

Statutory Liens

I.

Priority Between Secured Parties and
Statutory Lienholders

The U.C.C. generally provides answers to questions concerning priority between rights of secured parties and other claimants in personal property and fixtures. Where the competing claimant is another secured party or a purchaser, the Code generally attempts to sort out priority without reference to other sources of law. However, certain kinds of claims to an interest in collateral are termed beyond the scope of Article Nine in U.C.C. 9-102, or are excluded from Article Nine's provisions by 9-104. Thus, where a secured party is competing with such claims other sources of state law become controlling. This discussion looks at some of these claims and claimants.

A. Liens for Taxes

All states make provisions of some sort for exacting payment of taxes owed by taxpayers, usually by imposing a statutory lien on the taxpayer's property, both personal and real, in the amount of the tax. While the Code doesn't expressly exclude such state tax liens from Article Nine's provisions, 9-102(2) states that

This Article applies to security interests created by contract This Article does not apply to statutory liens except as provided in Section 9-103.

Courts have interpreted this section to mean that statutory tax liens are not governed by the Code's priority provisions. See e.g., Malakoff v. Washington, D.C. App. 434 A.2d 432, 435 (1981); Sun First National Bank of Orlando v. Miller, 397 So.2d 943, 944 (1981) [However, Sun, supra, noted that where the

state acquires a lien for unpaid taxes based on attachment and levy they become lien creditors, and priority would be decided by reference to 9-301. Sun at 944.] The priority given the tax lien would then be determined by common law notions of "first in time first in right," unless the state by statute gives such tax liens a preferred status. Malakoff, supra, at 435.

Both the Nebraska and Iowa Supreme Courts have stated that the legislature may constitutionally give absolute priority to tax liens over prior as well as subsequent liens. Licking v. Hays Lumber Co., 19 N.W.2d 148, 150 (Neb. 1945); Barker's Inc. v. B.D.J. Development Co., 308 N.W.2d 78, 83 (Iowa, 1981); Linn County v. Steele, 223 Iowa 864, 273 N.W. 920 (1937). Iowa has apparently done just that with respect to the tax liens created under sections 445.28 and 445.31 of the Iowa Code, or at least that seems to be the result of the holdings in Linn, supra, and Barker's, supra. Section 445.28 (real estate taxes) imposes this lien upon the taxpayer's real property. Prior mortgagee's (and perhaps fixture financiers) would thus lose priority regardless of when they attached. Section 445.31 of the Iowa Code imposes a lien for personal property taxes assessed upon ". . . stocks of goods or merchandise, . . . fixtures and furniture in hotels, restaurants, . . ." This section was also construed to give this tax lien "absolute" priority in Evans v. Stewart, 66 N.W.2d 442 (Iowa 1954):

The lien created by the above statute is a first lien, superior to a mortgage or other contract lien. Evans, supra, at 446.

Finally, Iowa Code 445.43, which imposes a tax lien on migratory personal property states that the lien "relates back" and exists from January 1 of the year for which it assessed, but seems to make no provision for protection of interests created during the "relation back" period.

Liens for Income Taxes (Iowa Code § 422.26) and Gross Receipt taxes (Iowa Code 422.56) do not enjoy this absolute priority given the above liens. Section 422.26 states:

422.26 Lien of tax-collection-action authorized. Whenever any taxpayer liable to pay a tax and penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the costs that may may accrue in addition thereto, shall be a lien in favor of the state upon all property and rights to property, whether real or personal, belonging to said taxpayer.

In order to preserve the aforesaid lien against subsequent mortgagees, purchasers or judgment creditors, for value and without notice of the lien, on any property situated in a county, the director shall file with the recorder of the county, in which said property is located, a notice of said lien.

The language, particularly, the indexing requirement, seems to give sufficient protection to both existing and subsequent mortgagees and secured parties so as to avoid any unpleasant surprises. The Gross Receipts Taxes on retail sales is less charitable. Section 422.56 has no recording requirement in order to attach the lien to personal property of the debtor:

422.56 Statute applicable to sales tax. All the provisions of section 422.26 shall apply in respect to the taxes and penalties imposed by this division, excepting that, as applied to any tax imposed by this division, the lien therein provided shall be prior and paramount over all subsequent liens upon any personal property within this state, or right to such personal property, belonging to the taxpayer without the necessity of recording as therein provided.

Nebraska seems generally to forego this absolute priority of tax liens, at least in contests with persons claiming a security interest in personal property.

Section 77-2712, R.R.S. Neb. (Reissue 1981) provides for a lien on all personal and real property owned by one owing any sales or use tax. Section 77-27,104 R.R.S. Neb. (Reissue 1981) provides for a similar lien on all personal and real property owned by one owing income taxes. Both sections provide explicitly for priority as follows: (77-2712 R.R.S. Neb)

(c) A lien imposed pursuant to this subsection shall be valid against any - subsequent creditor when notice of such lien and the amount due has been filed by the Tax Commissioner in the county in which the property subject to the lien is situated. In the case of any prior mortgage on real property or secured transaction covering personal property so written as to secure a present debt and also future advances, the lien provided in this subsection, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior lien unless the Tax Commissioner also notified the lienholder of the recording of such tax lien in writing, in which case the lien of any indebtedness thereafter created under such mortgage or secured transaction shall be junior to the lien provided for in this subsection.

Section 77-205 R.R.S. Neb. (Reissue 1981) provides for a general lien on all personal property owned by one against whom a personal property tax has been assessed. While this section does not expressly determine priority of the tax lien with respect to other interests, it has been construed to give priority to security interests created prior to the date the lien arises:

In other words, we must hold that a conditional sales contract executed before November 1 is superior to statutory tax liens of prior years, but inferior to such tax liens for subsequent years . . . Landis Machine Co. v. Omaha Merchants Trans. Co., 9 N.W.2d 198 (Neb. 1943).

B. Other Statutory Liens

While the code is inapplicable to statutory liens under U.C.C. 9-102(2), it provides for the subordination of perfected security interests to certain liens under section 9-310:

9-310. Priority of certain liens arising by operation of law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Most states have a variety of such laws. For example, among others, Nebraska gives lien protection for the cost of work to persons who repair automobiles or other machinery (Artison's Liens, Neb. Rev. Stat. § 52-201 (Reissue 1978)), those who repair jewelry, clocks and the like (Jewelers' Lien for Repair Work, Neb. Rev. Stat. § 52-301), and persons who provide services or materials in the production of crops (Threshers Liens, Neb. Rev. Stat. § 52-501; Petroleum Products Lien, Neb. Rev. Stat. § 52-901).

The U.C.C. gives priority to such liens unless they "expressly provide otherwise." U.C.C. 9-310. This is so even where prior court decisions had given priority to the secured party. See Comment 2 to U.C.C. 9-310.

However, determination of when a statute "expressly provides otherwise" can be difficult. Furthermore, it is doubtful that 9-310 applies to all statutory liens, for example,

non-possessory liens, see note, 23 Drake L. Rev. 169, 176 (1973). Thus priority between such liens and a secured party may be left to statutory interjection and court decision.

The interaction between the Nebraska Artisans Lien, supra, the Nebraska Certificate of Title Act, Neb. Rev. Stat. § 60-110 (Reissue 1978) and U.C.C. 9-310 illustrates some problems with applying 9-310.

In White Motor Credit Corp. v. Sapp Brothers Truck Plaza, Inc., 197 Neb. 421, 249 N.W.2d 489 (1977) the Supreme Court construed the Certificate of Title Act and Artison's Lien Law so as to give priority to the secured party who properly notes his security agreement on the certificate of title. White, at 493. This was because the Title Act states that a security agreement properly noted "shall be valid as against the creditors of the debtor, whether armed with process or not." Id.

This seems to imply that the "expressly provide otherwise" language of U.C.C. 9-310 refers to such language not only in the statute creating the lien (here, the Artisons Lien, supra) but also every other relevant statute. Thus, while the Nebraska Artisons Lien law contains no language subordinating that lien to a perfected security interest, the Certificate of Title Act, which determines only how one perfects a security interest in motor vehicles, does contain such language. Thus, it makes the Artisons Lien subordinate. One wonders whether such a result will advance the purpose of 9-310, which is at least to simplify these priority problems. It may well be, as was suggested in a recent note, U.C.C. Section 9-310, The Certificate of Title Act, and the Artisons Lien: Three

Act Play or Three Ring Circus?, 11 Creighton L. Rev. 947, 970 (1977) that 9-310 may yet be construed, to give priority to Artisons Liens.

II.

Priority of Lien Claimants, Mortgagees, and Secured Parties Under the Nebraska Construction Lien Law

Effective January 1, 1982 Nebraska adopted the Nebraska Construction Lien Act, § 52-125 R.R.S. Neb. (1982 Supp.) which replaced the prior Mechanics Lien Law, §§ 52-101 to 52-121, R.R.S. Neb. This Act was primarily designed to resolve the problems presented by such decisions as Ideal Basic Industries v. Juniata Farmers Cooperative Association, 205 Neb. 611, 289 N.W.2d 192 (1980) [a "supplier of a supplier" was not entitled to protection under the old mechanics lien law] and Wickes Corp. v. Frye, 202 Neb. 23, 273 N.W.2d 663 (1979) [payment by owner to contractor for work done by subcontractor does not prevent subcontractor from obtaining lien when contractor does not actually pay that subcontractor]. However, the new lien law also contains express priority provisions concerning the rights of various lien claimant and other parties, another troublesome area under old law. See Chicago Lumber Co. v. Horner, 210 Neb. 833, 312 N.W.2d 87 (1982) Gilchrist v. Wright, 167 Neb. 767, 94 N.W.2d 476 (1959).

The new Act attempts to resolve the Ideal, supra, "supplier problem by removing any limit on who may be a lien claimant, based on supplying materials, substituting instead the general requirement that materials be supplied with the intent that they be incorporated in the realty, and actually be so incorporated. § 52-134 R.R.S. Neb. (Supp. 1981).

The Wickes, supra, problem of double liability of owners is addressed in § 52-136. If the owner is a "protected party", see § 52-129, which means primarily a residential owner, a lien other than the prime contractor's lien can be only in an amount up to the lesser of the amount unpaid and owed to the claimant, or the amount left unpaid under the prime contract.

The priority and attachment problems illustrated by Chicago Lumber and Gilchrist, supra, are now governed by Sections 52-137, 52-138 and 52-139. Those sections state:

52-137. Attachment and enforcement of lien; recording required; time limitation; attachment, when. (1) A claimant's lien does not attach and may not be enforced unless, after entering into the contract under which the lien arises and not later than one hundred twenty days after his or her final furnishing of services or materials, he or she has recorded a lien.

(2) If a lien is recorded while a notice of commencement is effective as to the improvement in connection with which the lien arises, the lien attaches as of the time the notice is recorded, even though visible commencement occurred before the notice is recorded. A notice of commencement is not effective until recording and, after recording, is effective until its lapse. A notice of commencement lapses at the earlier of its expiration as provided in subsection (2) of section 52-145 or the date it is terminated by a notice of termination as provided in section 52-146.

(3) If a lien is recorded while there is no recorded notice of commencement covering the improvement in connection with which the lien arises, the lien attaches at the earlier of visible commencement of the improvement or the recording of the lien, but if visible commencement has occurred before or within thirty days after the lapse of the last notice of commencement covering the improvement:

(a) The lien attaches at the time the lien is recorded if the lien is recorded within thirty days after lapse of the last effective notice of commencement; or

(b) The lien relates back to and attaches thirty-one days after the termination date if the lien is recorded more than thirty days after lapse of the last effective notice of commencement.

(4) If new construction is the principal improvement involved and the materials, excavation, preparation of an existing structure, or other preparation are readily visible on a reasonable inspection of the real estate, visible commencement occurs when:

(a) Materials are delivered to the real estate to which the lien attaches preparatory to construction;

(b) Excavation on the real estate to which the lien attaches is begun; or

(c) Preparation of an existing structure to receive the new construction, or other preparation of the real estate to which the lien attaches, is begun.

(5) In all cases not covered by subsection (4) of this section the time visible commencement occurs is to be determined by the circumstances of the case.

52-138. Priority among lien claimants. (1) All liens attaching at the same time have equal priority and share the amount received upon foreclosure of the liens and available for distribution to construction lien claimants in the same ratio as the ratio of the particular lien bears to the total of all liens attaching at the same time.

(2) Except as provided by subsection (3) of this section, liens attaching at different times have priority in the order of attachment.

(3) A claimant who records a notice of commencement after he or she has recorded a lien has only equal priority with claimants who record a lien while the notice of commencement is effective. Any priority which the claimant gained over third parties by recording his or her notice of lien is preserved for the benefit of all claimants having equal priority under this subsection.

52-139. Priority of construction liens as against claims other than construction lien claims. (1) Except as provided in this section, a construction lien has priority over adverse claims against the real estate as if the construction-lien claimant were a purchaser for value without knowledge who had recorded at the time his or her lien attached.

(2) Except as provided in subsection (3) of this section, a construction lien has priority over subsequent advances made under a prior recorded security interest if the subsequent advances are made with knowledge that the lien has attached.

(3) Notwithstanding knowledge that the construction lien has attached, or the advance exceeds the maximum amount stated in the recorded security agreement and whether or not the advance is made pursuant to a commitment, a subsequent advance made under a security agreement recorded before the construction lien attached has priority over the lien if:

(a) The subsequent advance is made under a construction security agreement and is made in payment of the price of the agreed improvements;

(b) The subsequent advance is made or incurred for the reasonable protection of the security interest in the real estate, such as payment for real property taxes, hazard insurance premiums, or maintenance charges imposed under a condominium declaration or other covenant; or

(c) The subsequent advance was applied to the payment of any lien or encumbrance which was prior to the construction lien.

(4) To the extent that a subsequent security interest is given to secure funds used to pay a debt secured by a security interest having priority over a construction lien under this section, the subsequent security interest is also prior to the construction lien.

(5) Even though notice of commencement has been recorded, a buyer who is a protected party takes free of all construction liens that are not of record at the time his or her title document is recorded.