

Summer 2017

# FINANCIAL newsletter

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Ag Lenders Webinar



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## THE BASICS OF COLLECTING ON A JUDGMENT

Sometimes winning a court case and obtaining a judgment is only the beginning of the effort to get paid. This article will address what it means to obtain a judgment, what rights a creditor has with respect to the judgment, as well as how to pursue assets that are located out of the State of Minnesota. A judgment under Minnesota law means the final determination of rights of the parties in a lawsuit. When a judgment is properly entered it survives for ten years after its entry. A judgment can be

renewed prior to its expiration for additional ten year terms. A judgment can also be assigned to a third party with or without compensation for the assignment.

A judgment automatically becomes a lien on abstract property in the county where it is filed and docketed. For the judgment to be a lien on Torrens property a transcript of the judgment must be filed with the registrar of titles and memorialized on the certificate of title. To become a lien on property in another

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## THE BASICS OF COLLECTING ON A JUDGMENT continued from pg 1

county, the transcript of judgment must be filed with the court administrator or registrar of titles in the county where the property is located. In order for a judgment to become a lien on personal property there must be a levy or attachment on the personal property.

While obtaining a judgment gives a creditor rights, there are other creditor rights which may arise without obtaining a judgment. Those rights may include the rights of a secured party pursuant to a grant of the security interest, statutory liens, agricultural liens, and possessory liens. In Minnesota there are also restrictions on obtaining a judgment against agricultural property if the collection action falls within the Farmer-Lender mediation requirements. A recent task force has recommended changes to the Farmer-Lender Mediation Law.

Once a judgment has been obtained, the judgment creditor gains certain rights under Minnesota law. In addition to the property lien rights which arise from the docketing of the judgment, the judgment creditor can pursue discovery to attempt to locate assets to satisfy the judgment. Discovery methods available to a judgment creditor include: taking depositions; issuing subpoenas to compel persons to appear and provide testimony or documents; conducting written discovery; supplementary proceedings; and the ability to pursue an order for disclosure. Depositions, subpoenas and written discovery requests are all similar to those methods which occur during the pendency of a lawsuit, but instead focus upon the assets of the judgment debtor. Supplementary proceedings in Minnesota allow a judgment creditor to apply to the court by affidavit for an order compelling the judgment debtor to appear before a court reporter or notary public to be examined under oath as to potential assets of the judgment debtor. A writ of execution must be first returned unsatisfied by the sheriff's office. An order in supplementary proceedings has a similar effect on a debtor as service of a subpoena and notice of a taking of deposition. An order for disclosure allows a judgment creditor to request from the district court an order requiring the debtor to provide the creditor with information

regarding the nature, account, identity of, and location of the debtor's assets, liabilities, and personal earnings. An order for disclosure is available after the judgment has been docketed for thirty days.

If a judgment debtor fails to cooperate with discovery efforts, fails to appear for a deposition pursuant to a subpoena, fails to appear for supplementary proceedings, or fails to timely return an order for disclosure, an order to show cause can be obtained from the court requiring the debtor to appear and show cause why they have not provided the requested information or appeared for the deposition or supplementary proceeding. If the debtor fails to appear for the order to show cause hearing, a finding of contempt of court is the

likely result which can result in the issuance of a warrant for the arrest of the judgment debtor. Typically if the judgment debtor is taken into custody pursuant to the warrant the court will require the judgment debtor to provide the information or appear at the requested proceeding to answer the judgment creditor's inquiries.

If nonexempt assets are determined to exist either through information possessed by the judgment creditor prior to the time of the judgment, through discovery efforts, or through

public records, the judgment creditor has a number of avenues available to obtain possession of those assets. One method is garnishment. Garnishment can be used to obtain a lien on assets held by a third person such as a financial institution, somebody possessing the assets or who owes money to the judgment debtor, or through a wage garnishment with the judgment debtor's employer. Prior to garnishing wages a notice of intent to garnish wages must be provided to the judgment debtor at least ten days before the wage garnishment is served.



## THE BASICS OF COLLECTING ON A JUDGMENT continued from pg 3

A second method of obtaining possession of assets is through a levy. A writ of execution must be obtained from the district court where the judgment is docketed. Attorneys are able to directly levy upon assets up to \$10,000. Amounts over \$10,000 must be levied upon by providing the writ of execution to the sheriff with direction to the sheriff regarding where the assets are located. The sheriff will charge a fee for the levy typically a percentage of the amounts recovered. A liquidation receivership can also be used to gain access to assets. Similar to appointment of a receiver in a foreclosure setting, a receiver can be appointed by the court to liquidate the assets of a judgment debtor. Typically, in a receivership for liquidation purposes the creditors of the judgment debtor are all paid on a pro rata basis.

If assets are located outside the State of Minnesota most states have enacted the Uniform Enforcement of Judgments Act. In most instances it will be necessary to docket the judgment in the state where the assets are located. This is done by obtaining a certified copy of the judgment and filing it in the state and county where the assets or judgment debtor are located along with an affidavit of judgment creditor or attorney which contains

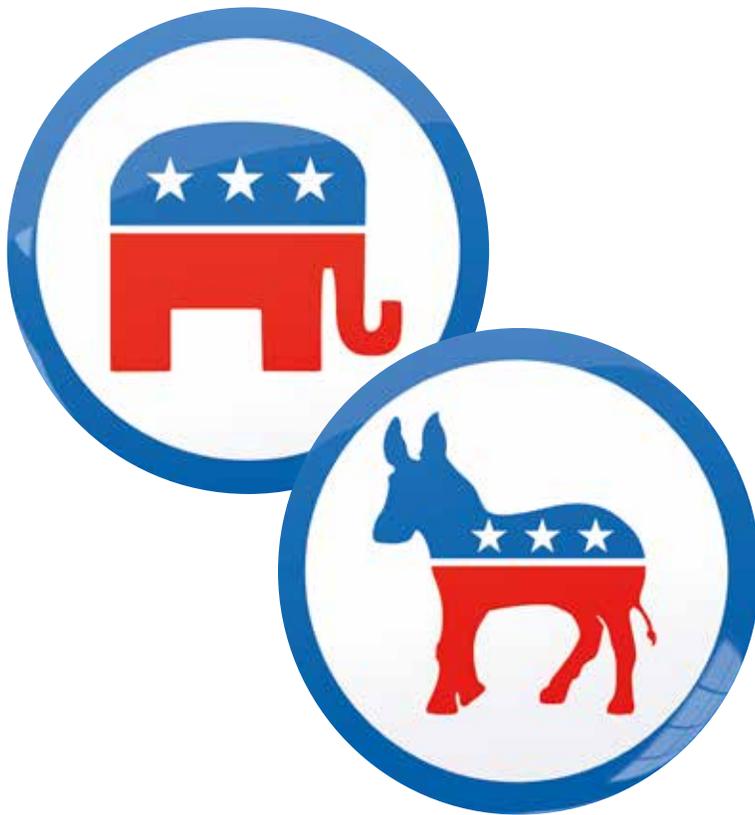
the name of the judgment debtor and last known post office address of both the creditor and the debtor. The court will then typically mail notice to the judgment debtor of the intent to enter judgment in the court. The judgment is typically stayed during this period of time to allow the judgment debtor to raise any defenses which may exist to entry of the judgment. While the judgment debtor will not be able to relitigate issues which were appropriately in front of the court issuing the judgment, there are defenses which may be raised in the foreign state such as the lack of appropriate jurisdiction over the judgment debtor in the state where the judgment was obtained. Once the judgment is entered in the other state, typically the judgment creditor will have the same rights as in Minnesota to pursue a discovery and execute on any assets located in that state.

Obtaining a judgment can be only the first step in the collection process. Having an experienced collection attorney assist in recovering assets can make the efforts to obtain the judgment and pursue collection worthwhile. Timing can be a concern as other creditors may be pursuing the same assets so acting as quick as possible can improve the prospects of payment. ■



**By Cory A. Genelin**  
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# THE STATE OF MINNESOTA CONTINUES TO BE A HOUSE DIVIDED



The State of Minnesota continues to be a house divided. Republicans control both houses but the Governor is a Democrat. In such a condition it is unlikely that the legislative process will produce any major changes. In all likelihood, less than five percent of bills will even make it out of one chamber. That being said, some bills that have no chance of passing still give us an insight into the worldview of the politicians drafting them, and give us some prediction of what would come about if we ever have single party control of the State. With that in mind, let's examine a few.

HF 1075 (Author David Bly (D) Northfield)/SF934 (Author Carolyn Laine (D) District 41) is a resolution that would urge the Federal Government to adopt an "American Recover" program. Not only is the resolution not going to be passed, even if it was, it would have no legal consequence; but it's well worth a read. The resolution would include passing a bill similar to Glass-Steagall. In keeping with a certain narrative of the 2008 crisis, the resolution suggests that the crisis arose out of the combination of commercial and investment banking. It would also urge the construction of a new nationalized

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## THE STATE OF MINNESOTA CONTINUES TO BE A HOUSE DIVIDED continued from pg 5

banking system and suggests that such a system “built all the infrastructure of the nation for the first 40 years . . .” The resolution suggests that a new nationalized banking system would be “capitalized at \$1-2 trillion of not taxpayer money,” and could be used to “build a modern network of high-speed rail,” and other public works. The resolution also advocates establishment of a moon base. No, I’m not making that up.

HF 273 (Author David Bly (D) Northfield) would take the State of Minnesota from bank regulator to competitor. The bill would create “The State Bank of Minnesota” “for the purpose of facilitating and supporting agriculture, commerce, and industry in the state.” The State Bank of Minnesota would be fully owned by the State of Minnesota. Bank deposits would be guaranteed in full by the state and would be exempt from any and all state, county, and municipal taxes.

HF 1477 (Author Kelly Fenton (R) Woodbury) would allow credit unions to conduct meetings, including providing notice and voting, via email “or other verifiable means” in addition to regular mail.

SF1673 (Author Rich Draheim (R) District 20) addresses Farmer Lender Mediation. The bill would change the minimum dollar

amount from \$5,000.00 to \$15,000.00, which would be adjusted for inflation every five years. The bill would also clarify that a new line of credit, loan, or other debt worked out in one round of Farmer Lender Mediation would not be subject to a second round of mediation for two years. For example: Farmer defaults on Note A and Farmer and Lender engage in mediation. They execute Workout Agreement B. 23 months later, Farmer defaults on Workout Agreement B, Lender would not have to go back to mediation. But if Farmer makes payments for 25 months and only then defaults, then mediation would be required.

Student loans continue to be an area of focus for both parties. HF 21 (Author Erin Murphy (D) St. Paul) would establish a licensing regime for anyone acting as a student loan servicer. It would also establish a state student loan ombudsperson to serve student loan borrowers, resolve conflicts with lenders, and recommend changes to state law. SF 941, a Republican bill, would establish a refundable state income tax credit of up to \$1,000.00 for anyone paying more than ten percent of their adjusted gross income to student loan payments. I asked one Senator “If we encourage solar panels by offering a refundable tax credit for solar panels, won’t a refundable tax credit for student debt encourage more student debt?” He looked at me like a duck watching television. Governor Dayton vetoed a similar measure last session, and this proposal might meet the same fate. The DFL has authored SF 1444 which would set aside \$5,000,000.00 as a “bad debt reserve” to be used to expand the State’s student loan refinancing program to less creditworthy borrowers.

Of course all of the above are just bills. Substantive changes that are enacted will be covered in future issues. ■





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## WHAT TO DO ABOUT SECRET LIENS

**B**efore extending new or additional credit, most lenders will conduct UCC searches or may run land title searches to discover if property that might serve as security for the loan is already encumbered by liens or mortgages. And while such searches are an important part of ensuring a particular loan is a satisfactory risk, there are many liens that may exist which are difficult to discover by normal means, may arise after an initial search has been completed, and may not even be known by the borrower. Some of these liens also can upset the typical first-in-time, first-in-right rules. These “secret liens” can turn a good loan into a promissory note not worth the paper it is printed on.

One of the most common and potentially detrimental liens that can impact a lender’s secured position is a tax lien, which can arise under either state and federal law. Minnesota law provides that taxes due, and interest and penalties on that tax, become a lien on all real and personal property of the person obligated to pay the tax. As a general matter, Minnesota tax liens are not strictly always “secret”—a tax lien is not enforceable against a person with a perfected security interest or prior recorded mortgage in the property unless the Department of Revenue files a Notice of Lien with the relevant county recorder’s office or the Minnesota Secretary of State. Further, as a general rule a Minnesota tax lien does not obtain priority over a perfected UCC lien or mortgage, but a lender can lose priority, if only partially, by operation of the 45-day rule. A lender that extends new funds 45 days or more after a Notice of Lien is filed loses priority as to the new funds advanced. Additionally, a lender who extends new funds at any time after actually learning of a tax lien will similarly lose priority as to those newly advanced funds. To avoid this, it is good practice to perform new UCC searches before advancing substantial additional sums to a borrower; tax liens discovered must be dealt with before a lender can safely advance new funds.

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## WHAT TO DO ABOUT SECRET LIENS continued from pg 9

Similarly, the IRS can obtain a federal tax lien for unpaid federal taxes, and federal tax liens work similarly to Minnesota's own tax liens described above. The IRS must file a notice of the tax lien in the appropriate office—the county recorder's office for real property, and the Secretary of State's Office for personal property—to obtain lien rights which are enforceable against third parties. While the IRS rules are somewhat more complicated, a similar 45-day rule applies. Generally, if a secured lender makes additional advances 45 days or more after a IRS tax lien notice is filed, the lender loses priority in the collateral with respect to those new advances, even if the lender perfected by filing before the IRS.

For lenders that provide financing to certain buyers and sellers of perishable produce such as fruits and vegetables, a true hidden lien to contend with is the statutory trust provided by PACA, the federal Perishable Agricultural Commodities Act. PACA was enacted over a century ago to protect farmers who were compelled to quickly unload their perishable commodities on delayed payment terms with little recourse if payment was never made. PACA provides that certain buyers of perishable commodities hold the commodities, derivative products, and proceeds in trust for the sellers or suppliers until full payment is made. A claim against a PACA trust will supersede even a prior perfected security interest in the same farm products, inventory, and proceeds. Simply put, when the produce buyer stops making payments to its suppliers and its lenders, the suppliers will likely succeed in a dispute over whatever inventory or proceeds that remain. These disputes most often come to a head when the produce buyer is in severe financial trouble and files bankruptcy, but a lender can minimize risk by looking at the buyer's past business history when dealing with suppliers to ensure the buyer has a good track record of timely and full payment. The federal Packers and Stockyard Act creates a similar trust system for livestock sold to meatpackers, stockyards, and market agencies; however, it applies only to "cash sales" as defined by the statute.

Another hidden lien that may arise is a warehousemen's lien. Under state law, a warehouse in possession of goods has a lien on those goods for storage and similar charges. The warehouse need not make any filing or take any action to create or preserve the lien; however, the lien is lost as to goods the warehouse voluntarily delivers or unjustifiably refuses to deliver. Generally the warehouse lien will take priority even over a prior perfected security interest in the same goods.

Another broad category of hidden liens that should be of particular interest to lenders serving agricultural producers

are the various agricultural liens created by statute. Such liens generally provide a method of recovery to persons who supply goods or services in support of agricultural production. For example, a person who provides inputs such as feed or labor for raising livestock has a lien on that livestock equal to the retail value of the inputs. It is possible for a livestock production input lien to become superior to a prior perfected security interest of a lender. The person who provided the input must timely provide a lien notification statement to the lender. If the lender does not respond to the lien notification statement within ten days after receipt, then the input lien can have priority over the lender's security interest.

In Minnesota, statutory liens exist for veterinarians, breeders, feeders, landlords, harvesters, and crop production input suppliers, and many of these liens can have priority over a perfected security interest in certain circumstances. Understanding the effect and operation of these liens is especially important when making decisions on extending credit to agricultural producers for a new crop year. Questions such as whether a landlord can obtain priority over a prior lien or how a crop production input lien operates arise when a borrower chooses alternative financing for a new crop year, or when the lender decides not to extend additional credit for a new year. To learn more about these secret liens particular to agricultural producers, and for information on other springtime lending issues, please join our April 5, 2016 Webinar.

There are many other "secret" liens provided for under federal and state law, but a thorough examination of all potential liens goes beyond the scope of this newsletter. For some of these liens, lenders must simply accept the risk that such a lien might arise. For others, like those discussed in this article, knowing that these secret liens might exist allows a lender to engage in additional investigation to eliminate or reduce the risk before advancing funds. ■





# GISLASON & HUNTER LLP

*Invites you to be our guest for an educational webinar*

**Wednesday, April 5, 2017 | 11:00 a.m.**

Call in number will be provided to all registrants.

Please register by: **March 22, 2017**

## **Springtime Stresses for Ag Lenders**

### DESCRIPTION:

Stress levels in the farming community can rise as spring approaches, particularly when there is uncertainty over how farmers will finance the year's operation. Lenders sometimes face unpleasant situations and choices when their farm borrowers change the way they finance their operation. This webinar will help you assess what to expect and how to respond if you face questions such as:

- What if my borrower gets its input financing elsewhere?
- What will become of my perfected security interest if I don't finance this year's inputs?
- What statutory liens can trump my prior perfected security interest?
- What can the landlord do if I don't advance money for rents?
- What if the cooperative decides to sell my borrower inputs on open account?
- What if my borrower says it has someone else lined up to finance this year's crop, then files bankruptcy?
- What can a bankruptcy trustee or debtor-in-possession do with my collateral?

Name \_\_\_\_\_

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## *Banking Services*

Gislason & Hunter represents numerous financial institutions and has a thorough familiarity with financial economic conditions, as well as an ever-evolving regulatory environment. We have extensive experience in the following banking areas:

- Management & shareholder issues
- Transfer of bank assets
- Bank litigation
- Business planning
- Real estate
- Property foreclosures and repossessions
- Loan and workout agreements
- Collateralizing and securing all forms of loans
- Loan and credit agreements
- Subordination and participation agreements

*This publication is not intended to be responsive to any individual situation or concerns as the contents of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney.*

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