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LIEN TIMES

SUPER-PRIORITY LIENS CAN AMBUSH SECURED LENDERS WHO ARE NOT PREPARED

Lenders who extend credit secured by receivables can be involuntarily subordinated by intervening creditors, often without notice. Aside from super-priority liens arising in bankruptcy,[1] there are a number of statutory super-priority liens granted to various special interest groups, including trade organizations and the Internal Revenue Service, all of which can lead to secured lenders seeing their position in receivables reduced to little or nothing. Awareness of these liens and the serious problems they can cause is of great value to the secured lender in documentation, liquidation, and litigation.

The most prevalent of the nonbankruptcy super-priority liens arises pursuant to Internal Revenue Code Section 6323, which provides that when a taxpayer fails to pay a tax after assessment[2] and demand,[3] the IRS may issue, file, and record a lien.[4] The lien must be filed with the secretary of state in the state of the taxpayer's residence and with the clerk of the federal district court.[5] This lien is also generally recorded in any county in which the taxpayer has property.[6] Although the lien by statute has unlimited duration,[7] the ability of the IRS to collect the underlying tax (as opposed to enforcing the lien) is limited to six years after assessment.[8] This lien gains super-priority status on all assets of the taxpayer 45 days after filing and service of the lien on the taxpayer. There is no requirement that the lien be served on anyone other than the assessed taxpayer.[9]

The statutes giving rise to this lien do not contain any provisions as to priority. Instead, its super-priority status is based on the so-called choateness doctrine, which developed between 1950 and 1963 in a series of U.S. Supreme Court cases that tested the priority of federal tax liens.[10] The choateness doctrine provides that a prior perfected security interest has priority over a later-filed tax lien only if, at the time the tax lien was filed, the secured lender's lien was "choate."[11] A secured lender's lien is choate only if the lender is identified, the property subject to the lien is established, and the dollar amount of the lien is liquidated.[12] Trust deeds and mortgages on real property are usually deemed to be choate, as are liens perfected pursuant to a UCC filing on specific items of identified personal property.[13] However, a secured lender's lien on accounts receivable is choate only if the lender has advanced sums to the debtor, has perfected its security interest, and the specific account receivable in question existed at

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the time the court measured priority, which is 45 days after the date the tax lien was filed and served.[14] Thus, accounts receivable generated 45 days after the lien filing are not choate. In order to have priority, the lender with a security interest in accounts receivable must be able to point to an assigned invoice that was in existence within 45 days after the tax lien was filed and served.

There are very few defenses to the super-priority lien of the IRS, because the lien essentially terminates a debtor's interest in all property, including receivables, after the IRS filing, even over a bankruptcy filing.[15] Lenders have asserted two main defenses to the IRS super-priority lien: the "statutory commercial finance" and the "purchase money" exceptions. Neither defense has proven successful.

The statutory commercial finance exception is rooted in 26 USC Section 6323, which provides that an IRS super-priority lien is not valid against a security interest created by a "commercial financing agreement in the ordinary course of the taxpayer's business,"[16] if the security interest was acquired within 45 days of the filing of the lien.[17] Lenders have argued that the filing of a UCC-1 before the filing of the IRS lien, which perfects the security interest in receivables, constitutes the acquisition of a prior security interest and that it was the intent of Congress to exempt commercial financing agreements from the 1966 amendments to the tax code.[18] Notwithstanding this exception, the courts still use the choateness doctrine to rule that accounts in which the lender claims a prior interest must be in existence within the 45-day time window.[19] Thus, any invoice generated after the 45-day time window, even though subject to a security agreement and a financing statement, will belong to the IRS.

Of course, if the invoice is in existence before the 45-day period and not yet paid, the account receivable will be subject to the secured lender's lien. If the invoice was paid and was deposited in the borrower's bank account, then the proceeds should be subject to the IRS lien, unless the secured lender has a lien on the deposit account.[20] If the secured lender does not have a specific lien on the deposit account, it may be able to argue that a proceeds clause in the documentation may extend to the deposits over the claim of the IRS.[21]

The purchase money security interest exception is applicable in cases in which a borrower purchases tangible property, financed by a secured lender, before the expiration of the 45-day time window.[22] It seems clear that this would not encompass receivable financing, although several lenders have attempted to argue that assignment of specific invoices constitutes a purchase money security interest. All of them have failed.[23]

Another important issue is the extent to which the super-priority IRS lien attaches to the borrower's bank account. Because the IRS lien attaches to all the borrower's property, absent a perfected security interest, the IRS will have priority over the bank account.[24] However, the amount in the borrower's checking account, if properly pledged to the lender and perfected before the expiration of the 45-day time window, should be considered choate, and not subject to the federal lien, and therefore should be a safe harbor for secured lenders.[25]

While super-priority tax liens remain a powerful weapon in the hands of the IRS against a secured lender financing receivables,[26] lenders may protect themselves from application of the IRS super-priority lien statute by following some commonsense guidelines (see "Guarding against Super-Priority Liens," this page), by cooperating

Guarding against Super-Priority Liens

In order to maximize recovery and minimize exposure to super-priority liens, a secured lender should consider the following practices:

- Be familiar with the borrower's specific industry and determine if there is potential exposure to industry-specific super-priority liens.
- If the borrower is in an industry that may be subject to the Perishable Agricultural Commodity Act (PACA) liens, the lender may consider past-due payables as a potential PACA lien. For that reason, the lender may deduct the amount of the past-due payables over 90 days from the borrower's credit availability to reduce the lender's exposure.
- Strong documentation will allow the lender to identify potential problems quicker and, if necessary, declare a default based on financial covenants. Documentation requiring representations of events that may cause a lien to arise under ERISA or the tax code, complete financial disclosure, reimbursement for audits, and compliance with financial covenants will also assist the secured lender in spotting potential problems.
- Strict monthly reporting requirements, such as reports of payables, receivables, and payroll taxes,[1] will also assist the secured lender in evaluating the borrower's business status. There is no substitute for in-depth knowledge of the borrower's business, so that the lender can distinguish between normal business cycles and a problem loan.
- Routine audits of the borrower will verify the borrower's reports and assist the secured lender in spotting potential problems with super-priority lien claimants.[2] The cost of audits is usually less than $1,000 and is paid for by the borrower. Most lenders conduct them at least annually, and some quarterly.[3]
- Routine lien searches through the office of the secretary of state of the borrower's state or the county recorder are an invaluable tool in determining if a super-priority lien has already attached to the secured lender's assets.[4] One court has even made the impractical suggestion that secured lenders perform these searches every 45 days or they may jeopardize their collateral position.[5] When a lien is discovered, the damage may have already been done, but the secured lender can avoid any further advances until the borrower solves the problem with the lienholder.
- Whenever possible, the secured lender should attempt to obtain fully perfected, choate liens on property of either the borrower or a guarantor. The borrowers may be motivated to divert receivables to pay super-priority lien claimants. If the lender holds choate liens on the principal's property, the principal may be less inclined to divert the receivables.

The secured lender financing receivables should be on constant guard for intervening super-priority liens. Ironclad documentation, a thorough knowledge of the borrower's industry, strong reporting requirements, and frequent audits and lien searches will assist the secured lender in avoiding, discovering, and defeating these liens. **—T.E.M.**

[1] Payroll taxes become relevant if the borrower fails to pay the withholding taxes, thus incurring a tax liability.

[2] The right to audit is contained in most typical accounts receivable financing agreements. Audits should disclose the existence of a sizeable IRS payable and/or lien. WEIL, ASSET-BASED LENDING, app. 1-1 at 1-48 (3d ed. 1996).

[3] L. Singer, *The Little Bank That Could,* THE SECURED LENDER 50, 54, 94 (Mar./Apr. 1997).

[4] 26 U.S.C. §6323(f)(1)(A)(ii) requires the IRS to file its lien with the secretary of state. The lien is also recorded with the clerk of the district court.

[5] Texas Oil & Gas Corp. v. United States, 466 F. 2d 1040, 1053 (5th Cir. 1972).

with the IRS, and, if demanded, considering turning over (or at least interpleading) any disputed funds. Indeed, the failure to turn over the funds in which the IRS claims an interest may subject the lender to severe sanctions, including a 50 percent penalty of the sums withheld.[27]

Another government statute affecting receivable financing is not a lien at all but a priority order of distribution. Known as the federal insolvency statute, this act imposes a specific order of distribution whenever money is owed to the government.[28] Specifically, the statute requires that all government claims, which include any money owed to the U.S. government or an agency thereof,[29] be paid ahead of all other creditors, including secured lenders, when two factors exist—the existence of a government claim and a defined act of insolvency by the debtor.[30] For purposes of the statute, an act of insolvency includes the appointment of a receiver over any asset,[31] an assignment for the benefit of the creditors of the borrower,[32] a fraudulent transfer,[33] or liabilities in excess of assets.[34] Interestingly, insolvency does not include a bankruptcy filing,[35] in which case priority is governed by general bankruptcy laws.[36]

The typical example would involve a borrower that has assigned its receivables to a secured lender. Separately, the borrower has also obtained a loan from the SBA. The borrower defaults on its loan to the secured lender, and the secured lender files suit, seeking the appointment of a receiver to collect the receivables. The SBA may intervene in the case, remove to federal court, and seek an order compelling the receiver to pay the SBA any receivables generated after the appointment of the receiver.

The effect of the application of this statute is that the government has a priority claim to any distribution of property when the appropriate criteria have been met.[37] This statute does not create a lien;[38] however, there is little practical distinction between the two,[39] as the statute subordinates secured lenders.[40] The effect of this statute is that the government is paid first from the property subject to the statute.[41] This "lien" may be imposed on all property of the debtor,[42] including property transferred to assignees[43] and real estate.[44] All state law liens yield to this statute[45] unless the liens are choate, which is defined in a similar manner as in the cases interpreting IRS liens.[46]

Because the application of this statute is triggered only by an act of insolvency and is governed by principles of choateness, it is a bit easier for the secured lender to avoid application of this statute than the application of the IRS lien. First, lenders secured with inchoate liens on property owned by borrowers who have government claims against them should avoid seeking a receiver, which is considered an act of insolvency and triggers application of the statute.[47] Second, because the act does not apply to choate liens, it does not affect perfected security interests in identifiable personal property, a mortgage or trust deed on real property, or existing identifiable accounts receivable as of the date of insolvency.[48] But future accounts receivable (those not existing on the date of the act of insolvency) are subject to the interest of the government. Third, the act of insolvency (usually a receivership or fraudulent transfer) often occurs long after the collateral pledged to the secured lender has been perfected, unlike the IRS lien, which is filed only because of unpaid taxes.

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Many borrowers who operate union shops are required to make contributions to a union retirement trust fund under the Employee Retirement Income Security Act (ERISA), which provides for a super-priority lien in favor of the trust fund in the event any person fails to pay contributions to a defined pension trust fund.[49] This lien is of the same priority as IRS super-priority liens.[50] Indeed, the ERISA statute incorporates by reference Section 6323 of the Internal Revenue Code. The ERISA lien is imposed on all property of the borrower.[51] It subordinates all other liens, except those that are choate,[52] and is even applicable in a bankruptcy proceeding.[53] This lien arises after the trust has audited the borrower, determined there is a default, and made a demand on the borrower.[54] The trust fund enforces the lien by a federal lawsuit.[55]

Secured lenders financing certain types of agricultural, livestock, or poultry dealers should be aware that there are three main sources of super-priority liens directly affecting these industries. The three acts are the Perishable Agricultural Commodity Act, the Packers and Stockyard Act, and the Poultry Commodity Act, and each imposes a super-priority lien in favor of the trade creditors of dealers of fruits and vegetables, livestock producers, and poultry dealers. All three work in an identical fashion.

The first of these liens is rooted in the Perishable Agricultural Commodity Act, in which Congress granted a super-priority lien status in favor of trade creditors who supply perishable agricultural commodities to dealers of fruits and vegetables.[56] Known by the acronym PACA, this statute imposes a trust fund on all assets of any dealer who has purchased fruit and vegetables from any supplier and has failed to pay for them within 30 days after receiving the goods. Essentially, the dealer is deemed to hold its assets (cash, accounts receivable, and inventory) in trust for the benefit of its trade creditors. The super-priority lien status is not automatic, and it arises if the unpaid seller files a specified form of notice with the secretary of agriculture before the goods are invoiced[57] or by including a simple notice on the invoice to the

dealer that states that the goods sold are subject to a statutory trust.[58] The notice must be served no earlier than 10 days and no later than 30 days after the payment due date, which is deemed to be 10 days after taking possession of the commodity, unless agreed to in writing and disclosed on the face of the invoice.[59] The courts require strict compliance and improper notices may be void.[60] It is usually enforced by the suppliers by a lawsuit against the dealer in which the supplier either levies against the receivables or seeks the appointment of a receiver to collect the receivables.

This lien has priority over a prior secured lender on receivables, even if the lien was choate.[61] The lien also takes precedence over a prior secured lender on its commodity inventory collateral[62] and noncommodity inventory if the proceeds were commingled.[63] The lien also primes a prior secured lender on previously made payments to the lender if the lender had actual knowledge of the existence of the PACA trust, such as reviewing the invoices with the statutory notice, at the time that the payments were received.[64] Finally, the lien can prime funds in a checking account if the bank had knowledge of the PACA trust.[65]

California has a state statute similar to PACA, called the Producer's Lien Statute, which grants a lien in favor of producers on all farm products sold to a processor. This lien, which is not dependent on filing, attaches to the products and all forms of the product, even after processing. In a recent case, an Illinois court applying California law ruled in favor of a California nut supplier and granted a super-priority lien against the assets of an Illinois nut company.[66]

The Packers and Stockyard Act is largely identical to PACA, imposing a trust in favor of its suppliers on the assets of a livestock packer that may spring into a super-priority lien when a packer fails to pay for livestock, such as cattle, sheep, or horses.[67] The act has identical provisions that notice be given to the secretary of agriculture, and it has spawned identical case law concerning the nature of the lien[68] and the lien's priority against receivables and other property of the packer.[69] The only significant difference is that under the Packers and Stockyard Act, the packer must have annual purchases of more than $500,000 to fall within the provisions of the act.[70]

The third federal act is the Poultry Producer Financial Protection Act. Enacted in 1987, it is also identical to PACA as to the nature of the lien, the lien's priority, and its effect on property of the dealer.[71] It has a lower floor in annual purchases of $100,000.[72]

In enforcing these liens, the trade creditor typically institutes an action for declaratory relief against the borrower and the secured lender,[73] or the secretary of agriculture institutes a receivership action.[74]

Lenders have few defenses to claims under PACA or any of its progeny. In a typical example, a secured lender may finance receivables in a PACA-controlled industry. If the borrower fails to pay its suppliers, the trade creditors sue and seek the appointment of a receiver, who will collect the receivables for the benefit of the trade creditors. The secured lender will be primed, to the extent of the amount of all PACA trade accounts.

Tangible collateral, such as equipment, is exempt if the secured lender received the loan payments without notice of the PACA trust as a "bona fide purchaser for value," which is a defense under general trust law[75] and under applicable PACA case law.[76] However, the borrower's bank account and even loan payments made to the secured lender may be recovered by the trade creditors. The secured lender may oppose claims against bank accounts in which PACA trust funds were allegedly deposited and against the recovery of loan payments from proceeds of PACA funds by showing that the funds came from non-PACA sources, such as another industry or product line not covered by PACA.[77]

Because the PACA trust lien is dependent on the prompt filing and service of notices by the trade creditors, lenders may be able to defeat the claim based on an untimely[78] or improper[79] notice. The lender can also argue that the account debtor was not within the class of dealers as defined in the statute. In order for PACA to apply, the borrower's customers must be either a seller or supplier such as a commission merchant, broker, or dealer.[80] A dealer is defined as a person who purchases the agricultural goods solely for sale at retail, and purchases in excess of either $230,000 (PACA), $500,000 (Packers and Stockyards Act), or $100,000 (Poultry Producer Protection Act) in perishable agricultural goods per calendar year.[81] The courts have been relatively generous in interpreting this definition, and in a recent case, a restaurant was held to be a dealer of agricultural goods.[82]

Because of the fast-acting and decisive nature of these liens, there is little a secured lender can do to protect itself except to monitor the credit facility carefully by conducting frequent audits to determine the status of the trade payables covered by PACA and its offspring. Of course, the lender should always consider taking guaranties or additional collateral to support the credit facility in industries in which these agricultural liens may occur.

There has been a continuing dispute between lenders secured by receivables and other secured creditors concerning inventory. Specifically, once inventory has been sold, the question arises whether the receivable constitutes proceeds of the inventory in which the inventory creditor has a claim, or belongs to the secured lender financing the receivable.[83]

The courts will typically look to whether the creditor secured by the inventory has a proceeds clause in its security agreement and UCC filing. If this creditor has a collateral description including proceeds, and its filing is prior to the filing of the receivables lender, the receivable generated from the sale of the inventory will be subject to a prior lien in favor of the inventory lender.[84] If, on the other hand, the inventory lien does not contain a proceeds clause or is not prior in time, the sale of the inventory will be considered a receivable subject to the lien of the secured lender financing the receivables.[85]

As a consequence, when reviewing a UCC-3 report at the outset of the loan process, receivable lenders should be wary of other liens that may extend to proceeds. These competing receivable/inventory issues may be resolved by the use of a subordination or participation agreement between the two lenders[86] or by taking physical possession of the invoices in question, with a stamped endorsement assigning the invoice to the lender.[87]

The secured lender financing receivables also risks losing its priority under the doctrine of equitable subordination, by which another creditor has expended effort in storing or improving collateral. In the typical example, a farmer pledges a security interest on the crops, or the proceeds thereof, to a bank. The farmer loses his lease or mortgage, and the landowner/mortgagee harvests the crops, deducting the mortgage/lease payment for the time the crops were being harvested and the costs of harvesting. Courts have equitably subordinated the lender to the lessor/mortgagee on the theory that the lease or mortgage payments assisted the secured lender by allowing the crops to be harvested.[88]

In addition to unjust enrichment, other equitable theories have been applied to overturn UCC priorities. These include equitable estoppel,[89] promissory estoppel,[90] good faith and fair dealing,[91] subrogation,[92] equitable liens,[93] mistake,[94] alter ego,[95] successor liability,[96] or constructive trust.[97] The state of California has held that a state-imposed tax on hospitals takes priority over a secured lender's interest in receivables.[98]

Super-priority liens for taxes, government

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claims, ERISA, and agricultural products are a danger to lenders, which risk having their security interest subordinated without notice. Lenders and their counsel must be aware, before making a transaction, of the potential for exposure and must practice continued vigilance during the lending relationship, monitoring the business activities of borrowers that may have super-priority liens placed on their assets, searching for registration of liens at appropriate government offices, and obtaining fully perfected, choate liens. If the lender does not take measures to defend itself against super-priority liens, it may find itself without collateral. ■

[1] There are three types of super-priority liens in bankruptcy, all of which are beyond the scope of this article. They include the priming lien under 11 U.S.C. §364, the trustee's lien under 11 U.S.C. §506, and instances of super-priority liens jumping ahead of secured lenders that improperly draft cash collateral stipulations under 11 U.S.C. §363. *See, e.g.*, In re Vandy, Inc., 189 B.R. 342, 346 (Bankr. E.D. Pa. 1995) (cash collateral stipulation did not displace IRS lien).

[2] 26 U.S.C. §6321; In re Kobiela, 152 F. Supp. 489 (D. Neb. 1957).

[3] 26 U.S.C. §6321. The demand must be made within 60 days after assessment. 26 U.S.C. §6303.

[4] 26 U.S.C. §6321.

[5] 26 U.S.C. §6323(f)(A)(ii).

[6] Citizens Nat. Trust & Sav. Bank of Los Angeles v. United States, 135 F. 2d 527, 528 (9th Cir. 1943).

[7] 26 U.S.C. §6322.

[8] 26 U.S.C. §6502; Calvin & Co. v. United States, 264 Cal. App. 2d 571, 574 (1968).

[9] 26 U.S.C. §6303(a). Case law interpreting this section has required notice to spouses, Bauer v. Foley, 408 F. 2d 1331, 1333 (2d Cir. 1969), and to partners, United States v. Coson, 286 F. 2d 453, 462 (9th Cir. 1961).

[10] United States v. Security Trust & Sav. Bank, 340 U.S. 47, 71 S. Ct. 111, 114 (1950); United States v. City of New Britain, 347 U.S. 81, 74 S. Ct. 367, 370 (1954); United States v. Acri, 348 U.S. 211, 214, 75 S. Ct. 239, 241 (1955); United States v. Pioneer American Insurance Co., 374 U.S. 84, 88, 83 S. Ct. 1651, 1655 (1963); Peace, *Choateness and Lien Priority*, 106 BANKING L. J. 157 (1989).

[11] Acri, 348 U.S. 211, 214, 75 S. Ct. 239, 241 (attachment lien was inchoate, and IRS lien held superior); City of New Britain, 347 U.S. 81, 86, 74 S. Ct. 367, 370 (municipal water lien held to be inchoate); Security Trust & Sav. Bank, 340 U.S. 47, 71 S. Ct. 111, 114 (attachment lien held to be inchoate to IRS lien).

[12] City of New Britain, 347 U.S. 81, 86, 74 S. Ct. 367, 370; Acri, 348 U.S. 211, 214, 75 S. Ct. 239, 241.

[13] Bank of St. Charles v. Alloy & Steel Fabricators, 643 F. Supp. 206, 208 (E.D. La. 1986) (real property); McDermot v. Zions First Nat. Bank, 945 F. 2d 1475, 1482 (10th Cir. 1991) (personal property).

[14] Du-Mar Marine Service v. State Bank & Trust Co., 697 F. Supp. 929, 935 (E.D. La. 1988) (IRS lien superior only if account receivable is not in existence 45 days after filing of lien); J.D. Court, Inc. v. United States, 712 F. 2d 258, 261 (7th Cir. 1983) (lender's security interest did not attach until account was in existence); Sgro v. United States, 609 F. 2d 1259, 1261 (7th Cir. 1979) (identity of lienor, property subject to the lien, and amount of lien must be established prior to tax lien); Shell Oil v. Capital Financial Services, 170 B.R. 903, 907 (D.C. S.D. Tex. 1994) (account must be in existence prior to tax lien).

[15] United States v. Hemmen, 51 F. 3d 883, 892 (9th Cir. 1995). *But see* In re Wolensky's Ltd. Partnership, 163 B.R. 629 (Bankr. D.C. 1994) (the interest of the debtor is not terminated, but the IRS is entitled to adequate protection).

[16] Sgro, 609 F. 2d at 1264 (lender who sold business and took back security interest in receivables not engaged in ordinary course of business).

[17] 26 U.S.C. §6323(c).

[18] First Interstate Bank v. IRS, 930 F. 2d 1521, 1524 (10th Cir. 1991); In re Halperin, 280 F. 2d 407, 409 (3d Cir. 1960).

[19] Texas Oil & Gas Corp. v. United States, 466 F. 2d 1040, 1049 (5th Cir. 1972).

[20] COM. CODE §9302(1)(g); *see also* cases cited *infra* note 26.

[21] *See* cases cited *infra* note 88.

[22] 26 U.S.C. §6323(c)(2)(A)(ii); COM. CODE §9107.

[23] First Interstate Bank, 930 F. 2d at 1524; In re Halperin, 280 F. 2d at 409.

[24] 26 U.S.C. §6321.

[25] Jefferson Bank & Trust v. United States, 894 F. 2d 1241, 1244 (10th Cir. 1990) (bank's right to funds hinged on relationship between bank and its customer and on legal principle that bank acquires title to funds on deposit); Jersey State Bank v. United States, 926 F. 2d 621, 622 (7th Cir. 1991) (bank setoff same day as levy, but prior to lien, held to have achieved choate lien over deposit account); Trust Company of Columbus v. United States, 735 F. 2d 447, 449 (11th Cir. 1984) (bank had a prior security interest in deposit account to secure loan); United States. v. Bell Credit Union, 635 F. Supp. 501, 504 (D. Kan. 1986) (credit union had no right to set off deposit account after service of levy).

[26] Gold Coast Leasing Co. v. Cal. Carrots, Inc., 93 Cal. App. 3d 274 (1979) (IRS was entitled to priority over the lessor of trucks to whom lessee had assigned its accounts receivable); District of Columbia v. Thomas Funding Corp., 593 A. 2d 1030, 1034 (D.C. Cir. 1991) (secured lender was not perfected as against IRS when financing statement misspelled debtor's name); Continental Finance, Inc. v. Cambridge Lee Metal Co., 56 N.J. 148, 265 A. 2d 536, 537 (N.J. 1970) (IRS was entitled to priority in accounts receivable that arose two months after recordation of tax lien); Craner v. Marine Midland Bank, 110 B.R. 111 (Bankr. N.D. N.Y. 1988), *rev'd in part*, 110 B.R. 124 (N.D. N.Y. 1989) (IRS super-priority statute applicable in bankruptcy claims litigation proceeding to subordinate secured lender financing receivables).

[27] 26 U.S.C. §6332(c)(2). Bell Credit Union, 635 F. Supp. at 504 (bank that failed to turn over levied funds and sued for wrongful levy ordered to pay 50 percent penalty).

[28] 31 U.S.C. §3713.

[29] The case law interpreting this section has been very generous to the definition of a government claim. It includes any money owed to the United States or any agency. United States v. King, 322 F. 2d 317, 320 (3d Cir. 1963), *aff'd*, 379 U.S. 329, 85 S. Ct. 427 (1964) (governmental agency contract claim entitled to priority); W.T. Jones & Co. v. Foodco Realty, 318 F. 2d 881, 885 (4th Cir. 1963) (SBA entitled to priority claim over mechanic's lien).

[30] 31 U.S.C. §3713(a)(1)(A).

[31] Brown v. Coleman, 318 Md. 56, 566 A. 2d 1091 (1989).

[32] 31 U.S.C. §3713(a)(1)(A)(I).

[33] In re Gottheiner, 3 B.R. 404, 408 (Bankr. C.D. Cal. 1980).

[34] *Id.*

[35] 31 U.S.C. §3713(a)(2).

[36] The BANKR. CODE has its own order of distribution. *See, e.g.*, 11 U.S.C. §507.

[37] Brown, 318 Md. 56, 566 A. 2d 1091.

[38] United States v. Williams, 139 F. Supp. 94, 97 (D. N.C. 1956).

[39] In re Meyer's Estate, 159 Pa. Super. 296, 299, 48 A. 2d 210, 212 (1946).

[40] One practical effect of the priority claim not being construed as a lien is that the government does not have to do anything to perfect its priority position. There is no need for an assessment, levy, and sale. Leggett v. Southeastern People's College, 234 N.C. 595, 68 S.E. 2d 263 (1951).

[41] Brown, 318 Md. 56, 566 A. 2d 1091.

[42] *Id.*

[43] United States v. Barnes, 31 F. 705, 709 (S.D. N.Y. 1887).

[44] The applicability of this section to real estate is tempered by preexisting mortgage loans, which are usually considered choate. Bank of St. Charles, 643 F. Supp. 206; *but see* Pioneer American Ins. Co., 374 U.S. 84, 88, 83 S. Ct. 1651, 1655 (a choate lien is perfected in the sense that there is nothing more to be done; since the amount of attorney's fees owed on a mortgage was undetermined, the lien was not choate). Pioneer Americans Ins. Co. was rendered prior to the Federal Tax Lien Act of 1966, and has been widely criticized. For a good discussion of such criticisms, *see* First Peoples Bank of Jefferson County v. United States, 806 F. Supp. 187 (E.D. Tenn. 1992).

[45] W.T. Jones, 318 F. 2d at 885.

[46] Danbury Sav. and Loan Ass'n, Inc. v. Delaney, 207 Conn. 743, 754, 542 A. 2d 1153 (1988), *cert. denied*, 488 U.S. 1004, 109 S. Ct. 783 (1988) (state's public assistance lien on real property was inchoate).

[47] Brown, 318 Md. 56, 566 A. 2d 1091.

[48] *See* cases cited *supra* note 12.

[49] 29 U.S.C. §1368(a).

[50] 29 U.S.C. §1368(c).

[51] 26 U.S.C. §6321.

[52] *See* cases cited *supra* note 12.

[53] In re Mechanical Maintenance, Inc., 14 E.D.C. 1413 (Bankr. E.D. Penn. 1991) (unions' claims for unpaid employee benefits were entitled to super-priority lien under BANKR. CODE).

[54] 29 U.S.C. §1368(a).

[55] 29 U.S.C. §1368(d).

[56] Perishable Agricultural and Commodity Act, 7 U.S.C. §499e.

[57] 7 U.S.C. §499e(c)(2).

[58] 7 U.S.C. §499e(c)(4).

[59] 7 C.F.R. §46.46(f)(2).

[60] In re Altabon Foods, Inc. 998 F. 2d 718, 720 (9th Cir. 1993); C.H. Robinson v. B.H. Produce, Inc., 723 F. Supp. 785 (N.D. Ga. 1989), *aff'd*, 952 F. 2d 1311 (11th Cir. 1992).

[61] In re Southland+Keystone, 132 B.R. 632, 637 (Bankr. BAP 9th Cir. 1991) (bank ordered to return collected receivables but was allowed offset for costs of collection).

[62] In re Fresh Approach, Inc., 48 B.R. 926, 931 (Bankr. N.D. Tex. 1985).

[63] Sanzone-Palmisona Co. v. M. Seaman Ent., 986 F. 2d 1010 (6th Cir. 1993) (burden of proof on lender to establish that collateral foreclosed upon was from non-PACA sources).

[64] C.H. Robinson Co., 723 F. Supp. 785, *aff'd*, 952 F. 2d 1311.

[65] Six L's Packing Co. v. West Des Moines State Bank, 967 F. 2d 256, 258 (8th Cir. 1992); Continental Fruit Co. v. Thomas J. Gatziolis & Co., 774 F. Supp. 449 (N.D. Ill. 1991) (bank's prior secured interest and otherwise legal setoff held invalid because of PACA statutory super priority).

[66] In re S.N.A. Nut Co., 197 B.R. 642 (Bankr. N.D. Ill. 1996).

[67] 7 U.S.C. §196.

[68] As with PACA liens, the lien will prime prior per-

fected liens on receivables and inventory. In re G & L Packing Co., Inc., 41 B.R. 903, 915 (D.C. N.Y. 1984).
[69] In re Gotham Provision Co. Inc., 669 F. 2d 1000, 1015 (5th Cir. 1982), *cert. den.*, 459 U.S. 858 (1982) (bank's lien on packer's escrow account held to be subordinate to seller's trust lien).
[70] 7 U.S.C. §196(b).
[71] 7 U.S.C. §197(b).
[72] *Id.*
[73] Continental Fruit Co., 774 F. Supp. 449.
[74] Lyng v. A. Pellegrin & Sons, Inc., 694 F. Supp. 976 (D. Mass. 1988).
[75] RESTATEMENT (SECOND) OF TRUSTS §284(1) (1997).
[76] C.H. Robinson Co., 723 F. Supp. 785.
[77] Six L's Packing Co., 967 F. 2d at 258.
[78] The notice must be served no earlier than 10 days and no later than 30 days after the payment due date, which is deemed to be 10 days after taking possession of the commodity, unless agreed to in writing and disclosed on the face of the invoice. 7 C.F.R. §46.46(f)(2); In re San Joaquin Food Serv., 958 F. 2d 938 (9th Cir. 1992). The payment due date can not be more than 30 days after taking possession. In re Altabon Foods, Inc., 998 F. 2d at 720. Courts require strict compliance. *See generally* Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L.R. 1051, 1097 (1995). Untimely notices may be void. C.H. Robinson Co., 723 F. Supp. 785.
[79] The notice must be served on the buyer and the secretary of agriculture. 7 U.S.C. §499e(c)(3).
[80] In re W.L. Bradley Co., 75 B.R. 505, 509 (Bankr. E.D. Penn. 1987).
[81] 7 U.S.C. §499A(b)(6).
[82] In re Magic Restaurants, 197 B.R. 455, 458 (Bankr. D. Del. 1996).
[83] *See generally* CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶10.02(1) (1993); and WEIL, ASSET BASED LENDING ¶4.4.3.6 at 4-27 (3d ed. 1996).
[84] Metter Banking Co. v. Fisher Foods, Inc., 183 Ga. App. 441, 359 S.E. 2d 145 (Ga. Ct. App. 1987).
[85] Arizona Ammonia of Tucson, Inc. v. Mission Bank, 152 Ariz. 361, 732 P. 2d 591 (Ariz. Ct. App. 1986); Metter Banking Co., 183 Ga. App. 441, 359 S.E. 2d 145 (1987); Todsen v. Runge, 211 Neb. 226, 318 N.W. 2d 88 (1982).
[86] WEIL, *supra* note 83, ¶4.4.3.6 at 4-27.
[87] COM. CODE §9308; WEIL, *supra* note 83, ¶5.5 at 5-14.
[88] In re Hoover, 31 B.R. 432, 36 U.C.C. Rep. Serv. 1348 (Bankr. S.D. Ohio 1983); Producers Cotton Oil Co. v. Amstar Corp., 197 Cal. App. 3d 638, 659 (1988).
[89] Affiliated Foods, Inc. v. McGinley, 426 N.W. 2d 646 (Ia. Ct. App. 1988).
[90] Citizens State Bank v. Peoples Bank, 475 N.E. 2d 324 (Ind. Ct. App. 1985).
[91] United States National Bank of Oregon v. Boge, 102 Or. App. 262, 12 U.C.C. Rep. Serv. 2d 15 (Or. App. 1990).
[92] Western State Bank v. Grumman Credit Corp., 564 F. Supp. 9 (D. Mont. 1982); French Lumber Co. v. Commercial Realty & Finance Co., 346 Mass. 716, 195 N.E. 2d 507 (1964).
[93] General Insurance Co. of America v. Lowry, 412 F. Supp. 12 (S.D. Ohio 1976), *aff'd*, 570 F. 2d 120 (6th Cir. 1978).
[94] In re Pacific Trencher Equipment, Inc., 35 U.C.C. Rep. Serv. 742 (9th Cir. BAP 1983).
[95] Deutsch Credit Corp. v. Case Power Equip. Co., 24 U.C.C. Rep. Serv. 2d 652 (Ariz. Ct. App. 1994).
[96] Glynwed, Inc. v. Plastimatic, Inc., 25 U.C.C. Rep. Serv. 2d 341 (D. N.J. 1994).
[97] In re Howard's Appliance Corp., 874 F. 2d 88, 94 (2d Cir. 1989).
[98] Manalis Finance Co. v. Gedulig, 47 Cal. App. 3d 672 (1975).