

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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January 15, 2002 Recreated February 18, 2002, in identical form

Sen. Plache:

I will be out of town until Tuesday so I have drafted your amendment as requested and attached this drafter's note giving you information about your requested language. If you need to redraft this amendment before I return, please contact:

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The bankers change that you requested be drafted as an amendment gives secured parties, when disposing of collateral after default, priority over payments by the state, counties, and local governmental units in the areas of tax liens, child support liens, public assistance liens, wage claim liens, environmental remediation liens, and farmland preservation liens.

Do you want the amendment drafted to give secured parties priority over all payments to the state, county, and local governments (as it is drafted currently); to all payments except those in some of the above listed areas; or just payments in some of the above listed areas?

In drafting Section 9-617 (a) (3) for Wisconsin, I narrowed the bracketed exception for liens to those held by a government. I was unable to identify statutory liens held by persons other than governments. I am setting forth here a representative sample of Wisconsin statutes that create statutory liens, some explicitly in favor of a state agency and some not clearly in favor of a state agency. They relate to public assistance payments, environmental clean-up payments, wage claims, unemployment and worker's compensation payments, state tax liens, and liens on aircraft for nonpayment of fees.

Here is the official Revised Article 9 Section 9-617 and the comment from the enactment guide regarding this provision:

OFFICIAL ACT

SECTION 9-617. RIGHTS OF TRANSFEREE OF COLLATERAL.

(a) [Effects of disposition.] A secured party's disposition of collateral after default:

- (1) transfers to a transferee for value all of the debtor's rights in the collateral;
- (2) discharges the security interest under which the disposition is made; and
- (3) discharges any subordinate security interest or other subordinate lien [other than liens created under [cite acts or statutes providing for liens, if any, that are not to be discharged]].

(b) [Rights of good-faith transferee.] A transferee that acts in good faith takes free of the rights and interests described in subsection (a), even if the secured party fails to comply with this article or the requirements of any judicial proceeding.

(c) [Rights of other transferee.] If a transferee does not take free of the rights and interests described in subsection (a), the transferee takes the collateral subject to:

- (1) the debtor's rights in the collateral;
- (2) the security interest or agricultural lien under which the disposition is made; and
- (3) any other security interest or other lien.

Official Comment

1. Source. Former Section 9–504(4).

2. Title Taken by Good-Faith Transferee. Subsection (a) sets forth the rights acquired by persons who qualify under subsection (b)'s transferees who act in good faith. Such a person is a "transferee," inasmuch as a buyer at a foreclosure sale does not meet the definition of "purchaser" in Section 1–201 (the transfer is not, vis-a-vis the debtor, "voluntary"). By virtue of the expanded definition of the term "debtor" in Section 9–102, subsection (a) makes clear that the ownership interest of a person who bought the collateral subject to the security interest is terminated by a subsequent disposition under this Part. Such a person is a debtor under this Article. Under former Article 9, the result arguably was the same, but the statute was less clear. Under subsection (a), a disposition normally discharges the security interest being foreclosed and any subordinate security interests and other liens.

A disposition has the effect specified in subsection (a), even if the secured party fails to comply with this Article. An aggrieved person (e.g., the holder of a subordinate security interest to whom a notification required by Section 9–611 was not sent) has a right to recover any loss under Section 9–625(b).

Section 9–617 (a) (3). Section 9–617 sets forth the rights of transferees of collateral when the collateral is disposed of by the secured party following a default by the debtor. Generally all subordinate security interests and liens are discharged by the secured party's disposition. However, if there is a statutory lien in the jurisdiction that would survive a foreclosure disposition by a secured party, even though the lien is subordinate to the security interest, that statutory lien should be mentioned by appropriate statutory reference. If there is no such statutory lien in the jurisdiction, the brackets and bracketed language should be deleted so that subsection (a)(3) reads as follows:

(3) discharges any subordinate security interest or other subordinate lien.

3. Unitary Standard in Public and Private Dispositions. Subsection (b) now contains a unitary standard that applies to transferees in both private and public dispositions—acting in good faith. However, this change from former Section 9–504(4) should not be interpreted to mean that a transferee acts in good faith even though it has knowledge of defects or buys in collusion, standards applicable to public dispositions under the former section. Properly understood, those standards were specific examples of the absence of good faith.

4. Title Taken by Nonqualifying Transferee. Subsection (c) specifies the consequences for a transferee who does not qualify for protection under subsections (a) and (b) (i.e., a transferee who does not act in good faith). The transferee takes subject to the rights of the debtor, the enforcing secured party, and other security interests or other liens.

ENACTMENT GUIDE

Section 9–617 (a) (3). Section 9–617 sets forth the rights of transferees of collateral when the collateral is disposed of by the secured party following a default by the debtor. Generally all subordinate security interests and liens are discharged by the secured party’s disposition. However, if there is a statutory lien in the jurisdiction that would survive a foreclosure disposition by a secured party, even though the lien is subordinate to the security interest, that statutory lien should be mentioned by appropriate statutory reference. If there is no such statutory lien in the jurisdiction, the brackets and bracketed language should be deleted so that subsection (a) (3) reads as follows:

(3) discharges any subordinate security interest or other subordinate lien.

EXAMPLES OF WISCONSIN STATUTORY LIENS

It is not totally clear to me what is a subordinate lien, as that term is used in 9–617 (a) (3). For example:

Is the lien created under s. 46.27 (7g) (c) 5. or any one of the following statutes in favor of DWD a “subordinate lien” held by that department? Does the state (DWD) hold a subordinate lien to pay off a person’s child support payments?

46.27 (7g) (c) 5. a.

a. If the department’s claim is not allowable because of subd. 4. and the estate includes an interest in a home, the court exercising probate jurisdiction shall, in the final judgment or summary findings and order, assign the interest in the home subject to a lien in favor of the department for the amount described in subd. 1. The personal representative or petitioner for summary settlement or summary assignment of the estate shall record the final judgment as provided in s. 863.29, 867.01 (3) (h) or 867.02 (2) (h).

46.27 (7g) (c) 5. b.

b. If the department’s claim is not allowable because of subd. 4., the estate includes an interest in a home and the personal representative closes the estate by sworn

statement under s. 865.16, the personal representative shall stipulate in the statement that the home is assigned subject to a lien in favor of the department for the amount described in subd. 1. The personal representative shall record the statement in the same manner as described in s. 863.29, as if the statement were a final judgment.

49.854 (2)

(2) Creation of lien; satisfaction.

49.854 (2) (a)

(a) Creation. If a person obligated to pay support fails to pay any court-ordered amount of support, that amount becomes a lien in favor of the department upon all property of the person. The lien becomes effective when the information is entered in the statewide support lien docket under par. (b) and that docket is delivered to the register of deeds in the county where the property is located. A lien created under this paragraph is not effective against a good-faith purchaser of titled personal property, unless the lien is recorded on that title.

49.496 (2)

(2) Liens on the homes of nursing home residents and inpatients at hospitals.

49.496 (2) (a)

(a) Except as provided in par. (b), the department may obtain a lien on a recipient's home if the recipient resides in a nursing home, or if the recipient resides in a hospital and is required to contribute to the cost of care, and the recipient cannot reasonably be expected to be discharged from the nursing home or hospital and return home. The lien is for the amount of medical assistance paid on behalf of the recipient that is recoverable under sub. (3) (a).

49.85 (5)

(5) Effect of certification. Receipt of a certification by the department of revenue shall constitute a lien, equal to the amount certified, on any state tax refunds or credits owed to the obligor. The lien shall be foreclosed by the department of revenue as a setoff under s. 71.93. Certification of an amount under this section does not prohibit the department of health and family services or the department of workforce development from attempting to recover the amount through other legal means. The department of health and family services or the department of workforce development shall promptly notify the department of revenue upon recovery of any amount previously certified under this section.

49.89 (2)

(2) Subrogation. The department of health and family services, the department of workforce development, a county or an elected tribal governing body that provides any public assistance under this chapter or under s. 253.05 as a result of the occurrence of an injury, sickness or death that creates a claim or cause of action, whether in tort or contract, on the part of a public assistance recipient or beneficiary or the estate of a

recipient or beneficiary against a 3rd party, including an insurer, is subrogated to the rights of the recipient, beneficiary or estate and may make a claim or maintain an action or intervene in a claim or action by the recipient, beneficiary or estate against the 3rd party. Subrogation under this subsection because of the provision of medical assistance under subch. IV constitutes a lien, equal to the amount of the medical assistance provided as a result of the injury, sickness or death that gave rise to the claim. The lien is on any payment resulting from a judgment or settlement that may be due the obligor. A lien under this subsection continues until it is released and discharged by the department of health and family services.

66.0809(3)

(3) Except as provided in subs. (4) and (5), on October 15 in each year notice shall be given to the owner or occupant of all lots or parcels of real estate to which utility service has been furnished prior to October 1 by a public utility operated by a town, city or village and payment for which is owing and in arrears at the time of giving the notice. The department in charge of the utility shall furnish the treasurer with a list of the lots or parcels of real estate for which utility service charges are in arrears, and the notice shall be given by the treasurer, unless the governing body of the city, village or town authorizes notice to be given directly by the department. The notice shall be in writing and shall state the amount of arrears, including any penalty assessed pursuant to the rules of the utility; that unless the amount is paid by November 1 a penalty of 10% of the amount of arrears will be added; and that unless the arrears, with any added penalty, are paid by November 15, the arrears and penalty will be levied as a tax against the lot or parcel of real estate to which utility service was furnished and for which payment is delinquent. The notice may be served by delivery to either the owner or occupant personally, or by letter addressed to the owner or occupant at the post-office address of the lot or parcel of real estate. On November 16 the officer or department issuing the notice shall certify and file with the clerk a list of all lots or parcels of real estate, giving the legal description, for which notice of arrears was given and for which arrears remain unpaid, stating the amount of arrears and penalty. Each delinquent amount, including the penalty, becomes a lien upon the lot or parcel of real estate to which the utility service was furnished and payment for which is delinquent, and the clerk shall insert the delinquent amount and penalty as a tax against the lot or parcel of real estate. All proceedings in relation to the collection of general property taxes and to the return and sale of property for delinquent taxes apply to the tax if it is not paid within the time required by law for payment of taxes upon real estate. Under this subsection, if an arrearage is for utility service furnished and metered by the utility directly to a mobile home unit in a licensed mobile home park, the notice shall be given to the owner of the mobile home unit and the delinquent amount becomes a lien on the mobile home unit rather than a lien on the parcel of real estate on which the mobile home unit is located. A lien on a mobile home unit may be enforced using the procedures under s. 779.48 (2). This subsection does not apply to arrearages collected using the procedure under s. 66.0627.

71.91 (4)

(4) Unpaid tax is perfected lien on property. If any person liable to pay any income or franchise tax neglects, fails or refuses to pay the tax, the amount, including any

interest, addition to tax, penalty or costs, shall be a perfected lien in favor of the department of revenue upon all property and rights to property. The lien is effective at the time taxes are due or at the time an assessment is made and shall continue until the liability for the amount to be paid or for the amount so assessed is satisfied. The perfected lien does not give the department of revenue priority over lienholders, mortgagees, purchasers for value, judgment creditors and pledges whose interests have been recorded before the department's lien is recorded.

91.19 (7)

(7) Whenever a farmland preservation agreement is relinquished under sub. (2) or (6t) or all or part of the land is released from a farmland preservation agreement under sub. (2) or (6p) or a transition area agreement is relinquished under sub. (2) or, subject to subs. (12) and (13), a transition area agreement is relinquished under sub. (1) or (1m), the department shall cause to be prepared and recorded a lien against the property formerly subject to the agreement for the total amount of all credits received by all owners of such lands under subch. IX of ch. 71 during the last 10 years that the land was eligible for such credit, plus interest at the rate of 9.3% per year compounded annually on the credits received from the time the credits were received until the lien is paid for farmland preservation agreements relinquished under sub. (6t) and 6% per year compounded annually on the credits received from the time the credits were received until the lien is paid for other agreements. No interest shall be compounded for any period during which the farmland is subject to a subsequent farmland preservation agreement or transition area agreement or is zoned for exclusive agricultural use under an ordinance certified under subch. V.

101.143 (4e) (d)

(d) Any payments made by the department under this subsection constitute a lien upon the property on which the remedial action is conducted if the department records the lien with the register of deeds in the county in which the property is located.

108.22 (1m)

(1m) If an employer owes any contributions, interest or fees to the department under this chapter and fails to pay the amount owed, the department has a perfected lien upon the employer's right, title and interest in all of its real and personal property located in this state in the amount finally determined to be owed, plus costs. Except where creation of a lien is barred or stayed by bankruptcy or other insolvency law, the lien is effective when the department issues a determination of the amount owed under s. 108.10 (1) and shall continue until the amount owed, plus costs and interest to the date of payment, is paid. If a lien is initially barred or stayed by bankruptcy or other insolvency law, it shall become effective immediately upon expiration or removal of such bar or stay. The perfected lien does not give the department priority over lienholders, mortgagees, purchasers for value, judgment creditors and pledges whose interests have been recorded before the department's lien is recorded.

Is the wage claim lien under s. 109.09 a "subordinate lien" held by that department or is it just enforcing an individual's claim?

109.09 Wage claims, collection.

109.09 (1)

(1) The department shall investigate and attempt equitably to adjust controversies between employers and employees as to alleged wage claims. The department may receive and investigate any wage claim which is filed with the department, or received by the department under s. 109.10 (4), no later than 2 years after the date the wages are due. The department may, after receiving a wage claim, investigate any wages due from the employer against whom the claim is filed to any employee during the period commencing 2 years before the date the claim is filed. The department shall enforce this chapter and ss. 66.0903, 103.02, 103.49, 103.82, 104.12 and 229.8275. In pursuance of this duty, the department may sue the employer on behalf of the employee to collect any wage claim or wage deficiency and ss. 109.03 (6) and 109.11 (2) and (3) shall apply to such actions. Except for actions under s. 109.10, the department may refer such an action to the district attorney of the county in which the violation occurs for prosecution and collection and the district attorney shall commence an action in the circuit court having appropriate jurisdiction. Any number of wage claims or wage deficiencies against the same employer may be joined in a single proceeding, but the court may order separate trials or hearings. In actions that are referred to a district attorney under this subsection, any taxable costs recovered by the district attorney shall be paid into the general fund of the county in which the violation occurs and used by that county to meet its financial responsibility under s. 978.13 (2) for the operation of the office of the district attorney who prosecuted the action.

109.09 (2) (a)

(a) The department of workforce development, under its authority under sub. (1) to maintain actions for the benefit of employees, or an employee who brings an action under s. 109.03 (5) shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency.

109.09 (2) (b)

(b) 1. A lien under par. (a) upon real property takes effect when the department of workforce development or employee files a notice of the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed, pays the fee specified in s. 814.61 (5) to that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified mail with a return receipt requested. The clerk of circuit court shall enter the notice of the lien on the judgment and lien docket kept under s. 779.07.

(b) 2. A lien under par. (a) upon personal property takes effect when the department of workforce development or employee files notice of the lien in the same manner, form, and place as financing statements are filed under subch. V of ch. 409 regarding debtors who are located in this state, pays the same fee provided in s. 409.525 for filing financing statements, and serves a copy of the notice on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified mail

with a return receipt requested. The department of financial institutions shall place the notice of the lien in the same file as financing statements are filed under subch. V of ch. 409.

(b) 3. The department of workforce development or employee must file the notice under subd. 1. or 2. within 2 years after the date on which the wages were due. The notice shall specify the nature of the claim and the amount claimed, describe the property upon which the claim is made and state that the person filing the notice claims a lien on that property.

109.09 (2) (c)

(c) A lien under par. (a) takes precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien of a financial institution, as defined in s. 69.30 (1) (b), that originates before the lien under par. (a) takes effect or a lien under s. 292.31 (8) (i) or 292.81. A lien under par. (a) may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20 and 779.21, insofar as those provisions are applicable. The lien ceases to exist if the department of workforce development or the employee does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.

114.20 (15) (a)

(a) In addition to all existing remedies afforded by civil and criminal law, upon complaint of the department the fees, interest and late filing charges specified in this section shall be and will continue to be a lien against the aircraft for which the fees are payable until such time as the fees, along with any accrued charges or interest, are paid.

229.11 (13)

(13) Lien. Any expenditures made by the department under sub. (4), (6) or (8) shall constitute a lien upon the property for which the expenses are incurred, as provided in s. 292.81.

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