



WISCONSIN LEGISLATIVE COUNCIL LEGAL MEMORANDUM

Wage Liens and Article 9 of the Uniform Commercial Code (UCC)

INTRODUCTION

2003 Assembly Bill 2, as originally drafted, changes how a lien held by the state or a local governmental unit would be treated when goods are sold, pursuant to default, under Article 9 of the UCC.* While the change would affect all state and local government liens, the effect of this change on wage liens has been a particular concern. This Legal Memorandum explains both the history of the relevant provisions and how the proposed change would affect current law.

WAGE CLAIM LIEN

BACKGROUND

Currently, the Department of Workforce Development (DWD) or an employee may bring an action to collect unpaid wages. DWD or an employee who brings such an action has a lien upon all property of the employer, real or personal, located in this state. The lien is for the full amount of any wage claim or wage deficiency. [s. 109.09 (2) (a), Stats.] If DWD or the employer does not bring an action to enforce the lien within two years, the lien ceases to exist. [See s. 109.09 (2) (b) and (c), Stats.]

HISTORY OF CURRENT LAW

Generally speaking, liens are given priority on a first-in-time basis. As originally written, the wage lien under ch. 109 took “...precedence over all other debts, judgments, decrees, liens or mortgages against the employer...” [s. 109.09, 1977 Stats.] In 1998, the Wisconsin Court of Appeals held that that language created a “superpriority lien.” Thus, a wage lien would take precedence over all other debts, judgments, decrees, liens, and mortgages against the employer, regardless of when they were filed. The statute provided only that certain liens relating to environmental remediation costs had priority over wage claim liens. [See *Pfister v. Milwaukee Economic Development Corporation*, 216 Wis. 2d 242, 576 N.W.2d 554 (Ct. App. 1998).]

Shortly after the ruling in *Pfister*, the Legislature, in 1997 Wisconsin Act 237 (budget adjustment act), amended the statutory provision at issue in *Pfister* to provide that wage claim liens take precedence over other debts and liens against the employer that “originate *after* the lien takes effect.” [SECTION 354r, 1997 Wisconsin Act 237; emphasis added.] Thus, wage claim liens were treated, like nonstatutory liens, on a first-in-time basis. Wage liens were made subordinate to liens and other debts filed before the wage claim lien.

Subsequently, in 1999 Wisconsin Act 9 (the Biennial Budget Act), the Legislature further amended the provision. Act 9 restored the priority of wage claim liens to where it had been before the Act 237 amendments with the exception that a

* It should be noted that Assembly Amendment 1 removed this provision from Assembly Bill 2. The amendment was adopted on the Assembly floor by a voice vote.

lien of a financial institution that originates before the wage claim lien would have priority over the wage claim lien. This is present law. Thus, a wage claim lien under ch. 109 has priority over all liens or debts except: (1) a lien of a financial institution that originates before the wage claim lien; and (2) a lien relating to costs of certain environmental remediation expenses incurred by the state. [See s. 109.09 (2) (c), Stats., as affected by 1999 Wisconsin Act 9.]

ARTICLE 9 OF THE UCC

Wisconsin's version of Article 9 of the UCC is contained in ch. 409. Under current s. 409.617, when collateral is disposed of by a secured party pursuant to a debtor's default, all subordinate liens and security interests are discharged *except* for liens held by the state or a local governmental unit. [s. 409.617, Stats.]

The current ch. 409 was created by 2001 Act 10. It has been in effect since July 1, 2001. Before Act 10, when collateral was disposed of by a secured party pursuant to a debtor's default all subordinate liens and security interests were discharged *including* liens held by the state or a local governmental unit. [s. 409.504 (4), 1999 Stats.] As originally drafted, Assembly Bill 2 would have changed the law to how it was before Act 10.

INTERACTION IN A HYPOTHETICAL SITUATION

The most effective way of explaining how these two laws interact is through a hypothetical. The facts of the hypothetical are as follows: The Widget Company has a loan from Bank. Bank has a first priority lien on all of the company's assets. The company falls on hard times and defaults on

its loan to Bank. The company also fails to pay its employees, and the state files a wage claim lien on their behalf.

The relative priority of Bank's lien and the state's lien matters only when the company cannot satisfy both debts. The law then has several mechanisms for selling off assets and allocating the proceeds.

In a disposition under Article 9 of the UCC, Bank could take the company's widget-making machine and sell it. Since a wage lien is a lien of the state, when Bank sells the machine, s. 409.617 dictates that the wage lien will not be discharged. The state's lien will remain attached to the machine. In theory, the DWD could pursue a claim against the machine when the machine is in the hands of the new owner. Practically speaking, however, a buyer would not want to buy a machine that still has a lien attached to it. It is most likely that Bank will pay off the wage lien at the time it sells the machine, even though Bank would have to share proceeds with the state.

Where Article 9 does not apply, the exception under s. 409.617 would not either. For example, Article 9 does not apply to the disposition of real property. If Bank foreclosed on the Widget Company's building and land, the state's lien would enjoy only the priority it is assigned under current s. 109.09 (2), Stats. Bank would pay itself out of the proceeds of the sale up to the amount of the defaulted loan and then, if any funds remained, pay toward the wage lien.

This Legal Memorandum was prepared on May 2, 2003 by **Nicholas Zavos, Staff Attorney**.

The memorandum is not a policy statement of the Joint Legislative Council or its staff.

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