

HAZARDOUS WASTE

AND

TOXIC TORTS

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Regulatory Analysis

Superlien Ensures That State Will Recover the Cleanup Costs

By Larry Schnapf

During the past few years, several states have enacted what are known as "Superlien" laws. These laws were initially adopted to ensure that states could recover the costs of publicly funded cleanups of hazardous waste sites. In effect, they grant a first-priority lien on various assets of a potentially responsible party (PRP) equal to the amount of cleanup expenditures incurred by that state.

The Superliens not only subordinate the rights of a lender with a previously perfected security interest or a bona fide purchaser who bought property without notice of the contamination, but 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 minimal number of liens have actually been filed. Instead, states are prospectively wielding these laws like a sword of Damocles hanging over the assets of the PRPs to extract concessions for privately financed cleanup settlements. Still, it is extremely important that both business and legal practitioners be aware of the requirement of these Superlien 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, while others attach to all the assets of the re-

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Legislative Analysis

Denying a Waste Permit Request: Once a Violator, Always a ...

By F. Henry Habicht II and Leonard H. Shen

Your client is a national company with a long track record of absolutely perfect compliance with environmental laws. A single mid-level employee in a branch facility violates company policy and willfully discharges overflow from a hazardous waste collection cell into a nearby creek. His managers immediately discover the violation and report it to state environmental officials, but the state nonetheless proceeds to indict the company for criminal violation of the environmental laws.

With the promise of a minimal fine, your client pleads guilty to a misdemeanor. The next year, the hazardous and solid waste permit applications of your client and two of its subsidiaries in five separate states are suddenly denied, and \$30 million of operations are forced to close immediately after 12 years of perfect compliance.

'Bad Actor' Laws

This situation, while clearly a worst case scenario, is possible under the operation of so-called "bad actor" laws that have appeared in the past few years on the books of some 19 states. These laws, which are increasingly and aggressively being applied by many of the major industrial states, allow denial, suspension or revocation of both solid and hazardous waste permits based on an

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sponsible 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 statutes permit a "secret" Superlien that attaches to the property before public notice of the lien is filed.

These are particularly onerous because a prudent lender or landowner 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 largely withstood legal challenges. (See *Kessler v. Tarrats*, 194 N.J. Super 136 [App. Div. 1984] (Superlien law did not impermissibly impair contract rights nor amount to an unconstitutional taking of private property); *Chicago Title Insurance Company v. Kumar*, 506 N.E.2d 154 [Mass. App. Ct. 1987] (Possibility of a Superlien did not render title unmarketable. A state-by-state analysis of the various Superlien statutes is set forth below).

Arkansas

(Ark. Stat. Ann. 82-4708, 4720)

This statute grants a super-priority lien to the state for expenditures from either the Hazardous Substance Remedial Action Trust Fund or the Emergency Response Fund. This lien attaches to the remediated property although it is subordinate to liens for real estate taxes. The lien is effective upon the filing of a Notice of

Lien with the Circuit Clerk in the county where the land is located. The Notice of Lien must be filed within 30 days of completion of cleanup activity at the site. The lien is limited to the amount expended by the state and any increase in property value resulting from the cleanup.

Connecticut

(Conn. Gen. Stat. 22a-452a)

The legislature created a two-tiered Superlien. 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 the other real estate and personal property of the person responsible for the discharge.

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 (Conn. Gen. Stat. 22a-134a). 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—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, that law also provides that a lien cannot be placed on property on which a retail service station is located provided that any underground 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, a lender who acquires title to contaminated property by foreclosure or tender of a deed in lieu of foreclosure will be liable only 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 owner and the person responsible for the spill.

Maine

(Me. Rev. Stat. Ann. Tit. 38, 1370, 1306-C, 1362)

This is one of the most far-reaching of the Superlien statutes. Under the Uncontrolled Hazardous Substance Sites Act, not only is the state granted a super-priority lien on the contaminated property but all real estate, fixtures, improvements, equipment, machinery, materials and other personal property relating to 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 deposited in the state general treasury and may not be distributed to unsecured creditors or creditors holding liens on personal property used at the site.

Massachusetts

(Mass. Ann. Laws Ch. 21E, Sec. 13)

Similar to Connecticut's law, the Massachusetts Oil and Hazardous Material Release and Response Act creates a two-tiered system. A super-priority lien affects the remediated property while a non-priority lien at

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taches to all the other real and personal property of the party responsible. The superiority lien does not apply to residential property.

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.

New Hampshire

(N.H. Rev. Stat. Ann. 147-B:10)

The state is granted a Superlien upon the business revenues and all the real and personal property of all liable individuals, including innocent landowners who are strictly liable.

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

(N.J.S.A. 58:10-23.11F)

The Spill Compensation and Control Act contains a two-tiered Superlien similar to Connecticut and Massachusetts. The super-priority lien only applies 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.

Oregon

(Or. Rev. State. 466.205)

This state is granted a general lien for expenditures from the Hazardous Substance Remedial Action Fund on the real and personal property of the responsible party.

Although subject to previously perfected interests, the lien will take effect retroactively on the date the cleanup commenced if the state files

a Notice of Potential Lien within 120 days of the cleanup commencement date. Thus, security interests perfected within the intervening period will be subordinated to the state lien. The Notice must be filed with the recording office in the county where the real estate is located or with the Secretary of State if personal property is the subject of the lien.

Tennessee

(Tenn. Code. Ann. 68-46-209)

This Superlien only pertains to the property subject to the cleanup but is subordinate to tax liens. The lien is for the amount of the funds disbursed as well as any significant increase in property value resulting from the cleanup activities.

The state is required to file a statement with the register of deeds in the county where property is located within one year of completing cleanup activities. However, the lien is effective as of the date when funds were expended to perform the cleanup.

It should be noted that other states, including Maryland, Ohio, Pennsylvania, Rhode Island and Texas, have enacted statutes that grant general liens for cleanup costs that are subordinate to encumbrances or interests in contaminated property perfected before the lien is filed.

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tions of "bad actor" laws can only be performed on a case-by-case basis. Companies that have submitted or anticipate submitting permit applications should promptly examine the "bad actor" provisions of the states in which they operate.

Otherwise, any prior compliance problems long since thought resolved may suddenly reassert themselves in the form of a series of permit denials and other disruptive impacts.

The policy issues surrounding these laws are only now beginning to crystallize. It is important that they be

applied in a sound fashion which encourages companies to correct management systems which may have contributed to problems in the past.

Within Reason

It is in everyone's interest to ensure that well-capitalized and managed firms are available to help solve waste problems and that, within reason, otherwise qualified firms are not unnecessarily prohibited from providing critical expertise in dealing with disposal of toxic substances.

HW People - On the Move

New York Gov. Mario Cuomo has appointed Peter A.A. Berle (a member of this newsletter's Board of Editors) to head a new state commission to plan the future of the Adirondack Park. The Governor is concerned that a surge of land sales in the past few years may indicate an increase in speculation and development that could endanger the park's wilderness.

The Superfund hotline is open from 8:30 a.m. to 7:30 p.m., EST, and can provide information about the EPA's regulations to the public. It can be reached toll-free at 800-535-0202.