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The Wisconsin Wage Lien: What Lenders Should Know

The words "priming lien" cause many lenders to shudder. While some priming liens, such as purchase money security interests, are expected and routinely accounted for in loan documentation, we find that wage liens are sometimes overlooked. We thought it was time for a refresher on Wisconsin's priming wage lien law, both to remind lenders that it exists and to give some strategies for mitigating risks associated with the priming wage lien.

As a refresher, Chapter 109 of the Wisconsin Statutes (the "Wisconsin Wage Lien Statutes") sets forth guidelines for employers related to payment of wages and giving advance notice of mass layoffs or plant closings. Employers who fail to comply with various requirements of the Wisconsin Wage Lien Statutes may be subject to claims by its employees or the Department of Workforce Development for unpaid wages (which include not only salary, but also things like vacation pay and bonuses), potential plant closing liabilities and potential civil and criminal penalties. Of particular importance to lenders, the Wisconsin Wage Lien Statutes allow for a priming lien (the "Wage Lien") on all of an employer's real and personal property located in Wisconsin for the full amount of any wage or plant closing violation claim, including any penalties assessed against the employer.

The Wage Lien takes priority over all other debts, judgments, decrees, liens or mortgages against an employer, including liens of secured creditors, even if the Wage Lien originates after the secured creditor's lien is perfected. Commercial lending institutions do have some relief from the priming Wage Lien. The Wage Lien takes priority over a lien of a commercial lending institution only as to the first $3,000 of unpaid wages earned by an employee or plant closing liability arising within the six months preceding the wage claim. Despite this cap, the amount covered by the priming Wage Lien can be substantial if the employer has many employees. You should note that while the term "commercial lending institution" includes banks, savings banks, savings and loan associations, and finance companies, among others, it does not include venture capital funds or individuals who become lenders. With respect to entities which are not commercial lending institutions, there is no cap.

What can lenders to do mitigate risks associated with the priming Wage Lien?

- Establish a reserve. Lenders that are commercial lending institutions can

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roughly calculate the risk of a priming Wage Lien by multiplying the number of employees by $3,000. A lender can require that its borrower maintain a reserve of at least that amount so that if a Wage Lien is applicable, the borrower will still have enough assets to pay back the lender's loan.

- Look for additional collateral or security to secure loans made to the borrower. Perhaps there is property located outside of Wisconsin (and therefore not subject to the Wisconsin Wage Lien Statutes) that can provide additional value, or the lender can obtain a guaranty or collateral from an affiliate of the borrower.
- Document specific representations, warranties and covenants that relate to paying employees on time or require certification that wages were paid when due.

Lenders, particularly asset-based lenders, should review potential risks associated with the Wage Lien and consider taking steps to mitigate the risk, if appropriate. For more information on the Wisconsin Wage Lien Statutes, please contact a member of Reinhart's Banking and Finance Group.

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