



THE ENFORCER

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THE COURT GRANTED MY DIVORCE, AM I STILL ATTACHED

Family practitioners like to tell their clients that almost everything is marital property and that the Court can divide it. Smart practitioners would also require a lien against the ex-spouse's business to serve as security for payment and performance of the divorce settlement. The problem is that although it may be marital property, the court may not have jurisdiction to impose a valid lien.

Jane and John Doe are in the midst of a divorce. As Jane's attorney, you negotiate for her to receive spousal support and other marital property with John keeping his business. John is the co-owner of John and Jerry Doe, LLC ("JJD, LLC") which he owns with his brother, Jerry. Knowing that John has a propensity to not follow through on agreements, you demand that John agree to a lien so that he complies with the terms of the Judgment. You provide for a lien on JJD, LLC in the Judgment of Divorce and file a UCC-1 with the secretary of state with the judgment attached. Did you properly perfect the lien? Nope, better check your malpractice insurance.

Asserting that a business is 'marital property' is different than the court actually having jurisdiction over the business entity itself. If the business does not properly authorize the lien, the court's lien will be unperfected against the business and unenforceable. The most commonly required form of perfection entails filing a financing statement with the Secretary of State.¹

Businesses take on many forms and unless it is a sole proprietorship, you are likely to run into trouble if you fail to investigate the business' status. As Jane's attorney you will first want to consult the articles of incorporation or equivalent document for John's business. The corporation or other business entity will also have to authorize execution of a security agreement. When a written security agreement is required, the requirements of the UCC, and when a security interest can be attached and enforced is beyond the scope of this article. (See The Enforcer: Give Me Security and Satisfaction: the JOD & the UCC, August 2007 for a further discussion).

Further, the court can only secure John's membership interest to the extent of the distributions from JJD, LLC. MCL 450.4507 provides:

- (1) On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of judgment with interest. **To the extent the membership interest is so charged, the judgment creditor has only the rights of an assignee of the membership interest.** This act does not deprive any member of the benefit of any exemption laws applicable to his or her membership interest.
- (2) Unless otherwise provided in an operating agreement, the member remains a member and retains all rights and powers of membership except the right to receive distributions to the extent charged. (Emphasis supplied)

MCL 450.4505(2) defines what an assignee of the membership interest is entitled to receive:

- (2) An assignment of a membership interest does not of itself entitle the assignee to participate in the management and affairs of the company or to become or exercise any rights of a member. **An assignment entitles the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled.** (Emphasis supplied)

So after all those negotiations, all Jane has is a charging lien on John's membership interest *to the extent of the distributions from JJD, LLC to John*. If JJD, LLC does not distribute any money, Jane gets nothing. In addition, John remains a member of JJD, LLC.

A properly drafted financing statement should contain the name of the debtor, the name of the secured party or his or her representative, and an indication of the collateral.² An "indication" of the property is had where either a description of the collateral pursuant to MCL 440.9108, or that the financing statement pertains to "all assets" or "all property".



Unlike attachment, perfection by means of filing a financing statement does not require the debtor's signature. Instead, if the proper debtor properly signed or authenticated the security agreement, authorization will be automatic with regard to the financing statement.³ One should be mindful that authorization will not be automatic if the financing statement describes the collateral more broadly than was described in the initial security agreement. Also, failure to obtain the debtor's authorization before filing a financing statement will not only result in incomplete perfection but may also result in damages being leveled against the secured party.⁴

Remember, proper perfection requires authorization by the debtor. Don't confuse the business owner and the business.

Endnotes

1. MCL 440.9310(dependent on type of collateral), MCL 440.9501(1)(b).
2. MCL 440.9501(1)(a)-(c).
3. MCL 440.9509(b).
4. MCL 440.9625.

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