

SPONSOR: Rep. Heffernan & Rep. Keeley & Rep. B. Short & Sen. McDowell
Reps. Baumbach, Q. Johnson, Kowalko, Mulrooney, Osienski, D.E. Williams; Sens. McBride, Peterson

HOUSE OF REPRESENTATIVES

147th GENERAL ASSEMBLY

HOUSE BILL NO. 95
AS AMENDED BY
HOUSE AMENDMENT NO. 2

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO CONSERVATION AND ENVIRONMENTAL LIENS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 9117, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§9117. ~~Obligations under bankruptcy.~~ Environmental liens.

~~No obligations imposed by this chapter shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute continuing regulatory obligations imposed by the State.~~

(a) Pursuant to the provisions of this section, all reasonable costs related to any remedy undertaken by the State for which a person is liable under this chapter or the regulations promulgated pursuant thereto shall constitute a lien in favor of the State upon the real property where such remedy takes place and which belongs to such liable person.

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property upon which a remedy has been undertaken by the State and which is owned by a person liable under this chapter when:

(1) No less that 30 days prior to the effective date of the lien, a notice of lien is sent by the Secretary, by means of certified or registered mail, to the last known address of all record owners of the property and to all persons holding liens or security interests of record. The notice of lien shall state the amount of and basis for the lien;

(2) No less than 30 days prior to the effective date of the lien, a notice of lien is filed by the Secretary with the Office of the Recorder of Deeds in the county in which the property is located; and

HD : SLT : TEH:1031470045
LC : MJC : RAY:4801470035

(3) Costs associated with any remedy at the property are incurred by the State.

(c) A person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board in accordance with § 6008 of this title. This section shall not preclude any equitable claims by an aggrieved person in the Court of Chancery to contest the imposition of a lien, including actions to quiet title. In any action seeking to contest or enforce a lien, the burden of establishing entitlement to such lien shall be consistent with the burden of proof applicable in an action brought by the Secretary pursuant to this chapter.

(d) A lien created under this section has priority over all other liens and encumbrances perfected after the date that the lien recorded pursuant to this section is perfected, except for liens and encumbrances which relate back to before the perfection of the lien recorded pursuant to this section.

(e) A lien created under this section continues until fully satisfied or otherwise discharged in accordance with law. The Secretary shall, on written request, make available the documentation upon which such lien is based within 10 days of such request.

(f) Upon satisfaction of the liability secured by a lien created under this section, the Secretary shall file a notice of release of lien with the Office of Recorder of Deeds in the county in which the real property is located.

(g) No lien or obligation created under this chapter may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute regulatory obligations imposed by the State.

(h) If the Secretary determines that the funds projected to be available in order to satisfy the lien provided pursuant to subsection (a) of this section will be insufficient to permit the State to recover fully its costs, the Secretary may file a petition in the Court of Chancery seeking to impose an additional lien or liens upon other real property in this State owned by the same liable person or persons as the property where the costs are incurred.

(1) A petition filed by the Secretary pursuant to this subsection shall describe with particularity the real property to which the requested lien will attach.

(2) Upon filing of a petition by the Secretary, the Court shall schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the Secretary, the record owner or owners of the real property which is the subject of the petition, and any person holding a lien or a perfected security interest in the property.

(i) A person whose interest is substantially affected by any action of the Secretary taken pursuant to this section, while contesting the imposition of such environmental lien in accordance with the procedures set forth herein, shall have the right to discharge said lien upon payment into the Court of Chancery or entry of security as follows:

(1) Cash deposit. -- Any environmental lien filed hereunder shall, upon petition of the owner or any party in interest, be discharged as a lien against the property whenever a sum equal to the amount of the claim shall have been deposited with the Court in said proceedings for application to the payment of the amount finally determined to be due. Said petition shall include an affidavit by the owner or party in interest setting forth which parts of the claim filed hereunder are disputed and which parts are not disputed. The non-disputed part of the claim shall be paid to the Secretary before the lien against the property is discharged. If it is finally determined by the Court that the disputed portion of the claim has been grossly overstated by the affiant, the Court may, in its discretion, award damages to the Secretary against the affiant in an amount up to twice the figure stated by the affiant to be disputed.

(2) Refund of excess. -- Any excess of funds paid into Court as aforesaid, over the amount of the claim or claims determined and paid therefrom, shall be refunded to the owner or party depositing same upon application.

(3) Security in lieu of cash. -- In lieu of the deposit of any such sum or sums in cash, approved security may be entered in such proceedings in an amount which the Court shall approve, which, however, shall in no event be less than the full amount of such required deposit; and the entry of such security shall entitle the owner to have such liens discharged to the same effect as though the required sums have been deposited in Court as aforesaid.

(4) Authority of Court. -- The Court, upon petition filed by any party, and after notice and hearing, may upon cause shown:

(i) Require the increase or decrease of any deposit or security;

(ii) Strike off security improperly filed;

(iii) Permit the substitution of security and enter an exoneration of security already given.

Section 2. Amend § 7419, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 7419. ~~Recovery of expenditures.~~ Environmental liens; recovery of expenditures.

~~The Department shall seek recovery of moneys expended from the fund for corrective action under this chapter where the owner or operator has violated substantive regulations pertaining to underground storage tanks which have been promulgated by the Department or has engaged in grossly negligent conduct.~~

(a) Pursuant to the provisions of this section, all reasonable costs expended by the State related to investigating a release or suspected release of a regulated substance from an underground storage tank system including, but not limited to, performing inspections, release detection monitoring, site assessments, removal of regulated substances, removal or closure in place of any part of the underground storage tank system, actions necessary to abate an emergency situation such as

installing water treatment, supplying drinking water, installing wells and venting petroleum vapors, as well as other necessary corrective actions for which a person is liable under this chapter or the regulations promulgated pursuant thereto shall constitute a lien in favor of the State upon the real property where such activities take place and which belongs to such liable party.

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property upon which any corrective action has been undertaken by the State and which is owned by a person liable under this chapter when:

(1) No less that 30 days prior to the effective date of the lien, a notice of lien is sent by the Secretary, by means of certified or registered mail, to the last known address of all record owners of the property and to all persons holding liens or security interests of record. The notice of lien shall state the amount of and basis for the lien;

(2) No less than 30 days prior to the effective date of the lien, a notice of lien is filed by the Secretary with the Office of the Recorder of Deeds in the county in which the property is located; and

(3) Costs associated with corrective action at the property as described in subsection (a) of this section are incurred by the State.

(c) A person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board in accordance with § 6008 of this title. This section shall not preclude any equitable claims by an aggrieved person in the Court of Chancery to contest the imposition of a lien, including actions to quiet title. In any action seeking to contest or enforce a lien, the burden of establishing entitlement to such lien shall be consistent with the burden of proof applicable in an action brought by the Secretary pursuant to this chapter.

(d) A lien created under this section has priority over all other liens and encumbrances perfected after the date that the lien recorded pursuant to this section is perfected, except for liens and encumbrances which relate back to before the perfection of the lien recorded pursuant to this section.

(e) A lien created under this section continues until fully satisfied or otherwise discharged in accordance with law. The Secretary shall, on written request, make available the documentation upon which such lien is based within 10 days of such request.

(f) Upon satisfaction of the liability secured by a lien created under this section, the Secretary shall file a notice of release of lien with the Office of Recorder of Deeds in the county in which the real property is located.

(g) No lien or obligation created under this chapter may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute regulatory obligations imposed by the State.

(h) If the Secretary determines that the funds projected to be available in order to satisfy the lien provided pursuant to subsection (a) of this section will be insufficient to permit the State to recover fully its costs, the Secretary may file a petition in the Court of Chancery seeking to impose an additional lien or liens upon other real property in this State owned by the same liable person or persons as the property where the costs are incurred.

(1) A petition filed by the Secretary pursuant to this subsection shall describe with particularity the real property to which the lien will attach.

(2) Upon filing of a petition by the Secretary, the Court shall schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the Secretary, the record owner or owners of the real property which is the subject of the petition, and any person holding a lien or a perfected security interest in the property.

(i) A person whose interest is substantially affected by any action of the Secretary taken pursuant to this section, while contesting the imposition of such environmental lien in accordance with the procedures set forth herein, shall have the right to discharge said lien upon payment into the Court of Chancery or entry of security as follows:

(1) Cash deposit. -- Any environmental lien filed hereunder shall, upon petition of the owner or any party in interest, be discharged as a lien against the property whenever a sum equal to the amount of the claim shall have been deposited with the Court in said proceedings for application to the payment of the amount finally determined to be due. Said petition shall include an affidavit by the owner or party in interest setting forth which parts of the claim filed hereunder are disputed and which parts are not disputed. The non-disputed part of the claim shall be paid to the Secretary before the lien against the property is discharged. If it is finally determined by the Court that the disputed portion of the claim has been grossly overstated by the affiant, the Court may, in its discretion, award damages to the Secretary against the affiant in an amount up to twice the figure stated by the affiant to be disputed.

(2) Refund of excess. -- Any excess of funds paid into Court as aforesaid, over the amount of the claim or claims determined and paid therefrom, shall be refunded to the owner or party depositing same upon application.

(3) Security in lieu of cash. -- In lieu of the deposit of any such sum or sums in cash, approved security may be entered in such proceedings in an amount which the Court shall approve, which, however, shall in no event be less than the full amount of such required deposit; and the entry of such security shall entitle the owner to have such liens discharged to the same effect as though the required sums have been deposited in Court as aforesaid.

(4) Authority of Court. -- The Court, upon petition filed by any party, and after notice and hearing, may upon cause shown:

(i) Require the increase or decrease of any deposit or security;

(ii) Strike off security improperly filed;

(iii) Permit the substitution of security and enter an exoneration of security already given.

(j) The provisions of this section shall not apply to those classes of underground storage tanks set forth in § 7404(1) and (2) of this chapter.

Section 3. Amend Chapter 74A, Title 7 of the Delaware Code by re-designating current § 7416A as § 7417A and by inserting a new § 7416A as shown by underlining as follows:

§ 7416A. Environmental liens; recovery of expenditures.

(a) Pursuant to the provisions of this section, all reasonable costs expended by the State related to investigating a release or suspected release of a regulated substance from an aboveground storage tank including, but not limited to, performing inspections, tests and repairs, release detection monitoring, site assessments, removal of regulated substances, removal or closure in place of any part of the aboveground storage tank, actions necessary to abate an emergency situation such as installing water treatment, supplying water, installing wells, and removing contaminated media, and abating hazardous vapors, as well as other necessary corrective actions for which a person is liable under this chapter or the regulations promulgated pursuant thereto shall constitute a lien in favor of the State upon the real property where such activities take place and which belongs to such liable person.

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property upon which funds have been expended by the State pursuant to § 7406A and which is owned by a person liable under this chapter when:

(1) No less that 30 days prior to the effective date of the lien, a notice of lien is sent by the Secretary, by means of certified or registered mail, to the last known address of all record owners of the property and to all persons holding liens or security interests of record. The notice of lien shall state the amount of and basis for the lien;

(2) A notice of lien is filed by the Secretary with the Office of the Recorder of Deeds in the county in which the property is located; and

(3) Costs associated with corrective action at the property as described in subsection (a) of this section are incurred by the State.

(c) A person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board in accordance with § 6008 of this title. This section shall not preclude any equitable claims by an aggrieved person in the Court of Chancery to contest the imposition of a lien, including actions to quiet title. In any action seeking to contest or enforce a lien, the burden of establishing entitlement to such lien shall be consistent with the burden of proof applicable in an action brought by the Secretary pursuant to this chapter.

(d) A lien created under this section has priority over all other liens and encumbrances perfected after the date that the lien recorded pursuant to this section is perfected, except for liens and encumbrances which relate back to before the perfection of the lien recorded pursuant to this section.

(e) A lien created under this section continues until fully satisfied or otherwise discharged in accordance with law. The Secretary shall, on written request, make available the documentation upon which such lien is based within 10 days of such request.

(f) Upon satisfaction of the liability secured by a lien created under this section, the Secretary shall file a notice of release of lien with the Office of Recorder of Deeds in the county in which the property is located.

(g) No lien or obligation created under this chapter may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute regulatory obligations imposed by the State.

(h) If the Secretary determines that the funds projected to be available in order to satisfy the lien provided pursuant to subsection (a) of this section will be insufficient to permit the State to recover fully its costs, the Secretary may file a petition in the Court of Chancery seeking to impose an additional lien or liens upon other real property in this State owned by the same liable person or persons as the property where the costs are incurred.

(1) A petition filed by the Secretary pursuant to this subsection shall describe with particularity the real property to which the lien will attach.

(2) Upon filing of a petition by the Secretary, the Court shall schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the Secretary, the record owner or owners of the real property which is the subject of the petition, and any person holding a lien or a perfected security interest in the property.

(i) A person whose interest is substantially affected by any action of the Secretary taken pursuant to this section, while contesting the imposition of such environmental lien in accordance with the procedures set forth herein, shall have the right to discharge said lien upon payment into the Court of Chancery or entry of security as follows:

(1) Cash deposit. -- Any environmental lien filed hereunder shall, upon petition of the owner or any party in interest, be discharged as a lien against the property whenever a sum equal to the amount of the claim shall have been deposited with the Court in said proceedings for application to the payment of the amount finally determined to be due. Said petition shall include an affidavit by the owner or party in interest setting forth which parts of the claim filed hereunder are disputed and which parts are not disputed. The non-disputed part of the claim shall be paid to the Secretary before the lien against the property is discharged. If it is finally determined by the Court that the disputed portion of the claim has been grossly overstated by the affiant, the Court may, in its discretion, award damages to the Secretary against the affiant in an amount up to twice the figure stated by the affiant to be disputed.

(2) Refund of excess. -- Any excess of funds paid into Court as aforesaid, over the amount of the claim or claims determined and paid therefrom, shall be refunded to the owner or party depositing same upon application.

(3) Security in lieu of cash. -- In lieu of the deposit of any such sum or sums in cash, approved security may be entered in such proceedings in an amount which the Court shall approve, which, however, shall in no event be less than the full amount of such required deposit; and the entry of such security shall entitle the owner to have such liens discharged to the same effect as though the required sums have been deposited in Court as aforesaid.

(4) Authority of Court. -- The Court, upon petition filed by any party, and after notice and hearing, may upon cause shown:

(i) Require the increase or decrease of any deposit or security;

(ii) Strike off security improperly filed;

(iii) Permit the substitution of security and enter an exoneration of security already given.

(j) The provisions of this section shall not apply to those classes of aboveground storage tanks set forth in § 7404A(a)(1), (3) and (4) of this chapter.

Section 4. If any provision of this Act or the application thereof is held invalid, such invalidity shall not affect the provisions of this Act that can be given effect without such invalid provisions or application, and to this end the provisions of this Act are declared to be severable.

Section 5. The provisions of this Act shall not apply to, or authorize the filing of a lien against, any real property acquired by a lender, or an affiliate of a lender, prior to the effective date of this Act; provided, however, that the lender, or affiliate of the lender, is not a liable person under Title 7.