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Statutory Agricultural Liens in North Dakota

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Highlights

Agribusinesses that sell production inputs to farm operators on credit seldom are protected with a security agreement to assure payment. State legislatures recognize the infrequency that a lien is acquired but also realize the important function these suppliers perform as a source of credit for farmers. Their response has been to enact laws which grant suppliers a lien upon a farmer's property or resulting production to help assure payment.

Liens that arise solely through operation of legislation are referred to as statutory liens. They also are considered involuntary because the indebted purchaser does not need to consent or agree to the imposition of a lien. Statutes frequently grant such liens priority over voluntary liens even though the statutory lien arises later.

North Dakota has numerous statutory liens which pertain to agriculture and include threshing, drying, crop production, seed, motor fuel, fertilizer, farm chemicals, warehouse, repairman, and mechanic liens. Landlord liens and crop mortgages are not strictly involuntary but are related since they apply to crops and have their application limited by statute. Statutory law also delineates the procedure for enforcing an involuntary lien. Suppliers and lenders who extend credit as well as farmers need an understanding of when a statutory lien may arise, how it will be enforced, and who among competing creditors will have priority. This report summarizes current North Dakota law on statutory liens that relate to agriculture.

Statutory Agricultural Liens in North Dakota

by

Timothy A. Priebe, Owen L. Anderson, and David M. Saxowsky*

Production practices in today's agriculture involve extensive use of purchased inputs such as fuel, fertilizer, seed, repairs, and chemicals. Suppliers of these inputs frequently permit farmers to buy on credit with an understanding that payment will be within several months.

Agribusinesses that extend credit for purchases by farm operators are similar to a financial institution or person which loans cash to buy land, equipment, or livestock. However, suppliers seldom request and therefore are not protected with a land mortgage or security interest in the farmers's crop, livestock, or machinery. Inconvenience, time required, cost, and negative reaction by farmers are common perceptions as to why suppliers do not obtain such protection for themselves. Thus, the agribusiness has little protection in terms of repayment priority, even though they provided inputs essential to raising a crop or livestock, or repairing and maintaining the farm land, buildings, or equipment. The alternatives of refusing to extend credit or requiring a security interest are likely to have a negative impact on sales and therefore are not adopted as business policy by suppliers.

State legislatures, including North Dakota's, recognize the involvement and importance of input and service suppliers as a source of credit for purchasers. Their response has been to enact laws which encourage suppliers to continue to sell on credit. The encouragement is in the form of repayment protection should the purchaser fail to pay as agreed. This protection is provided by laws which impose a lien upon property of a borrower (purchaser) for benefit of the creditor (seller).

These liens are referred to as statutory liens since their details have been specified by state legislatures. They are involuntary liens because they arise without any consent from the borrower. This is unlike a mortgage or security interest, which cannot exist unless the borrower has agreed to it. A statutory lien usually will encumber (that is, be against) the property that has been purchased or improved as a result of the credit transaction.

All persons and businesses involved in farming should be aware of statutory liens. Farmers need to recognize and understand when an unpaid supplier may be able to encumber their commodities. Purchasers of agricultural products and financial institutions should have an awareness of when their interest as a buyer or lender may be subordinated to the lien of an unpaid supplier. Agribusinesses that extend unsecured credit to farm

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operators will benefit by knowing what rights the state law extends and the steps necessary to assure payment should an account become delinquent.

This report explains how the various involuntary, or statutory, liens apply to North Dakota agriculture. The first part addresses liens that pertain to crops. The second part discusses liens on property other than crops, and the third part explains enforcement of statutory liens.

Statutory Liens on Agricultural Crops

Statutory liens that a creditor may obtain on a farmer's crop include a threshing or drying,[1] crop production,[2] seed,[3] motor fuel,[4] fertilizer or farm chemical,[5] and warehouseman's lien.[6] North Dakota law also provides a sugarbeet production lien[7] as a consequence of the unique relationships utilized in producing and marketing that crop. Prior to 1981, farm laborers could obtain a "farm laborer's lien" on the employer's crop for the value of their services,[8] but this statute was repealed by the 1981 Legislature.[9] A crop mortgage as well as a real estate lease also may encumber a farmer's crop, but these are voluntary liens. They will be briefly mentioned in this section, however, because their applications are defined by statute.[10]

Several points need explanation before the individual liens are addressed. A creditor must strictly comply with requirements set forth in the statute to preserve an involuntary lien.[11] These requirements generally are either to file a public notice with the county register of deeds within a specified time period after extending the credit or to retain possession of the item.[12] The purpose of filing or retaining possession is to notify other potential creditors and buyers that a lien may encumber the property.[13] Failure to file or retain possession waives any right to the lien.[14]

The 1985 North Dakota Legislature amended the law governing the notice procedure that must be followed by lenders and suppliers, but this amendment pertains only to the relation between the creditor and a purchaser. It does not alter the status between a secured lender and others who may have an interest in the commodities such as another lender or a trustee in bankruptcy. Restated, the 1985 amendment does not eliminate any of the previous requirements for lenders desiring to perfect a security interest; instead, it adds a requirement. Consequently, a supplier must continue to follow the procedure for filing locally in order to be perfected against nonpurchasers claiming an interest in the commodities plus file a document with the Secretary of State in order to be perfected against buyers of farm products. Agricutlural suppliers who do not complete this additional step will not be able to enforce a statutory lien against a buyer, as explained in a later section.

Priority for repaying statutory liens is specified in law and often ranks above voluntary liens. The reason for granting priority to involuntary liens is to encourage suppliers of inputs or services to extend credit so that the production process will be completed. For example, granting priority to a bank which provided funds for planting and raising the crop could leave a custom harvester unpaid if the crop proceeds are not sufficient to pay all production costs. Consequently, a ripe crop may remain unharvested, and the

bank may receive no payment. By comparison, the harvest will occur if the custom combiner is paid before other creditors. The bank also benefits because it will receive some proceeds from the crop rather than none if the crop is unharvested.

Implication of a lien is that the creditor holding a lien must be paid before any one is able to acquire clear title to the grain. For example, an elevator that purchases grain subject to an statutory lien will be liable to the unpaid creditor for taking (converting) property that should have been used to pay the creditor.[15] As a result, an elevator may find itself being required to pay for some of the grain twice--once to the farmer and a second time to the unpaid creditor who holds a lien on the commodity. The elevator would have a legal cause of action against the farmer, but it has a small chance for repayment if the farmer has no unemcumbered assets.

The 1985 Legislature passed a resolution directing the Legislative Council to study the state statutory lien laws and report its findings and recommendations to the 1987 Legislature. The Interim Legislative Judicial Process Committee has held hearings as part of that study and currently is preparing a bill draft to amend some provisions of the statutory lien laws.

Threshing or Drying Lien

Any person or business that threshes or dries a grain crop for another person may obtain a lien on the harvested or dried grain.[16] This lien is available to any person who owns or leases a combine or drying machine, but the amount of the lien is limited to the value of the services rendered.

A threshing or drying lien initially arises without any action required on part of the person who provided the service.[17] The crop will be encumbered by the lien for 90 days after the work has been completed. The lien expires at the end of that period unless the creditor has filed a statement with the county register of deeds during the 90 days.[18] A filed lien is immediately effective and relates back to the date combining or drying was commenced.

A filed lien statement must be verfied by oath and specify

1. the kind and quantity of grain involved,
2. the name of person for whom the service was performed,
3. a description of the land where the work was done, and
4. the agreed upon price or a reasonable value of the service if no price was agreed upon.

Failing to strictly comply with the statutory requirements will invalidate the lien.[19] For example, the North Dakota Supreme Court has ruled that a threshing lien is not valid if the quantity of grain has been omitted even though the statement specified the price per acre and the number of acres.[20] A misstatement as to the quantity of grain does not invalidate a filed lien as long as the mistake was honest and was not done with an intent to defraud.[21] The Court also ruled that an oath is verified when administered by an authorized officer (such as a notary public) and the party claiming the lien knows that an oath is being taken.[22]

Threshing and drying liens are given first priority over other statutory and voluntary liens.[23] The rationale for granting priority, as suggested in the introduction to this report, is to assure that the last steps in the production process are completed rather than having the crop remain unharvested. Threshing and drying liens are granted equal priority; consequently, priority will be given to the lien that was created first.[24] *Created* is not defined in the code, but it appears to mean the time when a lien arose rather than when it was filed. This is the general rule for determining priority among statutory liens of equal rank unless a more specific law sets forth a contrary rule.

Crop Production Lien

Certain governmental entities that furnish farmers with seed, feed, gas, oil, repairs, or money to buy these inputs may obtain a lien on crops produced from such inputs.[25] Entities that are entitled to this lien include "North Dakota counties, the United States, or any bureau, agency, or department thereof." Examples of entities that may obtain such a lien are the Farmers Home Administration (FmHA) and the Farm Credit Services (FCS). The practical application of a crop production lien is somewhat limited, however, because these agencies regularly require a security interest in the crop rather than rely upon a statutory lien.

An entity seeking a crop production lien must file a lien statement with the County Register of Deeds within 30 days of supplying the products.[26] The statement has to be verified by oath of the officer of the county or government agency which authorized the expenditure. The lien statement must include[27]

1. the kind, quantity, and value of the goods furnished,
2. the amount of money advanced for such purchases,
3. the name of the person to whom the goods were furnished,
4. a legal description of the land where the inputs will be used, and
5. a statement that a lien is claimed on the crops.

A crop production lien has priority over all liens and encumbrances on the crop except a threshing or drying lien.[28] Priority among several crop production liens will be granted in the order that the lien statements are filed with the register of deeds.[29] This is one example of an exception to the general rule mentioned in the preceding section for determining priority among statutory liens of equal rank.

Seed Lien

North Dakota law provides a statutory lien for any person who furnishes seed to another person.[30] Purpose of the lien is to secure payment of the seed's purchase price. The lien, after proper perfection, will encumber the crop produced from the seed. A person claiming a seed lien has the burden of establishing that the grain being claimed was produced from the furnished seed.[31]

A seller obtains a seed lien by filing a lien statement with the register of deeds for the county in which the seed will be used.[32] The filing must be within 90 days after the seed is furnished for the lien to arise. A North Dakota court decision held that seed is "furnished" at the time a contract is entered into for the sale of the seed.[33] The time a buyer takes actual possession is not determinative of when the 90-day period for filing a lien begins. The North Dakota Supreme Court has not addressed whether there is an automatic 90-day seed lien, but it is likely that the court would follow the ruling in the threshing lien context[34] by finding an automatic lien.

A seed lien is waived if a statement is not filed by the seller within 90 days of the sale.[35] The statute specifies that a seed lien statement be verified by oath and contain

1. the kind and quantity of seed,
2. the value of the seed,
3. name of the person to whom the seed was furnished, and
4. a description of the land where the seed was used.

An incorrect or omitted land description on the statement will render the lien invalid.[36] An attempt to correct a lien statement by filing an addition is likely to fail unless it also is verified by the seller.[37]

A properly perfected seed lien will have priority over all liens and encumbrances on the crop that was grown from the seed except threshing, drying, and crop production liens.[38]

Motor Fuel Lien

A lien may be obtained by any person who furnishes gasoline, diesel fuel, tractor fuel, or other motor fuel to another for use in the production of an agricultural crop.[39] Its purpose is to secure payment for the furnished fuel. The lien will be upon all crops produced by the use of the fuel. It is not clear, however, what the legislature meant by crops "produced by the use of such fuel." A liberal interpretation would indicate that using the fuel for any part of the production process (tillage, planting, harvesting, or even rock picking) is sufficient to encumber the resulting crop.

A motor fuel lien only can be obtained by filing a lien statement with the register of deeds in the county in which the fuel will be used.[40] The statute is clear that the lien does not automatically arise. A statement may be filed at any time after the fuel is furnished but not later than November 1 of the year. The lien commences from the date of filing the lien rather than from the date the input is furnished, as is the case of some statutory liens already discussed.

A motor fuel lien must be verified by oath and meet certain requirements which include

1. name and address of person claiming the lien,
2. name and address of person to whom the fuel was furnished,
3. name of the crops grown by the purchaser,

4. description of the land where the fuel will be used, and
5. amount of fuel furnished.

It probably is advisable to include the purchase price of the fuel in a lien statement even though it is not required by the statute.

A properly perfected motor fuel lien will have priority over all other liens and encumbrances on the crops raised by using such fuel, except threshing, drying, crop production, and seed liens.

Fertilizer and Farm Chemical Liens

Any person who furnishes fertilizer or farm chemicals to a farmer may obtain a lien on the crops produced from the use of those inputs.[41] The lien is to secure payment of the purchase price of the fertilizer or chemicals.

Requirements for a fertilizer or farm chemical lien are contained in the same statute as the seed lien and are essentially identical. A lien statement must be filed with the county register of deeds within 90 days after the inputs are provided.[42] The information that needs to be filed includes

1. kind and quantity of fertilizer or farm chemical furnished,
2. value of the fertilizer or farm chemical furnished,
3. name of the person to whom the goods were furnished, and
4. a legal description of the land on which the goods will be used.

The lien statement has to be verified by oath, and the omission of any requirement from the statement will void the lien.[43] The lien is waived if the statement is not filed within the specified period.[44]

A fertilizer and farm chemical lien is not given the same priority as a seed lien. Instead, it has priority over all liens and encumbrances against the crop except threshing, drying, seed, crop production, and motor fuel liens.[45]

Sugarbeet Production Lien

The North Dakota legislature created a separate lien for creditors of sugarbeet producers.[46] A supplier may obtain this lien after entering into a contract to furnish seed, insecticide, fertilizer, labor, material, cash advances, or services to be used in the production of sugarbeets. The lien will be upon the sugarbeets produced and for the amount due under the contract.

Eligibilty for a sugarbeet production lien differs from that of other statutory liens that are available after a supplier provides inputs. This lien is available only to suppliers who have a written contract with the sugarbeet producer. A verified copy of the contract must be filed within 60 days of entering into the agreement to obtain the lien.[47] The contract is to be filed with the register of deeds in the county where the sugarbeets will be grown and must include the names and post office addresses of all parties plus a legal description of the land upon which the crop will be grown. Failure to

file the contract constitutes a waiver of the lien. Only a crop production lien has priority over a sugarbeet lien.[48]

Scope of a sugarbeet production lien is extensive and encompasses creditors who agree in writing to supply any production input or cash advances to sugarbeet producers. The practical consequence of requiring a contract for the lien to arise is that only suppliers willing to take the additional step and incur the cost of requiring a written contract benefit from this lien. These suppliers benefit because a contract (lien) may be filed and encumber a sugarbeet crop before any inputs are delivered or the crop is planted. Suppliers who do not enter into a contract will have to rely on other statutory liens and wait until they have actually provided the inputs or services before perfecting a lien in the crop. Suppliers willing to enter into a written contract also benefit from the priority granted a sugarbeet production lien, which renders all other statutory liens available to private individuals subordinate even if the sugarbeet production lien arises later.

Warehouseman's Lien

North Dakota law permits grain elevators and warehouses to impose a charge for storing grain.[49] The warehouse, however, may not begin assessing a storage charge until it has issued a warehouse receipt to the owner of the grain. The receipt is documented evidence that holder of the receipt owns some of the grain stored in the warehouse. The law also provides that a warehouse may sell a sufficient quantity of the stored grain to cover unpaid charges arising from the storage arrangement.

Another statute allows warehouses and elevators to obtain a lien upon stored grain to assure payment of storage and other related charges such as receiving and redelivery.[50] The lien will be upon grain described in the warehouse receipt or proceeds from sale of the grain. This lien is dependent on possession and, therefore, terminates when the warehouse relinquishes possession of the grain or its proceeds. The lien also terminates if the warehouseman voluntarily delivers or unreasonably refuses to deliver the grain upon presentation of the warehouse receipt. A warehouse, however, may impose a lien for unpaid charges arising from a previous storage arrangement if that fact is stated in the receipt that is issued for the grain which is currently being stored.

A warehouse lien will be superior to all other statutory liens encumbering the grain even though it is not explicitly listed in the other statutes. This interpretation is primarily based on the warehouse law that permits sale of stored grain sufficient to cover unpaid storage charges.

Lien for Unpaid Earned Property or Casualty Insurance Premiums

Another lien that can be obtained on agricultural crops is for the value of unpaid insurance premiums.[51] Any insurance agent, insurance broker, or surplus lines insurance broker may obtain a lien on crops protected by the insurance for which there remains unpaid premiums. An insurance agent is any person appointed by an insurance company to solicit applications for or negotiate an insurance policy on behalf of the company.[52] An insurance

broker is any person who acts or aids in negotiating insurance contracts even though not a licensed agent for the insurance company.[53] A surplus lines insurance broker is any person who solicits or negotiates an insurance policy (1) from a company not licensed to transact business in North Dakota and (2) that cannot be procured from licensed insurers.[54] This lien is limited to earned but unpaid premiums for property or casualty insurance policies.[55]

A person claiming this lien must file a verified statement with the register of deeds in the county where the insured party is located.[56] The statement is to be filed within 90 days after effective cancellation of the policy and must include

1. name of the policyholder,
2. nature and quantity of the insurance coverage,
3. amount of unpaid but earned premium,
4. a description of the property covered by the insurance and subject to the lien, and
5. a statement that a lien is claimed upon the property.

This statement must be served upon any loss payee named in the policy.[57]

The statute does not contain any information on the priority of an unpaid insurance premium lien. The law is clear, however, that this lien would be inferior to threshing, drying, crop production, seed, motor fuel, fertilizer, farm chemical, and sugarbeet production liens.

Crop Mortgages

Crop mortgages and landlord's liens differ from the statutory liens discussed above because they are not genuine involuntary liens. The owner of the growing crop must agree to the lien for either to arise in favor of a creditor. These two liens warrant discussion, however, because state statutes define their application.

North Dakota law, since the 1930s, has prohibited creditors from imposing a mortgage upon a growing or unharvested crop, and any arrangement which encumbers a growing crop will be considered void and unenforceable.[58] This law, however, does not prohibit liens or security interests upon grain after it is harvested.

Exceptions to the general prohibition against crop mortgages have been enacted over time. The exception allows certain financial institutions to impose a lien on growing or unharvested crops and currently applies to (1) any agency or department of the federal, state, or county governments, (2) banking institutions, and (3) agricultural lending agencies. The practical result of the exception is that almost any commercial or governmental entity involved in agricultural credit may impose a crop mortgage if the borrower agrees.

A security agreement which imposes a crop mortgage is not valid nor may it be filed if it also encumbers personal property.[59] Lenders seeking both a crop mortgage as well as a security interest in the borrower's equipment, for example, must execute two security agreements. Application of a crop mortgage was further restricted in 1985 by an amendment that limits the effectiveness

of a crop mortgage to one year immediately after the security interest is taken.[60]

A crop mortgage is valid between the lender and borrower when the farmer (1) has received the loan proceeds, (2) signed the security granting a lien on the crop to the lender, and (3) has an ownership interest in the growing crop. A lender does not have priority over other crop mortgagees or buyers until a financing statement is filed with the register of deeds in the county where the crop is being grown. The financing statement must include names of the indebted farmer and lender, signature of the farmer, address of the lender, the debtor's mailing address, and the legal description of the land where the crop is growing.

Crop mortgages are not given the same priority as the statutory liens discussed in preceding sections. Lower priority is justified on the basis that creditors who obtain crop mortgages may not have provided production inputs necessary to raising a crop. A second justification is that a creditor with a crop mortgage has the option of providing the capital needed to grow and harvest a crop. Lending sufficient capital to pay all other providers of inputs and services would assure the crop mortgage has first priority.

Landlord's Lien

Landowners who lease their land to farmers can acquire a lien on the crops grown on the land if the lease agreement reserves title to the landlord in all or part of the crop.[61] The lease agreement may reserve the title until the tenant has complied with all conditions of the arrangement and the crop has been divided.

The landowner must file the lease agreement with the register of deeds in the county where the land is located in order to obtain this lien. The lease has to be filed prior to July 1 of the year in which the crop is raised. A landowner who fails to file the lease will be deemed to have waived the right to this lien. A landlord may want to file a financing statement (as described in the preceeding section) also, since North Dakota law is not clear as to whether filing only a copy of the lease agreement is adequate since adoption of the Uniform Commercial Code in 1965.

Reservation of title in a properly filed lease will be effective against subsequent purchasers and encumbrances. The statute does not state the priority of a landlord's lien with respect to the statutory liens already discussed. However, logic would suggest that a statutory lien would have priority, since the law states that all other liens and encumbrances upon the grain would be subordinate to a statutory lien. Consequently, a landlord's lien will not be given priority over threshing, drying, seed, crop production, motor fuel, fertilizer, and farm chemical liens.

Priority of Liens on Agricultural Crops

Several liens may encumber the same commodity; therefore, it is important to understand the relative priority among statutory liens as well as other encumbrances, such as a security interest under the Uniform Commercial

Code. Certain statutory liens have priority over all other liens and encumbrances against the crop. These liens apparently will also have priority over previously perfected security interests because such a security interest would be considered an "other lien or encumbrance" on the grain.

First priority belongs to a warehouseman as long as a warehouse lien encumbers the property. This lien will have priority over all security interests in the grain as well as all properly perfected statutory liens. This interpretation conflicts with statutory language (such as contained in the statute describing a threshing lien) that does not explicitly mention a warehouse lien. But not granting priority to a warehouse lien would render language in the Uniform Commercial Code and warehouse law meaningless. Therefore, an effective warehouse lien arguably has first priority. This lien and priority is lost, however, when the warehouseman relinquishes possession.

Respective priorities of statutory liens for all agricultural crops (except sugarbeets) are (1) threshing and drying, (2) crop production, (3) seed, (4) motor fuel, and (5) fertilizer and farm chemical. These priorities prevail even though a lower ranked lien may have been perfected before a lien with priority arose.

A sugarbeet production lien is subordinate to a crop production lien (item 2, above) but has priority over all other liens. Warehousing, threshing, and drying liens are irrelevant for sugarbeets since production of sugarbeets does not include these activities. Consequently, the order of priority for statutory liens upon sugarbeets is crop production, sugarbeet production, seed, motor fuel, fertilizer, and farm chemicals.

A landlord's lien, crop mortgage, and lien for unpaid insurance are perfected by filing and are effective against all subsequent purchasers and encumbrances upon the grain except statutory liens described above. Priority among these three liens and a voluntary security interest in a harvest crop will be determined according to the time of filing. Priority will be given to the creditor who was first to file.

Statutory Liens on Property Other Than Agricultural Crops

Several other statutory liens available to farmers and farm creditors in North Dakota include repairman, mechanic, agister, vendor, and purchaser. These liens are not secured by agricultural crops but rather by some other property depending on the nature of the debt. Priority conflicts between these liens and those explained in the preceding sections will not arise because the liens explained in this section do not encumber grain or other farm commodities.

Repairman's Lien

Persons who provide repairs at the request of the owner can obtain a repairman's lien.[62] The lien is available to any mechanic, farm equipment dealer, machinist, blacksmith, welder, or aviation operator who has an established place of business in North Dakota. A person is entitled to the lien after repairing a car, truck, engine, aircraft, or farm equipment.

No filing is required to perfect the lien as long as the repairman retains possession of the property.[63] By comparison, a verified lien statement must be filed with the county register of deeds within 90 days after the work is completed if possession is relinquished. The statement must specify

1. the work performed,
2. the material furnished,
3. the agreed upon price or reasonable value if no price was agreed to,
4. the name of person for whom the work was done, and
5. a description of the property.

A separate statement does not need to be filed for each job performed for one person.[64] Instead, the repairman may file a single statement which specifies the needed information for all unpaid jobs performed for that person during the preceding 90 days. The lien is waived if a repairman relinquishes possession and fails to timely file a statement.

A repairman must send notice by certified or registered mail to the owner of the property that a lien was filed.[65] This notice has to be sent within 20 days of the filing. A repairman also must send notice to persons with liens against the property if the repair will be more than $1,000 or 25 percent of the repaired property's value, whichever is greater.[66] Failure to provide the notice subordinates a repairman's liens to existing liens.[67]

A lienholder, upon receipt of a notice, may object to the intended repairs and, thereby, limit the repairman's lien to the greater of $1,000 or 25 percent of the property's repaired value. A repairman's lien has priority over all other encumbrances if all necessary notices are provided and there is no objection.

Mechanic's Lien

A mechanic's lien is available for persons who improve real property whereas a repairman's lien applies only to personal property. The law states that any person who improves real estate through labor or materials shall have a lien upon the improvement and the land.[68] The lien is effective from the time the first labor or material is furnished upon the premises for the improvement. Repairing or constructing a building, installation of an irrigation system, or constructing a dam are examples of improvements to real estate.

A person intending to claim a mechanic's lien must file a verified notice with the register of deeds in the county where the land is situated.[69] This notice has to be signed by the person entitled to the lien and specify:[70]

1. the name of the person in possession of the land,
2. a description of the property to be encumbered,
3. the date of the contract, and
4. that a mechanic's lien will be perfected unless the account is paid.

A mechanic's lien is perfected by filing a second time with the county register of deeds within 90 days after completion of the work.[71] The second filing must describe the property and the amount due. The lien will not arise, however, unless the mechanic has maintained an itemized separate account for this contract and served written notice by registered or certified mail to the owner demanding payment and stating that a lien will be perfected if not paid within 15 days.[72]

A mechanic's lien will have priority over other encumbrances against the real estate except a mortgage that secures a loan given for the purpose of funding the improvement.[73]

Agister Lien

Any person who feeds, herds, or pastures horses, sheep, or cattle may acquire a lien upon the animals for the amount due as a result of the service.[74] The person providing the service (the agister) may retain possession of the livestock until the obligation is paid.

An agister lien has priority over all other liens and encumbrances upon the animals for the first 10 days after the agister takes possession.[75] The agister can retain priority by providing notice during this period to prior lienholders that a lien is being claimed. The written notice must specify the purpose of the service that will be rendered and name the person who entrusted the livestock to the agister.

Liens for Sellers and Buyers

Agriculture, like most other industries, involves numerous sales transactions with one person selling and another buying. North Dakota law has three statutory liens intended to protect sellers of personal property, sellers of real property, and buyers of real property. Their application is quite narrow but merit a brief review.

A seller of personal property has a lien upon that property for the sale price if the seller has possession of it when the price becomes payable.[76] For example, a farmer agrees to sell a piece of equipment to a neighbor with delivery to be during the next several weeks. They also agree that the selling price will be paid within 10 days regardless of whether the buyer had taken possession by that time. A "vendor's lien of personalty" will arise if payment is not made as agreed and the seller remains in possession of the implement at that time. Procedure for enforcing the lien is explained in a subsequent section; the contract cannot simply be cancelled unless the parties agree. This lien is dependent upon possession and terminates when possession is relinquished.

A person who sells real property to another party has a lien on the land for the amount of the purchase price that remains unpaid and unsecured.[77] This lien is referred to as a "vendor's lien," is not dependent on possession, and is not available when the unpaid purchase price is secured by a mortgage, collateral, or other means. A buyer of real property has a lien upon the property for the amount that has been paid and that may be recovered if the

seller cannot complete the sale.[78] This lien is a "purchaser's lien" and is not dependent on possession.

Both vendor's and purchaser's liens are subordinate to (1) subsequent creditors who are unaware of the liens, and (2) subsequent purchases and encumbrances made in good faith and for which a payment has been given.[79] The statute has no provision for filing or otherwise providing notice of a vendor's or purchaser's lien.

Catch-all Possessory Lien

There is a statutory "catch-all" lien in North Dakota.[80] This lien is available to persons who perform certain services to the owner of personal property if such services do not entitle the creditor to one of the specific statutory liens. Services which trigger this lien are repairing, improving, safekeeping, or transporting goods. This lien is dependent on possession; that is, the lien is lost as soon as the provider of the service relinquishes possession.

This lien may be enforced by notifying the owner through registered or certified mail of the lienholder's intent to foreclose and assume ownership if the amount owed is not paid within 60 days. The owner may challenge this procedure and thereby require the lienholder to proceed by action as explained in the following section.

Extinguishment and Enforcement of Statutory Liens

The preceding sections described statutory liens available in North Dakota that are likely to apply to agriculture. The explanations focused upon when a lien will arise, who is entitled to the lien, what steps must be taken to perfect the lien, when the lien terminates, and what priority the lienholder has been granted. This last section reviews the procedure that must be followed by a lienholder to enforce or foreclose a statutory lien.

Implications of a statutory lien were briefly mentioned in the section entitled Statutory Liens on Agricultural Crops. The idea was that a person who acquires property subject to a statutory lien is liable to the lienholder for conversion, that is, taking property that someone else is legally entitled to (the lienholder) and converting it to their own use. The remedy for wrongfully taking or converting property is to pay the dollar value of the lienholder's interest in the property up to the value of the property.

Statutory liens can cause practical problems for agricultural lenders and purchasers of farm commodities. Both groups have interest in a farmer's production that can be subordinated to a statutory lien. Priority rules combined with the 30-, 60-, or 90-day period before a lien must be filed as part of the public record creates a time when buyers and lenders are not certain whether their interest will be subordinated. Infrequent use of statutory liens at the current time has minimized the potential difficulties, but the problem could intensify as more farmers seek credit from suppliers who, in turn, seek to secure their position with statutory liens. The North Dakota Supreme Court has decided, however, that an unpaid creditor must reveal

an unfiled lien if the creditor is aware that a third person is acquiring an interest in the crop.[81] Failure to reveal the unfiled lien will prevent the creditor from later collecting from the third person if the debt is not paid by the farmer.

The focus of this section is on the relation between a lienholder and a debtor rather than a lienholder and a third party. Topics that are discussed include (1) remedy for a debtor who disagrees with imposition of a lien, (2) a debtor's alternative for satisfying a claim, (3) foreclosure procedures a lienholder must follow if the obligation is not satisfied, and (4) a debtor's redemption rights following foreclosure.

Release of a Lien by Undertaking

Any owner of personal or real property that is encumbered by certain statutory liens may seek a release of the lien because the owner has a defense against collection on the lien and that a disagreement exists as to the validity or amount of the lien.[82] The lien will be released if the owner of the property files (1) an affidavit stating that a defense and disagreement exists and (2) an undertaking or commitment by the owner to pay to the lienholder the amount that could have been recovered plus costs. The undertaking has to be supported by two sureties. An affidavit is a written statement, signed under oath by the person who is making the statement, and witnessed by a notary public. A surety is a person or company that (1) promises to pay the owner's obligation if the owner fails to do so and (2) has a net worth twice the amount of the obligation.

A copy of the affidavit and undertaking must be served upon the lienholder and a hearing will be held as to the sufficiency of the sureties.[83] A lien will be discharged if the sureties are justified, leaving the unpaid creditor to seek payment through other legal recourse.[84] Statutory liens that are vulnerable to an undertaking include mechanic's, repairman's, seed, sugarbeet production, crop production, threshing, and unpaid earned insurance premium liens.[85]

Satisfaction

Any person who owns personal property that is subject to a lien can satisfy such lien at any time before the debt is due.[86] Satisfaction is accomplished by paying the full amount due on the maturity date. A lien is satisfied by paying the debt under which the lien arose.

A lienholder must file within 30 days after a lien is satisfied a certificate of discharge with the county register of deeds where the lien was filed.[87] The notice informs other persons that the property is no longer subject to the lien. A debtor who is adversely impacted by a creditor's failure to file a certificate of discharge may recover monetary damages from that creditor.

Foreclosure

A creditor's remedy when a purchaser defaults on a debt secured by a statutory lien is to foreclose the lien.[88] The legal procedure and other requirements that have to be followed vary depending on whether real or personal property is subject to the lien. This discussion focuses upon creditors who hold a statutory lien on personal property and does not address enforcement of security interests in personal property nor real property mortgage foreclosures.

Prior to 1985, the type of statutory lien and who had possession determined which enforcement procedure a creditor would follow. A creditor whose lien was dependent upon possession could sell the property as if it had been pledged. Creditors not in possession of the encumbered property could seize it themselves if they could do so without a breach of the peace. The alternative was to initiate a "Claim and Delivery" action with the court assisting in the repossession. Once possession had been regained, a creditor would follow the procedures established in the Uniform Commercial Code and conduct a commercially reasonable sale.

State law also permitted creditors to initiate a judicial action to foreclose a lien on personal property rather than follow the alternatives described above, but it was seldom used. Primary reason for creditors' reluctance to initiate an action was the risk of being defeated because the authorizing statute appeared to be unconstitutional.

The 1985 Legislature amended the procedure for foreclosing a lien on personal property in an attempt to resolve the constitutional issue.[89] The amendment also designated the judicial action as the procedure for enforcing a statutory lien upon personal property unless the statute setting forth the lien prescribes otherwise.[90] A warehouse lien is an example of a statutory lien that has its enforcement "otherwise prescribed by law;" that is, a warehouseman may sell grain necessary to cover unpaid storage charges.

Other lienholders are required to initiate a foreclosure action even though they have possession of the encumbered property. Creditors not in possession of the property may ask the judge of the court in which the action is commenced to issue a warrant ordering the sheriff to seize and keep the encumbered property.[91] A debtor is permitted to argue undue hardship as a defense against the court order for the sheriff to seize the property. This defense must be raised within 10 days after issuance of the warrant and this issue must be resolved before the foreclosure action may proceed.[92] The cost of resolving the undue hardship issue will be charged to the unsuccessful party.[93]

A foreclosure action judgment that finds in favor of the lienholder must be accompanied by an order to sell the property.[94] The sale has to be advertised and followed by public auction. All the encumbered property will not be sold at the public auction sale if only a portion is needed to cover the unpaid debt. In addition, a debtor present at the sale may direct the order in which property is sold. Crops may be sold at the nearest usual market rather than by public auction.[96]

An alternative approach for a creditor is to sue on the debt for failure to pay rather than initiate an action to foreclose the lien. This approach delays seizing the property until a judgment is entered and a writ of execution is issued unless the creditor can argue for the court to attach property of the debtor. The advantage of this strategy prior to 1985 was avoiding the constitutional issue, and it continues to offer an alternative to creditors since the amendment.

Redemption

Property that is being foreclosed to satisfy a lien can be redeemed by anyone, including inferior lienholders, who has an interest in the property.[97] Simply stated, redemption means that a person with legal interest in the property will become the owner by paying the lienholder who is foreclosing. The purpose of redemption is to assure that a debtor will receive the full benefit of the property's market value. Redemption may be made any time before the claim is due but must be made before the court-ordered sale.[98]

Redemption is made by paying the amount which the lien secures plus damages to the lienholder caused by the delay.[99] Redeeming a thresher's lien, for example, requires the debtor to pay the lienholder the amount that is due for threshing, plus any damages the lienholder may have suffered by not receiving the payment when due. The right of redemption is similar to satisfaction except that redemption arises after a debt is due whereas satisfaction occurs before the debt is due.

Conclusion

The North Dakota legislature has established several types of agricultural liens. Creditors must comply with the requirements of the statute to obtain a lien but liens benefit both parties by providing added security to creditors and encouraging suppliers to provide goods and services to farmers on credit.

Endnotes

1. N.D. Cent. Code 35-07-01.
2. N.D. Cent. Code 35-08-01.
3. N.D. Cent. Code 35-09-01.
4. N.D. Cent. Code 35-08-04.
5. N.D. Cent. Code 35-09-01.
6. N.D. Cent. Code 41-07-15.
7. N.D. Cent. Code 35-10-01.
8. N.D. Cent. Code 35-11-01.
9. 1981 N.D. Session Laws, ch. 360.
10. N.D. Cent. Code 35-05-01 and 47-16-03.
11. Lavin v. Bradley, 1 N.D. 291, 47 N.W. 384 (1890).
12. For example, see N.D. Cent. Code 35-07-02 and 35-13-02.
13. Rolla Community Hospital v. Dunseith Community Nursing Home Inc., 354 N.W.2d 643 (N.D. 1984).
14. For example, see N.D. Cent. Code 35-07-02.
15. Mitchell v. Monarch Elevator Co., 15 N.D. 495, 197 N.W. 1085 (1906).
16. N.D. Cent. Code 35-07-01.
17. Mitchell v. Monarch Elevator Co., supra.
18. N.D. Cent. Code 35-07-02.
19. Lavin v. Bradley, supra.
20. Carlson v. Powers Elevator Co., 61 N.D. 438, 238 N.W. 548 (1931).
21. Murie v. National Elevator Co., 60 N.D. 665, 236 N.W. 269 (1931).
22. Agricultural Bond & Credit Corp. v. Courtenay Farmers' Co-op Assoc., 64 N.D. 253, 251 N.W. 881 (1934).
23. N.D. Cent. Code 35-07-03.
24. N.D. Cent. Code 35-01-14.
25. N.D. Cent. Code 35-08-01.

26. N.D. Cent. Code 35-08-02.

27. Id.

28. N.D. Cent. Code 35-08-03.

29. N.D. Cent. Code 35-01-14.

30. N.D. Cent. Code 35-09-01.

31. Stiehm v. Gruthie Farmers Elevator Co., 40 N.D. 648, 169 N.W. 318 (1918).

32. N.D. Cent. Code 35-09-02.

33. Juno v. Northland Elevator Co., 56 N.D. 223, 216 N.W. 562 (1927).

34. Mitchell v. Monarch Elevator Co., supra.

35. N.D. Cent. Code 35-09-02.

36. Chaffee v. Edinger, 29 N.D. 537 151 N.W. 223 (1915); Lavin v. Bradley, supra.

37. Chaffee v. Edinger, supra.

38. N.D. Cent. Code 35-09-03.

39. N.D. Cent. Code 35-08-04.

40. Id.

41. N.D. Cent. Code 35-09-01.

42. N.D. Cent. Code 35-09-02.

43. Chaffee v. Edinger, supra.

44. N.D. Cent. Code 35-09-02.

45. N.D. Cent. Code 35-09-03.

46. N.D. Cent. Code 35-10-01.

47. N.D. Cent. Code 35-10-02.

48. N.D. Cent. Code 35-08-03 and 35-10-02.

49. N.D. Cent. Code 60-02-17.

50. N.D. Cent. Code 41-07-15.

51. N.D. Cent. Code 35-20-15.

52. N.D. Cent. Code 26-17.1-02(1).

53. N.D. Cent. Code 26-17.1-02(2).

54. N.D. Cent. Code 26-17.1-02(3).

55. N.D. Cent. Code 35-20-15.

56. N.D. Cent. Code 35-20-16.

57. Loss payee is anyone to whom the insurance proceeds are payable according to the terms of the policy.

58. N.D. Cent. Code 35-05-01.

59. N.D. Cent. Code 35-05-04.

60. N.D. Cent. Code 35-05-01.1.

61. N.D. Cent. Code 47-16-03.

62. N.D. Cent. Code 35-13-01.

63. N.D. Cent. Code 35-13-02.

64. N.D. Cent. Code 35-13-03.

65. N.D. Cent. Code 35-13-02.

66. N.D. Cent. Code 35-13-01.

67. N.D. Cent. Code 35-13-04.

68. N.D. Cent. Code 35-27-01.

69. N.D. Cent. Code 35-27-05.

70. N.D. Cent. Code 35-27-11(3).

71. N.D. Cent. Code 35-27-13.

72. N.D. Cent. Code 35-27-11.

73. N.D. Cent. Code 35-27-04.

74. N.D. Cent. Code 35-17-01.

75. N.D. Cent. Code 35-17-02.

76. N.D. Cent. Code 35-20-05.

77. N.D. Cent. Code 35-20-01.

78. N.D. Cent. Code 35-20-03.

79. N.D. Cent. Code 35-20-04.

80. N.D. Cent. Code 35-20-11.

81. Branthover v. Monarch Elevator Co., 156 N.W. 927 (N.D. 1916).

82. N.D. Cent. Code 35-21-01 and 35-21-02.

83. N.D. Cent. Code 35-21-03.

84. N.D. Cent. Code 35-21-04.

85. N.D. Cent. Code 35-21-01.

86. N.D. Cent. Code 35-01-24.

87. N.D. Cent. Code 35-01-28.

88. N.D. Cent. Code 35-01-29.

89. N.D. Cent. Code 32-20-02.

90. N.D. Cent. Code 35-01-29.

91. N.D. Cent. Code 32-20-02.

92. N.D. Cent. Code 32-20-04.1.

93. N.D. Cent. Code 32-20-04.2.

94. N.D. Cent. Code 32-20-05.

95. N.D. Cent. Code 28-23-01 and 28-23-07.

96. N.D. Cent. Code 28-23-02.

97. N.D. Cent. Code 35-01-16 and 35-01-17.

98. N.D. Cent. Code 35-01-16.

99. N.D. Cent. Code 35-01-18.