

INSIDE THE LAW

FALL 2020



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Can the IRS Take My House?

by Michael P. Duffy, Esq. | 508-459-8043 | mduffy@fletchertilton.com



The Internal Revenue Code allows the government to use federal and state courts to collect unpaid taxes and enforce liens. This collection power includes instituting foreclosure proceedings and obtaining administrative seizure of a taxpayer's home or other property under certain circumstances.

The IRS is unlikely to pursue foreclosure actions against most taxpayers, especially if the property at issue is the taxpayer's primary residence. This is a summary of what the government takes into consideration when enforcing tax liens on a taxpayer's primary residence.

THE SECRET LIEN

Legally, a general lien automatically exists in the government's favor the moment even one dollar of unpaid tax is assessed. This lien, which is sometimes referred to as the "secret lien," is effective the date a tax becomes final and attaches to all property the taxpayer owns now or in the future. Although the government and taxpayer will likely know about the tax liability, the lien is usually a secret from the perspective of third parties. The concept of a lien attaching to property is very important because attachment is the legal mechanism that gives a creditor enforceable rights against a debtor's property.

Although the secret lien is incredibly broad in what property it covers, it is not enough for the government to protect its interests in many cases because it does not by itself establish any sort of priority over other creditors. Priority is the legal concept as to who gets paid first when there are limited assets left to satisfy all creditor claims. Creditors with priority in an asset get paid before claims of unsecured creditors are considered. Creditors normally establish priority with respect to a particular piece of property by recording a lien in official public records. Earlier-recorded filings have priority over later-recorded filings on the same property.

NOTICE OF FEDERAL TAX LIEN

Because the secret lien isn't recorded anywhere, if a taxpayer runs up additional debts after not paying their taxes, subsequent creditors may have the same priority or better priority relative to the government. Consequently, when \$10,000 or more is owed by a taxpayer, the government will normally file a Notice of Federal Tax Lien (the "Notice") to establish priority ahead of later creditors. When this Notice is filed, the lien is no longer a secret, as the rest of the world – including credit reporting agencies – is put on notice that the taxpayer has unpaid taxes. The Notice is filed with the state registry of deeds or a federal district court depending on the state, and is then indexed in the local land records against any real property the taxpayer may own.

A Notice of Federal Tax Lien acts as an anchor on the taxpayer's property and increases the government's potential rights if an administrative seizure or foreclosure proceeding is initiated.

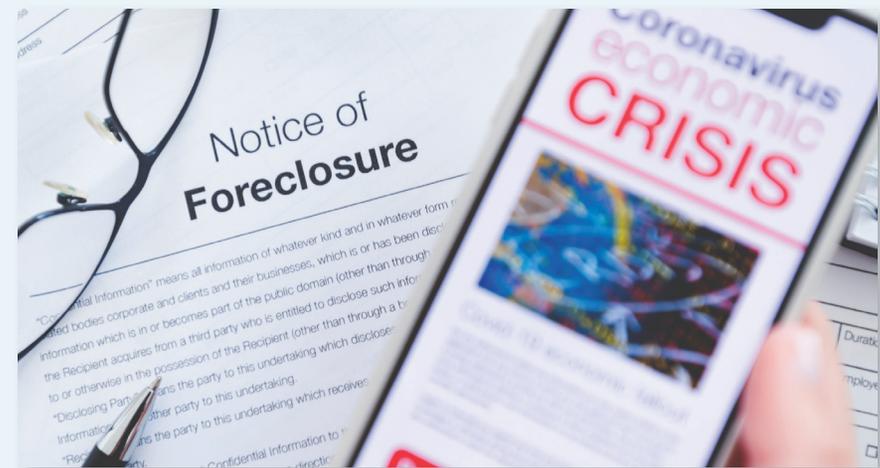
FORECLOSURE OF PRINCIPAL RESIDENCE IS UNLIKELY

Even though the government may use its lien power to seize or foreclose on the taxpayer's property, there are many practical reasons why the IRS will not resort to this action,

especially because the criteria for seizure or foreclosure are even more stringent for the taxpayer's primary residence.

First, the IRS's own administrative procedures require that other collections options be considered prior to taking a home. These options include installment agreement offers and offers in compromise. Even when the IRS determines internally that a suit to seize or foreclose the home is appropriate, it is required to notify the taxpayer and all occupants in the home of their intent and again open the line of communication to discuss other payment options. As is the case with all collections alternatives, the IRS considers economic hardship in these negotiations. If there is no resolution at this stage, the IRS will proceed but also notify the taxpayer of their right to seek assistance from the independent Taxpayer Advocate Service.

Assuming these procedures all take place, the IRS will then need to go to the Department of Justice to request action be taken in court. Compared to the IRS's authority to levy a taxpayer's bank account, pursuing either an administrative seizure or a foreclosure is significantly more challenging because it requires formal judicial approval. A foreclosure or administrative seizure against a personal residence is not authorized as a collection option unless the IRS can demonstrate there are no other reasonable alternatives for collection, or there is a conclusion that the taxpayer has "refused or neglected to pay." The taxpayer is, of course, given an opportunity to rebut the IRS's claims in these proceedings.



A second barrier to the IRS' pursuit of foreclosure or seizure actions on a primary residence is economic. As noted above, the filing of a Notice of Federal Tax Lien establishes priority for the government, but this priority only puts the government in front of subsequent creditors and unsecured lenders. The IRS simply won't foreclose or seize property if there is no money left after the payment of superior claims. The IRS will not initiate a suit where it is not going to get any sort of payoff.

Lastly, federal income tax liens are only enforceable to the extent the underlying unpaid tax may be legally collected. The government is subject to a ten-year statute of limitations on collections actions following the assessment of tax. Although this ten-year period can be extended based on various workout options, at some point it will expire. If the collections statute of limitations expires, any liens in place on the taxpayer's property automatically become unenforceable. A large portion of tax liens expire for this reason before the IRS fully recovers what is owed.

Note that when the collections statute of limitations is about to expire, taxpayers who have been off the IRS's radar will again come into focus. Taxpayers with significant liability and home equity who are reaching the end of their statute of limitations period sometimes need to worry about late-stage enforcement for this reason.

WHEN FORECLOSURE OF PRINCIPAL RESIDENCE IS POSSIBLE

Because of all the considerations discussed, taxpayers normally should not expect to face foreclosure or seizure of their primary residence. It is a course of action the government does not resort to lightly. There are certain cases in which the IRS and DOJ will be more inclined to pursue this avenue, however.

Taxpayers have greater risk of being subjected to a seizure or foreclosure of their home if they have a large amount of unpaid liability. Unfortunately, there are no publicly available magic numbers to indicate when the IRS is going to consider a particular sum an enforcement priority, but most court cases concerning federal tax foreclosure actions cite liabilities well into the six- and seven-figure ranges.

The IRS's role in ensuring the integrity of the tax system is also relevant. The DOJ, in particular, will prioritize civil fraud and criminal cases for potential seizure or foreclosure in order to deter bad actors and encourage voluntary compliance from the public. Somewhere below taxpayers who have been convicted of criminal offenses or civil fraud are taxpayers the IRS characterizes as "won't payers." These are taxpayers who have the means to negotiate at least partial payment of their tax liability, but for whatever reason either do not do so or do not negotiate with the government in good faith. "Won't payers" run the risk of being subjected to enhanced IRS collection actions.

FINAL THOUGHTS

I wish to note that the presence of a Notice of Federal Tax Lien recorded on a taxpayer's primary residence absolutely does not mean the IRS intends to foreclose. The government files a Notice of Federal Tax Lien as part of its standard operating procedures to protect its interests as a creditor. The Notice filing process is a largely automated.

The IRS's own internal documentation indicates that administrative seizures and suits to foreclose are extreme remedies and should only be pursued when there are *both* no other reasonable collection alternatives *and* when no material hardship will be felt by the taxpayer and their family. A tax collection matter should, therefore, never reach this stage.

Where taxpayers have real risk in this situation is where they either do not respond to multiple notices of the IRS's intent or are not able to navigate the alternative collection processes offered. Taxpayers who are facing potential threats for foreclosure or seizure from the IRS should nonetheless contact competent tax counsel immediately.

While it is unlikely the IRS will take your home, it is extremely unwise to ignore the IRS or to act in bad faith when negotiating workout options. **FT**

Taxpayers have greater risk of being subjected to a seizure or foreclosure of their home if they have a large amount of unpaid liability.

Under What Circumstances Can a Civil Lawsuit Be Filed? An Introduction to Causes of Action

by Michael E. Brangwynne, Esq. | 617-336-2281 | mbrangwynne@fletchertilton.com



Despite references in popular culture to the contrary, one cannot sue another, or be sued for that matter, for any reason at all. To be more precise, a person could file a civil lawsuit against another for any reason under the sun, but unless that individual's lawsuit is based on an appropriate cause of action, there is a very strong likelihood it will be dismissed by the court in short order.

CAUSES OF ACTION GENERALLY

A cause of action, also known as a claim or a count, is a combination of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a legal right against another party. Causes of action can arise from the common law, which has been created over hundreds of years through the decisions of our courts, or they can be created by statute by the state or federal legislature.

A cause of action is the civil law equivalent of a crime. Much like the prosecutor in a criminal prosecution must prove certain elements to establish that a crime has been committed, so too the plaintiff (claimant) in a civil lawsuit must prove each of the elements of his or her cause of action to establish that the defendant is liable for damages.

Indeed, some causes of action closely resemble crimes, and have similar elements that must be proven. For example, battery has long been recognized as a civil cause of action under the common law. In order to establish a claim for battery in Massachusetts, the plaintiff must prove:

1. an act by the defendant;
2. with the intent to cause harmful or offensive contact;
3. resulting in a harmful or offensive contact to the plaintiff.

For example, if David aimed a pistol at Patrick and fired a shot, striking Patrick in the leg, Patrick would have a legitimate cause of action against David for battery and could file a lawsuit against him. If Patrick could prove these facts in court to a jury - through eye



witness testimony, video footage, or other evidence - then a jury could find David liable to Patrick for battery, and award Patrick monetary compensation for his damages, which might include medical bills, lost wages, pain, suffering, and emotional distress.

DEFENSES GENERALLY

Under certain circumstances, even if a plaintiff can prove each element of his or her cause of action, the defendant may be able to establish additional facts that protect him or her from liability. Such assertions are known as affirmative defenses to a claim. Continuing with our example above, if David could show, through evidence, that he and Patrick were in fact friends and that Patrick had asked David to shoot him in the leg, then David could raise the defense of consent - that Patrick had consented to the otherwise harmful or offensive touching. By establishing these facts at trial, David could avoid a finding of liability, even where Patrick was able to prove each of the elements of his battery cause of action.

WHY IS THIS IMPORTANT?

You may be asking, "When is the chase, and can you please cut to it, counselor?" Simply put, there is no better way to avoid unwanted litigation or understand when you may need to initiate litigation than by becoming familiar with the most common causes of action. The purpose of this series is to explore some of the most common causes of action that the reader may encounter in his or her personal or professional life. By understanding the types of conduct that can give rise to liability, we can (1) avoid engaging in such conduct ourselves (and potentially prevent our employees from engaging in such conduct) and (2) recognize when others have engaged in legally actionable conduct and may be liable for harms that they have caused. **FT**

Corporate Liability: An Introduction to Causes of Action

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This is the second article in a series on the circumstances that can give rise to a civil lawsuit.

CORPORATE LIABILITY GENERALLY

Before diving into a discussion of the most common causes of action - which are the combination of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party - it seems appropriate first to discuss corporate liability generally.

Many owners of small and large business will be familiar with the fact that a corporation is a separate legal entity which affords protection against liability to the owners of the corporation, who are also known as shareholders. A corporation's liability is typically limited to assets that are held in the name of the corporation. Put another way, if the corporation is sued and is found liable in an amount that exceeds the total assets of the corporation, the shareholders' personal assets usually will not be at risk. This allows individuals to invest a certain amount of capital into a business, and rest assured that they only stand to lose, at most, only the amount that they have invested. The shareholders usually cannot be held personally responsible for the debts or liabilities of the corporation.

RESPONDEAT SUPERIOR

You may be wondering how a corporation would become liable to anyone in the first place. What actions can we attribute to the corporation itself? Unlike with individuals, we do not see corporations walking down the street each day.

The answer is that a corporation can only act through its agents - such as its officers, directors, and employees. Under the legal doctrine of *respondeat superior*, a corporation can be held vicariously liable for the actions of its employees while they are employed and acting within the scope of their employment. That is not to say that individual employees cannot be held liable for their own unlawful conduct while acting on behalf of their employer - they can. Nevertheless, our courts long ago decided that both the employer and employees should be liable if the employees' conduct was in furtherance of their employer's interests.

BY WAY OF EXAMPLE

Suppose Builder Corp. is 100% owned by John Builder, who is also the president of the corporation. Don Driver is an employee and operates heavy machinery for Builder Corp. Business has been good, and in addition to having a flush corporate bank account and a fleet of construction vehicles, Mr. Builder has recently purchased a personal beach house with distributions from the corporation.

One day, while operating a front-end loader at a Builder Corp. job site, Driver forgets to set the brakes properly before taking his lunch break. The front loader, which is parked on an incline, rolls through the neighborhood, destroying several expensive houses and injuring a bystander.

In the inevitable lawsuits that follow, the injured bystander and homeowners would have a very strong claim for negligence against not only Driver, but also against Builder Corp. Because Driver was acting within the scope of his employment with Builder Corp. in operating the front-end loader, the corporation will be held vicariously liable for his actions.

The silver lining for Mr. Builder is that only the corporate assets of Builder Corp. should be at stake in the litigation. If the plaintiffs obtain a judgment that far exceeds Builder Corp.'s ability to pay, the plaintiffs could seize Builder Corp.'s vehicles and corporate bank accounts to satisfy the judgment, but they will not be able to reach Mr. Builder's personal assets, such as his new beach home.

As a practical matter, while this example does demonstrate the benefits of a corporation's limited liability, it also demonstrates the importance of corporate liability insurance. It may be small consolation to Mr. Builder that he can keep his beach house, when a single employee's careless actions have bankrupted his business. We will pick up on the topic of liability insurance in the next installment of this series. **FT**

Under the legal doctrine of *respondeat superior*, a corporation can be held vicariously liable for the actions of its employees while they are employed and acting within the scope of their employment.

Virtual Estate Planning in Massachusetts During COVID-19

by Lauren E. Miller, Esq. | 508-459-8044 | lmiller@fletcherilton.com



Thanks to technology, estate planning can often be done virtually for those who are concerned about in-person meetings during the COVID-19 pandemic. Pursuant to Governor Charlie Baker's April 27, 2020 order, Massachusetts temporarily allows for virtual notarization of certain documents, which includes estate planning documents. The act requires that the clients, the witnesses and the notary are all physically

located in Massachusetts, that the signing is recorded and stored for 10 years, and that all parties disclose anyone else located in the room and show those parties to the camera. This last requirement is presumably to help protect clients from influence or coercion by a party not visible to the notary.

However, this act does not allow for electronic signatures. The documents must be physically signed by the clients and any witnesses at their separate locations, and then sent to the notary to complete the notarization process.

Unless further legislation is passed to make this order permanent, the Massachusetts order allowing virtual notarization remains in effect only until three days after the state of emergency ordered by Governor Baker expires. (The state of emergency was declared on March 10, 2020, and is currently in effect.)

While using video-conferencing technology may be intimidating to some, many clients have adapted quickly and taken advantage of this option. In addition, for those not comfortable leaving their home or having someone enter their home, video-conferencing allows for superior communication as compared with a phone conference. Video-conferencing can be set up through a laptop with a webcam, through a tablet or through a smart-phone. Ask your attorney whether remote notarization can be used in your case. **FT**

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FIRM NEWS



WE ARE PLEASED TO ANNOUNCE THE 2020 SUPERLAWYERS® SELECTIONS HAVE BEEN PUBLISHED AND INCLUDE FIVE OF OUR ATTORNEYS.

For this designation, attorneys are nominated by their peers, evaluated by third-party research across 12 key categories, and reviewed by a highly credentialed Blue Ribbon Panel of attorneys.



Richard C. Barry has been designated as a *SuperLawyer* for the 16th year in a row in the area of Estate Planning & Probate. He is the vice chairman of the Trust & Estate Department and is a leading resource on sophisticated estate planning techniques.



William D. Jalkut has been designated as a *SuperLawyer* for the 6th year in a row in the area of Civil Litigation. He is Chair of the Litigation Department focusing on commercial litigation and personal injury litigation. Mr. Jalkut has been appointed as a Master by the Superior Court and the Probate Court on numerous disputes.



Frederick M. Misilo, Jr. has been designated as a *SuperLawyer* for the 4th year in a row in the area of Elder Law. He is the Chair of the Trust & Estate Department. His practice encompasses all aspects of estate planning, including elder law, special needs planning, estate administration, trusts and foundations, guardianship, and adult service advocacy.



Nelson L. Santos has been designated as a *Rising Star* by *SuperLawyers* for the 2nd year in a row. He focuses his practice on litigation matters related to real estate, representing individuals, businesses, owners, developers, and entrepreneurs in transactional legal matters.



Scott E. Regan has been designated as a *Rising Star* by *SuperLawyers* for the first time in 2020 in the area of Employment & Labor Law. He concentrates his practice in commercial and employment litigation, representing corporate entities and individuals in all aspects of litigation.

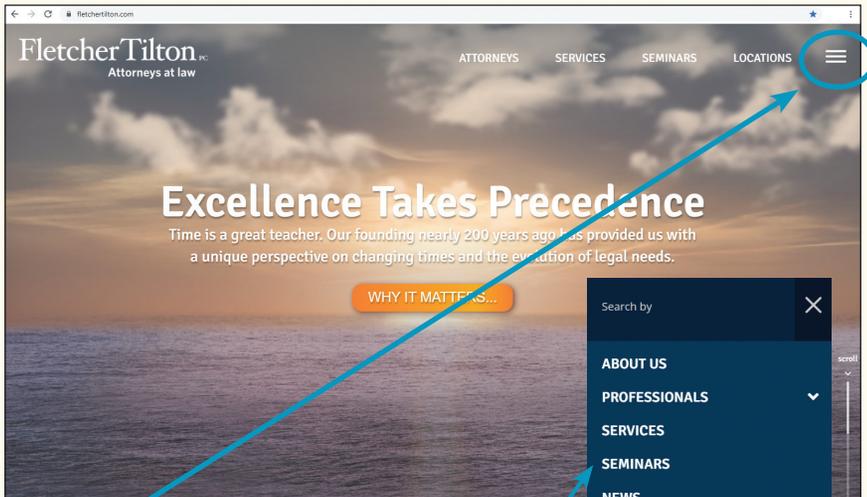
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UPCOMING WEBINARS

Remaining 2020 events will be LIVE WEBINARS. Check website for details.

Estate Planning with attorney Michael Lahti

- Wed., November 4, 2020 | 10:00-11:30 a.m. | Live Webinar
- Tues., November 17, 2020 | 10:00-11:30 a.m. | Live Webinar
- Tues., January 19, 2021 | 10:00-11:30 a.m. | Live Webinar
- Tues., February 9, 2021 | 10:00-11:30 a.m. | Live Webinar
- Tues., March 2, 2021 | 10:00-11:30 a.m. | Live Webinar

How to Administer a Special Needs Trust with Fletcher Tilton's Special Needs Practice Group

- 3 sessions: Thurs., November 5
- Tues., November 10
- Thurs., November 12
- All Live Webinars from 6:00-7:30 p.m.
- Check website for details.

For details and registration, visit FletcherTilton.com/seminars-events

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