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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

REPLY BRIEF FOR THE APPELLEE

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SUMMARY OF ARGUMENT

In the only case to consider the perfection of a security interest in an alcoholic beverage license since the 1981 amendments to Section 561.65, Fla. Stat., the federal court rendered its decision based on a stipulation of the parties where the facts were the opposite of the facts in this case. That decision does not support the United States' argument that dual filing is required to perfect a security interest in an alcoholic beverage license when a secured party has properly filed under Section 561.65, Fla. Stat.

Chapter 561, Fla. Stat. was substantially amended in 1981. The amendments reflect the intent of the legislature to substantially regulate indirect interests in liquor licenses. The State has an overriding concern in insuring that anyone interested, indirectly or directly, in a liquor license is subject to regulation by the Division of Alcoholic Beverages and Tobacco. Setting up a separate process for qualifications, perfection, enforcement and foreclosure of liquor licenses is appropriate and necessary for this very unique asset.

The coverage of Chapter 561, Fla. Stat., is much broader and stricter than the Uniform Commercial Code. Because of the differences in coverage of the two statutes, it is impossible to harmonize them by construing "the date of filing" to mean the earliest date on which two different filings are made.

The language used by the legislature in 1981 to describe the effect of filing with the Division under Section 561.65, Fla.

Stat. reinforces that the intent was to make the liens filed with the Division enforceable and give them priority.

It is important to remember that the priority of the McGurns' lien competing against the federal tax lien is not based upon whether they perfected their lien under the Uniform Commercial Code but whether their lien is "protected under local law against a subsequent judgment lien arising out of an unsecured obligation." The Court must determine if and how an unsecured judgment lien creditor could obtain priority over the McGurns and have the right to be paid first out of the proceeds of the sale of the Whiskey Creek alcoholic beverage license. There is no way for an unsecured judgment lien creditor to obtain priority over the McGurns and therefore no way for the federal tax lien to obtain priority.

ARGUMENT

A. DUAL FILING WITH THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO PURSUANT TO SECTION 561.65, FLA. STAT. AND WITH THE DEPARTMENT OF STATE PURSUANT TO CHAPTER 679, FLA. STAT. IS NOT REQUIRED TO PERFECT A SECURITY INTEREST IN AN ALCOHOLIC BEVERAGE LICENSE AGAINST A SUBSEQUENT JUDGMENT LIEN.

The United States relies on In re Seville Entertainment Complex of Pensacola, Inc, 79 B.R. 491 (Bankr. N.D. Fla. 1987), to support its argument that dual filing is required under both Chapter 679, Fla. Stat., Uniform Commercial Code - Secured Transactions (U.C.C.) and Section 561.65, Fla. Stat. to perfect a security interest in an alcoholic beverage license. (Br. 7.) The facts in Seville do not support such a broad assertion. The federal court did not discuss the applicability of the U.C.C. to the perfection of a security interest in an alcoholic beverage license. The specific issue presented to the court by 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 Department of State. The court based its decision on the language of Section 561.65(4), Fla. Stat. which it said was clear and unambiguous. The conclusion that "dual filing" was required must be considered in the context of the question presented to the court.

Using the same reasoning the court used in Seville and looking at the wording of Section 561.65(6), Fla. Stat., should lead this Court to hold that dual filing is not required.

Section 561.65(6), Fla. Stat. is clear and unambiguous. The proceeds from the judicial sale of an alcoholic beverage license shall be distributed "first, to the lienholder or lienholders in the order of date of filing..."

B. THE STATE OF FLORIDA HAS A OVERRIDING CONCERN IN REGULATING INDIRECT INTERESTS IN ALCOHOLIC BEVERAGE LICENSES UNDER CHAPTER 561, FLA. STAT.

The Twenty-first Amendment to the United States Constitution grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L. Ed. 2d. 233 (1980). The states have broad powers to regulate all aspects of the liquor business. "There is no field in which the courts have recognized a wider latitude for the exercise of the police power-nor one where there is greater need therefor-than in the sale or possession of intoxicating liquors." Holloway v. Schott, 64 So. 2d 680, 681 (Fla 1953).

The United States argues that the legislative history of the 1981 amendment to Section 561.65(4) does not support the ability of a lienholder to perfect a lien by filing only with the Division under Section 561.65, Fla. Stat. (Br. 7.) The two sentences quoted from the CS/SB 1034 and 987, Florida Senate Staff Analysis and Economic Impact Statement, June 11, 1981 (updated) do not indicate that a dual filing system was contemplated.

The amendments to Chapter 561 in 1981 dealt in numerous sections with indirect interests in alcoholic beverage licenses. The State had a legitimate concern that indirect interests were not properly regulated and needed to be addressed. Two laws amending Chapter 561, Fla. Stat. were enacted in 1981. Chapter 81-166 and Chapter 81-158, Laws of Florida, both included provisions applicable to indirect interests, enforcement of liens and judicial transfer of licenses. The legislative history of Chapter 81-166 which also refers to Section 561.65 provides the basis for understanding the legislature's concern with indirect interests.

This bill has been requested by the Division of Alcoholic Beverages and Tobacco and the Department of Business Regulation as an enforcement tool. The agency's position is that unqualified persons, including organized crime figures, have been able to acquire interests in alcoholic beverage licenses through complicated corporate arrangements and legal technicalities....

HB 1003 and CS/SB 337, Florida Senate Staff Analysis and Economic Impact Statement, June 10, 1981 (updated), at 2.

In addition to the substantial amendments to Section 561.65 which are the focus of this action, the 1981 amendments contained in Chapter 81-158 included the following provisions:

Section 561.01(14) was added as follows:

"Licensee," "applicant" or "person" means an individual, corporation, firm, partnership, limited partnership, incorporated or unincorporated association, professional association, or any other legal or commercial entity, or combination of such entities, or any such entity having a financial interest, directly or indirectly, in such entity.'

Section 561.20(6) added three references to indirect interests in liquor licenses. Section 561.32(2) was added which included two references to an indirect transfers of a liquor license. Sections 561.14(4) and (5) were added which included references to indirect affiliations with alcoholic beverage vendors.

Chapter 81-166 made amendments to the following sections:

Sections 561.15(3)(b) and (c) added references to persons interested directly or indirectly in a corporation. Section 561.15(3)(d) was added to limit requirements on certain entities which have interests, directly or indirectly, in an alcoholic beverage license. Section 561.17(1) added provisions that if any person "who has a security interest in the license" is not qualified, then the application for a license shall be denied. It also included two other references to indirect interests of certain entities that would have different requirements. Section 561.29(1)(f) was added to provide that the Division could revoke or suspend a license if it determined that any person who is directly or indirectly interested in the license or licensed business is not qualified. Section 561.32(1)(b) was added as follows:

"Persons holding liens against alcoholic beverage licenses may have their rights enforced in judicial proceedings subject to the rights of lienholders set forth in s. 561.65. However, any person having a security interest in an alcoholic beverage license is deemed to be interested indirectly in such license and shall be disclosed to the division and shall be subject to the qualifications of the Beverage Law as a precondition to the enforcement of the security interest. The foreclosure of a security interest or judicial transfer of a license shall not prevent the division from suspending the license or imposing a

civil penalty against the licensee of record which held the license at the time of the Beverage Law violations. However, should the division obtain a revocation of the license against the previous licensee of record, said revocation shall be effective only to impair the qualifications of the officers, directors, stockholders or persons having any interest in the license at the time of the revocable offense."

The legislature was interested in making sure that the Division of Alcoholic Beverages and Tobacco had full control over any indirect interests in alcoholic beverage licenses. The comprehensive treatment given indirect interests does not require any further coverage under the U.C.C. that serves any useful purpose.

C. IT IS IMPOSSIBLE TO HARMONIZE THE FILING PROVISIONS OF SECTION 561.65, FLA. STAT. AND CHAPTER 679, FLA. STAT. BECAUSE THE PURPOSE AND COVERAGE OF EACH STATUTE ARE NOT EQUAL.

The United States argues that Section 561.65 may be read harmoniously with the dual filing requirement by construing "the date of filing" to mean the earliest date upon which a filing has been made under the U.C.C. and Section 561.65. (Br. 9.) However, Section 561.65, Fla. Stat., is a broader statute than the U.C.C. Section 561.65(4), Fla. Stat., is applicable to "any person holding a bona fide mortgage, lien or security interest in an alcoholic beverage license." The U.C.C. specifically excludes several transactions in Section 679.104, Fla. Stat. For example a landlord's lien and judgment lien are specifically excluded and could not be filed with the Department of State. However, a landlord's lien and judgment lien could both be perfected against a liquor license by filing with the Division under Section

561.65(4), Fla. Stat. If one accepts the harmonizing theory advanced by the United States in this case, then only liens which could be perfected under the U.C.C. and "filed" with the Department of State would be entitled to be paid out of the proceeds of the sale of an alcoholic beverage license. A lienor holding a landlord's lien or judgment lien who had properly filed with the Division under Section 561.65(4), Fla. Stat. would therefore not be paid out of the proceeds of the judicial sale of the alcoholic beverage license even though they had done every thing possible to "perfect" their lien against the alcoholic beverage license.

Section 561.65(6) does not say that the first to be paid will be the lienholders in order of "perfecting." It says the lienholders will be paid "in order of date of filing." There is no basis to read other "filing" provisions of other chapters of Florida Statutes into this section.

The purpose of notice and filing provisions is generally to give appropriate notice of prior liens and provide certainty in commercial transactions. Multiple filing requirements for some lienors but not for others serves no useful purpose. The unique character of an alcoholic beverage license and the State's interest in maintaining control over all persons who claim indirect interests in a license, dictate that the Division be the sole place to file in order to perfect a lien in an alcoholic beverage license. Dual filing with the Department of State would serve no purpose other than as a trap for those who read Section

561.65(4), Fla. Stat. and believe what they read on where to "perfect" a security interest in an alcoholic beverage license.

D. THE LANGUAGE USED BY THE LEGISLATURE IN SECTION 561.65, FLA. STAT., EVIDENCES THAT A LIEN RECORDED WITH THE DIVISION SHOULD BE ENFORCEABLE AND GIVEN PRIORITY AGAINST AN SUBSEQUENT JUDGMENT LIEN.

The United States argues that the language of Section 561.65, Fla. Stat., does not support the "perfection" of a security interest by filing solely with the Division. (Br. 2.) The meaning of "perfect" under the U.C.C. is determined based on the requirements set forth in the U.C.C. and the effects of having met the various requirements. The meaning of "perfect" in Section 561.65, Fla. Stat. is determined from that statute based on the requirement of filing with the Division and the effect of having filed in that the lien will be enforceable. There was no need for the legislature to use the word "perfect" and "security interest" if they did not intend to substitute the provisions of Section 561.65, Fla. Stat. for the U.C.C.

The meaning of "perfect" as found in the dictionary conflicts with the requirement of dual filing urged by the United States since it really results in "dual perfection" which is nonsensical. The dictionary defines "perfect" as " free from any valid legal objection, lacking in no essential detail, valid and effective in law". "To perfect" means "to complete or put in final conformity with the law." Webster's Third New International Dictionary of the English Language, Unabridged,

(1986), at 1677. To ignore the plain meaning of the word is not justified.

E. A SUBSEQUENT JUDGMENT LIEN ARISING OUT OF AN UNSECURED OBLIGATION WILL BE SUBJECT TO THE RIGHTS OF A LIENHOLDER WHO HAS FILED UNDER SECTION 561.65, FLA. STAT. ON THE JUDICIAL SALE OF AN ALCOHOLIC BEVERAGE LICENSE.

It is important to remember that the priority of the McGurns' security interest when competing against the federal tax lien is not based upon whether they perfected their security interest under the U.C.C. but whether their security interest is "protected under local law against a subsequent judgment lien arising out of an unsecured obligation." Internal Revenue Code Section 6323(h)(1). The Court must determine if and how an unsecured judgment lien creditor could be paid out of the proceeds of the sale of the Whiskey Creek alcoholic beverage license before the McGurns. The United States has cited Dragstrem v. Obermeyer, 549 F. 2d. 20 (7th Cir. 1977) to support its position that the McGurn's needed to file under the U.C.C. (Br. 6.). However, in that case the court held that Internal Revenue Code Section 6323(h)(1) "on its face allows creditors interests to prime federal tax liens if they are protected against subsequent judgment liens 'under local law' generally, not just under the U.C.C." Id. at 24. The local law referred to encompasses the whole body of lien law of the pertinent state, and not merely priorities established by the U.C.C. The court reviewed the legislative history of Code Section 6323, numerous

decided cases and commentaries to conclude "that a security interest need not be perfected under the U.C.C. in order to be protected against a subsequent judgment lien under Section 6323(h)(1) of the Federal Tax Lien Act." Id. at 25.

The federal standard was followed in Major Electrical Supplies, Inc. v. J.W. Pettit Co., 427 F. Supp. 752 (M.D. Fla. 1977). In that case, the United States maintained that its tax liens should have priority over an assignment of a contract right because the assignment had not been perfected in the manner provided by Section 679.401, Fla Stat. The court held the assignment was entitled to priority over the federal tax liens. The court stated the provisions of Internal Revenue Code Section 6323 (h)(1) "clearly state when a security interest exists in the federal sense for the purpose of adjudicating questions of priority." Id. at 756. Applying the federal standard to the facts, the court found that the security interest was protected under Florida law against a subsequent judgment lien because as between the assignor and assignee there was no requirement that the assignment be recorded with the Department of State (citing Section 679.201, Fla. Stat.) to be valid. The court further noted that a judgment lien does not attach to an intangible interest under Florida law. Therefore under the facts of the case, a judgment lien creditor could not disrupt the assignment under Florida law and neither could the federal government.

If the subsequent judgment lien creditor files under Section 561.65, Fla. Stat., then the McGurns will have filed first and be

entitled to be paid first. If the subsequent judgment lien creditor attempts to collect his judgment through a writ of execution, the license could be levied upon and sold to satisfy the judgment debt. Coney v. First State Bank of Miami, 405 So.2d 257 (Fla. 3rd DCA 1981). However, the judgment lien creditor could only levy on the debtor's right, title, and interest and the McGurns' prior interest would not be affected by the levy or sale. Under Section 561.32(1)(b), Fla. Stat., enforcement of liens in judicial proceedings would be "subject to the rights of lienholders set forth in s. 561.65." There is simply no way for the unsecured judgment lien creditor to obtain priority over the McGurns and therefore no way for the federal tax lien to obtain priority.

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,

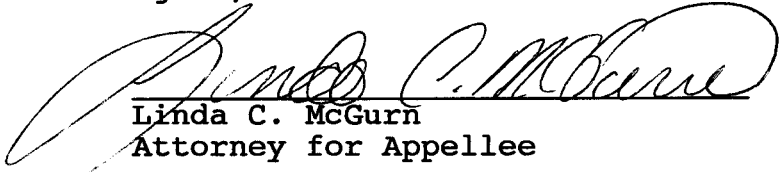


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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to attorneys for appellant this 17th day of June, 1991 by mail to them in an envelope, with postage prepaid, properly addressed to them as follows:

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