

# OSRE Enforcement 201 Webinar Series

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The background image shows the Thurgood Marshall United States Courthouse, a grand neoclassical building with a prominent portico of columns. The inscription "ADMINISTRATION OF JUSTICE IS THE FIRMEST PILLAR OF GOOD GOVERNMENT" is visible on the pediment. The building's facade is inscribed with "UNITED STATES COURT HOUSE". A stone block in the foreground displays the number "40" and the name "THURGOOD MARSHALL UNITED STATES COURTHOUSE".

# CERCLA LIENS

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EPA Region 2

# Outline of Webinar

- ◆ Discuss Some Significant Caselaw Surrounding the Evolution of Federal Lien Law
- ◆ Explain the Congressional Responses to Caselaw
- ◆ Place the Enactment of CERCLA Lien Provisions into Some Perspective
- ◆ Different Treatment of Different Types of Liens
- ◆ How This All Plays Out in Actual Practice

# CERCLA LIENS: Introduction

## ◆ What is a Lien?

A claim or charge on a property as security for payment of a debt

## ◆ Types Include:

Consensual or contractual liens  
(e.g., a Mortgage)

Statutory liens  
(CERCLA 107(I)  
Lien, Tax Lien)

Judgment liens  
(Obtained Post-Judgment)

# CERCLA LIENS: Introduction continued

- ◆ Lien enforcement through Foreclosure
- ◆ Competition Among Liens:
  - if Multiple Liens Encumber a Property, Lien Priority is at Issue
  - Senior; Junior; Circularity

# *U.S. v. City of New Britain, CT*

## 347 U.S. 81 (1954)

- ◆ In *U.S. v City of New Britain*:
  - There were **two competing liens** on real estate.
  - One was a federal lien for **unpaid federal taxes**, and the other was for **delinquent City real-estate taxes**.
  - Connecticut law provided that real-estate tax liens “**shall take precedence of all transfers and incumbrances**”.
  
- ◆ Held that there is **Federal Primacy**
  
- ◆ Where Congress Sets a Priority Scheme, Follow Congress’ Direction. If Congress Does Not, the Principle of “First in Time is First in Right” Prevails.

## *New Britain* - Continued

- ◆ Choateness doctrine reaffirmed: A non-federal lien is *inchoate* (*i.e.*, It has not ripened into a valid lien as against a federal lien) until there is certainty as to the:
  - **identity of the lienor,**
  - **the property subject to the lien,** and
  - **the amount of the lien.**

## *New Britain* – Bottom Line

- ◆ **“First in Time is First in Right”**  
among competing federal and non-federal liens, unless Congress specifies otherwise



# United States v. Brosnan et al.

## 363 U.S. 237 (1960)

- ◆ The decision resolved two separate cases:
  - one in **California** and
  - one in **Pennsylvania**.
- ◆ **Both** involved the treatment of federal tax liens that were subordinate, or junior, to other liens, and the issue was **whether the junior federal liens were extinguished without any notice to the U.S.**

# United States v. Brosnan et al.

## 363 U.S. 237 (1960) continued

- ◆ It was a 5-4 decision with a robust dissent by the minority.
- ◆ The decision created a fair amount of confusion within the world of competing federal and non-federal liens.
- ◆ The majority of the Court focused on whether Congress intended
  - (a) that a case must be filed against the United States to extinguish its junior lien, and
  - (b) to exclude the application of all state law procedures outright.

# *Brosnan Outcome*

- ◆ The majority grappled with the difficult decision of...  
**whether to establish a uniform federal rule on the topic of how to extinguish junior federal liens**  
- or -  
**allowing “long-standing state procedures” to dictate state-dependent outcomes. It decided the latter was the better approach.**
- ◆ The Minority Dissent was much more logical and persuasive, in our humble opinion

## *Brosnan* – Bottom Line

- ◆ Federal Liens that were junior to other non-federal liens could be **extinguished without any notice to the U.S.** if **state law** where the property is located **does not require such notice.**

## *Brosnan* Majority's Closing

*“[The competing considerations of junior lien priority] involve many imponderables which this Court is ill-equipped to assess, on which Congress has not yet spoken, and which we think are best left to that body to deal with in light of their full illumination ... Until Congress otherwise determines, we think that state law is effective to divest government junior liens in cases such as these.”*

- ◆ The Difficult *Brosnan* Decision became much less relevant in not too many years ...

## Congressional Response: 1966

- ◆ And Congress did so speak (six years later)
- ◆ It amended the Internal Revenue Code to enact into law that a federal IRS tax lien will not be valid as against an ad valorem tax lien on real property if such a lien is entitled under local law to priority over other liens on such property, even those that are prior in time
- ◆ See 26 U.S.C. § 6323(b)(6)

# Congressional Response: 1966 (cont.)

## ◆ Congress Also Amended 28 U.S.C. § 2410

- Originally Enacted in 1931
- Intent Was Waiver of Sovereign Immunity

### 1966 *Brosnan* Amendments

- Notice to U.S. Affirmed and Expanded
- Must Seek Judicial Sale
- Senior Federal Liens Undisturbed in Foreclosure
- Junior Federal Lienors Have Right of Redemption

# Supreme Court's View of Amendments

- ◆ These amendments:
  - Modified the Federal Government's preferred position under the choateness and first-in-time doctrines, and
  - Allowed a priority of certain state claims over federal tax liens.
  
- ◆ In enacting this legislation, Congress sought to **"[improve] the status of private secured creditors" and prevent impairment of commercial financing..."**
  
- ◆ Excerpt From Supreme Court *Kimbell Case*



# *U.S. v. Kimbell Foods*

## 440 U.S. 715 (1979)

- ◆ Like *Brosnan*, the Court addressed two cases in one decision.
- ◆ It involved **whether federal contractual liens from federal loan programs had priority over private liens.**
- ◆ In both instances, Congress had not expressly set any lien priorities in enabling legislation.
- ◆ The ruling required:
  - (a) a determination whether federal or state law governed and
  - (b) if federal law did, whether a uniform federal standard was necessary or desirable.

## *Kimbell (Cont.)*

- ◆ The Court readily held that federal law applied.
- ◆ It then determined that a national rule was unnecessary for federal loan programs (contractual liens).
- ◆ It adopted application of state law as the federal rule for determining the relative priorities of these competing contractual federal and private liens.
- ◆ The Court in *Kimbell*, in adopting the readymade body of state law as the federal rule of decision, stated that, “[as] a quasi-commercial lender, [the Government] does not require the special priority which it compels as sovereign in its tax-collecting capacity.”

## *Kimbell* – Bottom Line

- ◆ The Court's ruling was limited to **federal contractual liens** and not other federal liens (e.g., federal tax liens were discussed and contrasted).
- ◆ The Court made it clear **that if Congress had included lien priority** in either of the respective loan programs' legislation, **Congress' priorities would have prevailed.**

## Query:

*“So, what does any of this have to do with a CERCLA 107 lien?”,  
you ask?*

Let's turn to that now...

# The CERCLA 107(I) Lien

The 1986 SARA Amendments to CERCLA Add Section 107(I), Which Creates a CERCLA Lien

**(I) IN GENERAL.—All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) shall constitute a lien in favor of the United States upon all real property and rights to such property which—**

**(A) belong to such person; and**

**(B) are subject to or affected by a removal or remedial action.**

# The CERCLA 107(I) Lien

**(2) DURATION.—**The lien imposed by this subsection shall *arise* at the later of the following:

- (A)** The time costs are first incurred by the United States with respect to a response action under this Act.
- (B)** The time that the person referred to in paragraph (1) [*i.e.*, liable property owner] is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113 [of CERCLA].

# The CERCLA 107(I) Lien

**(3) NOTICE AND VALIDITY.—The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law ... For the purposes of this subsection, the terms “purchaser” and “security interest” shall have the definitions provided under Section 6323(h) of the Internal Revenue Code... .**

## Other CERCLA liens

- ◆ **Maritime lien:** CERCLA § 107(m)
- ◆ **Windfall lien:** added by CERCLA § 107(r) in 2002
- ◆ **CERCLA “in rem” judgment lien**



# Arising, Choateness, Perfection

“**Arising**” is to spring up, originate, come into being, to become operative.” Section 107(l)(2) states that “[t]he lien imposed by this subsection shall *arise* at the later of the following....”

“**Choateness**” of a lien is when the lien is perfected so that nothing more need be done to make it enforceable. A lien is choate “when the identity of the lienor, the property subject to the lien, and the amount of the lien are established”.

“**Perfection**” of a security interest is when the secured party has taken those steps required to vest an interest in the property as against other creditors.

# Lessons from the Internal Revenue Code

- ◆ Federal tax liens have been around for more than 100 years and for the last 20 years, IRS files approximately 500,000 Notices of Federal Tax Liens per year (as many as 768,000 in 2008).
- ◆ Therefore, federal lien jurisprudence typically involves federal tax lien more so than any other type of federal lien.
- ◆ Internal Revenue Manual Link:  
[https://www.irs.gov/irm/part5/irm\\_05-017-002](https://www.irs.gov/irm/part5/irm_05-017-002)

# Ad Valorem Taxes

- ◆ “Ad valorem” means “according to value”, and an ad valorem tax is one that is imposed on the value of property. The most common ad valorem tax is one that is imposed by state, county, or local governments on real estate.
- ◆ Reminder: the IRS Tax Code amendments of 1966 subordinates federal tax liens to local ad valorem taxes if local law gives them priority

# Competition:

## Municipal Ad Valorem Tax Liens

- ◆ Section 107(I)(3) Requires filing Notice of Lien for Priority against Security Interest, Purchasers, and Judgement Lien Creditors
- ◆ Congress, in Section 107(I), did not subordinate the CERCLA Lien as It Did the Federal Tax Lien
- ◆ For Section 107 Liens, “Arising” Is Relevant Date
- ◆ Necessitates Education of Municipalities

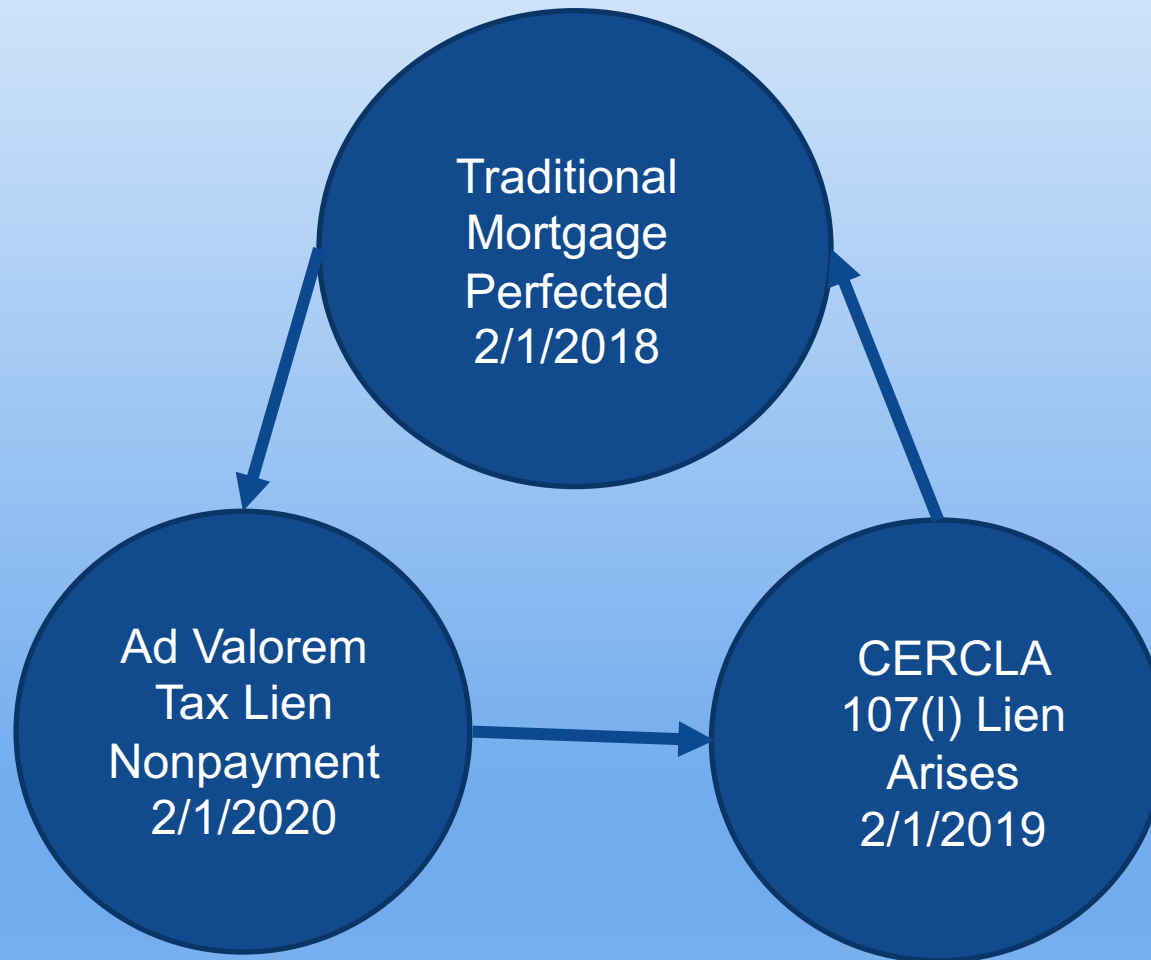
# Secret Liens

- ◆ A Secret Lien is an informal term used to indicate that the lien is one for which no notice is required for it to arise, thus its existence can remain a “secret” to those searching a title
- ◆ *E.g.*, Ad Valorem Tax and CERCLA 107(I) Liens
- ◆ Congress tries to protect against “secret liens” those parties that need to be able to rely on a title search

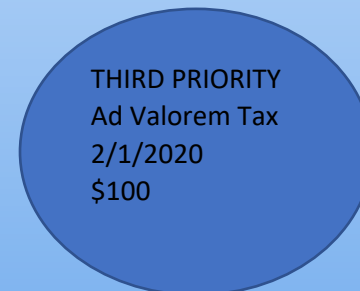
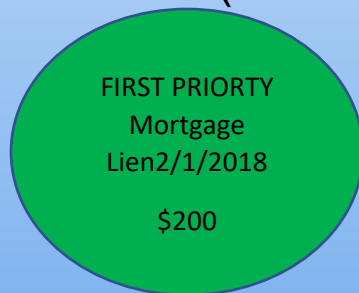
# Circular Priority

- ◆ Circular priority describes a situation where: A's lien is senior to the federal lien; the federal lien is senior to B's lien; but state law makes B's lien senior to A's lien.
  
- ◆ In *New Britain*, the Supreme Court resolved the circular priority problem by providing:
  - first, that the portion of the fund for which federal law creates a lien superior to that of the Government's tax lien is set aside;
  - second, the federal tax claim is paid from the remainder; and
  - third, the reserved portion of the fund (A.) is distributed among competing claimants according to state law

# The Circularity Dilemma



- ◆ “[T]he United States is not interested in whether the state receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. There is nothing in the language of sec. 3672 [of the IRS Code] to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression.” ***U.S. v. City of New Britain, CT***
- ◆ A: PRIORITY (Based on First in time, First in Right)



- ◆ Property is foreclosed and sold - \$250 net proceeds to be divided.
- ◆ CERCLA is subordinate to the full \$200 amount of the Mortgage Lien. CERCLA takes the remaining amount of the net proceeds up to its lien value, or \$50 in this case, which leaves \$200 to be distributed under State law.



- ◆ B: Apply State law to the remaining \$200 of undistributed net proceeds.
- ◆ State Law affords super-priority to the municipal lien - as against the mortgage lien. Municipality takes its \$100, and that leaves the remaining \$100 for the mortgage lienor.

\$100 to  
Municipality  
– the full  
amount of its  
lien

\$100 to  
Mortgage  
lienor (the  
residual)

# Implication of a Local Taxing Entity's Foreclosure

- ◆ State laws generally entitle ad valorem tax liens “super-priority” as against all competing liens.
- ◆ Typically, when a local taxing authority forecloses on its ad valorem tax lien, the foreclosure clears the title of all liens and liquidates the ad valorem tax debt.
- ◆ **However, as discussed above, pursuant to 28 U.S.C. § 2410(c):**
  - A senior CERCLA lien would remain undisturbed on the otherwise lien-free property;
  - A junior CERCLA lien that had been properly foreclosed is afforded a one-year right of redemption against the lien-free property.
  - Thus an undisturbed or redeemed CERCLA lien may afford further cost-recovery opportunities.

## Liens In Reality

- ◆ In 1987, EPA issued Lien Guidance (OSWER Dir. 9832.12, September 22, 1987).
- ◆ The text reflects the thinking at the time, which has evolved somewhat since. *E.g.*, it really only focused on the 107(I)(3) lienholders.
- ◆ But by and large, the majority of that Guidance document remains relevant, such as where it addresses policy considerations regarding under what circumstances notice should be filed.
- ◆ Subsequent Guidance documents regarding liens have addressed other issues (*i.e.*, post-Reardon decision) and not lien validity or priority.

# Region 2 Lien Examples

- ◆ Highlights of Region 2 Lien Examples
- ◆ Lawrence Aviation and others



Questions?