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IN THE SUPREME COURT OF FLORIDA

UNITED STATES OF AMERICA

Appellant,

vs.

Case No. 77,390

KENNETH R. MCGURN, ET UX.

Appellee.

* * * * *

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF
FLORIDA PURSUANT TO ARTICLE 5, SECTION 3(B)(6)
OF THE FLORIDA CONSTITUTION

INITIAL BRIEF FOR THE APPELLEE

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STATEMENT OF THE CASE AND OF THE FACTS

This case was certified from the United States Court of Appeals for the Eleventh Circuit to the Supreme Court of Florida pursuant to Article 5, Section 3(b)(6) of the Florida Constitution as it involves a question of Florida law which is determinative of the cause, but is unanswered by controlling precedent of the Supreme Court of Florida.

Without intending the particular phrasing of the question to limit the Supreme Court in its consideration of the problems posed by the entire case, the following question was certified:

Whether the recording of a security interest with the Florida Division of Alcoholic Beverages and Tobacco pursuant to Section 561.65, Fla. Stat., is sufficient under Florida law to perfect that interest against a subsequent judgment lien.

The case went to the United States Court of Appeals for the Eleventh Circuit on appeal from the United States District Court for the Northern District of Florida.

As set forth in the certification, the following facts are not in dispute. In December, 1981, Kenneth and Linda McGurn leased certain real property and premises in Gainesville, Florida, to Harrison R. Glidden and Whiskey Creek, Inc., for use as a lounge and nightclub. To secure the McGurns' right to rent under the lease, Whiskey Creek and Glidden executed a security agreement granting the McGurns an interest in their liquor license issued by the Division of Alcoholic Beverages and Tobacco of the state of Florida (the Division). The McGurns recorded their security agreement with the Division within ninety days of

its execution; however, the McGurns did not file a financing statement with the Secretary of State.

In November, 1983, Glidden and Whiskey Creek began to default on lease payments owed to the McGurns. These defaults continued periodically until April, 1987, when Glidden and Whiskey Creek discontinued operation of the bar on the premises. During this time, the United States filed three different tax assessments for unpaid taxes by Glidden and Whiskey Creek against the property, followed by notices of tax liens. The total amount due the government pursuant to these liens is \$25,302.04. The total amount owed the McGurns for rent defaults is \$18,084.40.

The McGurns filed suit in Florida circuit court seeking to foreclose their interest under the security agreement in the liquor license. The complaint included the United States as named defendants because the Internal Revenue Service had seized the liquor license for nonpayment of federal taxes. The United States removed the case to federal district court. The liquor license was sold for \$23,562.50, and the proceeds placed in an interest-bearing account pending disposition of the suit.

The United States and the McGurns filed motions for summary judgment. The District Court granted the United States' motion and denied the McGurns' motion. The District Court held that the federal tax lien took priority because, at the time that the notices of federal tax lien were filed, the McGurns' security agreement had not been filed with the Secretary of State, and was therefore not perfected. The McGurns appealed from this judgment.

SUMMARY OF ARGUMENT

The recording of a security interest in an alcoholic beverage license with the Florida Division of Alcoholic Beverages and Tobacco pursuant to Section 561.65, Fla. Stat., is sufficient under Florida law to perfect that security interest against a subsequent judgment lien.

Section 561.65, Fla. Stat. is a specific and comprehensive statute relating to the perfection, enforcement and foreclosure of liens or security interests in alcoholic beverage licenses. Under Section 561.65, Fla. Stat., if a security interest is perfected by timely filing with the Division, it will be enforceable against the license. Upon the foreclosure of any lien under Section 561.65, Fla. Stat., the lienholders shall be paid in order of their filing with the Division.

The practical effect of perfecting a security interest under Section 561.65(4), Fla. Stat. is that no subsequent lien creditor can prime a security interest which has been properly filed with the Florida Division of Alcoholic Beverages and Tobacco. This is in conflict with Chapter 679, Fla. Stat., Uniform Commercial Code - Secured Transactions.

The Chapter 679, Fla. Stat. is a general statute which applies to perfection of security interests in all personal property, including general intangibles. Prior to the enactment of Section 561.65, Fla. Stat., the Uniform Commercial Code was held applicable to the perfection of a security interest in a liquor license based on it being a general intangible.

The enactment of Section 561.65, Fla. Stat. in 1981 resulted in inconsistencies and direct conflicts in the requirements for perfection and enforcement of liens and security interests in alcoholic beverage licenses.

As to conflicts between two statutes which cover the same subject matter, the later more specific statute addressing the perfection and foreclosure of liens and security interests in liquor licenses, should take priority over the more general Uniform Commercial Code - Secured Transactions statute which addresses the perfection of security interests in, inter alia, general intangibles.

ARGUMENT

The issue of whether the McGurns' security interest in the alcoholic beverage license is protected under Florida law against a subsequent judgment lien arises out of the requirements of federal law since the security interest is in competition with federal tax liens. Federal law determines the priority of liens competing against federal tax liens. Aquilino v. United States, 363 U.S. 509 (1960). Section 6323 of the Internal Revenue Code provides that an unfiled federal tax lien is not valid against, inter alia, a "holder of a security interest." Internal Revenue Code Section 6323(h)(1) defines "security interest" as--

any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

THE RECORDING OF A SECURITY INTEREST WITH THE FLORIDA DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO PURSUANT TO SECTION 561.65, FLA. STAT., IS SUFFICIENT UNDER FLORIDA LAW TO PERFECT THAT INTEREST AGAINST A SUBSEQUENT JUDGMENT LIEN.

A. SECTION 561.65, FLA. STAT. IS A SPECIFIC AND COMPREHENSIVE STATUTE RELATING TO THE PERFECTION, ENFORCEMENT AND FORECLOSURE OF LIENS OR SECURITY INTERESTS IN ALCOHOLIC BEVERAGE LICENSES IN FLORIDA.

Section 561.65(4), Fla. Stat. (1987) sets forth the specific steps to be taken to perfect a lien or security interest in a

liquor license as follows:

In order to perfect a lien or security interest in a spirituous alcoholic beverage license which may be enforceable against the license, the party which holds the lien or security interest, within 90 days of the date of creation of the lien or security interest, shall record the same with the division on or with forms authorized by the division, which forms shall require the names of the parties and the terms of the obligation. The division, upon request and at no more than actual cost, shall provide copies of all recorded liens or security interests against a spirituous beverage license.

Section 561.65, Fla. Stat. contains not only the recording provision, but also detailed provisions regarding the foreclosure of liens. Sections 561.65(5) and (6), Fla. Stat. (1987) provide as follows:

(5) Any foreclosure of a perfected lien in a beverage license shall be in the circuit court in the county in which the beverage license is issued, and the division shall be joined as an indispensable party. All holders of liens senior to the lien being foreclosed shall be joined and deemed necessary parties to the foreclosure.

(6) Upon a judgment of foreclosure and after written notice to each distributor of alcoholic beverages who has filed a claim in the foreclosure, the clerk of the circuit court shall sell the license at public auction, pursuant to chapter 45, to the highest and best bidder, who shall pay the amount bid by a cashier's check within 24 hours of the time of sale. The proceeds from the sale of such license, after deducting the expenses of the sale, shall be paid, first, to the lienholder or lienholders in the order of date of filing and, second, to creditors who have paid or by law are obligated to pay federal or state excise taxes on purchases by the licensee; and the balance shall be paid as directed in the judgment of foreclosure.

Therefore under Florida law, any foreclosure of any subsequent lien against the license in accordance with Section 561.65(5), Fla. Stat. would result in those lienholders who have

filed with the Division being paid first out of the proceeds in order of their date of filing by virtue of their having perfected their interest under Section 561.65(4), Fla. Stat.

In Florida, a judgment lien creditor is entitled to collect his judgment through a writ of execution. Coney v. First State Bank of Miami, 405 So. 2d 257 (Fla. 3rd DCA 1981) held that a liquor license could be levied upon and sold to satisfy a judgment debt. However, the court also stated that the judgment lien creditor could only levy on the debtor's right, title and interest and that a prior interest would not be affected by the levy or sale. It is well settled under Florida law that a purchaser at an execution sale buys at his own risk and takes title subject to existing liens. Cape Sable Corp. v. McClurg, 74 So. 2d 883 (Fla. 1954).

The Coney case was decided prior to the 1981 revisions to Section 561.65, Fla. Stat. which amended the statute to make it mandatory to file with the Division of Alcoholic Beverages and Tobacco to perfect and foreclose a lien or security interest. Arguably, a liquor license could not be levied upon and sold except pursuant to Section 561.65, Fla. Stat. since the effective date of the statute.

However, even if a hypothetical judgment lien creditor had a writ of execution issued, levied upon the license and had it sold by the Sheriff, the security interest of the lienholders who filed with the Division would still be protected because the sale would be made subject to their interest under Florida law.

Based on Florida law and Section 561.65, Fla. Stat., it would be impossible for any subsequent lien creditor to prime the lienholders who filed with the Division.

B. SECTION 561.65, FLA. STAT. CONFLICTS WITH CHAPTER 679, FLA. STAT., UNIFORM COMMERCIAL CODE - SECURED TRANSACTIONS, WHICH IS A GENERAL STATUTE APPLICABLE TO THE PERFECTION OF SECURITY INTERESTS IN PERSONAL PROPERTY.

The problem arises in this case because of the consideration of Chapter 679, Florida's Uniform Commercial Code - Secured Transactions. Section 679.102(1)(a), Fla. Stat. (1987) provides that the chapter applies "to any transaction ... which is intended to create a security interest in personal property or fixtures including ... general intangibles..." In In re Coed Shop, 435 F. Supp. 472 (N.D. Fla. 1977), a case decided prior to the amendments to Section 561.65, Fla. Stat. in 1981, the court held that a liquor license was a general intangible and therefore U.C.C. filing was required to perfect a security interest in a liquor license. At that time, there was no other statute which addressed perfection of a security interest in a liquor license. The court held that Section 561.65, Fla. Stat. as it then read, did not provide a central filing system for liens on liquor licenses, and accordingly a filing with the Division in the absence of a filing with the Department of State provided no protection to the creditor. The present Section 561.65(4), Fla. Stat. is an entirely new provision which was added in 1981. The former Section 561.65(3), Fla. Stat. which the court addressed in

Coed Shop, simply provided for a permissive filing which entitled the filing party to notice of certain actions against the license, as the court recognized. In In re Seville Entertainment Complex of Pensacola, Inc, 79 B.R. 491 (Bankr. N.D. Fla. 1987), the bankruptcy court specifically held that Coed Shop was no longer applicable to the issue of where a lien on a liquor license must be recorded to be perfected.

In Seville, the court did not discuss the applicability of the U.C.C. based upon a liquor license coming within the term "general intangible." In Seville the secured party had perfected its security interest in an alcoholic beverage license by filing with the Secretary of State under the U.C.C., but had failed to file in accordance with Section 561.65(4), Fla. Stat. The specific issue presented to the court in Seville through a stipulation of the parties was whether the secured party must file with the Division under Section 561.65(4), Fla. Stat. having filed with the Secretary of State. The court noted that Section 561.65(4), Fla. Stat. was clear and unambiguous:

In order to perfect a lien in a liquor license which is enforceable against the license, a lienholder must file the appropriate forms with the Division of Alcoholic Beverages. The penalty for failure to do so is that the lien is unenforceable against the license . . . To hold otherwise would be to completely disregard Section 561.65 of the Florida Statutes.

79 B.R. at 492. The court concluded that "dual filing" was required by the secured party in a situation where the initial filing was made under the U.C.C.

However, where the security interest was properly perfected

with the Division in accordance with Section 561.65(4), Fla. Stat., to hold that it is unenforceable against the license, negates the specific wording of that section and also completely disregards Sections 561.65(5) and (6), Fla. Stat. on the enforcement of any liens or security interests. Therefore the reasoning of Seville is not equally applicable when the initial filing is made with the Division.

Section 679.401(1), Fla. Stat. (1987) provides that "the proper place to file in order to perfect a security interest...." in inter alia, a general intangible, is "by filing in the office of the Department of State." If a liquor license is a general intangible subject to the U.C.C., there is an inconsistency with Section 561.65(4), Fla. Stat. (1987) which provides that "in order to perfect a....security interest in a spirituous alcoholic beverage license....the party....shall record the same with the division..."

The practical effect of requiring dual filing and holding that the recording of a security interest with the Division is not sufficient to perfect that interest under Florida law against a subsequent judgment lien requires that Section 561.65, Fla. Stat. be held subordinate to Section 679.401, Fla. Stat. By not recognizing a security interest as perfected and enforceable under Section 561.65, Fla. Stat. solely because it was not perfected under the U.C.C., the Court completely disregards the wording of Section 561.65(4), Fla. Stat. on enforceability and the provisions of Sections 561.65(5) and (6), Fla. Stat. on

disposition of proceeds at foreclosure sale.

Section 679.301(1)(b), Fla. Stat. (1987) provides that unless a security interest is perfected by filing with the Secretary of State, the security interest will be subordinate to the rights of a subsequent lien creditor. Therefore, upon foreclosure of a subsequent creditor's lien, the security interest holder would supposedly be paid after the subsequent lien creditor.

Section 561.65(4) through (6), Fla. Stat. provides that if a security interest is perfected by timely filing with the Division, it will be enforceable against the license and upon the foreclosure of any junior lien, will be paid first out of the proceeds of sale of the license. Therefore, upon foreclosure of a subsequent creditor's lien, the security interest holder would be paid before the subsequent lien creditor.

While Section 679.301(1)(b), Fla. Stat. says the security interest will not be protected against a subsequent lien creditor, any attempt by that subsequent lien creditor to foreclose against a liquor license will result in the security interest holder being paid first and therefore protected under Section 561.65(6), Fla. Stat.

C. WHERE INCONSISTENT AND CONFLICTING STATUTORY PROVISIONS EXIST FOR PERFECTION OF A SECURITY INTEREST IN A ALCOHOLIC BEVERAGE LICENSE, THE MORE RECENT AND SPECIFIC LEGISLATION SHOULD PREVAIL.

Section 671.104, Fla. Stat. (1987) states that the Uniform

Commercial Code is intended as a unified coverage of its subject matter and no part of it shall be repealed by implication if such construction can be reasonably avoided. The general rule in Florida for any statute is against repeal by implication. However, it is also recognized that the latest enactment takes precedence over prior enactments. Carcaise v. Durden, 382 So. 2d 1236 (Fla. 5th DCA 1980). Chapter 679 was enacted in 1965 and substantially amended in 1979. The amendments to Section 561.65(4), Fla. Stat. referring to perfection of security interests or liens in liquor licenses were added in 1981 as were sections 561.65(5), (6) and (7), Fla. Stat. on the foreclosure of security interests or liens on liquor licenses.

In a case such as the one at bar, where there is a positive conflict in the filing requirement and the priority of payment upon foreclosure, taking the later statute as a modification or exception to the first gives effect to both statutes by giving each a field of operation and leaves no part meaningless. State of Florida v. Board of Public Instruction of Escambia County, 113 So. 2d 368 (Fla. 1959). In other words, the subsequent more narrowly drawn statute operates as an exception to or a qualification of the general terms of the more comprehensive statute where there is a special subject matter covered by the latter, and the general statute covers the same and other subjects in more general terms. Floyd v. Bentley, 496 So. 2d 862 (Fla. 2nd DCA 1986).

When two statutes are inconsistent or in conflict, the more

specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms. Department of Health and Rehabilitative Services v. American Healthcorp of Vero Beach, Inc., 471 So. 2d 1312 (Fla. 1st DCA 1985).

This concept has most recently been embraced in McClelland v. Cool, 547 So. 2d 975 (Fla. 2nd DCA 1989) where there were competing statutes waiving immunity for wilful and wanton acts of employers. The court, in accepting the appellant's argument that the worker's compensation provision governing tort actions between co-employees should control because the statute was more specific in its subject matter further stated: "We also adhere to the principal that where it is not possible to give the effect to two statutes without materially altering their intent, the last expression of legislative will prevails." Id. at page 976.

In another case, the Supreme Court of Florida, through Justice Barkett, held that where competing statutes controlled business licensure of both citizens and non-citizens, the statute "covering a specific subject is controlling over a Statute...that applies to a general class of subjects; in effect, the specific Statute operates as an exception to the general." Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987 at page 251).

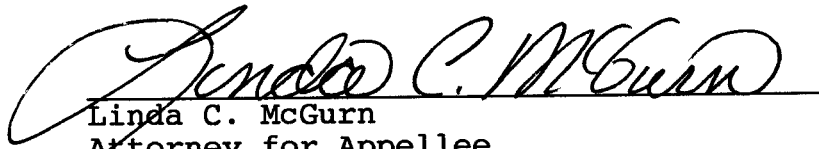
The U.C.C. can only be applicable to an alcoholic beverage license by including a license within the term "general intangible." Section 561.65, Fla. Stat. applies specifically to

alcoholic beverage licenses. Therefore, taking the latter statute, Section 561.65, Fla. Stat. as an exception to the more general U.C.C. provision under Chapter 679, Fla. Stat. as to this very unique species of property, an alcoholic beverage license, gives effect to both statutes by giving each a field of operation and resolves an other wise direct conflict in operation.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative and hold that the recording of a security interest with the Florida Division of Alcoholic Beverages and Tobacco pursuant to Section 561.65, Fla. Stat. is sufficient under Florida law to perfect that interest against a subsequent judgment lien.

Respectfully submitted,

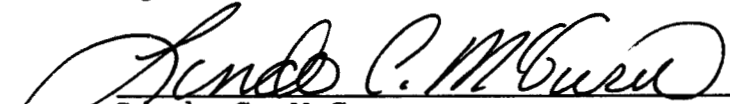
A handwritten signature in cursive script, reading "Linda C. McGurn", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to attorneys for appellant this 8th day of April, 1991 by mail to them in an envelope, with postage prepaid, properly addressed to them as follows:

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