of execution was filed or a garnishment summons was issued as also provided in section 759 of this title, such judgment shall become unenforceable and of no effect, and shall cease to operate as a lien on the real estate of the judgment debtor. Provided, that this section shall not apply to judgments against municipalities.

8. OKLA. STAT. tit. 12 § 801; see also Aetna Finance Co. v. Schmitz, 849 P.2d 1083 (Okla. 1993).

a 20-year, or even a 40-year, life, but may also require periodic efforts to enforce the judgment in order to keep the lien alive. In Oklahoma, for example, the applicable statute provides that such collection efforts must be repeated every five years to allow the judgment lien to survive.⁹ An unanswered question arises as to whether this state-mandated precondition to a lien's continued existence is intended to be preempted by the FDCPA's creation of an unconditional 20-year lien.

5. *Judgment Creditors as Second Class Creditors.* As noted above, the FDCPA specifically provides, at 28 U.S.C. section 3201(a), that "[a] lien created under subsection (a) shall have priority over any other lien or encumbrance which is perfected later in time." This federal statute tries to treat a federal court money judgment like a mortgage or other voluntary lien ("Mortgage 1") that is perfected (*i.e.*, filed of record) ahead of any other voluntary lien ("Mortgage 2"). However, this federal statutory language fails to provide for the situation where such later-perfected voluntary lien, Mortgage 2, was granted and attached (*i.e.*, was signed and delivered) before the earlier-filed mortgage, Mortgage 1, was granted and attached. In some states, such as Oklahoma, a judgment lien creditor is treated under the recording act as a "second class" creditor. This "second class" status means that even if the public land records show that the judgment debtor owns certain real property, but in fact there is an unrecorded voluntary conveyance to a third party, then the judgment creditor has no claim against such real property. "Judgment

creditors are not *bona fide* purchasers."¹⁰ Similarly, if there is a prior unrecorded mortgage lien or comparable encumbrance on the tract, the federal judgment lien will be junior to such claim. This federal statutory language establishing the priority for such federal judgment liens fails to address this issue.

6. *Race v. Race/Notice Recording Acts.* The federal lien priority language in 28 U.S.C. section 3201(b) presumes that all 50 state jurisdictions have "Race" type recording acts. Only if a state has a "Race" statute will this federal statute on priorities be consistent with state law. In a "Race" jurisdiction the winner of the race to the courthouse to record a conveyance or lien wins *even if* the winner acquired its interest with actual knowledge that another person already held an unrecorded interest. As noted in an article on recording acts, only 10% of the 50 states (*i.e.*, five states) have "Race" statutes.¹¹ Most of the states, (*i.e.*, 26 or 52%), are "Race/Notice" jurisdictions. In a "Race/Notice" jurisdiction the winners of the race to the courthouse to record their deed only win if they not only get to the courthouse first, but also did not have actual notice of the previously granted, but unrecorded, interest when they acquired their own interest. In the remaining 19 states (*i.e.*, 38%) there are pure Notice-type statutes. In such states, perfection by filing is not even required, but initial acquisition without actu-

al, or constructive, notice of other outstanding interests in a debtor's real property is essential to establish one's lien priority. Therefore, in the vast majority of states (*i.e.*, 90%), the actual knowledge of the federal government of any outstanding interests will be relevant, and such knowledge will arguably prevent the government from having a senior lien on the real property. Therefore, this federal statutory statement of priority may be subject to challenge depending on the particular facts of the situation.

IV. Conclusion

In conclusion, it appears that the Congress has finally filled in that gap for "judgments in favor of the United States" that has existed since before 1948 in the language of 28 U.S.C. section 1962. However, new questions have been created and left unresolved due, in large part, to Congress's apparent (and erroneous) assumptions about the length of time that various state statutes provide for judgment liens to exist and about how the various states' recording systems establish and maintain lien priorities. Hopefully, the courts, or perhaps Congress itself, will promptly answer these significant and troubling questions. To date, however, a review of the annotations in the 1993 U.S.C.A. pocket part failed to disclose any helpful cases. While awaiting official clarification of these numerous issues, creditors and title professionals will have to take an extremely cautious approach. Such an approach will require that they must not only report, but also insist on getting releases of, all recorded federal court money judgment liens which arise due to debts owed to the United States — at least for 40 years.

9. OKLA. STAT. tit. 12 § 735.

10. "The lien of a judgment attaches only to the interest in real estate owned by the judgment defendant; and judgment creditors are not *bona fide* purchasers. Such creditors part with nothing to acquire the lien." *Gilbraith et al. v. Smith*, 150 P. 719 (Okla. 1915), citing *J.I. Case Threshing Mach. Co. et al. v. Walton Trust Co. et al.*, 39 Okla. 748, 136 Pac. 769 (Okla. 1913); *Scott-Baldwin Co. et al. v. McAdams*, 43 Okla. 161, 141 Pac. 770 (Okla. 1914). See also *Buell Cabinet Co., Inc. v. Sudduth*, 608 F.2d 431 (10th Cir. 1979).

11. See, e.g., *Ray E. Sweat, Race, Race-Notice and Notice Statutes: The American Recording System*, 3 *Probate and Property* 27 (May/June 1989).

Commentary: Why We Love "It's a Wonderful Life"

By Alvin C. Harrell

The 1993 Christmas season included the usual showings of the classic film, "It's a Wonderful Life,"¹ and this prompted several published commentaries reflecting on the meaning and impact of the film.

One was a disparaging editorial in *The Wall Street Journal*.² This critical commentary was surprising, both because one would have expected the *Journal* to recognize the continuing significance of the film's message³ and because of the somewhat gratuitous nature of the *Journal's* criticisms.⁴

Another noteworthy article appeared in *The Los Angeles Times*.⁵ Though reflecting a politically correct point of view (the focus was an interview with a federal regulator) this article, perhaps unintentionally, also reflects some of the generally unheeded lessons that director Frank Capra built into his classic movie.

Of course "It's a Wonderful Life" illustrates the many ways that normal human beings, left to pursue their life's goals, interact in beneficial ways that no central plan ever could devise. But there is a concurrent theme that illustrates the importance of free and diverse financial intermediaries, offering consumers a menu of financing alternatives in a competitive business environment.

The inevitable Hollywood villains in the film appear in the form of the corrupt and heartless Mr. Potter and the government enforcement apparatus that he enlists in his effort to

destroy his lower-cost competitor.⁶ There is an obvious parallel in the way various competitors promoted the demise of the thrift industry as a solution for the failure of federal regulation and deposit insurance in the 1980s, and in the way that federal law and regulation is being used to hobble community banking in the 1990s.⁷

It is in this regard that the *Los Angeles Times* article reflects surprising insight. Your author must admit to a certain naivete in assuming that nearly everyone would recognize the societal

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1. For some background and one perspective on this film, see Alvin C. Harrell, *Commentary on FIRREA: What Would George Bailey Think?*, 44 *Consumer Fin. L.Q. Rep.* 215 (1990).

2. *Why We Hate "It's a Wonderful Life"*, *Wall Str. J.*, Dec. 17, 1993, at A14.

3. See Harrell, *supra* note 1, and discussion *infra*.

4. A "tiresome . . . heart warmer saturated with bathos and bleakness." *Why We Hate "It's a Wonderful Life"*, *supra* note 2.

5. James Risen, *George Bailey Would Have a Tough Time Under Today's Strict Thrift Regulations*, *L.A. Times*, Dec. 26, 1993, at D2.

6. As noted in Harrell, *supra* note 1 at 215, n. 1, this was not intended to reflect badly on banks generally. Mr. Capra directed a predecessor firm, "American Madness" (Columbia Pictures 1932), that purveyed many of the same themes using a banker as the hero.

7. Frank Capra was no friend of FDR or the New Deal, and both "American Madness" and "It's a Wonderful Life" reflect subtle disapproval of the business consolidations and reduced competition inherent in the New Deal regulatory model and again so familiar in the 1990s.