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**§ 11.07 State Superlien Statutes**

Lenders enter into financing transactions expecting to be repaid according to the terms of the loan. Thus, in addition to direct liability for cleanup costs, lenders are concerned with the impact that environmental liability may have on the borrower's ability to repay its loan obligations.

The enormous cleanup liabilities under CERCLA as well as the operating and corrective action requirements of RCRA may not only render a borrower insolvent, but also significantly impair the value of contaminated collateral. Environmental laws that restrict development of former hazardous waste sites or prohibit construction activity in ecologically sensitive areas such as wetlands can severely erode the value of real estate used to secure a borrower's loan obligations. If a borrower is forced to file a bankruptcy petition, a creditor's rights may be affected by pending cleanup obligations. Finally, many states have enacted Superlien laws that subordinate previously perfected security interests.

Nearly two-dozen states have non-priority environmental lien laws that operate in the same manner as general commercial liens.<sup>165.95</sup> The cleanup costs incurred by environmental agencies in

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<sup>165.95</sup> Alaska Stat § 46.08.075; Ariz. Rev. Stat § 49-295; Ark. Stat Ann. § 8-7-417(a), 516(a); Cal. Health & Safety Code § 25365.6(a), Cal. Water Code 13304(c)(2); Fla. Stat. § 376.308(3)(c); Ill. Code. Stat.5\21.3; Ind. Code § 13-7-8.7-10.7(a); Iowa Code. Ann. 455B.396; Ky. Rev. Stat. Ann. 224.01-400(23)(a); La Rev. Stat. Ann. 30.1149.7(f); Md. Health and Environment Title 7-266(b)(5); Minn. Stat. Ann. 514.672; Montana, M.C.A. § 75-10-720; New York, N.Y. Nav. Law. § 181-a-e; Ohio Rev. Code Ann. § 3734.20(B), 3734.22 and 3734.26; Okla Stat. Ann. Tit. 63, § 1-1011; Ore.

those states take precedence over all other claims except previously perfected security interests. However, during the past few years, six states have enacted so-called “Superlien” provisions within their mini-Superfund laws. These laws, initially adopted to ensure that states could recover the costs of publicly financed cleanups of hazardous waste sites, grant a first-priority lien on various assets of PRPs equal to the amount of cleanup expenditures incurred by the state that is superior to previously perfected mortgages or security interests.

The Superliens not only subordinate the rights of lenders with previously perfected security interests, but also subordinate the rights of a bona fide purchaser who bought property without notice of the contamination or who acquired title through abandonment, foreclosure, deed in lieu of foreclosure, or bankruptcy order. In addition, these laws can jeopardize the solvency of de minimis PRPs whose limited assets may be attached despite their tenuous connection to a hazardous waste site.

Interestingly, only a limited number of liens have actually been filed. Instead, states are prospectively wielding these laws like a sword of Damocles over the assets of the PRPs in order to extract concessions for privately financed settlements. Nevertheless, it is extremely important that corporate managers, lenders and their counsel be aware of the requirements of these laws and the risks they represent.

The “Superlien” laws vary considerably from state to state. Some of the Superlien statutes merely impose a priority lien on the property which is subject to the cleanup while others attach to all of the assets of the responsible party, including personal property and business revenues located or derived from within the state.

While some Superliens only become effective after the lien has been recorded, several states permit a “secret” Superlien, which attaches to the property before public notice of the lien is filed.

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Rev. Stat 466.205, 465.335 and 466.835; Pa. Stat Ann. Tit. 35,6020.509; R.I. Gen. Laws § 23.19.14-15; South Dakota, S.D. Codified Laws Ann., § 34A-12-13; Tenn. Code Ann. 68-212-209(d); Texas Health & Safety Code Ann. § 361.194; Va. Code Ann. 10.1-1406(c) (repealed); Washington, RCW § 70-105B (repealed).

These are particularly onerous provisions because a prudent lender who diligently searches the public records may nevertheless find its interest subordinated by the “hidden” Superlien.

Finally, some states permit the Superlien to apply retroactively and prevail over security interests that were perfected before the Superlien law was enacted.

Surprisingly, the Superlien legislation has spawned only a handful of lawsuits, but thus far these statutes have withstood those challenges.

For example, in *Kessler v. Tarrats*,<sup>165.96</sup> the plaintiff charged that the New Jersey Superlien amounted to an unconstitutional taking of private property and impermissibly interfered with private contracts. However, the Appellate Division of the Superior Court of New Jersey ruled that the strong public interest in cleaning up hazardous waste sites warranted the impairment of private contract rights. Furthermore, the court noted that since the plaintiff had placed the hazardous materials on the property, there could be no “taking” because it was the plaintiff’s acts which had caused the diminution in market value of the property.

Likewise, in *Chicago Title Insurance Company v. Kumar*,<sup>165.97</sup> the issue was whether the Massachusetts Superlien law rendered title to land unmarketable. In that case, the defendant insured claimed that the possibility that the state might attach a lien on its property because of contamination undisclosed at the time the property was acquired was a title defect. The plaintiff denied coverage to the defendant insured on a claim under its title insurance policy, which alleged that the existence of the Massachusetts Superlien rendered the defendant’s title to contaminated property unmarketable. The plaintiff denied the claim and filed suit for a declaratory judgment. In upholding plaintiff’s denial of the claim, the Appeals Court of Massachusetts observed that one could have a perfected title in valueless land. The court also said that while the possibility that a Superlien may be imposed on the land may render the property uneconomical, it did not affect title to the land and the plaintiff’s denial of coverage was upheld.

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<sup>165.96</sup> 194 N.J. Super 136 (App. Div. 1984).

<sup>165.97</sup> 506 N.E.2d 154 (Mass. App. Ct 1987).

While a New Jersey court in *Simon v. Oldmans Township*,<sup>165.98</sup> did allow a purchaser of property at a tax sale to rescind the sale when state environmental authorities subsequently asserted a Superlien, it was a narrow ruling that is probably limited to tax sales where the purchaser does not initially acquire full legal title to the land. In that case, notice of the Superlien had not been filed when the tax sale took place and the plaintiff claimed that the defendant withheld information that the property was contaminated. The court said it was essential to maintain the integrity of title recordation and a purchaser of tax certificates should be entitled to relief when public records did not reveal any Superlien and the purchaser had no reason to suspect land was contaminated.

Much to the relief of lenders, the Superlien laws have not proven to be the lethal enforcement weapon that was once feared. Perhaps because of a credit crunch that has reduced the resources available to perform cleanups, states are now rarely using their Superlien authority. Indeed, during the past few years, Arkansas, Tennessee and Texas repealed their Superlien provisions.

### **Connecticut**

The legislature created a two-tiered Superlien, in which a super-priority lien attaches to the contaminated property or the property from which the spill emanated and a non-priority lien applies to all other real estate and personal property of the person responsible for the discharge.<sup>165.99</sup>

There are important restrictions to the super-priority lien. First, it only subordinates encumbrances that were created on or after July 3, 1983 and does not apply to residential real estate. Second, it is not superior to security interests in real estate that have been transferred in accordance with the Connecticut negative declaration law.<sup>165.100</sup> This law requires industrial establishments generating 100 kilograms of hazardous waste per month, or dry-cleaners, furniture strippers, auto body repair shops and paint shops

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<sup>165.98</sup> . 203 N.J. Super 365 (Ch. Div. 1985).

<sup>165.99</sup> . Conn. Gen. Stat. 22a-452a

<sup>165.100</sup> . Conn. Gen. Stat. 22a-134a.

regardless of the quantity of hazardous waste generated, to file a negative declaration that there has been no discharge of hazardous waste or that such a discharge has been cleaned up before the establishment can be transferred.

In addition, the law provides that a lien cannot be placed on property where a retail service station is located provided that any underground storage tanks located on the property conform with the applicable technical standards, any previous spill has been removed in accordance with the Connecticut Department of Environmental Protection (DEP) regulations, and any waste or oil remaining on the site is managed in conformance with DEP requirements.

Particularly significant is that a lender who acquires title to contaminated property by foreclosure or tender of a deed in lieu of foreclosure will only be liable for cleanup costs equal to the value of the property.

The lien does not take effect until a certificate of lien is filed in the land records of the town where the property is located. The certificate must describe the real estate affected by the lien, the amount of the lien, the name of the owner and the person responsible for the spill. The certificate of lien must contain the lien amount, the owner's name and the person responsible for the discharge.

### **Illinois**

To encourage the redevelopment of brownfields, the Illinois legislature recently enacted legislation allowing municipalities and county governments the right to impose liens on property which will have priority over all other previously recorded liens. The lien is assignable and the amount of the lien may be taken into account when determining the fair market value of the property to be condemned.<sup>165.101</sup>

### **Louisiana**

The state has a partial Superlien statute under which the state is granted a lien against "immovable property" to recover response

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<sup>165.101</sup>. 415 ILCS 5/21.3.

costs and is perfected by filing a notice of lien containing the legal description of the immovable property in the mortgage records of the parish where the immovable property is located.<sup>165.102</sup> The lien takes priority against all existing encumbrances, liens or other security interests affecting the property. Previously perfected encumbrances filed against the property shall continue to have a priority lien only for the fair market value of the property prior to the remedial action. The state shall have a priority lien on the amount of the increase in the fair market value of the property resulting from the remedial actions.

### **Maine**

This is one of the most far-reaching of the Superlien statutes.<sup>165.103</sup> Under the Uncontrolled Hazardous Substance Site Act, the state is not only granted a super-priority lien on the contaminated property, but all real estate, fixtures, improvements, equipment, machinery, materials and other personal property involved in the discharge can be forfeited to the state. Proceeds from the sale of the property are used to reimburse the state for cleanup and reasonable expenses of the forfeiture proceedings. Funds remaining after the state has satisfied its cleanup expenses are distributed to mortgagees. Any money left over is then forfeited to the state and may not be distributed to unsecured creditors or creditors holding liens on personal property used at the site.

### **Massachusetts**

This statute is similar to Connecticut's law since it creates a two-tiered system. Under the Oil and Hazardous Material Release and Response Act, a super-priority lien affects the remediated property, whereas a non-priority lien attaches to all the other real and personal property of the party responsible for the discharge.<sup>165.104</sup> However, the super-priority lien does not apply to residential property.

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<sup>165.102</sup> . La. Rev. Stat. Ann. § 30:2281.

<sup>165.103</sup> . Me. Stat. Ann. tit. 38, sect. 1370, 1306-C, 1362.

<sup>165.104</sup> . Mass. Ann. Laws ch. 21E, sect 13.

The lien is not effective until a Statement of Claim is filed with the registry of deed where the property is located and in each registry district where the responsible person has registered title to land. If the property subject to the lien is personal property, the Statement of Claim is to be filed in accordance with the provisions of the Massachusetts Uniform Commercial Code.

In *Acme Laundry Co. v. Massachusetts*,<sup>165.105</sup> the state Supreme Court ruled that the state could impose a lien on contaminated and uncontaminated property owned by a responsible party for investigative and monitoring costs even where the responsible party had performed a cleanup.

### **Michigan**

The Michigan Superlien law also has a two-tiered priority scheme.<sup>165.106</sup> The state is granted a non-priority lien for all unpaid costs and damages on the facility that has been subject to the response action. However, there are two instances where the lien may be converted to a priority lien.

The first means for obtaining a super-priority lien occurs if the attorney general determines that the lien will be insufficient to cover the state's response costs. In such a case, the attorney general may file a petition in the circuit court where the facility is located seeking either (1) priority over all other liens encumbering the facility where the response action took place or (2) a non-priority lien upon all of the other real or personal property of the person owning the facility. However, the following categories of properties are not subject to this non-priority lien:

- (1) assets of a qualified pension plan or individual retirement account;
- (2) assets held expressly to finance a dependent's college education; and

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<sup>165.105</sup> . 410 Mass. 760 (1991).

<sup>165.106</sup> . Mich. Comp. Laws Ann. 324.20138.

- (3) non-business real or personal property totaling \$500,000 or less, although no more than \$25,000 of these assets may be cash or securities.

A petition seeking a super-priority lien for this situation must set forth the type of lien sought, a description of the property and why the lien is necessary. The court is required to promptly hold a hearing and give notice of the hearing to the responsible person and anyone holding liens or perfected security interests in the real property subject to the lien.<sup>165.107</sup>

The second circumstance under which the state may obtain a super-priority lien is when the response action taken by the state increases the market value of the real property. If the state has unpaid response costs, the state may obtain a super-priority lien for the amount of the increased value of the property until the costs are satisfied.<sup>165.108</sup>

The priority and non-priority liens arise when the state first incurs response costs and are perfected against real property when a notice of lien is filed with the register of deeds in the county where the property is located. A lien on personal property is perfected when the state makes the required filing pursuant to the requirements of the Uniform Commercial Code and a notice of the lien is mailed to the owner of the property.<sup>165.109</sup> When the state has been reimbursed for its response costs, a notice of release of lien shall be filed.<sup>165.110</sup> If additional response actions were required and were completed prior to or at the time of the filing of the notice of release of lien, the state will also file a notice stating that all required response actions have been completed.<sup>165.111</sup>

### **New Hampshire**

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<sup>165.107</sup>. Id. at 324.20138(3).

<sup>165.108</sup>. Id. at 324.20138(4).

<sup>165.109</sup>. Id. at 324.20138(5).

<sup>165.110</sup>. Id. at 324.20138(7).

<sup>165.111</sup>. Id. at 324.20138(8).



The state is granted a Superlien upon the business revenues and all the real and personal property of the person who is liable for the cleanup, including innocent landowners who are strictly liable for contamination caused by a predecessor in interest.<sup>165.112</sup>

The lien is not effective until a Notice of Lien is filed in the registry of deeds in the county where the real property is located. To perfect the lien on business revenues or personal property, the Notice of Lien must be filed with the Secretary of State.

### **New Jersey**

This is a two-tiered Superlien similar to those of Connecticut and Massachusetts.<sup>165.113</sup> The super-priority lien applies only to the contaminated property, while a non-priority lien attaches to all other real and personal property and business revenues of the discharger. However, the super-priority lien does not apply to property containing six or less residential dwellings.

The lien takes effect after a Notice of Lien is filed with the Superior Court Clerk. The Notice of Lien must include a description of the property and identify the cleanup costs.

If the lien attaches to property owned by a lender who qualifies as a holder under the state lender liability provisions, the state's right of recovery is limited to the actual financial benefit conferred upon the holder by the cleanup and shall not exceed the amount realized from the sale or disposition of the property.<sup>165.114</sup>

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<sup>165.112</sup>. N.H. Rev. Stat Ann. § 147-B:10-b.

<sup>165.113</sup>. N.J.S.A. 58:10-23.11f.

<sup>165.114</sup>. N.J.S.A. 58:10-23.11g(7).

## **Ohio**

The state has a general lien provision which does not subordinate previously perfected security interests.<sup>165.115</sup> However, the lien statute has some features worth noting. The owner of property where the state is performing a response action can be forced to grant an easement to the state for the duration of the cleanup. Moreover, the state can force the owner to record restrictive covenants that limit the uses of the land if certain future uses could interfere with the remedial action.<sup>165.116</sup>

## **Rhode Island**

This statute is not a true Superlien law but is a concern to creditors with interests in personal property since it provides that vessels and other personal property used to transport or dispose of hazardous wastes will be forfeited to and sold by the state and the proceeds applied toward response costs, unpaid penalties and the expenses of seizure and sale.<sup>165.117</sup>

## **Wisconsin**

The state also has a two-tiered system. The state may be granted a super-priority lien against non-residential property but may only impose a non-priority lien against residential property.<sup>165.118</sup>

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<sup>165.115</sup>. Ohio Rev. Code Ann. § 3734.20.

<sup>165.116</sup>. Id. at 3734.22.

<sup>165.117</sup>. R.I. Gen. Laws 23.19.1-17.1.

<sup>165.118</sup>. Wis. Stat. § 144.442(9)(i).