

EMPLOYMENT LAW MATTERS IN BANKRUPTCY

I. CLAIMS AGAINST THE BANKRUPT EMPLOYER

1.1 CLAIMS FOR PERFORMED SERVICES

<as opposed to, unearned prospective compensation under employee contracts>

1.1.a. Statutory priority reflects strong public policy interest in assuring payment to employees. 11 USC sec. 507(a):

"(4) *Fourth, allowed unsecured claims, but only to the extent of \$10,950 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for*

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;"

11 U.S.C. § 507(a), from 2005 BAPCPA (blue lines reflect changes by BAPCPA) (underlining added for emphasis)

1.1.b. Individual employee's earned compensation claims

1.1.b.1. Wages/Salaries/Commissions

1.1.b.1.A. When is such compensation "earned," for determining its priority:

[See Exhibit A hereto]

- post petition administrative claim [top priority in first tier]
- "gap" claim [second priority in first tier]
- within 180 days prepetition claim [third priority in first tier]
- older than 180 days prepetition [After all nine priorities in first tier: pro rated with all other unsecured claims of trade and other creditors, second tier]

1.1.b.1.B. State law defines the nature of a claim, and thus where it stands in the queue of payment priority, Butner v. United States, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979). The starting point in establishing priorities is the legal entitlements that exist outside of bankruptcy. In re American Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988).

1.1.b.1.C. In general, wages are **earned** at the time (i) the claimant's right to receive those wages is fixed as a matter of contract and (ii) may not be defeated by the occurrence of some contingent event. In re Crouthamel Potato Chip Co., 52 B.R. 960, 965-66 (ED Pa. 1985), on remand 52 B.R. 43 (BC ED Pa) and rev'd on other grounds, 786 F.2d 141, 14 B.C.D. 482, 14 C.B.C. 2d 502 (3rd Cir. 1986).

1.1.b.1.D. In Wisconsin, compensation is generally **earned** as a function of "hours worked" under state minimum wage requirements, Wis. Admin. Code § IND 72.03(1), which apply to almost all employees, even if their actual pay rate is much higher than the minimum. Thus, since time on the job is measured in hours to define the compensable time by which employees "are suffered or permitted to work," § IND 72.12(1)(a), compensation is earned by the hour, for each hour ... as opposed to being earned at a subsequent vesting date, such as, a pay date.

See DILHR v. Coatings, Inc., 126 Wis. 2d 338, 375 N.W.2d 834 (1985), where "wages" under the state wage payment law under Ch. 109 (see page 10, herein) does not include post termination compensation due under an employment contract, where no further services would be performed: Such "contractual" debt is contract damages, but not **earned** compensation due priority treatment.

Thus, in Wisconsin generally, an employee who has provided hours of service after the bankruptcy petition (voluntarily or involuntarily filed,) will be accorded first priority, top tier distribution status (administrative expense treatment) for compensation so **earned** by actual services, as in In re Valley Concrete Corp., 118 B.R. 174 (Bank RI 1990).

Query: Can, as a matter of contract, an employer provide that compensation for services performed does not become "earned" until a later date than the hour of performance?

Yes — In re Eye Contact, Inc., 97 B.R. 990 (Bank WD WI 1989), involving a bonus compensation plan (but such will likely be subject to the vacation pay accrual convention, embodied in Northwest II, infra.)

1.1.b.1.E. Statutory Wages. Certain remedial employment legislation provides, directly or indirectly, for compensatory earnings even though no actual services are exchanged in consideration

i.) Direct.

a. WARN Act ("Worker Adjustment and Retraining Notification Act") back pay: compensation up to average earnings for no more than 60 days that is paid to replace earnings lost by prematurely terminated employees, see also p. 10 herein.

– held, if triggered within immediate 90 (now, 180) days prepetition, it is first tier, fourth priority (wages) under 507(a). In re Riker Insurance Industries, Inc., 151 B.R. 823 (BK ND OH 1993); In re Cargo, Inc., 138 B.R. 923, 22 B.C.D. 1193 (BC ND IA 1992) ("pay earned" upon termination ... and it is not a penalty against the employer); and,

– held, if triggered in postpetition period, it is first tier, first priority under 507(a). In re Hanlin Group, 176 B.R. 329, 26 B.C.D. 576 (BK NJ 1995); **by inference, if the period starts pre-petition and overlaps post petition**

WARN Act backpay for days before the immediate 180 days prepetition, by implication, remain a second tier unsecured claim, payable after all nine priority categories in the first tier are satisfied.

Similar treatment (1st priority or 4th priority of first tier; or a second tier unsecured claim) should thus be afforded "pay" under Wisconsin's "business closing" law, sec. 109.07, Stat., a statutory remedy patterned after WARN (always subject to the cap amount, of course).

b. Wage rate and unpaid hours of service for Equal Pay Actor Fair Labor Standards Act violations, 29 U.S.C. § 206(d). Violations under the FLSA can draw judgments for compensation for lack of proper rate (minimum wage; overtime) or lack of payment for otherwise compensable hours, *as well as* an award of liquidated damages equal to the wages, 29 U.S.C. § 216, for, inter alia, the potential harm by the delay in proper payment. The former is a type of back pay, but clearly has been **earned**, and its treatment is dictated by the date of earned accrual as for wages, above.

The latter (liquidated damages) has been viewed as a penalty, Hultgren v. County of Lancaster, Neb., 912 F.2d 498, (8th Cir. 1990), or as a substitute for punitive damages, Gilchrist v. Jim Siemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986), because it accrues on a willful violation of the FLSA (a similar penalty is available under the Age Discrimination in Employment Act).

Thus, the "liquidated damages" component often is held by a bankruptcy court to be a *fourth tier* penalty, even though there are elements of its intendment as compensation for a pecuniary loss of an employee. See Overnight Motor Transport Co. v. Missel, 316 U.S. 572 (1942), construing an earlier pre-code version. Arguably, a claimant's attempt to link the award with specific harms may be

deemed immaterial. See, for example, Kuehl v. Eisenberg, 965 F.2d 651 (7th Cir. 1992), reviewing ERISA penalties, and causes of action for relief under 29 U.S.C. § 1132(a)(1)(B), to seek a higher priority.

ii.) **Indirect.** "Back pay" is a common remedy under other federal and state employment laws

-Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e-5(g)

-Age Discrimination in Employment Act, 29 U.S.C. § 626(b)

-Americans with Disabilities Act, 42 U.S.C. § 12117(a) and

-Wisconsin employment laws, such as the Wisconsin Fair Employment Act, Wis. Stat. § 111.39(4)(c).

Back pay is also the historic remedy for unlawful termination due to unfair labor practices.

The case law is relatively uniform that if such a discharge contrary to the above laws occurs postpetition and at least some postpetition services were rendered, first tier administrative priority treatment follows, not unlike any postpetition tort, under the doctrine set forth in Reading Co. v. Brown, 391 U.S. 471 (1968). See also Yorke v. National Labor Relations Board, 709 F.2d 1138, 10 B.C.D. 1160, 8 C.B.C.2d 921 (7th Cir. 1983), cert. denied, 465 U.S. 1023, 79 L. Ed. 2d 680, 104 S. Ct. 1276; and In re Tucson Yellow Cab Co., 789 F.2d 701 (9th Cir. 1986).

A clearly prepetition wrongful discharge creates a backpay cause of action that is for "constructive wages", thus a general unsecured (second tier) claim standing; and cannot create a first tier, first priority claim (administrative) by the subsequent failure to rehire postpetition, In re Palau Corp., 18 F.3d 746, 30 C.B.C.2d 1204, 25 B.C.D. 547 (9th Cir. 1994). In accord, for state human/equal rights law claims, Kapernekas v. Continental Airlines, Inc., 148 B.R. 207 (D. Del 1992) (handicap discrimination)

The foregoing cases emphasize that unlike the WARN Act, back pay for unlawful discharges is a "constructive" wage, and not an entitlement as a contractual/quasi-contractual form of severance pay ... and thus it is not "**earned**," at least for priority treatment. In that regard, it is treated as a statutory tort with no enhanced priority.

Instead, such claims are general unsecured second tier claims. Even if the effect of the unlawful termination continues into the 180 (but then, 90) days prepetition, or even afterwards. See Nathanson v. NLRB, 344 U.S. 25, 28-29 (1952)

1.1.b.2. Vacation Pay

Statutorily defined to be eligible for potential first tier fourth priority, first tier treatment. 11 U.S.C. § 507(a)(4)

-General rule is that vacation pay accrues on a day-to-day basis, absent any specific provision to the contrary. In re Northwest Engineering Company ("Northwest II"), 863 F.2d 1313, 18 B.C.D. 1051 (7th Cir. 1988). So for 12 days of vacation per year, one day accrues per month, or 1/20th per working day; thus six (6) days would be earned in the first tier, fourth priority ("wages") level, balance of days would be second tier unsecured.

In Northwest II, a collective bargaining agreement provided that paid vacation was earned in the year prior to its utilization (and as such, one had to be employed for at least one day in the utilization year). When bankruptcy was filed on April 1, 1983, the union sought first tier, then-third (now 4th) priority status for all unpaid vacation time earned in 1982, because the "accrual" date could thus occur within 90 days of the filing. The employer argued that all 1982 earned vacation was a second tier unsecured claim.

In a classic division of the spoils, the Seventh Circuit concluded that for bankruptcy purposes, the accrual date (for utilization) for vacation pay is irrelevant; it is the day of "earning" that counts. All the 1982 vacation time was earned more than 90 days prior to filing, and was thus an unsecured claim; but the period of January 1 through March 31, 1983 represented a new indebtedness to the worker, and even though such debt might never ripen into a full-blown, separate claim (since the employee may not be employed as of next January 1!) at least it provides a basis for -at most-180 days of third (now 4th) priority treatment so long as, and solely to the extent that, there has been full accrued unpaid vacation-supporting "earned" days and resulting unsecured vacation pay owed to the employee.

Note: If there is no specific separation of "earning" and "vesting" under the employer's paid vacation benefit arrangement, Northwest II operates much more straightforward ... approximately a half year first level, 4th priority vacation pay accrues to the worker at the time the petition is filed... all earlier periods being an unsecured claim. This suggests that a drafter of the employee handbook could separate the "accrual" of the benefit and its vesting, which often happens in large business (i.e., vesting earned one year does not vest for a benefit until some time in the next year, with a requirement that the employee still then be employed.)

1.1.b.3. Severance Pay

-Again is defined to be eligible for first-tier fourth priority status, 11 U.S.C. § 507(a)(4)

-Typically takes one or two forms:

(1) pay at termination in lieu of notice (i.e., “you are entitled to two weeks’ notice or one week’s pay”), and

(2) pure “pay at termination” based on length of employment. In re Health Maintenance Foundation, 680 F.2d 619 (9th Cir. 1982).

Pay in lieu of notice (typically a set amounts) takes on a distribution characteristic determined by the fact of the termination date: postpetition (first priority, first tier); or, within 180 day prepetition (fourth priority, first tier); or, before 180 days prepetition (second tier unsecured, nonpriority). In re Jeannette Corp., 118 B.R. 327, 20 B.C.D. 1478, 23 C.B.C.2d 1075 (BC WD Pa 1990). This feature is reflected in the WARN Act cases, supra. See also In re Child World, Inc., 147 B.R. 847, 23 B.C.D. 1054 (BC SD NY 1992).

Severance pay based on duration of service (typically formula based) takes on a distribution characteristic based on the period of its accrual, not on the date of its vesting-by-occurrence. Thus, a postpetition termination might involve primarily an unsecured (second tier) claim, with only modest increments of first tier, fourth priority distribution preference (for that portion of the benefit accruing in the 180 day prepetition period) and first tier, first priority status (for the benefit portion accruing during the postpetition time). In re Jartran, Inc., 732 F.2d 584, 11 B.C.D. 1181, 10 C.B.C.2d 1069 (7th Cir. 1984); In re Northwest Engineering Company (“Northwest I”), 43 B.R. 603, 11 C.B.C.2d 831 (BC ED WI 1984); contra, In re St. Louis Globe-Democrat, Inc., 86 B.R. 606 (DC ED MO 1988) (all severance pay is an administrative claim – first priority, first tier – under a postpetition termination).

Occasional cases involve severance pay terms that, as in Child World, supra, are difficult to catalog.

The offer of such pay in the first instance at the time of termination suggests no “earned” right to the pay, In re Microwave Products of America, Inc., 100 B.R. 379 (BC WD TN 1989), and “plans” which are neither service nor notice based, may be denied first tier status – even in postpetition termination circumstances – as neither then being “**earned**,” nor being clearly an expense “necessary” to the postpetition administration/operation of the debtor.

1.1.b.4 Sick Leave Pay

-Also by code language statutorily eligible for first tier, fourth priority treatment

-As in vacation and severance pay issues, terms of employer's policy or collective bargaining agreements will influence specific priority location

-General rule: will still likely follow Northwest II methodology of being accrued on a day-by-day basis, so the worker could have a mix of priority and unsecured claims

-Federal ("FMLA") and Wisconsin Family and Medical Leave Act, ("WFMLA") Wis. Stat. § 103.10(5)(a). does not create an entitlement to pay, as opposed to a right of absence from work, with protected reinstatement. However, WFMLA provides a right of substitution of any paid or unpaid leave offered by the employer and accrued by the employee, Richland School District v. DILHR, 174 Wis. 2d 878, 498 N.W.2d 826 (1993) for otherwise unpaid WFMLA leave. Thus, an employee wrongfully denied leave (or substituted pay) during leave postpetition or in the 90 days prepetition, could potentially have a higher priority distribution right (first tier) than would have been afforded by the other accrued "payable" leave right (second tier) that cannot be used in substitution of the unpaid WFMLA leave. Vacation pay; bereavement pay; "personal days" pay-are all types of a paid benefit that can be substituted and (depending on the dates of absence, could be superior (as in, during the 180 day prepetition period, or postpetition periods) than if the absence occurred prior to the 180 day prefiling period.

1.1.b.5. Non-Employee Individual (or Entity) Sales Commissions from Debtor

-BAPCPA codified priority treatment first afforded under In re Wang Lab, 164 B.R. 404 (BC MASS 1994) to "employee-like" independent sales contractors: to be treated like wage-earning employees; see 507(a)4(B), Page 1.

1.2 LIMITATIONS ON CLAIMS ARISING OUT OF EMPLOYMENT CONTRACTS

"§ 502. Allowance of claims or interests.

"(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, ... objects.

(b) ... if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that

...

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds-

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of

(i) the date of the filing of the petition, or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

..."

-This section acts to cap the bankrupt employer's financial exposure on terminated employment contracts: the amount of the claim for post-petition damages in excess of the limitations is simply disallowed; it is not moved into some inferior distribution category.

- BUT Note that prepetition claim right (Section 1.1.3 above) remains intact.

An employee under a long term contract with six years' remaining who has been unpaid for 180 days prior to a (Chapter 11) bankruptcy, works nine months without pay thereafter, and is then terminated, would have the following possible claims: 180 days' pay; as a third priority, first tier claim, subject to the \$10,500 limit; one (1) year's pay: second tier, unsecured. This is so because even when terminated postpetition, executory contracts (such as term employment agreements) are deemed by 11 U.S.C. § 502(g) to have been terminated (for claim priority purposes) before the petition filing. **ESSENTIALLY, THE TYPICAL CONTRACT IMPLICATION, THAT THE POST PETITION BREACH ACCELERATES SUMS DUE UNDER THE CONTRACT, IS AVOIDED.**

Collective bargaining agreements are not employment contracts for section 502(b)(7) cap purposes, In re Gee & Missler Services, Inc., 15 C.B.C. 199 (BC ED MI 1986); In re Continental Airlines Corp., 901 F.2d 1259, 23 C.B.C.2d 795 (5th Cir. 1990), reh'g denied, 918 F.2d 177 (5th Cir. 1990), but "future" damages are thus limited by the period when business operations cease.

NOTE: Where contract earnings are uncertain, such as in "on call" contracts, Addison v. Langston, 737 F.2d 1338, 11 C.B.C.2d 588 (5th Cir. 1984), or in cases of gradual CBA employee layoffs, bankruptcy court must fix estimated value of claim, per 11 U.S.C. § 502(c)(1).

1.3 CLAIMS FOR UNFUNDED BUT DUE CONTRIBUTIONS TO EMPLOYEE BENEFIT PLANS

“(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan -

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of -

(i) the number of employees covered by each such plan multiplied by \$10,950; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.”

11 U.S.C. § 507(a)(5)

The Code does not define "employee benefit plan," and it has been held to apply to unilaterally adopted plans, not just to those collectively bargained. In re SACO Local Development Corp. 711 F.2d 441, 10 B.C.D. 1263, 8 C.B.C.2d 1093 (1st Cir. 1983)

There was a conflict of cases as to whether worker's compensation insurance as mandated by state laws is a "plan" for purposes of 11 U.S.C. § 507(a)(4). Compare In re HLM Corp., 165 B.R. 38, 25 B.C.D. 623 (BC Minn 1994) (No), with Employers Ins. v. Plaid Pantries, 10 F.3d 605, 24 B.C.D. 1439, 30 C.B.C.2d 159 (9th Cir. 1993) (Yes). The fact that a benefit is compelled by law under an insured format, as the core of HLM holds, seems a distinction without substance. Nevertheless, the Supreme Court, in a case brought by an insurance company, denied its attempt to seek premiums as being under an "employee benefit plan." Howard Delivery Serv. V. Zurich American Ins. Co., 126 S. Ct. 2105 (2006).

Note that if there is more than one plan, there will/could be a pro rata distribution among them of the \$10,500 limit, under subsection (B). Further note: state law imposes a modest fine which may be sought for an employer's failing to timely make benefit payments, Wis. Stat. § 103.86(1); but is abated if the failure is prevented by proceedings in bankruptcy ... or "circumstances over which the employer has no control," Wis. Stat. § 103.86(2). As a penalty, it is decidedly subordinated in the distribution tier (see next section).

Unions and pension fund trustees have been unsuccessful in arguments that when a bankrupt employer withdraws postpetition from a multi-employer pension plan (and is thus subject to withdrawal liability under ERISA at 29 U.S.C. § 1381), such ERISA liability should be first tier first priority rather than fifth priority (benefits) under 11 U.S.C. § 507(a)(5). In re Kessler, 23 B.R. 722 (BC SD NY 1982, aff'd, 55 B.R. 735 (D SD NY 1985); Trustees of the Amalgamated Ins. Fund v. McFarlin's, 789 F.2d 98, 14 C.B.C.2d 1075 (2nd Cir. 1986).

Postpetition accruing contribution obligations to plans for employees in service to the debtor are first tier priority obligations as administrative claims. In re Pacific Far East Lines v. Pacific Maritime Ass'n, 713 F.2d 476 (9th Cir. 1983). There is a split of authority over the treatment of benefit plan funding obligations that come due postpetition, but are attributable to prepetition services. Steelworkers v. Unimet Corp., 842 F.2d 879, 18 C.B.C.2d 694, 17 B.C.D. 726 (6th Cir. 1988) (first priority); contra, In re Roth American, 975 F.2d 949, 27 C.B.C.2d 1125, 23 B.C.D. 669 (3rd Cir. 1992), and In re Moline Corp., 144 B.R. 75 (BC ND ILL 1992) (third priority, or unsecured second tier if accrued more than 180 days prepetition). The latter cases are more in line with Northwest II.

1.4 EMPLOYMENT LAW PENALTIES

As noted **at page 4** herein, certain federal laws (the Fair Labor Standards Act [FLSA], for itself and as its remedy provisions are incorporated into the Age Discrimination in Employment Act [ADEA]; Employment Retirement and Income Security Act [ERISA]; Occupational Safety and Health Act [OSHA]), et. al., contain remedies that are not directly compensatory, and thus likely penal.

Wisconsin employment laws in chapters 102, 103 and 109, Stat. also provide for many penalties. Some are profound:

109.09 Wisconsin WARN ACT business closing law: 60 days' pay

109.11(2) delayed wage payment civil penalty: 50% increase in delinquent wages

102.57 safety provision violation: 15% increased worker compensation award, not to exceed \$15,000

— In most cases, as penalties not intended to compensate for actual pecuniary loss (the WARN Act being the exception), they appear to have only fourth tier distribution rights under 11 U.S.C. § 726(a)(4). Exhibit A.

— If applied against an individual who is a sole proprietor, penalties running in favor of a governmental unit (versus an employee) will not be discharged in bankruptcy, 11 U.S.C. § 523(a)(7), upon that government creditor's objection.

II. IMPACT OF WISCONSIN WAGE LIEN [See Exhibit B]

2.1 HISTORY

While pervasive in its scope, it had initially been held ineffective in bankruptcy to create a secured position by reason of its legislative history that it shall not apply to insolvent businesses, DILHR v. Kubly, 65 B.R. 845, (Bankr. W.D. WI 1986), and because its determined unconstitutionality as a retroactive lien, in state court proceedings, precluded DWD from enforcement, In re Napco Graphic Arts, Inc., 83 B.R. 558 (Bankr. E.D. Wis. 1988). No private right of action existed. Henne v. Allis-Chalmers Corp., 660 F. Supp.1464 (E.D. Wis.1987)

The Napco decision also found that features of the 1988 version of the law left its "lien" susceptible to being dissolved by a trustee under 11 U.S.C. § 545(2).

2.2 IMPROVEMENT

Subsequently, the statute was reworded by the Legislature (i) to create an enforcement right in the wage claimant as well as for the "barred" DWD, (ii) to provide for a clear, simple method of lien perfection, (iii) to provide a limited enforcement period and notice of lien imposition, so as to refute the defects noted in Napco and qualify for barring the trustee's attack, under 11 U.S.C. 546(b). The deficiencies observed by Napco have been addressed ... to its theoretical validity. Kubly, however, reflects that if the statute was intended to create lien priorities for bankruptcy purposes, such intent might result in its preemption by the Code.

2.3 SCOPE

(3) "Wage" or "Wages" mean remuneration payable to an employee for personal services, including salaries, commissions, holiday and vacation pay, supplemental unemployment benefit plan payments when required under a binding collective bargaining agreement, bonuses and any other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy.

Wis. Stat. § 109.01. This offers broad coverage for all earnings and benefits.

2.4 EASE OF IMPLEMENTATION

Unpaid wages and benefits can be pursued in one of two ways: a private right of action, or submittal of the matter to the Wage and Hour Division of DWD, where, after investigation, pursuit may be assigned to the Attorney General or to a local enforcement situation. Typically, enforcement in a bankruptcy goes to the Attorney General, while nonbankruptcy enforcement is referred to the county's Corporation Counsel.

The difference between going private and going through the government is that the government can obtain a 100% penalty (equal to the claim) while a private action can only be eligible for a 50% claim increase. But, because we are assuming the employer is in financial difficulty, time may be of the essence, certainly for bankruptcy purposes. Accordingly, the Statute provides a fairly easy circumstance for recovering on a wage claim.

First, a lien can be laid against the employer's real property. As set forth in the Statute, a lien can be filed with the Register of Deeds by preparing a Petition and submitting it with the recording fees (by Statute, currently, \$_____). But because this involves finding the employer's tax key number and/or the legal description of the property (which may be easy in some counties such as Milwaukee and Waukesha, as the tax agency/treasurers provide that access easily online), this is still a somewhat costly way to proceed. You also have to send the employer a copy of the filed Petition by certified mail, return receipt requested) or serve it like a Summons.

Second, personal property liens can be assessed by a simple and quick filing with DFI, as in the manner of a UCC filing. The filing portion of the DFI website provides a tutorial as to how to fill in the claims and information box that will result in a filing as appears in Exhibit C5. The fee to become a registered filer is \$10.00 and the whole process takes about 15 minutes and so it is one of the first steps that should be taken towards securing your client's rights. Like the real property filing, a notice should be served (or certified mailed) on the employer (and I recommend that a copy also be directed to the secured creditor). The lien is (subject to the comments below) valid against all prior lien holding parties, up to a cap per person for defined financial institutions. Note that private financing by credit corps and personal individuals are not subject to the dollar limitation (presently \$3,000.00) as they are not defined as a "financial institution." Also in the Exhibits, C2, is a form of a release letter that upon payment will be demanded by the lender, who will also require a termination notice of the UCC filing. Again, the tutorial walks you through the process of doing a termination notice.

2.5 WAGE LIENS IN INSOLVENCY

The lien permitted by Chapter 109, Wis. Stats. is a statutory lien. Its perfection by a UCC filing prior to bankruptcy remains unchallenged. But there is a running battle over post-petition perfection that the State Attorney General's office initially won, but later lost. See, In re A.R. Accessories Group, Inc., 345 F.3d 454, 457 (7th Cir. 2003); In re Globe Building Materials, Inc., 463 F.2d 631 (7th Cir. 2006).

A.R. seems to imply that the lien filing might have success but ultimately, because of a flaw in sec. 109.09, the post-petition lien filing does not prevail over a trustee. Generally, the trustee's power for avoiding liens, including statutory liens, is premised upon whether that lien could prevail over a bona fide purchaser. The Statutes does state that the lien prevails over many types and kinds of creditors, including on a limited cap basis, to state-defined "financial institutions" but the statutory language is absent the "bona fide purchaser." The State vainly argued that the trustee's powers are limited only if there is such a purchaser, a battle long since lost and which was lost again in Global. Curiously, while Global noted that the Legislature could cure this deficiency simply, no action has been taken to date.

NOTE: Arguably, in Chapter 128 proceedings, even a post-petition lien could be valid against the Receiver and/or a financial institution to the extent of the cap. Chapter 128 is a law of equal consequence, but it lacks the avoiding powers of a chapter 7 trustee as being provided to the receiver. Given the explicit arguments raised and considered in A.R. and Global, there is much to support the authenticity of a lien even if it was filed after the chapter 128 commenced. There is not definitive case law but often receivers never see such a challenge, or are able to resolve it with the assistance of the lender (who, more often

than not, is the sponsor of the receivership, who enters into a pre-filing agreement with the receiver to advance his necessary fees in the performance of his duties and will on occasion provide post-filing operating funds to finish manufacturing, for instance, to maximize the lender's recovery).

NOTE: In an Article 9 Liquidation preceded by a voluntary surrender to a lender, the key issue is to have the lien filed before the surrender is accomplished, because the Article 9 transfer strips the employer of any property rights to which the lien could attach at that point. Prior versions of Chapter 109 made clear the rights to a lien arose when the services were performed, but that language has been deleted, as noted in A.R., *supra*, at 458.