NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

July 11, 1991

Donald J. MacKinnon
Pope Federal Credit Union
P.O. Box 35169
Fayetteville, NC 28303

Re: Statutory Liens & Joint Share Accounts (Your June 14, 1991, Letter)

Dear Mr. MacKinnon:

You have asked us to comment on an article in the Credit Union Attorney Law Letter (May 1991) which seems to contradict a statement in the NCUA News that "[a] joint share account cannot be impressed by statutory lien to cover one member's defaulted loan without the express consent of the non-depositor, joint account holder."

The statement in the NCUA News is a synopsis of a NCUA legal opinion which was limited to a fact pattern covered under Florida common law and as such is correct only as far as it concerns federal credit unions located in Florida (see attached). The article concerns credit unions located in Massachusetts which are covered under Massachusetts common law. Under Florida law, neither spouse can, without the consent of the other, encumber property held by the entireties. The joint account held in the entireties, therefore, cannot be attached by a statutory lien, without the prior permission of the non-debtor account holder. It appears from the article that Massachusetts common law allows the pledging of a joint account without the permission of the non-debtor spouse accountholder and therefore the Massachusetts court concluded, under these facts, that the credit union had an equitable security interest in a portion of the joint account. In summary, the use of the statutory lien on joint accounts may vary depending on state property law.

Sincerely,

James J. Engel
Deputy General Counsel

Attachment

FOIA Vol. III, C, 11, C Statutory Lien

NATIONAL CREDIT UNION ADMINISTRATION
WASHINGTON, D.C. 20456

March 6, 1991

Mr. Douglas L. Smith
Johnston, Harris & Gerde, P.A.
239 East Fourth Street
Panama City, Florida 32401

Re: Federal Credit Union's Statutory Lien and Share Accounts Held by the Entireties

Dear Mr. Smith:

Let me first apologize for the delaying in responding to your inquiry.

You have posed the following situation. A married couple, in Florida, maintains a joint share account held by the entireties at a federal credit union ("FCU"). One of the spouses has defaulted on a loan from the FCU. You have asked whether the FCU may impress its statutory lien on the account to satisfy the debt of only one of the spouse accountholders. It is our opinion, that in order to do so, the FCU must obtain the consent of the non-debtor spouse. Such consent should be obtained at the time a loan is granted.

ANALYSIS

Federal Credit Union Act

Section 107(11) of the Federal Credit Union Act (12 U.S.C. §1757(11)) states that a Federal credit union "shall have the power . . . to impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him." (See also Interpretative Ruling and Policy Statement ("IRPS") 82-5, 47 F.R. 57483, December 27, 1982, enclosed.) Section 109 of the

Act (12 U.S.C. §1759) provides that "[s]hares may be issued in joint tenancy with right of survivorship...."

Section 107(11) empowers an FCU to impress a lien against shares held by the member at the time the loan is made, as well as against all subsequently acquired shares, to the extent of the unpaid loan balance together with interest, fees, and other charges. The FCU Act does not differentiate between types of shares. Although we did state in the preamble to IRPS 82-5 that Section 107(11) preempts state law, that was only with respect to enforcing the lien without judicial process. The IRPS does not address the preemption of other state laws.

Florida Law

We are not aware of any Florida caselaw that specifically addresses the statutory lien authority of an FCU. However, it is our understanding that, under Florida law, property held by the entireties cannot be attached to satisfy the individual debt of either spouse. U.S. v. Gurley, 415 F.2d 144 (5th Cir. 1969). As stated in Gurley, "property held [by the entireties] cannot be charged with the individual debts of either spouse .... Neither spouse has any separate interest in such property upon which a lien can attach or execution can be had." 415 F.2d at 149. Based on our review of the annotations to West's F.S.A. §689.15, it seems clear under Florida law that neither spouse can, without the consent of the other, encumber property held by the entireties.

Although we did not conduct an exhaustive review of caselaw regarding imposition of liens against estates by the entireties, we did review a somewhat analogous situation involving the imposition of federal tax liens under 26 U.S.C. §6321. That section provides that the amount of any person's tax liability "... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

It is a generally accepted principle, at least with respect to tax liens, that state law determines property interests to which a lien may or may not attach. In United States v. Bess, 357 U.S. 51 (1958), the Supreme Court determined that Section 3670 of the Internal Revenue Code of 1939, a

predecessor of 26 U.S.C. §6321, "creates no property rights but merely attaches consequences, federally defined, to rights created under state law ...." (*Accord*, Commissioner v. Stern, 357 U.S. 39 (1958), dissenting opinion at 48, note 1.) In determining whether a taxpayer has property or rights to property that may be attached, "both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property ... sought to be reached by the [revenue] statute.'" Aquilino v. United States, 363 U.S. 509, at 513, (1960) quoting Morgan v. Commissioner, 309 U.S. 78, at 82 (1940). (*Accord*, Roland v. United States, 838 F. 2d 1400 at 1402 (5th Cir. 1988), "[f]ederal law governs the right of the United States to enforce a tax lien, but state law determines the taxpayer's interest in property to which the lien attached."; Short v. United States, 395 F. Supp. 1151 at 1153 (E.D. Tex. 1975), "[t]he question of whether and to what extent each spouse has property is determined under the applicable state law.")

First National Bank of Cartersville v. Hill, 412 F. Supp. 422 (N.D. Ga. 1976), explained the import of the principle stated in Morgan and Aquilino:

> "a federal tax lien can only attach to a property interest of the taxpayer which exists under state law, and if the taxpayer does not own the property or have rights to the property under state law, then the federal tax lien could not attach to such property, and, thus, the federal tax lien could not take precedence over the person with the rights of ownership in the property."

In Lapp v. United States, 316 F. Supp. 386 (S.D. Fla., 1970), Chief Judge Fulton, also the author of the Gurley decision, noted that federal courts recognize tenancies by the entireties "where they have been created by state law. It has been established that such interests are not only insulated from ordinary creditors, but are also invulnerable to assaults by the federal tax collector." (Emphasis added.) 316 F. Supp at 390.

Should the above principle apply equally to the statutory lien authority of federal credit unions, and logically it

seems it should, then state law will determine what property a delinquent borrower owns or has a property right in, and Section 107(11) will determine the FCU's right to attach that property. In other words, once it is determined that the borrower has a property interest in the shares in an account, an FCU can impress and enforce its lien against those shares. Applying the Supreme Court's rationale in Bess, if Florida law creates a sufficient interest in property, Florida law is inoperative to prevent the attachment of a lien created by a federal statute. 357 U.S. at 56.

With respect to an account held by the entireties in Florida, however, an individual spouse does not own or have a separate property interest under state law. If our understanding of Florida law is correct, property held by the entireties is just that: it is property owned by the husband and wife as one unit (the entireties), neither one having an interest or right in the property separate and apart from the other. Therefore, there is no property against which the FCU's lien can attach. Preemption is not an issue since there is no conflict between federal and state law. The Federal Credit Union Act does not establish interests in property; it merely recognizes joint ownership with right of survivorship. Preemption would only come into play if state law interfered with the FCU's exercise of its lien authority with respect to the property determined under state law to belong to the borrower.

Sincerely,

James J. Engel
Deputy General Counsel

GC/JJE/MM:bhs
SSIC 3601
90-0413

Enclosure

NATIONAL CREDIT UNION ADMINISTRATION

INTERPRETIVE RULING AND POLICY STATEMENT

IRPS 82-5

DATE: December 22,1982

NATIONAL CREDIT UNION ADMINISTRATION

12 C.F.R. Part 701

Statutory Lien;

Final Interpretive Ruling and Policy Statement

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Interpretive Ruling and Policy Statement.

SUMMARY: Even if a member's loan is not secured by shares, under the Federal Credit Union Act a Federal credit union has the power to impress and enforce a lien upon that member's shares and dividends. NCUA is interpreting the Federal Credit Union Act to authorize a Federal credit union: (a) to impress a lien at the time the loan is granted, for instance, by noting the existence of the lien in its records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect; and (b) to enforce the lien by applying the shares and dividends directly to the amount due on the loan without obtaining a court judgment, even if the credit union has allowed the member to make withdrawals and even if a court judgment would be required under state law before a statutory lien could be enforced.

EFFECTIVE DATE: December 16, 1982.

FOR FURTHER INFORMATION CONTACT: Robert M. Fenner, Deputy General Counsel, or John L. Culhane, Jr., Senior Attorney, Department of Legal Services, National Credit Union Administration, 1776 G Street, N.W., Washington, D.C. 20456 or telephone: (202) 357-1030.

SUPPLEMENTARY INFORMATION: Section 107(11) of the Federal Credit Union Act states that a Federal credit union "shall have the power . . . to impress and enforce a lien upon the shares and dividends of any member to the extent of any loan made to him and any dues or charges payable by him." 12 U.S.C. 1757(11). Since 1979, NCUA had taken the position that before a Federal credit union could enforce this lien it had to obtain a court judgment on the debt, unless state law would allow the credit union to enforce the lien without going to court; once the credit union were to obtain a court judgment, it could then apply the member's shares to the outstanding loan balance. Credit Manual for Federal Credit Unions 29 (Dec. 1979 ed.).

A credit union trade association and an attorney who represented several credit unions asked NCUA to reconsider this interpretation, noting that it placed a credit union at a disadvantage with respect to any other financial institution, which can usually offset a borrower's loan without going to court. After examining the legislative history of and prior administrative interpretations of the statute, NCUA proposed to interpret section 107(11) of the Federal Credit Union Act to preempt state law and to authorize a credit union to enforce the lien on the shares and dividends of a member by applying those shares and dividends to the outstanding loan balance, as that interpretation appeared to be more consistent with Congressional intent and with the contemporaneous administrative interpretations of the statutory language. 47 Fed. Reg. 44340 (1982).

Comments on the proposed interpretation were submitted by 31 credit unions, 4 state credit union leagues, 2 national credit union trade associations, and 3 attorneys (two of the attorneys represent state credit union leagues, the other attorney represents a number of credit unions). The commentors unanimously supported NCUA's proposed interpretation, although one of the attorneys and one of the trade associations requested that rather than limiting the interpretation to enforcement of the lien in the event of default, NCUA expand the interpretation to discuss when the lien may be impressed and to discuss the consequences of permitting withdrawals. The NCUA Board concurs with these commentors that it would be best to address these related issues in one interpretive ruling and policy statement.

Based on an examination of the legislative history and the contemporaneous administrative interpretations of the statutory language, NCUA believes that Congress intended for the statutory lien to be a "floating" lien. That is, a Federal credit union that has impressed a lien on a member's accounts possesses a lien on those accounts at any time to the extent of the unpaid loan balance together with interest, fees, and other charges. The lien "floats" as outstanding obligations, as well as account balances, vary from time to time. The lien enables a credit union to take priority over other creditors when claims are asserted against a member's accounts. See D. Bridewell, Bridewell on Credit Unions 710 (1942 ed.) (quoting from the May-June, 1940 edition of Cooperative Savings, an official publication of the Farm Credit Administration, the agency then charged with administering the Federal Credit Union Act).

If the credit union evidences its intent to do so, it may impress the lien when the loan is granted. This may be done, for instance, by noting the existence of the lien in the credit union's records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect. See Credit Manual for Federal Credit Unions 16, 17 (May 1972 ed.); Handbook for Federal Credit Unions 18 (July 1947 ed.). Further, even though the lien has been impressed, the credit union may permit routine withdrawals from a member's account without waiving the statutory lien, even if the withdrawals would reduce the account balance to a level below the outstanding indebtedness.

Generally, a credit union may enforce the lien on the shares and dividends of the member by applying those shares to the outstanding indebtedness. Section 107(11) of the Federal Credit Union Act preempts state law; the credit union does not have to obtain a court judgment to enforce the lien, even if a court judgment is usually required under state law before a statutory lien can be enforced. However, if the outstanding indebtedness is the result of extensions of credit under a credit card program, Section 169 of the Truth in Lending Act, 15 U.S.C. 1666h, and Section 226.12(d) of Regulation Z, 12 C.F.R. 226.12(d), will apply; these provisions generally prohibit a Federal credit union from offsetting a borrower's indebtedness arising from a consumer credit transaction under a credit card plan against funds held by the credit union.

Accordingly, the NCUA Board is adopting a final interpretive ruling and policy statement to read as follows.

Interpretive Ruling and Policy Statement (IRPS) 82-5

Section 107(11) of the Federal Credit Union Act states that a Federal credit union "shall have the power . . . to impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him." If a credit union evidences its intent to do so, it may impress the lien when the loan is granted. This may be done, for instance, by noting the existence of the lien in the credit union's records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect. The lien dates from the time it is impressed and applies to all of the member's shares outstanding at the time the loan is made. If during the loan term the member's shares are reduced by withdrawal or increased by deposit or dividend payments, the lien will apply to the balance of the same from time to time and may be enforced with respect to any shares in existence at the time of enforcement. The credit union may enforce the lien on the shares and dividends of the member by applying those funds directly to the outstanding indebtedness, which may include the unpaid loan balance together with interest, fees, and other charges. The credit union does not need to obtain a court judgment to enforce the lien, even if a court judgment is usually required under state law before a lien can be enforced.

By the National Credit Union Administration Board, December 14, 1982.

Rosemary Brady
Secretary
National Credit Union Administration Board