

☞ **09hr\_SC-LEUA\_sb0002\_pt02**



Details:

(FORM UPDATED: 08/11/2010)

**WISCONSIN STATE LEGISLATURE ...  
PUBLIC HEARING - COMMITTEE RECORDS**

**2009-10**

(session year)

**Senate**

(Assembly, Senate or Joint)

**Committee on ... Labor, Elections, and Urban  
Affairs (SC-LEUA)**

**COMMITTEE NOTICES ...**

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

**INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL**

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  - (**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)
  - (**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**



Found in SB 2 folder

## Media Room

**For Immediate Release**

**Wednesday, October 22, 2003**

Jessica Erickson, Governor's Office, 608-261-2156

### **Governor Doyle Signs Financial Modernization Bill into Law Major Legislation Signed at GE in Waukesha**

WAUKESHA - Governor Jim Doyle today signed Assembly Bill 2, the "Financial Modernization Bill," at a public bill signing ceremony at GE in Waukesha. "Today I signed important legislation that will modernize our financial system, offer vital protections to workers when their employer goes bankrupt, and create strong incentives for business investment," Governor Doyle said. "This bill is an important part of my 'Grow Wisconsin' initiative - it's good for workers, good for the industry, and good for our economy." AB 2 will create a new category of lending institutions called "Commercial Lenders", which will allow them to make loans under the same terms as traditional financial institutions. Using this designation, companies like GE can be secure in making investments in other companies, because they will have a more certain understanding of their risk. "Because of this simple but important change, GE Financial Services has estimated that it will increase its lending by several hundred million dollars," Governor Doyle said. "These investments will bring new innovations and - most importantly - new jobs for the people of Wisconsin. GE is just one example of the kind of company that will benefit from this bill. The increased investments they have proposed are just one example - many others will follow their lead." The bill will also bring Wisconsin's version of the Uniform Commercial Code into uniformity with 43 other states and will create a super priority wage lien for employees that are due back wages - a provision that is especially important in uncertain economic times. In the past two and a half years, Wisconsin has lost 56,000 manufacturing jobs. "Too often, when a company falls on hard times and goes bankrupt, it's the employees who bear the burden," Governor Doyle said. "If their employer goes bankrupt, employees will be the first in line for repayment - ahead of the banks, ahead of local governments, ahead of all the other creditors. This bill protects our workers and gives them the ability to collect at least the first \$3,000 of wages they're owed." Governor Doyle noted that although some may have preferred a higher cap or no cap at all on the payment of back wages, the \$3,000 was a reasonable solution and it provides a much stronger law than most other states have. "Wisconsin's workers used to have protections in the case of a bankruptcy, but in 1997, the Legislature took those protections away," Governor Doyle said. "During the campaign, I said we needed to get these protections back in place so that workers would be first in line if their company goes bankrupt. Today I'm pleased we are fulfilling that promise to our workers." Finally, the bill will also permit credit unions and banks to modernize and remain competitive in Wisconsin by allowing them to offer new products and services to their members such as tax preparation. "This bill provides important benefits for credit unions," Governor Doyle said. "It allows them to increase their membership and expand their range of services." The Governor thanked members of the Legislature from both parties who worked together to get this important legislation to his desk. Specifically, Governor Doyle thanked Representative Suzanne Jeskewitz, Representative Jon Richards, Senator Gwen Moore, and Senator Dale Schultz for their leadership.



WISCONSIN LEGISLATIVE COUNCIL  
AMENDMENT MEMO

2003 Assembly Bill 2

Senate Substitute Amendment 1 and  
Senate Amendments 1 and 2 to  
Senate Substitute Amendment 1

*Memo published:* June 20, 2003

*Contact:* Nick Zavos, Staff Attorney (266-1308)

**CHAPTER 109**

**Background**

Under *current state law*, the Department of Workforce Development (DWD) or an employee may bring an action to collect unpaid wages. DWD or an employee 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 employee 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.]

A wage claim lien under ch. 109 is a “superpriority” lien. With two exceptions, it has priority over all liens or debts regardless of when the lien or debt arises. The amount of lien entitled to priority is unlimited, and the wages may date back in time as long as two years from when the wages were due. The exceptions to this superpriority status are: (1) liens of financial institutions that originate before the wage claim lien; and (2) liens relating to costs of certain environmental remediation expenses incurred by the state. [See s. 109.09 (2) (c), Stats.]

**Definition of Employee**

Senate Substitute Amendment 1 changes the definition of “employee” for all of ch. 109 to exclude a larger class of workers. **Under current law**, s. 109.01 (1r) defines “employee” for the purposes of ch. 109. Under the current definition, “employee” excludes: (1) an officer or director of a corporation; (2) a member or manager of a limited liability company; (3) a partner of a partnership or joint venture; and (4) the owner of a sole proprietorship. The **substitute amendment** adds three other groups to the list of excluded workers: (1) an independent contractor; (2) a person employed in a managerial, executive, or commissioned sales capacity; and (3) a person employed in a capacity in which the person is privy to confidential matters involving the employer-employee relationship. Unlike the rest of the changes that the substitute amendment makes to ch. 109, the change in the definition of “employee” affects more than wage claims. The new group of excluded workers would also be excluded from all of the provisions of ch. 109, Stats., including requirements as to when employees must be paid and plant closing laws.

### **Lenders Who Have Precedence After the First \$3,000**

Under **current law**, one of the exemptions to the wage lien's superpriority status is for liens of financial institutions that arose before the wage lien took effect. A "financial institution" is defined as a bank, savings bank, savings and loan association, or credit union that is authorized to do business under state or federal laws relating to financial institutions. [ss. 69.30 (1) (b) and 109.09 (2) (c), Stats.] **Senate Substitute Amendment 1** expands the group of lenders who take precedence over a wage lien from financial institutions to "commercial lending institutions." The substitute amendment does not define the term "commercial lending institution."

**Senate Amendment 2** to the **Senate Substitute Amendment 1** defines the term "commercial lending institution" as having the same definition as "financial institution" as in s. 234.01 (5k). That subsection defines a financial institution as "a bank, savings bank, savings and loan association, credit union, insurance company, finance company, mortgage banker registered under s. 224.72, community development corporation, small business investment corporation, pension fund or other lender which provides commercial loans in this state."

### **\$3,000 of Wages Within Last Six Months**

**Senate Substitute Amendment 1** creates an exception to the priority given to the commercial lender's prior lien. A wage lien will take precedence over the lien of a commercial lender that originated before the wage lien took effect "only to the extent" that the wage lien is: (1) for unpaid wages of \$3,000 or less; and (2) earned within the six months preceding either the date on which the employee files a wage claim with DWD or the date the employee brings his or her own action to collect the wages.

There are two ways to interpret how the "to the extent" language interacts with the \$3,000 limit. The first and more likely interpretation is that \$3,000 of the wage lien would be paid to the employee first, before the commercial lenders. After the employee is paid \$3,000, the commercial lenders would be paid the full amount of their liens. Then, after the commercial lenders are paid in full, the employee would be paid the remaining amount of the wage lien, if any.

The second way to interpret the "to the extent" language is that it limits the type of liens that are given any priority over commercial lenders. Under this interpretation, only a lien that is for wages of \$3,000 or less earned within the appropriate time period would be given first priority. Under that interpretation, a lien for \$6,000 of unpaid wages would be paid, in its entirety, after the lien of a financial institution.

**Senate Amendment 1** to **Senate Substitute Amendment 1** changes the wording of the sentence in proposed s. 109.09 (2) (c) 2. in favor of the first option to make it clear that the first \$3,000 of a wage lien will take precedence over a commercial lender. The amendment deletes the "to the extent language." Instead, the sentence states that a wage lien will take precedence over a prior lien of a commercial institution "as to the first \$3,000 of unpaid wages covered under the lien" earned within the six months preceding the date the employee files a wage claim with DWD or the date the employee brings his or her own action to collect the wages.

### **Applicability**

**Senate Substitute Amendment 1** has several provisions affecting when the changes would take effect. The substitute amendment would affect no current financial institution liens. The amendment provides that a lien of a financial institution that exists on the day before the effective date of the bill

would still take precedence over a wage lien. In addition, the amendment specifies that any money advanced by a financial institution after a wage lien takes effect would take precedence over that wage lien if the money was advanced under a contract entered into before the effective date. This includes any extension or renewal of such a contract.

The liens of commercial lenders other than financial institutions would take precedence over any wage liens created after the effective date of the bill. Any wage lien that exists on the day before the effective date of the bill still takes precedence over liens of commercial lenders other than financial institutions, regardless of when the commercial lender's lien originated.

### **ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE**

Wisconsin's version of Article 9 of the Uniform Commercial Code 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.]

Current ch. 409 was created by 2001 Wisconsin 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. The bill was amended on the Assembly floor to remove the change to s. 409.617 and retain the current exemption for state and local government liens.

**Senate Substitute Amendment 1** puts the change to s. 409.617 back in the bill so that when collateral is disposed of by a secured party pursuant to a debtor's default all subordinate liens and security interests are discharged *including* liens held by the state or a local governmental unit.

### **LEGISLATIVE HISTORY**

Senate Substitute Amendment 1 was adopted by the Senate Committee on Agriculture, Financial Institutions and Insurance on June 16, 2003 on a vote of Ayes, 3; Noes, 2.

Senate Amendments 1 and 2 to Senate Substitute Amendment 1 were adopted by the Senate Committee on Agriculture, Financial Institutions and Insurance on June 16, 2003 by a vote of Ayes, 4; Noes, 1.

NZ:ksm;jal;tlu



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**WISCONSIN LEGISLATIVE COUNCIL  
ACT MEMO**

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<b>2003 Wisconsin Act 63</b> [2003 Assembly Bill 2]	<b>Universal Banks, Wage Liens, and Article 9 of the Uniform Commercial Code</b>
2003 Acts: <a href="http://www.legis.state.wi.us/2003/data/acts/">www.legis.state.wi.us/2003/data/acts/</a>	Act Memos: <a href="http://www.legis.state.wi.us/lc/act_memo/act_memo.htm">www.legis.state.wi.us/lc/act_memo/act_memo.htm</a>

2003 Wisconsin Act 63 makes numerous changes to the chapters that govern the formation, operation, and regulation of credit unions in this state, creates a new type of financial institution called a universal bank, and makes changes to chs. 109 and 409.

**CREDIT UNIONS**

Some of the major changes relating to credit unions are the following:

1. Expands the pool of people eligible for membership in a credit union.
2. Expands the type of organization that a credit union may invest in, and increases the amount of money that the credit union may invest in those organizations.
3. Expands the power of a credit union to act as a trustee or custodian of member tax-deferred retirement funds, individual retirement accounts, medical savings accounts, and other employee benefit accounts or funds.
4. Allows a credit union to accept deposits from anyone if the credit union satisfies the federal requirements for designation as a low-income credit union.
5. Allows a credit union to establish, with approval, branch offices anywhere inside or outside the state, and allows non-Wisconsin credit unions to establish branch offices in Wisconsin in certain circumstances.
6. Allows credit unions to merge with, acquire, or be acquired by a credit union in any state.

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This memo provides a brief description of the Act. For more detailed information,  
consult the text of the law and related legislative documents.

7. Exempts credit unions from the agriculture, trade, and consumer protection statutes that apply to businesses generally.

### **UNIVERSAL BANKS**

Act 63 creates a new kind of institution called a universal bank. To qualify as a universal bank, the financial institution must meet six requirements: (1) it must have been in existence and continuous operation for at least three years; (2) it must be "well-capitalized," as defined by federal law; (3) it must not exhibit moderately severe or unsatisfactory financial, managerial, operational, and compliance weakness; (4) it must not have been subject to any enforcement action within the 12 months preceding the application; (5) its most recent evaluation under the federal Community Reinvestment Act must have rated the financial institution as "outstanding" or "satisfactory;" and (6) the most recent report evaluating the financial institution's compliance with certain federal laws relating to customer privacy must indicate that it is in substantial compliance.

A universal bank may engage in any activity that is authorized for any savings bank, savings and loan association, or state bank. In addition, a universal bank may exercise all of the powers that a national bank, federally chartered savings and loan association, or federally chartered savings bank may exercise. The division of banking must approve the first exercise such of federal power. Once the division approves the exercise of that power for one universal bank, any universal bank may exercise that power. A universal bank may also exercise all powers necessary or convenient to affect the purposes for which the universal bank is organized or to further the business in which the bank is lawfully engaged.

### **ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE**

Wisconsin's version of Article 9 of the Uniform Commercial Code (UCC) is contained in ch. 409, Stats. Under previous s. 409.617, Stats., when collateral was disposed of by a secured party pursuant to a debtor's default, all subordinate liens and security interests were discharged *except* for liens held by the state or a local governmental unit. Act 63 deleted this exemption so that when collateral is disposed of by a secured party pursuant to a debtor's default all subordinate liens and security interests are discharged *including* liens held by the state or a local governmental unit.

### **CHAPTER 109**

Chapter 109 governs issues such as wage liens, when employees must be paid, plant closings, and cessation of health care benefits. Act 63 changed the definition of "employee" for all of ch. 109 to exclude the following workers: (1) an independent contractor; (2) a person employed in a managerial, executive, or commissioned sales capacity; and (3) a person employed in a capacity in which the person is privy to confidential matters involving the employer-employee relationship.

A wage claim lien under ch. 109 is a "super priority" lien. Under prior law it had priority over all liens or debts, regardless of when the lien or debt arose, except for liens of financial institutions that originated before the wage claim lien, and liens relating to costs of certain environmental remediation expenses incurred by the state. A "financial institution" was defined as a bank, savings bank, savings and loan association, or credit union.

Act 63 expanded the group of lenders who take precedence over a wage lien to include a bank, savings bank, savings and loan association, credit union, insurance company, finance company, mortgage banker registered under s. 224.72, community development corporation, small business investment corporation, pension fund or other lender which provides commercial loans in this state.

Act 63 also created an exception to the priority given to these lenders. A wage lien will take precedence over the lien of a lender that originated before the wage lien took effect as to the first \$3,000 of unpaid wages covered under the lien. Those wages must have been earned within the six months preceding the date the employee files a lien with the Department of Workforce Development or the date the employee brings his or her own action to collect the wages.

**Effective Date:** The provisions of the Act that concern universal banks take effect on February 1, 2004. The provisions of the Act concerning credit unions and Article 9 of the UCC take effect on November 6, 2004. The provisions of the Act concerning wage liens, and the definition of "employee" take effect on December 1, 2003.

**Prepared by:** Nicholas Zavos, Staff Attorney

January 28, 2004

NZ:rv:tlu



**WISCONSIN ASSEMBLY  
2003-2004 SESSION  
SPEAKER GARD**

**AB 2  
BY JESKEWITZ  
UNIVERSAL BANKING AND CREDIT UNIONS  
PASSAGE**

AYES - 95   NAYS - 2   NOT VOTING - 2   PAIRED - 0

<u>A</u>	<u>N</u>	<u>NY</u>	<u>NAME</u>		<u>A</u>	<u>N</u>	<u>NY</u>	<u>NAME</u>		<u>A</u>	<u>N</u>	<u>NY</u>	<u>NAME</u>	
Y			AINSWORTH	R	Y			KRAWCZYK	R	Y			RILEY	D
Y			ALBERS	R	Y			KREIBICH	R	Y			SCHNEIDER	D
Y			BALOW	D	Y			KREUSER	D	Y			SCHOOFF	D
Y			BERCEAU	D	Y			KRUG	D	Y			SERATTI	R
Y			BIES	R	Y			KRUSICK	D	Y			SHERMAN	D
Y			BLACK	D		x		LADWIG	R	Y			SHILLING	D
Y			BOYLE	D		x		LASEE	R	Y			SINICKI	D
Y			COGGS	D	Y			LASSA	D	Y			STASKUNAS	D
Y			COLON	D	Y			LEHMAN, J.	D	Y			STEINBRINK	D
Y			CULLEN	D	Y			LEHMAN, M.	R	Y			STONE	R
Y			FITZGERALD	R	Y			LEMAHIEU	R	Y			SUDER	R
Y			FOTI	R	Y			LOEFFELHOLZ	R	Y			TOWNS	R
Y			FREESE	R	Y			LOTHIAN	R	Y			TOWNSEND	R
Y			FRISKE	R	Y			MCCORMICK	R		N		TRAVIS	D
Y			GIELOW	R	Y			MEYER	R	Y			TURNER	D
Y			GOTTLIEB	R	Y			MILLER	D	Y			UNDERHEIM	R
Y			GRONEMUS	D	Y			MONTGOMERY	R	Y			VAN AKKEREN	D
	N		GROTHMAN	R	Y			MORRIS	D	Y			VAN ROY	R
Y			GUNDERSON	R	Y			MUSSER	R	Y			VRAKAS	R
Y			GUNDRUM	R	Y			NASS	R	Y			VRUWINK	D
Y			HAHN	R	Y			NISCHKE	R	Y			VUKMIR	R
Y			HEBL	D	Y			OLSEN	R	Y			WARD	R
Y			HINES	R	Y			OTT	R	Y			WASSERMAN	D
Y			HUBER	D	Y			OWENS	R	Y			WEBER	R
Y			HUBLER	D	Y			PETROWSKI	R	Y			WIECKERT	R
Y			HUEBSCH	R	Y			PETTIS	R	Y			WILLIAMS, A.	D
Y			HUNDERTMARK	R	Y			PLALE	D	Y			WILLIAMS, M.	R
Y			JENSEN	R	Y			PLOUFF	D	Y			WOOD, J.	R
Y			JESKEWITZ	R	Y			POCAN	D	Y			WOOD, W.	D
Y			JOHNSRUD	R	Y			POPE-ROBERTS	D	Y			YOUNG	D
Y			KAUFERT	R	Y			POWERS	R	Y			ZEPNICK	D
Y			KERKMAN	R	Y			RHOADES	R	Y			ZIEGELBAUER	D
Y			KESTELL	R	Y			RICHARDS	D	Y			SPEAKER	R

IN CHAIR: FREESE

NO VACANT DISTRICTS

SEQUENCE NO. 10  
Tuesday, January 28, 2003  
3:24 PM

*Wisconsin Senate Roll Call*  
*2003-2004 SESSION*

*AB 2*  
*CONCURRENCE*

*AYES - 24*

BRESKE  
BROWN  
COWLES  
DARLING  
ELLIS  
FITZGERALD  
GEORGE  
HARSDORF

JAUCH  
KANAVAS  
KEDZIE  
LASEE  
LAZICH  
LEIBHAM  
MEYER  
MOORE

PANZER  
PLALE  
REYNOLDS  
ROESSLER  
SCHULTZ  
STEPP  
WELCH  
ZIEN

*NAYS - 9*

CARPENTER  
CHVALA  
DECKER

ERPENBACH  
HANSEN  
LASSA

RISSER  
ROBSON  
WIRCH

*NOT VOTING - 0*

SEQUENCE NO. 219  
Tuesday, September 30, 2003  
5:19 PM

*Wisconsin Senate Roll Call*  
*2003-2004 SESSION*

*AB 2*  
*ADOPTION*  
SSA1

*AYES - 20*

BROWN  
COWLES  
DARLING  
ELLIS  
FITZGERALD  
GEORGE  
HARSDORF

KANAVAS  
KEDZIE  
LASEE  
LAZICH  
LEIBHAM  
MOORE  
PANZER

REYNOLDS  
ROESSLER  
SCHULTZ  
STEPP  
WELCH  
ZIEN

*NAYS - 13*

BRESKE  
CARPENTER  
CHVALA  
DECKER  
ERPENBACH

HANSEN  
JAUCH  
LASSA  
MEYER  
PLALE

RISSER  
ROBSON  
WIRCH

*NOT VOTING - 0*

SEQUENCE NO. 218  
Tuesday, September 30, 2003  
4:49 PM

**WISCONSIN ASSEMBLY  
2003-2004 SESSION  
SPEAKER GARD**

**AB 2  
BY JESKEWITZ  
UNIVERSAL BANKING AND CREDIT UNIONS  
CONCUR SENATE AMENDMENT  
SSA 1 OFFERED BY COMMITTEE**

AYES - 64 NAYS - 33 NOT VOTING - 2 PAIRED - 0

<u>A</u>	<u>N</u>	<u>NY</u>	<u>NAME</u>		<u>A</u>	<u>N</u>	<u>NY</u>	<u>NAME</u>		<u>A</u>	<u>N</u>	<u>NY</u>	<u>NAME</u>	
Y			AINSWORTH	R	Y			KESTELL	R		N		SCHNEIDER	D
Y			ALBERS	R	Y			KRAWCZYK	R		N		SCHOOFF	D
Y			BALOW	D	Y			KREIBICH	R	Y			SERATTI	R
	N		BERCEAU	D	Y			KREUSER	D	Y			SHERMAN	D
Y			BIES	R		N		KRUG	D		N		SHILLING	D
	N		BLACK	D		N		KRUSICK	D	Y			SINICKI	D
	N		BOYLE	D	Y			LADWIG	R		N		STASKUNAS	D
	N		COGGS	D	Y			LASEE	R	Y			STEINBRINK	D
	N		COLON	D		N		LEHMAN, J.	D	Y			STONE	R
	N		CULLEN	D	Y			LEHMAN, M.	R		x		SUDER	R
Y			FITZGERALD	R	Y			LEMAHIEU	R		N		TAYLOR	D
Y			FOTI	R	Y			LOEFFELHOLZ	R	Y			TOWNS	R
Y			FREESE	R	Y			LOTHIAN	R		x		TOWNSEND	R
Y			FRISKE	R	Y			MCCORMICK	R		N		TRAVIS	D
Y			GIELOW	R	Y			MEYER	R		N		TURNER	D
Y			GOTTLIEB	R		N		MILLER	D	Y			UNDERHEIM	R
Y			GRONEMUS	D		N		MOLEPSKE	D		N		VAN AKKEREN	D
Y			GROTHMAN	R	Y			MONTGOMERY	R	Y			VAN ROY	R
Y			GUNDERSON	R		N		MORRIS	D	Y			VRAKAS	R
Y			GUNDRUM	R	Y			MUSSER	R		N		VRUWINK	D
Y			HAHN	R	Y			NASS	R	Y			VUKMIR	R
	N		HEBL	D	Y			NISCHKE	R	Y			WARD	R
Y			HINES	R	Y			OLSEN	R		N		WASSERMAN	D
Y			HONADEL	R	Y			OTT	R	Y			WEBER	R
	N		HUBER	D	Y			OWENS	R	Y			WIECKERT	R
	N		HUBLER	D	Y			PETROWSKI	R		N		WILLIAMS, A.	D
Y			HUEBSCH	R	Y			PETTIS	R	Y			WILLIAMS, M.	R
Y			HUNDERTMARK	R		N		PLOUFF	D	Y			WOOD, J.	R
Y			JENSEN	R		N		POCAN	D		N		WOOD, W.	D
Y			JESKEWITZ	R		N		POPE-ROBERTS	D		N		YOUNG	D
Y			JOHNSRUD	R	Y			POWERS	R		N		ZEPNICK	D
Y			KAUFERT	R	Y			RHOADES	R	Y			ZIEGELBAUER	D
Y			KERKMAN	R		N		RICHARDS	D	Y			SPEAKER	R

IN CHAIR: FRISKE

NO VACANT DISTRICTS

SEQUENCE NO. 252  
Wednesday, October 01, 2003  
3:04 PM



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## WISCONSIN LEGISLATIVE COUNCIL LEGAL MEMORANDUM

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### 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

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\* 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.

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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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#### **WISCONSIN LEGISLATIVE COUNCIL**

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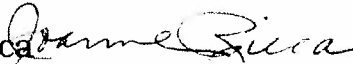
<http://www.legis.state.wi.us/lc>



# Wisconsin State AFL-CIO *...the voice for working families.*

David Newby, President • Sara J. Rogers, Exec. Vice President • Phillip L. Neuenfeldt, Secretary-Treasurer

To: Michael Browne  
Office of Senator John Lehman

From: Joanne Ricca   
Legislative Staff

Date: March 1, 2007

Re: **Wage Lien Law**

The enclosed correspondence relates to discussions around the wage lien provisions of Assembly Bill 2, known as the "financial modernization bill", which was signed into law during the 2003-04 legislative session. The letters outline the various concerns of then Attorney General Lautenschlager and our legal counsel, Atty. Marianne Goldstein Robbins.

I highlighted the sections of the letters that address the potential impact of the compromise cap on the effectiveness of our state laws related to plant closing notice and advance notice for cessation of health benefits. The removal of the current \$3,000 cap would resolve this concern (and many more) but at the very least the penalties assessed employers under these laws should also have superpriority.

Hope this provides the background you requested.

Enc.

cc Phil Neuenfeldt, Legislative Director



The Law Offices Of

Previant,  
Goldberg,  
Uelmen,  
Gratz,  
Miller &  
Brueggeman, s.c.

Writer's Direct Number  
(414) 223-0433

September 29, 2003

Cory L. Nettles  
Secretary  
Wisconsin Department of Commerce  
201 W. Washington Ave.  
Madison, WI 53717-7970

Re: Senate Substitute Amendment to AB 2

Dear Mr. Nettles:

The purpose of this letter is to follow up on our phone conversation Friday morning. As we discussed, the recent decision of the United States Court of Appeals for the Seventh Circuit *In re: AR Accessories Group* does not resolve the issues which the Wisconsin State AFL-CIO raised during the last legislative session when objecting to the then present version of Senate Substitute Amendment to Assembly Bill 2.

You indicated that last session's Senate Substitute Amendment to AB 2 was likely to be reintroduced as early as Tuesday as amended (we assume) by Senate Amendments LRBa0581/2 and LRBa0567/2 during the last legislative session. We are very concerned about the introduction of the bills from last term, without the amendments. We have long stressed that the amendments are necessary, and understand that they have had broad support.

We strongly urge that the proposed legislation not be introduced until we have had an opportunity to both address the issues which are not addressed by the *AR Accessories* decision, and to determine whether that decision will be appealed and what its impact will be on enforcement of the state wage lien law.

This letter will focus first on the issues which must be addressed apart from the *AR Accessories* decision, and then on the impact of that decision.

1. Under last year's proposed Senate Substitute Amendment to Assembly Bill 2, the proposed capped

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September 29, 2003

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superpriority for wages of up to \$3,000 had to be earned by an employee within the six months preceding the date on which the employee filed a wage claim. This time limitation would deny employees a considerable part of the superpriority's intended benefit. It is often employees without any union representation, the lowest paid and the most vulnerable, who are not covered by a wage claim until the Department of Workforce Development discovers that employees have not been paid, after a bankruptcy petition has been filed, and often more than six months after compensation was earned.

Even with vigilance, a six month limitation is unreasonable. Wisconsin has seen situations in which employers in financial distress have asked employees to work without receiving all or a portion of their wages and benefits for weeks and even months preceding bankruptcy or receivership. Accrued vacation is almost always one component of unpaid wages when a company liquidates. The six month limitation may call into question whether some or all of this amount would be covered by the superpriority, since vacation is earned over a one year period and may not be taken until the next. When employers are in financial distress and are self-insured for health benefits, they may delay paying these benefits. Employees often are not aware of this for a period of six months or more.

The wage claim statute itself has a two year statute of limitations. There is absolutely no reason for a more limited statute of limitations for the superpriority if it is to have any real benefit for employees.

2. We understand there has always been general agreement that the efficacy of the state WARN Act and advance notice of cessation of health benefits, §§109.07 and 109.075, Wis Stats. should be protected. These laws are incredibly important to employees and communities faced with permanent job loss. They are also important to the local businesses which are often the secondary casualties of sudden closures. Lack of notice that health benefits will cease has left families facing insurmountable debt of tens, even hundreds of thousands of dollars.

September 29, 2003

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Assembly Bill 2 and the Senate Substitute Amendment, as drafted, remove whatever incentive currently exists for employers facing bankruptcy and their lenders to comply with §§109.07 and 109.075, Wis. Stats. A few years ago, the wage lien statute was amended to provide that a preferential lien for wage claims does not take precedence over the lien of a financial institution. The proposed legislation greatly expands the exception to a wage lien's precedence by encompassing commercial lending institutions. It is our understanding that this may increase by threefold the amount of secured interests which may take precedence over a wage lien. It should be noted that AB 2 and the Senate Substitute Amendment also reduce the protections provided to employees by amending §409.617, Wis. Stats. in a way that eliminates protection of state liens in the context of a sale of property by a secured lender. In many instances, the proposed legislation would mean that employees will not receive anything owed above the superpriority. Employers and lenders who know employees are likely to be owed \$3,000 in back wages and benefits would have no incentive to comply with the state's WARN Act or advance notice of cessation of health benefits statutes.

If a wage lien beyond \$3,000 is not to have precedence over the liens of commercial lenders as well as financial institutions, penalties under Sections 109.07 and 109.075, Wis. Stats. must also have superpriority to assure that employers and their lenders have an incentive to comply with these statutes which allow employees and their communities to plan for the financial calamity of plant closure.

3. Senate Substitute Amendment to AB 2 defines "employee" in a manner which excludes many low income individuals from protection. The proposed definition excludes confidential employees, a term which is not limited to higher level managers, but also includes lower level clerical employees. The definition of "employee" also excludes commission sales persons, many of whom receive low compensation. The definition may also call into question coverage of contract workers who are often poorly compensated. There is no rational basis for excluding these individuals from the protection of the wage lien law. The law already excluded corporate officers. If there is a concern that the wage lien law should not cover highly compensated executives,

September 29, 2003

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it would be a simple enough matter to exclude only highly compensated individuals, for example, only managers and executives who have earned at least \$80,000 within the last year or a similar exclusion.

4. We have also pointed out, as have others, that it may make sense to combine Wis. Stats. §§109.09(2)(b)1. and 2., provisions which address perfection of liens upon real and personal property. As we understand it, this would both simplify perfection of the lien and simplify the task of title searches, since a wage lien would be found in one place rather than requiring a county by county search.

At the last legislative session we also stressed the need for changes to clarify the intent of the wage lien statute, §109.09, Wis. Stats. The decision of the Seventh Circuit in *AR Accessories* may in the long run help to protect employees' wage claims, but it is too early to announce that the proposed clarifications regarding the intent of §109.09, Wis. Stats. are no longer necessary. First of all, it is possible that the appellees in the *AR Accessories* case will seek *en banc* review or file a petition for writ of *certiorari* to the Supreme Court. A party has 14 days to file a petition for review *en banc* and an additional 90 days to file a petition for a writ of *certiorari* to the Supreme Court. Until those times have lapsed, the decision of the Seventh Circuit is not final.

There is also the question of whether the Seventh Circuit decision will be followed by other circuits. The issue addressed by *AR Accessories* involved treatment of a Wisconsin wage lien in the context of a bankruptcy. Although Wisconsin is in the Seventh Circuit, bankruptcies of employers in Wisconsin can and do occur anywhere in the country since they involve corporations which are national or international in scope.

The Attorney General's office, which took the *AR Accessories* case to the Seventh Circuit, may or may not believe that the State's interests are adequately protected once the *AR Accessories* decision is final. In any case, legislation should not be rushed through on the basis of premature speculation that a decision of the Seventh Circuit might protect employees when the proposed legislation

September 29, 2003

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itself will undermine that protection and the decision itself is not final and only addresses one of several important issues.

We urge you to allow time for the necessary changes to be made, for the AR Accessories decision to become final, and for the Attorney General's office to evaluate the impact of the decision on its litigation.

Very truly yours,

PREVIANT, GOLDBERG, UELMEN,  
GRATZ, MILLER & BRUEGGEMAN, s.c.

BY *J. Hall (TCIT for MGR)*

MARIANNE GOLDSTEIN ROBBINS

sjn

cc: Mary Panzer  
Tim Casper  
Vaughn Vance  
David Newby  
Phil Neuenfeldt

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STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

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September 29, 2003

The Honorable Jon Erpenbach  
Senate Democratic Leader  
State Capitol Building  
Room No. 202 South  
**HAND DELIVERED**

Re: 2003 Assembly Bill 2  
Wage Lien Enforcement

Dear Senator Erpenbach:

I write to respond to your recent inquiry related to the impact that passage of Assembly Bill 2 would have on the ability of the Department of Justice (DOJ) to recover wages owed to workers. As Attorney General, I have a primary responsibility to enforce wage liens and recover wages due employees under various state statutes affected by this legislation. It is my position that adoption of this legislation will adversely affect the ability of DOJ to recover wages owed to workers.

Wisconsin has a long history, dating back well over 100 years of protecting an employee's right to a lien for wages. In fact, our strong tradition, until only recently, provided that an employee's right to a lien for wages was always paramount to the claims of other financial creditors. This pro-worker tradition has been largely unparalleled in the nation. Despite changes in recent years to Wisconsin law that reprioritized wage liens, I am proud of the many successes of DOJ in recovering wages owed to workers.

Given my concerns about the likely impact that this legislation would have on DOJ's wage recovery efforts, I appeared before the Senate Committee on Financial Institutions this past June to suggest several potential amendments to the bill. Despite my efforts to improve the proposal, many of the concerns that I raised remain unresolved in the version of AB2 that is scheduled for Senate consideration on Tuesday, September 30, 2003. A copy of a detailed letter I prepared for the committee at that time is attached for your reference.

Just last week, the United States Court of Appeals for the Seventh Circuit upheld a key legal component of DOJ's wage lien enforcement. *In re AR Accessories Group, Inc.*, 2003 WL 22171688 (7<sup>th</sup> Cir. (Wis)). I am aware that some proponents of AB2 have maintained that this litigation has resolved the controversy surrounding this proposal. It has not. The AR case affirmed the priority of wage liens filed post-bankruptcy, but did not address any of the other issues set forth in my earlier letter. While certainly the decision can be characterized as a victory for the state, it remains true that the ability of DOJ to recover wages owed to workers would be undermined by the passage of this bill.

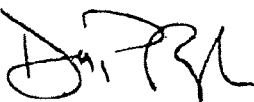

The Honorable Jon Erpenbach  
September 29, 2003

I am also aware that some proponents of AB2 have alleged that this legislation will confer a benefit to workers beyond current law. It will not. Under current law, the Department is able to recover far greater wages owed workers than it would subsequent to the passage of AB2. Under the provisions of this legislation, a "superpriority wage lien" relative to a bank of \$3,000 would be created. While employees would remain eligible to recover amounts they are owed in excess of this amount, the practical effect of the legislation will be to cap recovery at this level. The wages owed to an employee under this legislation that would be subject to the \$3,000 limit include: unpaid wages, health care claims, un-reimbursed expenses advanced by the employee and vacation pay. In many cases in which DOJ was involved, many individual employees have received more than the \$3,000 level proposed in this legislation. For example, in one recent case, a few individual employees were owed hundreds of thousands of dollars from an unfunded deferred compensation program. In another, tens of thousands of dollars in catastrophic health care costs were owed individual workers from a self-funded company health plan. Recovery of wages owed workers in excess of \$3,000 in these cases and others would be thwarted by the passage of this legislation. In both of these cases, recovery exceeded the \$3,000 cap proposed in this bill.

In addition to the proposed \$3,000 wage lien, this legislation also expands the definition of "financial institution" from simply including regulated banks to any "commercial lending institution." In the Department's experience, employers on the edge of insolvency borrow from non-bank lenders. Current state law provides an unlimited superpriority lien that can often make workers whole. Under this legislation, however, these recoveries would be subject to the \$3,000 cap.

A primary goal of this legislation is to allow lenders to better protect themselves through underwriting standards, reserves and reporting requirements. I remain willing to work with proponents to find ways to accomplish these goals without undermining the Department's ability to recover wages owed to workers. Unfortunately, AB2 will do nothing to assist in our efforts and is certain to diminish the enforcement ability of DOJ in this area.

Very truly yours,

  
for  Peggy A. Lautenschlager  
Attorney General

PAL: vlv



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

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June 2, 2003

The Honorable Dale Schultz, Chair  
Senate Committee on Financial Institutions  
State Capitol Building, Room No. 18 South  
VIA INTER-DEPARTMENTAL MAIL

Re: LRBs0071/1 – Assembly Bill 2 Substitute Amendment

Dear Senator Schultz:

I write to highlight some concerns of the Department of Justice (DOJ) related to Assembly Bill 2 and the proposed substitute amendment that the committee may wish to consider. As Attorney General, I have a primary responsibility to enforce wage liens and recover wages due employees under various state statutes impacted by this legislation.

Wisconsin has a long history, dating back well over 100 years, of protecting an employee's right to a lien for wages. In fact our strong tradition, until only recently, provided that an employee's right to a lien for wages was always paramount to other financial creditors. This pro-worker tradition has been largely unparalleled in the nation. Despite changes in recent years to Wisconsin law that reprioritized wage liens, I am proud of the many successes of DOJ in recovering wages owed to workers.

The substitute amendment under consideration by the committee ostensibly offers the wage lien a benefit beyond current law under Wis. Stat. § 109.09(2) by establishing a superpriority wage lien, relative to a bank, of \$3,000. While employees would remain eligible to recover amounts they are owed in excess of \$3,000, based upon the experience of the Department, such recoveries without the benefit of a superpriority lien are unlikely.

The wages owed to an employee under this legislation which would be subject to the \$3,000 limit, include: unpaid wages, health care claims, un-reimbursed expenses advanced by the employee, and vacation pay. In recent cases involving DOJ, some individual employees have quickly exceeded the \$3,000 level proposed in this legislation. In one case, a few individual employees were owed hundreds of thousands of dollars from an unfunded Deferred Compensation Program. In another, tens of thousands of dollars in catastrophic health care costs were owed individual workers from a self-funded company health plan. The committee should consider these potentially devastating costs for individual workers when determining the appropriate level for the superpriority wage lien.

In addition to the proposed \$3,000 wage lien, this legislation makes several other changes to current law of which the committee should be aware. Among these changes are the following:

- The proposal expands the definition of "financial institution" from simply including regulated banks to any "commercial lending institution." In the Department's experience, employers on the edge of insolvency often do their borrowing with non-bank lenders. Current state law provides an unlimited superpriority lien relative to the lender and can often satisfy the wage lien in full. Under the substitute amendment, these recoveries would be subject to the \$3,000 superpriority lien.
- Any currently existing lien of a bank will not be subject to the new \$3,000 superpriority wage lien under the proposal. Non-bank lenders, however, receive immediate benefit from the legislation's effective date.
- The proposal also narrows the definition of "employee." The proposal would exclude officers, directors, managers, professionals, commissioned salesmen, and those "privy to confidential matters involving the employer-employee relationship." Notably, this definitional change will exclude these groups not just from the wage lien, but from all of the other rights and protections afforded by Ch. 109.

As the state's top law enforcement officer whose ultimate responsibility it is to enforce wage liens and recover wages owed workers, I am concerned that this legislation provide strong incentives to insolvent employers and their lenders to comply with state plant closing (Wis. Stat. § 109.07) and health care cessation (Wis. Stat. § 109.075) laws. The committee may wish to consider an amendment to increase the proposed level of the superpriority lien under the bill to include any liability for wages under either of these statutes.

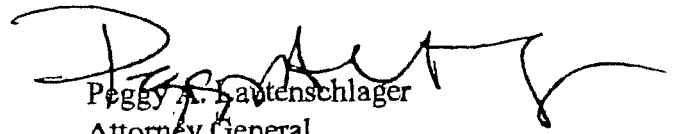
Given the trends in litigation surrounding wage liens in Wisconsin, I would also recommend minor changes to the statute that would provide this area of law with more stability. In several cases in which DOJ is currently involved, lenders are now arguing that the wage lien is not perfectable (and thus non-enforceable) in bankruptcy. The ability to perfect the lien during bankruptcy is crucial because, often, an employer will file for bankruptcy even the same day employees learn that they will be laid off without pay. Often the reason for filing bankruptcy is that the employer cannot make payroll. The employees, and the State on their behalf, thus do not have time before the bankruptcy begins to perfect a lien under Wis. Stat. Ch. 109. Without some clarification, courts may continue to grapple with this area of law. In recent cases, some have argued that the State may not perfect the wage lien by filing a lien after bankruptcy either because (1) the statute does not relate the wage lien back temporally to a specific point in time; or (2) because the wage lien is not created until the State sues the employer. DOJ believes the courts will reject this reasoning, but the bill would be enhanced by squarely addressing the issue. I have forwarded to you, under separate cover, suggested language that would help to accomplish this goal.



Providing more certainty, as envisioned by this bill, may allow lenders to better protect themselves through underwriting standards, reserves and reporting requirements. At the same time that we work towards this goal, we must also remain vigilant in our efforts to protect workers and the strong tradition in Wisconsin law to ensure that wages are paid.

I would respectfully request the committee consider these concerns when considering this legislation. As always, please feel free to give me a call if you have any questions or concerns about this or any other justice-related matter.

Very truly yours,



Peggy A. Lautenschlager  
Attorney General

PAL: vlv



FOR IMMEDIATE RELEASE

January 14, 2009

For more information, contact Eric Skrum  
608-441-1216 or eskrum@wisbank.com

**The Last Thing Wisconsin's Economy and Workers Need – Wage Lien Cap Removal**  
*Loss of Jobs and Tighter Lending Standards Direct Consequences of Lehman Legislation*

MADISON—Employees should be first in line to be paid for hours worked when a business fails. The current Wisconsin wage claim lien law, giving "super priority" status to employees over all other creditors is the most generous in the nation. It effectively balances the needs of employees against economic fundamentals that allow businesses to effectively operate and grow. But in a time when economic stimulus is most needed, recently introduced legislation would destroy this delicate balance resulting in the death of businesses and jobs, according to the Wisconsin Bankers Association (WBA).

"It's not an income protector; it's a job killer, plain and simple," said Kurt Bauer, WBA president/CEO. "This amounts to anti-economic stimulus for Wisconsin and will create a credit crunch where one didn't exist. How can something so anti-jobs and anti-business be called 'pro-worker?'"

Already the most "pro-worker" wage lien law in the country, Wisconsin's current law ensures that employees will be paid for hours worked, as well as vacation and severance, up to \$3,000 per employee. That cap amount is based on what the average Wisconsin worker makes in a two-week payroll period.

Senator John Lehman's legislation would remove the \$3,000 per worker ceiling to this law. The loss of this cap would be the final nail in the coffin for businesses with one foot in the grave already. Without this cap, creditors can't calculate their risk exposure and will have to assume that all of an ailing business' collateral will be absorbed by the lien. This would essentially leave many businesses with no or insufficient additional collateral to pledge against a line of credit to offset a creditor's risk exposure.

Banks will be far less likely to extend credit to businesses or allow continued draws on existing lines of credit just when businesses need it most, causing more Wisconsin businesses to fail and more employees to be without work.

"The result of this proposed legislation is a scenario that simply couldn't be more anti-business, anti-worker and anti-Wisconsin," explained Bauer.

###

*The Wisconsin Bankers Association is the state's largest financial industry trade association, representing 300 commercial banks and savings institutions, their nearly 2,300 branch offices and 30,000 employees.*



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**Wednesday, November 26, 2008**

## Press Releases

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**Don't be Fooled: "Big Ticket" Credit is Available**

*Wisconsin Bankers Association, Wisconsin Automobile & Truck Dealers Wisconsin Credit Union League Joint Press Release*

(Madison) The Wisconsin Automobile & Truck Dealers Association (WATDA), Wisconsin Bankers of Wisconsin and the Wisconsin Credit Union League, all say this is good news despite conflicting reports of tight money by lenders.

The four, member-based organizations agree that although many housing options are available to fit an individual's unique needs and circumstances,

"Sound credit practices over the years have allowed Wisconsin lenders to facilitate purchases, even though times are hard," said WATDA President Gary D. Heugens. "Home repair their homes can still find many sources for financing in our state."

He urged consumers to see their local automobile dealership or lender to take care of your own needs," he said, "There are plenty of credit options available."

All four organizations represent over 1400 members who collectively employ





# Wisconsin State AFL-CIO *...the voice for working families.*

David Newby, President • Sara J. Rogers, Exec. Vice President • Phillip L. Neuenfeldt, Secretary-Treasurer

To: Senator John Lehman  
From: Phil Neuenfeldt, Secretary-Treasurer  
Date: December 16, 2008

Re: **Wage Claim Lien Legislation**

We decided to compile a brief history related to workers' wage claim liens and the loss of their priority status, in the event that this background can be helpful during the 2009-10 Legislative Session. Also enclosed are documents related to that history.

Please let us know if you need any further information. We look forward to working with you again on this priority issue for labor in the upcoming session.

Encs.



December 16, 2008

## CHRONOLOGY OF WAGE CLAIM LIEN ISSUE

- Wisconsin workers had top priority under Wisconsin law for wage claim liens to recover unpaid wages and benefits from an employer. As early as 1862, the Wisconsin Supreme Court, in an action determining the priority of loggers' wage liens in relation to a prior security interest in the logs, commented that "it was the intention of the statute to give such workmen an absolute lien...as against everybody" and that "their claim is a sacred lien." That right in Wisconsin statutes was reaffirmed in January 1998 by the First Circuit Court of Appeals in a challenge to the law brought by First Bank and the Milwaukee Economic Development Corporation. The ruling strongly reaffirmed workers' priority status:

"After all, a lien for wages is a lien for money that should have been paid in the first instance – money that, in the ordinary course of business, would not have been available to pay any claims of a secured party."

"The absolute or sacred nature of the wage claim lien flows from the simple proposition: if workers are not paid their wages, they and their families will suffer."

"Nothing in the statutes suggests that the Legislature intended workers to lose their wages merely because a bank or some other creditor arrived at the courthouse first." (Pfister v. MEDC, 216 Wis. 2d 243 (Ct.App.1998) 576 N.W. 2d 554)

- Banking lobbyists then moved to nullify the court decision during the final weeks of the 1997-98 Legislative Session. During Joint Finance Committee action on AB 768, the 1997-99 Budget Adjustment Bill, a late-night "miscellaneous motion" (Motion 209) by co-chairs Rep. John Gard (R) and Sen. Tim Weeden (R) eliminated top priority for workers' wage liens and essentially put banks first. In the event that any employer assets were left, it capped the amount that workers could collect at \$1,000. Since Republicans were in control of the legislature at the time, the Wisconsin State AFL-CIO could not procedurally stop

## CHRONOLOGY OF WAGE CLAIM LIEN ISSUE (continued)

the provision from passing. (See Legislative Fiscal Bureau Summary, May 5, 1998, of "State Wage Payment and Collection" provision in AB 768.)

- Due to the outcry from the Wisconsin State AFL-CIO and others over this late-night wage theft, Governor Thompson did veto the \$1,000 cap, but left the language that essentially put banks first. Since it is rare for any business assets to remain after banks take their share, this did little to restore workers' rights. During each legislative session, the Wisconsin State AFL-CIO continued the fight to restore the wage lien rights that workers lost.
- More recently, an amendment was included in AB 2 Financial Modernization Bill that was signed into law in the 2003-04 session which gives workers' unpaid wages priority status over banks up to \$3,000. Because the Wisconsin State AFL-CIO had concerns about the inadequacy of the changes and their effects (related to the cap, the time limitation on superpriority status and other issues), we opposed the legislation with that amendment. In fact, a vote in favor of AB 2 was used as a "wrong" vote in our 2003-04 Voting Record of Wisconsin State Legislature. According to the experience of our legal counsel, these concerns are proving valid due to the obstacles that remain in collecting the wages and benefits that workers have earned and are owed by their employers.

Prepared by:

Joanne Ricca  
Legislative and Policy Research Director  
Wisconsin State AFL-CIO

**GET MOTIONS CONTD**

Motion 1270. (Gard) TRANSPORTATION - Specific information signs on STH 172 Act 27 repeal. Adopted. 14-

Motion 1271. (Decker) TRANSPORTATION - Highway signs on I-39 for the Korean War Memorial. Adopted. 16-0.

Motion 1272. (Porter) TRANSPORTATION - Traffic signal at intersection of West Forest Home and 76th Street in City of Greenfield, adopted. 13-3. Motion 299 (Linton) amends 1272 to require a traffic signal on STH 63 in Spooner. failed, 4-11.

Motion 1273. (Linton) TRANSPORTATION - Traffic signal at intersection of STH 13 and North Street in Adams. Failed, 4-12.

Motion 1274. (Burke) TRANSPORTATION - Lighting for Lisbon Avenue in Milwaukee. Failed, 8-8.

Motion 1275. (Porter) TRANSPORTATION - Highway lighting for USH 10 interchanges near Weyauwega. Adopted, 11-5.

Motion 1276. (Decker) TRANSPORTATION - Railroad crossing gates in the City of Mosinee. Failed, 4-12.

Motion 1300. (Albers) GENERAL FUND TAXES - Individual income tax - exclusion for capital gains on business assets sold to family members penalty provision. Adopted, 10-5

Motion 1301. (Porter) GENERAL FUND TAXES - Individual income tax - taxation of nonresident gambling winnings at Indian casinos. Adopted. 16-0.

Motion 1302. (Decker) GENERAL FUND TAXES - Individual income tax - exemption for severance pay. (SB-535). Failed. 4-12.

Motion 1303. (Ourada) GENERAL FUND TAXES - Occupational tax on net proceeds from bingo. (AB-354). Adopted. 15-1.

Motion 1304. (Ourada) GENERAL FUND TAXES - Net proceeds tax on mining of metallic minerals. Adopted. 16-0.

Motion 1305. (Schultz) GENERAL FUND TAXES - Sales tax exemption for county fair admissions. Adopted. 13-3

Motion 1306. (Cowles) GENERAL FUND TAXES - Sales tax exemption certificates for commodities in warehouses. Adopted. 16-0.

Motion 1307. (Panzer) GENERAL FUND TAXES - Sales tax. auction sales. Adopted. 13-3.

Motion 1308. (Farrow) REVENUE - Alcohol beverages: "Class B" liquor license quota, fee and transferability. Failed. 7-9

Motion 1311. (Burke) WORKFORCE DEVELOPMENT - Food stamp waiver. Failed. 4-12.

Motion 1312. (Linton) WORKFORCE DEVELOPMENT - W-2 child care for education, child care provider training, and head start participation for W-2 recipients. Failed. 4-12.

Motion 1313. (Burke) WORKFORCE DEVELOPMENT - Fair hearing process under W-2. Failed. 5-11.

**BUDGET MOTIONS CONTD**

Motion 1314. (Gard) WORKFORCE DEVELOPMENT - Requests for information relating to W-2. Adopted. 15-1.

Motion 1315. (Linton) WORKFORCE DEVELOPMENT - Release of the address of W-2 participants involved in legal proceedings. Adopted. 16-0.

Motion 1316. (Decker) WORKFORCE DEVELOPMENT/DNR - Repeal collection of social security numbers for use in child support enforcement. Failed. 3-13.

Motion 1319. (Linton) WORKFORCE DEVELOPMENT - Notification by employers that cease to provide health care benefits. Adopted. 16-0.

Motion 1320. (Linton) WORKFORCE DEVELOPMENT - State public accommodations law. Adopted. 16-0.

Motion 1309. (Gard) (motion made by Decker) WORKFORCE DEVELOPMENT - Food stamps for legal immigrants. Failed, 4-12.

Motion 315. (Gard) UW - Regents to develop legislation to establish an optional retirement plan for faculty an academic staff; actuarial study required. Adopted, 10-6.

→ Motion 209. (Gard/Weeden) MISCELLANEOUS PROVISIONS - Covers sales tax on prepaid calling cards. state wage payment and collection law, purchase of court transcription equipment, deputy executive secretary position. and land recycling loan applications. Adopted, 16-0.

Motion 1400. (Gard) DHFS - Prohibitions on funding for pregnancy projects, programs and services that conduct abortion related activities. Adopted, 9-6.

Motion 1125. (Gard) INSURANCE - Coverage for treatment of TMJ disorders and hospital and ambulatory surgery center charges. Adopted. 15-0.

MOTION FOR LFB TO INCORPORATE ALL COMMITTEE ACTIONS INTO A SUBSTITUTE AMENDMENT TO AB-768, AND TO INCLUDE ANY TECHNICAL MODIFICATIONS NECESSARY TO ENSURE INTENT OF THE COMMITTEE; ADOPT THE SUBSTITUTE, AND, RECOMMEND AB-768 FOR PASSAGE AS AMENDED. Adopted. 13-3.

**HEARING NOTICES**

Assembly Highways, 8:30 am, Tue, May 5, 415-NW SB-23. Green Bay Packer license plates.

SB-55. Restricts on-property signs.

(An exec may be held)

Assembly Veterans/Military Affairs, 9 am, Wed, May 6, 417-N. (Executive Session)

SB-352. Fishing licenses for certain disabled veterans.

Source:

The Wheeler Report (April 30, 1998)  
AB 768 1997-99 Budget Adjustment Bill  
Final Budget Motions  
Joint Finance Committee

5. ~~RELEASE OF THE ADDRESS OF W-2 PARTICIPANTS INVOLVED IN LEGAL PROCEEDINGS~~

~~Joint Finance: Require W-2 agencies to release the current address of a recipient of benefits under a W-2 subsidized employment position or as a custodial parent of an infant to a person, the person's attorney or an employe or agent of that attorney if the person is a party to a legal action or proceeding in which the recipient is a party or witness, except in certain cases of abuse or harassment. Also, add W-2 agencies to the organizations that must comply with other provisions related to the release of the address of benefit recipients involved in legal proceedings. Under current law, provisions related to the release of an address of a recipient involved in legal proceedings apply only to county departments of human services and relief agencies with respect to benefits under a relief block grant or the AFDC program.~~

6. STATE WAGE PAYMENT AND COLLECTION LAW

**Joint Finance:** Modify the state wage payment and collection law to define "employe" to mean any person employed by an employer in the state, except that "employe" would not be an officer or director of a corporation, cooperative or association, a member or manager of a limited liability company, a partner of a partnership or a joint venture or the owner of a sole proprietorship.

Modify the definition of "wage" or "wages" to mean remuneration actually rendered, including salaries, commissions, holiday and vacation pay, overtime pay, bonuses and any other similar advantages for personal services actually rendered. "Wages" would not include severance pay, dismissal pay, supplemental unemployment benefit plan payments when required under a binding collective bargaining agreement or any other similar advantage payable to an employe, but not for personal services actually rendered.

Authorize DWD to attach a lien on the real and personal property in the state of the employer for the amount of any wage claim, up to a maximum of \$1,000. A lien on real property would take effect when notice of the lien was filed as under current law. The clerk of the circuit court would be required to enter notice of the lien on the judgement and lien docket. A lien on personal property would take effect when DWD filed a notice of the lien with the Department of Financial Institutions (DFI) and served a copy of the notice on the employer by personal service in the same manner as a summons is served or by certified mail. DFI would be required to place the lien notice in the same file as financing statements that are filed with the Department. A lien on real property would take precedence over all other debts, judgements, decrees, liens and mortgages against the employer that originate after the lien takes effect except for those that have precedence under current law.

Under current law, employes have the right to file a wage claim with DWD for unpaid wages if there is a dispute with the employer regarding the amount of wages owed or if an employer fails to pay



the wages agreed upon for the time actually worked. Once a claim is filed, DWD seeks to resolve the matter with the employer. Wages are defined as remuneration payable to an employee for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment benefit plan payments when required under a binding collective bargaining agreement, bonuses and any other similar advantages.

Once a claim has been filed, it is reviewed and the validity of the claim is determined. If the claim is ruled valid and the employer pays the amount due, the case is closed. If the employer refuses to pay a valid wage claim, DWD is required to forward the claim to the local district attorney. The employee must then contact the district attorney and indicate if they wish to pursue the matter in court.

DWD, under its authority to act for employees, is authorized to place a lien on all property of the employer in the state for the full amount of any wage claim or deficiency. The lien takes effect when DWD files a verified petition 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 required fee and serves a copy of the petition on the employer in the same manner as a summons or by certified mail. The lien takes precedence over all other debts, judgements, decrees, liens or mortgages against the employer except for liens attached to recover certain environmental cleanup and construction costs.

This provision would modify the definition of "employee" to exclude certain officers, partners and managers and modify the definition of "wages" to exclude certain types of remuneration that was not for personal services actually performed. In addition, the process by which DWD would file a wage claim lien would be clarified, the amount of any lien that could be placed on the property of employers by DWD for unpaid wages would be limited to \$1,000 per claim and the lien would not take precedence over certain obligations previously incurred.

## ~~7 NOTIFICATION BY EMPLOYERS THAT CEASE TO PROVIDE HEALTH CARE BENEFITS~~

~~Joint Finance: Adopt the provisions of AB 148 that would require an employer that employs 50 or more persons that has decided to cease providing health care benefits to notify the affected employee, retiree or dependent and any collective bargaining representative of an affected employee of the cessation of health care benefits no later than 60 days before the cessation will occur. If an employer fails to give such notice to the affected employee, retiree or dependent, the affected person could recover the value of any health care benefits that would have been received, including medical treatment incurred, for the period beginning on the day the employer was required to give notice and ending on the earlier of the day the employer actually gave notice to the affected employee, retiree or dependent or the day that the cessation of health benefits occurred. The amount an affected employee could recover would be reduced by any cost the employer incurs by crediting the affected employee, under an employee benefit plan, for time not actually served because of a business closing.~~

OFFICE  
Room 309 North, State Capitol  
P.O. Box 8953  
Madison, Wisconsin 53708  
(608) 266-2530  
HOTLINE TOLL FREE  
1-800-362-9472  
8:30 a.m. to 5:00 p.m.  
FAX Number: (608) 266-7038



HOME  
28322 Durand Avenue  
Burlington, Wisconsin 53105  
TELEPHONE  
(414) 763-6827

**WISCONSIN LEGISLATURE**

RECEIVED MAY 29 1998

**CLOYD A. PORTER**

*State Representative — 66th District*

May 28, 1998

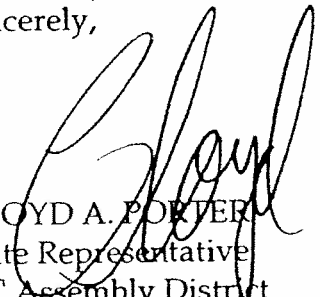
The Honorable Tommy G. Thompson  
Governor, State of Wisconsin  
115 East, State Capitol  
Madison, Wisconsin 53702

Dear Governor Thompson:

Enclosed is a copy of a provision in the budget adjustment bill relating to state wage payment and collection law. This language is very board and leaves much for interpretation. Also, the language was not agreed upon by the Department of Workforce Development before the motion was voted on in the Joint Finance Committee. The department is working with interested parties to come to a compromise for future legislation.

I hope that you will not retain this provision as part of the budget adjustment bill and strongly urge you TO VETO this measure. Thank you for your thoughtful consideration of this matter.

Sincerely,

  
CLOYD A. PORTER  
State Representative  
66<sup>th</sup> Assembly District

enclosure

CAP:sjs

# THE WHEELER REPORT

Wheeler Reports, Inc. - 121 E. Main St. #300 - Madison, WI 53703 - (608) 251-1626

Tuesday, June 2, 1998

## BUDGET VETOES NOTED

Gov. Thompson this morning signed AB-768, the budget adjustment bill into law during ceremonies in Waukesha County, Green Bay and Wausau. The bill becomes 1997 Wisconsin Act 237. The 22 partial vetoes are listed below:

### EDUCATION AND TRAINING - Public Instruction

1. National Teacher Certification Program (Sec. 361). Deletes limit of 20 teachers and eliminates annual \$2500 state grants to teachers beyond 1999-01 biennium.

2. Professional Teaching Permits (Secs 362c and 362p). Deletes requirement for DPI to renew a permit or issue a regular teacher license at the direction of a local school board.

### ENVIRONMENTAL AND COMMERCIAL RESOURCES Agriculture, Trade and Consumer Protection.

1. Fish Farming (Sec 9236(2c)). Restores positions and funding to DNR. Requesting DOA to freeze two of the five positions provided to DATCP and two of five restored to DNR.

2. Soil and Water Resource Management Engineering Positions (Sec 9204(1wx) and (1wy)). Deletes funding and authorization for 2 GPR FTE positions in DATCP.

### Natural Resources

3. Nonpoint Source Water Pollution Abatement Program (Secs 9131(1p) and 9136(2v)). Deletes audit request and Sugar-Honey Creek earmark.

4. Landfill Remediation Study (Sec 9136(2d)). Deletes study identifying all closed landfills and estimated cost of remediation.

5. Brownfields Fee for PECA-related services (Secs. 486p, 9136(1c) and 9236(3g)). Deletes provisions because they "unnecessarily limit" the department's flexibility to charge fees for services. Requests Dept of Commerce to include DNR Brownfields fees associated with providing assistance related to s. 101.143 as an eligible cost for reimbursement.

### Tourism

6. Marketing Appropriation (Sec. 9247(1)). Veto allocates all of the funding increase over the biennium to FY 1998-99.

### Transportation.

7. License Plate Reissuance (Secs 512fm, 512fp, and 9148(1d)(a)). Veto removes provisions restricting DOT from creating, increasing or charging fees to recoup license plate reissuance costs. Veto also removes requirement Sesqui-centennial commemorative license plates be reissued between July 1, 2002 and July 1, 2003.

## BUDGET VETOES CONTD HUMAN RESOURCES CONTD

### Health and Family Services

1. Milwaukee County Child Welfare Services (Sec 9222(3f)). Veto removes reduction in general program operation appropriation.

2. Kinship Care (Sec 152m). Veto removes requirement DHFS include eligibility criteria for cases in which the safety of the child is not an immediate concern but placement with the relative could avoid the need for more costly intervention services.

3. Community Options Program (Secs 22 [as it relates to s. 20.435(7)(bb)],, 44L, 98m, 98n, 203g, 203h and 203i). Veto removes GPR continuing appropriation for the MA-COP transfer; eliminates Oct. 1 report due date; and eliminates "overly prescriptive process" for MA-COP transfer.

4. Caretaker Support (Sec. 9122(4e)(b)). Removes requirements for DHFS to also seek JCF approval for use of same TANF funds.

5. Provider Assessments (Secs 393se, 393sh, 393sk and 9422(6k)). Veto retains GPR funding for FY 1998-99; restores authority to assess individual health care providers in the future; removes sections which shift cost of data collection to hospitals and surgery centers.

### Insurance

6. Specialist Physicians (Secs. 566cdf and 566 cfk). Removes language referring to access patients in managed care plans would have to specialist physicians. Requests OCI to include remedial language in next budget to fix ambiguity.

7. Prior Authorization for Diagnostic Procedures (Sec. 594p). Removes prior authorization for certain diagnostic procedures.

### Workforce Development

8. Wage Claim Liens (Secs 354m, 354p, 354r and 9355(1f)). Veto removes lien limit; restores current definition of "wages" and, removes requirement that covered employees must work in this state, and the exclusion of officers and directors of cooperatives and associations from the definition of "employee".

## JUSTICE

### Justice

1. Governor's Appointment of Special Counsel. (Sec 4n). Veto removes section. Attachment to Veto Message provides statement from Attorney General regarding Indian reservation boundary disputes and other Indian sovereignty issues.



**Wisconsin State AFL-CIO** ...the voice for working families.

David Newby, President • Sara J. Rogers, Exec. Vice President • Phillip L. Neuenfeldt, Secretary-Treasurer

TO: Members of the Senate  
FROM: Phil Neuenfeldt, Secretary-Treasurer  
DATE: September 30, 2003

RE: **Opposition to Senate Substitute Amendment 1 to Assembly Bill 2  
Financial Modernization Bill and Wage Lien Rights**

A recent court decision by the Seventh Circuit has prompted some to say that the concerns of the Wisconsin State AFL-CIO with regard to SSA 1 to AB 2 related to wage lien rights have been addressed. This is not true.

The court decision did not address all the wage lien rights that are impacted by the Substitute Amendment – and even the Seventh Circuit decision can still be appealed. In addition, it is clear that the wage lien cap as proposed in SSA 1 will undermine Wisconsin's Plant Closing Law. As currently drafted, Substitute Amendment 1 would remove whatever incentive exists for employers facing bankruptcy to comply with the law.

**Given all this, it is clear that wage lien protections for workers cannot be properly addressed in this legislation. We do not want workers to lose the rights and protections they do have as a result of provisions in Substitute Amendment 1. We urge the Senate to pass AB 2 as it was approved by the Assembly.**

PN/JR/mj



# Senate passes bankruptcy compromise

## Workers to get priority for wages up to \$3,000

By PAUL GORES  
pgores@journalsentinel.com

MJS 10/1/03

Workers at companies that go bankrupt in Wisconsin would get first crack at recovering up to \$3,000 each of unpaid wages before banks could collect on loans owed by the company, under compromise legislation approved Tuesday by the state Senate.

The provision giving employees limited priority over banks when a bankrupt company's assets are distributed came in an amendment to a financial modernization bill, a piece of legislation long sought by both banks and credit unions in Wisconsin.

The so-called "wage lien" issue has bogged down the legislation for years, with Democrats insisting that employees at bankrupt firms be first in line to collect wages and compensation they are owed when a company is liquidated. Banks have insisted that their liens continue to come first, claiming they would be more reluctant to make some business loans if they do not have priority in bankruptcies.

As a compromise, the bankers proposed letting workers get their money first — but with a cap of \$3,000. After the workers received that amount, banks could lay claim to the company's assets. If a worker was due more than \$3,000, he or she could seek the remainder after the lenders were

Please see **LEGISLATION, 3D**

### LEGISLATION, From 1D

paid, if there is money left.

"It was a big-time compromise," said Harry J. Argue, executive vice president and chief executive officer of the Wisconsin Bankers Association.

Argue said the provision was "a real positive" for workers, and put employees in Wisconsin at the forefront among states when it comes to accommodating their claims to unpaid wages in a bankruptcy.

"It's not all that labor would have liked, but it certainly is preferable to what is elsewhere," Argue said.

But some state Democrats do not favor the idea of a cap. State Attorney General Peg Lautenschlager said in a letter to Sen. Jon Erpenbach (D-Middleton) that compensation owed to workers often exceeds \$3,000 in bankruptcy cases.

"The wages owed to an employee under this legislation that would be subject to the \$3,000 limit include: unpaid wages, health care claims, unreimbursed expenses advanced by the employee and vacation pay," Lautenschlager wrote.

The bill passed Tuesday on a vote of 24-9. The legislation, which started in the state Assembly, is expected to go back to the Assembly for a vote today. If approved, it will go to Gov. Jim Doyle, who hasn't said how he would act on the bill.

Bankers say they want the financial modernization legislation so state-chartered savings banks will be able to better compete with their federally chartered peers when it comes to offering new products and services. Credit unions have pushed for the legislation, which, in part, will allow them to expand.

*Steven Walters of the Journal Sentinel staff reported from Madison and contributed to this report.*

**RELEVANT LANGUAGE FROM  
IN RE: GLOBE BUILDING MATERIALS, INC., 463 F.3d 631 (7 Cir 2006)**

The express statutory language states that the lien “takes precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien of a financial institution . . . .” Wis. Stat. 109.09(1)(c). The bona fide purchaser is conspicuously absent from this list. By specifying with such precision the claims over which the lien takes precedence, the Wisconsin legislature implicitly established the outer boundaries of Wis. Stat. 109.09.

*Id.* at 634-635

...

Should the State feel this holding does not reflect their intended meaning of Wis. Stat. 109.09, the legislature need only amend the statutory language to provide for the lien’s express precedence over the rights of bona fide purchasers in addition to “all other debts, judgments, decrees, liens, or mortgages . . . .”

*Id.* 635

**PROPOSED AMENDMENT**

1m. A lien under par. (a) takes precedence over the rights of any purchaser, including any bona fide purchaser and all other debts, judgments, decrees, liens, or mortgages against the employer, except a lien of a commercial lending institution as provided in subd. 2. and 3. or a lien under s. 292.31 (8) (i) or 292.81, regardless of whether those other debts, judgments, decrees, liens, or mortgages originate before or after the lien under par. (a) takes effect. 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.

In the  
United States Court of Appeals  
For the Seventh Circuit

---

No. 05-3738

IN RE:

GLOBE BUILDING MATERIALS, INCORPORATED,

*Debtor.*

APPEAL OF:

STATE OF WISCONSIN AND PEGGY LAUTENSCHLAGER

---

Appeal from the United States District Court  
for the Northern District of Indiana, Hammond Division.  
No. 04 C 481—**Rudy Lozano**, *Judge*.

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ARGUED MAY 10, 2006—DECIDED SEPTEMBER 8, 2006

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Before FLAUM, *Chief Judge*, and BAUER and EVANS,  
*Circuit Judges*.

BAUER, *Circuit Judge*. After an unsuccessful attempt to restructure, Globe Building Materials, Incorporated (Globe) was liquidated under Chapter 7 of the Bankruptcy Code. Peggy Lautenschlager, the Attorney General for the State of Wisconsin, sought to recover wages owed to former Globe employees in her state through a statutory lien. The trustee brought this adversary proceeding, and argued that the lien was avoidable under 11 U.S.C. § 545(2). Both the bankruptcy and district courts found for the trustee. We affirm.

The facts of this case are not in dispute. On January 19, 2001, Globe filed a voluntary petition for relief under

Chapter 11 of the Bankruptcy Code. Before ceasing operations, Globe manufactured, sold, and distributed residential roofing materials. The company's primary assets consisted of three manufacturing plants (one located in Wisconsin), machinery, equipment, inventory, and receivables. On April 4, 2001, the case was converted to Chapter 7, and Gordon E. Gouveia was appointed Trustee for the Debtor's estate.

On or about July 24, 2001, the State of Wisconsin's (the State) Department of Workforce Development filed a Notice of Lien with the State Department of Financial Institutions and the Office of the Chippewa Wisconsin County Clerk. The State asserted a wage lien under Wis. Stat. 109.09(2) against all real and personal property then owned or thereafter acquired by Globe within its boundaries. The lien was properly perfected by its filing.

Around February 22, 2002, the bankruptcy court approved the trustee's sale of Globe's Wisconsin manufacturing facility. The proceeds of the sale were paid to the trustee. On the basis of Wis. Stat. 109.09, the State claimed a first priority lien on the net sale proceeds. On January 17, 2003, the trustee brought this adversary proceeding to set aside the wage lien.

On September 13, 2004, the bankruptcy court found that there was no genuine issue of material fact and granted summary judgment to the trustee. The bankruptcy court held that 11 U.S.C. § 545(2) allowed the trustee to avoid the wage lien because Wis. Stat. 109.09 delineates the conditions under which the lien takes precedence, and the statutory language does not account for the trustee's hypothetical bona fide purchaser status. The district court affirmed, and this appeal followed. Both parties agree that this discrete legal issue represents the entirety of the case.

We review the decisions of the bankruptcy and district court to grant summary judgment on this matter *de novo*.



*In re AR Accessories Group, Inc.*, 345 F.3d 454, 457 (7th Cir. 2003).

Whether 11 U.S.C. § 545(2) allows the trustee to avoid the State's wage lien turns on the construction and interaction of three separate statutory sections. Sections 545 and 546 of the Bankruptcy Code set forth the extent of the trustee's power to avoid statutory liens. The relevant language of § 545(2) provides:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

...

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.

But this power is not absolute, 11 U.S.C. § 546 states, in relevant part:

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection[.]

The question before us, then, is whether Wis. Stat. 109.09 is such a "generally applicable law," and if so, how is it applied? The statutory language provides that:

(1) The department shall investigate and attempt equitably to adjust controversies between employers and employees as to alleged wage claims . . . .

(2)(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.

...

(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 . . . .

(Emphasis added.)

At the outset, we must dispose of the State's preliminary argument that the absence of an actual bona fide purchaser has some bearing on this matter. The express purpose of the § 545(2) language is not to affirm the rights of an actual bona fide purchaser, but to vest the trustee with those rights were such an entity to exist. This is a simple, but possibly deceptive, statutory mechanism designed to access a legal concept without establishing the traditional elements necessary to do so. The trustee's hypothetical status is therefore of no dispositive value to our analysis.

Turning back to the interaction of these three statutory subsections, we consider first the State's argument. The Attorney General submits that Wisconsin's wage lien statute "[meets] the requirements" of § 546(b)(1)(A), and thus completely forecloses all of the trustee's powers under §§ 544, 545, and 549, specifically those as a bona fide purchaser. To support this claim, the State relies heavily on our holding in *AR Accessories*, 345 F.3d at 454.

In *AR Accessories*, we addressed the initial question of whether a Wis. Stat. 109.09 wage lien was void *ab initio* when created after the debtor had filed its petition for

bankruptcy. 345 F.3d at 456. We held that a priming statute, such as 109.09, “need not contain language expressly providing for retroactive perfection in order to trigger the exception provided in 11 U.S.C. § 546(b)(1)(A) to the automatic stay of postpetition efforts to protect a property interest.” *Id.* at 458. Thus, the wage lien did not violate the Bankruptcy Code’s automatic stay, and was generally valid. Additionally, in rejecting an alternative argument, we noted that the Wis. Stat. 109.09 lien interest was created when the last services were rendered for which wages went unpaid. *Id.* at 459. We agreed with the bankruptcy court that the Department’s filing did not create a new interest under § 546(b), it merely put other claimants on notice of the pre-existing claim. But this analysis was the extent of our Wis. Stat. 109.09 review. *AR Accessories* did not address, as we do today, the internal operation of the Wisconsin statute and its interaction with the various powers of the trustee. This is because the debtor there did not assert that the wage lien could have been avoided under §§ 544 or 545, a legal question distinct from whether the lien’s prescribed operation was generally void. The challenge in *AR Accessories* was primarily facial, and, as such, our review was, too.

Despite having acknowledged these legal and factual differences, the State argues here that our analysis in *AR Accessories* informs and controls the instant matter. This argument turns on a broad interpretation of the § 546(b)(1) language that subjects the trustee’s power to “any generally applicable law. . . .” Specifically, the State claims that because we held Wis. Stat. 109.09 generally applies under § 546(b)(1)(A), the wage lien automatically forecloses all of the trustee’s powers under §§ 544, 545, and 549. But this interpretation reads § 546(b)(1)(A) as if the wage lien itself was the direct object of the “subject to” language, and turns a blind eye to the internal structure of Wis. Stat. 109.09.

In drafting §§ 545(2) and 546(b)(1)(A) as it did, Congress largely left the avoidability of statutory liens to state law. See *Stanford v. Butler (In re Stanford)*, 826 F.2d 353, 355-56 (5th Cir. 1987). Where the applicable state statute permits the lien in question to defeat the rights of a bona fide purchaser, the Bankruptcy Code will adopt that state policy choice and grant secured status to the lien. *Limperis v. First Nat'l Bank of Geneva (In re Phillips Constr. Co., Inc.)*, 579 F.2d 431, 432 (7th Cir. 1978). Further, where the state law denies enforcement of a statutory lien against a bona fide purchaser, the lien is avoidable pursuant to § 545(2). See *El Paso v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.)*, 217 F.3d 1161, 1164 (9th Cir. 2000); *City of Boerne v. Boerne Hills Leasing Corp. (In re Boerne Hills Leasing Corp.)*, 15 F.3d 57, 59 (5th Cir. 1994). We must, therefore, examine Wis. Stat. 109.09 to determine if the Wisconsin legislature intended for the wage lien to defeat the rights of a bona fide purchaser.

Our analysis of the wage lien statute's interaction with § 546 is a two-step process, and tracks the analysis conducted by both the bankruptcy and district courts.

First, is the statutory lien protected under nonbankruptcy law against . . . a bona fide purchaser under Code § 545 . . . arising as of the date of the filing of the bankruptcy petition? If the answer is "yes," the analysis need proceed no further. Unless avoided as a disguised priority or a landlord's lien under Code § 545, the statutory lien is valid in bankruptcy . . . . If the answer to . . . this first question is "no," then a second question must be asked. Under applicable nonbankruptcy law, does there remain a procedure by which the statutory lien claimant can still perfect the lien as against . . . bona fide purchasers whose interest arose as of the date of bankruptcy? If such a procedure exists and applies to the type of claimant against whom the statutory lien

was not previously protected, the holder of the statutory lien may still protect his interest.

2 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW & PRACTICE 2d § 55:3 (2003).

Upon subjecting Wis. Stat. 109.09 to this analysis, we hold that the State's argument fails. The express statutory language states that the lien "takes precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien of a financial institution . . . ." Wis. Stat. 109.09(1)(c). The bona fide purchaser is conspicuously absent from this list. By specifying with such precision the claims over which the lien takes precedence, the Wisconsin legislature implicitly established the outer boundaries of Wis. Stat. 109.09. This is a straightforward application of the concept *expressio unius est exclusio alterius*, "to express or include the one thing implies the exclusion of the other . . . ." BLACK'S LAW DICTIONARY 620 (8th ed. 2004); see also *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 861 (7th Cir. 2002) (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). In interpreting the statute we will not invent missing language. *In re Kmart Corp.*, 359 F.3d 866, 869 (7th Cir. 2004).

The State, however, argues that because the lien interest was created on the last date unpaid services were rendered, it defeats a bona fide purchaser under nonbankruptcy law. Again, its sole support for this argument is our reasoning in *AR Accessories*. But as we noted above, the ultimate issue before this court in *AR Accessories* was whether Wis. Stat. 109.09 violated the Bankruptcy Code's automatic stay. Our adoption of the statute's implied retroactive perfection was limited to that single legal question. We did not, as we have today, examine the specific workings of the statute itself. And nothing within Wis. Stat. 109.09 expressly provides for the wage lien's retroactive perfection or makes it enforceable against the rights of a bona fide purchaser under § 545(2).

Should the State feel this holding does not reflect their intended meaning of Wis. Stat. 109.09, the legislature need only amend the statutory language to provide for the lien's express precedence over the rights of bona fide purchasers in addition to "all other debts, judgments, decrees, liens, or mortgages . . . ."

For the abovementioned reasons, the decision of the district court is AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*