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Wisconsin's New Aviation-Specific Mechanic's Lien Law

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In May 2014, I gave a presentation to the General Session at the annual Wisconsin Aviation Conference about a legal issue of concern to many of the attendees – enforcement of mechanics' liens under Wisconsin's laws. After the presentation, Dave Weiman asked me if I would write an article for *Midwest Flyer Magazine* about Wisconsin's lien laws. My article was published in the June/July 2014 issue of this magazine. I gave another lien laws presentation at the 2015 Wisconsin Aviation Conference; and in 2017, I gave a similar presentation at the annual meeting of the Wisconsin Aviation Trades Association (WATA). Since then, I have been following the progress towards improving Wisconsin's lien laws for Wisconsin's aviation community. I am glad to write the following article, discussing how those improvements have been accomplished.

On November 15, 2019, a new law related to liens on aircraft and aircraft engines was introduced by Representative Paul Tittl (R-Manitowoc) and Senator Roger Roth (R-Appleton) for consideration before the Wisconsin State Legislature. The proposed legislation was introduced around the same time in both the Wisconsin Assembly and the Wisconsin Senate. The Assembly Bill was assigned number 611, and the Senate Bill was assigned number 557. The Bills were drafted to create specific lien rights for persons engaged in the repair and/or storage of aircraft and aircraft engines. The Bills proposed a procedure for persons claiming liens on aircraft or aircraft engines to record their liens in the Federal Aviation Administration's Aircraft Registry. Assembly Bill 611 was referred to the Assembly Committee on Jobs and the Economy. Senate Bill 557 was referred to the Senate Committee on Economic Development, Commerce and Trade.

Public hearings were held on the Bills on December 4, 2019. The Assembly Committee hearing began at 10:00 a.m., and the Senate Committee hearing began at 11:00 a.m. Representative Tittl made the opening statement for the Assembly Committee hearing, and Senator Roth kicked off the Senate Committee hearing.

Four members of the public appeared at both hearings to voice support for the Bills. No one appeared at either hearing to voice opposition to the Bills. The persons making appearances at the hearings in support of the Bills were: (1) Tom Ramee representing Gulfstream Aerospace; (2) Jeff Baum representing Wisconsin Aviation Inc.; (3) Curt Stanich representing Waukesha County Airport; and (4) Abe Weber representing Appleton International Airport and the Wisconsin Airport Management Association. Written submissions voicing support for the Bills were presented to the Committees by Mr. Tittl, Mr. Ramee, and Mr. Baum. A written submission was also made by Representative Mike Rohrkaste, representing the 55th Assembly District.

Mr. Tittl's written submission and testimony expressed his view that the Wisconsin aviation community faces a crucial problem, which he described as, "the inability to register aircraft liens with the FAA Aircraft Registry." He explained that Wisconsin's current state laws do not meet the FAA's requirements for aviation liens to be filed in the Federal Aircraft Registry. He explains that the Bill changes Wisconsin laws to meet the FAA's requirements, creating approved procedures allowing the filing of aircraft-related liens with the FAA.

Mr. Ramee's written submission and testimony explained that the proposed legislation, by creating a recordable aviation mechanic's lien law in Wisconsin, would benefit all members of the aviation community – buyers and sellers, mechanics and their customers.

Mr. Baum's written submission and testimony described how the proposed legislation would help protect aviation businesses involved in maintaining, repairing, fueling, and/or storing aircraft from the unfortunate circumstances where bills for services rendered go unpaid.

Mr. Weber's testimony highlighted how the proposed legislation would accomplish two important goals: (1) establish a lien recording method acceptable to the FAA for aircraft liens to be filed with the Aviation Registry, and (2) assist aircraft service providers in collecting fees for their services. Mr. Stanich's testimony expressed similar sentiments and ideas.

Mr. Rohrkaste's written submission stated:

This is a simple bill that helps Wisconsin clear up its laws regarding the most important element in an aircraft transaction: clear title. Should clear title not be established, both the buyer and the seller could lose property or money in a costly legal dispute.

As part of his written submission, Mr. Rohrkaste included a copy of the 2014 article I wrote for *Midwest Flyer Magazine*. My article was included with Mr. Rohrkaste's submission because it discussed in detail why Wisconsin should update its statutes to allow aircraft-related liens to be filed with the FAA's Aircraft Registry.

After the public hearing, the Bill was amended to add a specific reference to "fuel" to the list of charges for which an aircraft lien may arise. After the amendment was passed, the Bill was approved by the full Wisconsin Assembly and the Wisconsin Senate.

The Bill was signed into law by the Governor on February 21, 2020, and was renamed "2019 Wisconsin Act 103."

The new aircraft-related lien law creates a new Section of the Wisconsin Statutes, 779.413, which is entitled "Liens on aircraft and aircraft engines." Subsection 2 of the new statute, in part, provides that:

Every person . . . engaged in repair, storage, servicing, or furnishing supplies or accessories for an aircraft or an aircraft engine . . . , and every person, municipal or private, owning any airport, hangar or aircraft service station and leasing hangar space for aircraft, ***shall have a lien on the aircraft or aircraft engine for any reasonable charges***, including charges for labor, for the use of tools, machinery, and equipment, and for all parts, accessories, materials, fuel, oils, lubricants, keep or storage fees, earned premiums, and other supplies furnished. A lien under this section shall be superior to all liens except liens for taxes . . .

Subsection 3 of the new statute provides:

A lien under this section may be asserted by the retention of the aircraft or the aircraft engine, and . . . the lienor may not be required to surrender the aircraft or the aircraft engine to the holder of a subordinate security interest or lien. If possession of the aircraft or aircraft engine is surrendered by the person claiming the lien, the person claiming the lien may do all of the following within 180 days after repairs, storage, services, supplies, accessories, or contracts of indemnity are furnished:

- (a) ***provide written notice*** . . . giving an accurate account of the demands claimed to be due . . . to the registered owner and others holding recorded interests in the aircraft or aircraft engine at the addresses listed in the federal aviation administration's aircraft registry. . . .
- (b) file the written notice for ***recording in the federal aviation administration's aircraft registry*** in the matter prescribed by federal law under 49 U.S.C. 44107

The new statute – for the first time under Wisconsin law – creates a procedure for having liens on aircraft worked on or stored in Wisconsin filed with the FAA's Aircraft Registry.

Clear title is one of the most important elements in an aircraft transaction. Clear title means that ownership of the aircraft is transferred free and clear of all mortgages, liens, leases or other encumbrances; and that there are no legal questions or ambiguities as to the aircraft's ownership.

Even when it appears that an aircraft is being sold with a clear title, challenges to title lien claims can pop up after the aircraft has been sold. Many of these disputes can be avoided as long as liens are filed with the FAA Aircraft Registry and people use the Registry before buying/selling aircraft.

Aircraft records maintained by the Aircraft Registry are on file at the FAA's Mike Moroney Aeronautical Center in Oklahoma City. The FAA Aircraft Registry collects information necessary to establish and maintain title records for U.S. civil aircraft. Each time a bill of sale, a lien, or a 337 Form is submitted to the FAA, it is reviewed for completeness and accuracy, and then added to the appropriate aircraft folder. Examining the FAA Aircraft Registry before an aircraft transaction helps avoid the headaches some aircraft owners have suffered because they failed to take this one important step before purchasing an aircraft.

Generally, persons who provide services for maintaining, repairing, or storing aircraft – who have not been paid – would like to have the option to file proof of their liens with the FAA Registry. However, recording aircraft-related liens with the FAA is not allowed if the applicable state law fails to conform to the FAA's requirements.

Most, but not all, states have statutes allowing for maintenance/storage liens to be filed with the aircraft registry. The passage of Act 103 makes Wisconsin one of approximately 40 states with aircraft-related lien recording laws on the books. At this time, at least 10 states do not have such laws on the books.

Before Act 103 was passed, Wisconsin's lien laws did not meet the FAA recording requirements because they did not contain any provisions for recording aircraft-related liens. Because Wisconsin's lien laws did not satisfy the FAA's lien-recording requirements, Wisconsin aircraft-related maintenance/storage liens could not be recorded with the Aircraft Registry.

Obviously, unrecorded liens can create difficult legal problems for aircraft buyers and sellers. Before Act 103 became law, a search of the FAA Aircraft Registry would not reveal the existence of any Wisconsin mechanics' liens because the FAA did not permit recording of such liens.

All members of the aviation community are better off when a procedure is in place for recording storage/mechanics' liens with the FAA. First, buyers and sellers of aircraft will be better off because title problems will be avoided. Plus, persons who work on and/or store aircraft, and their customers, will benefit because problems with unpaid invoices will be reduced.

Concerning enforcing lien rights for unpaid fees, Section 779.413(2) provides that: "Every person . . . and keeper of a garage or shop engaged in repair [or] storage . . . for an aircraft . . . , and every person, municipal or private, owning an airport, hangar, or aircraft service station and leasing hangar space for aircraft, shall have a lien on the aircraft . . . for any reasonable charges, including . . . keep or storage fees . . ."

Section 779.413(3) provides that: "A lien under this section may be asserted by the retention of the aircraft . . . , and if the lien is asserted by retention of the aircraft . . . , the lienor may not be required to surrender the aircraft . . . to the holder of a subordinate security interest or lien." (Subsection 3 also states what may be done if possession of the aircraft is surrendered by the person claiming the lien.)

Concerning the ability to enforce a lien for unpaid aircraft storage or repair/maintenance fees, the Act includes revisions to Wisconsin Statute Section 779.48(2), which is the enforcement provision for other mechanics' liens, to include Section 779.413. Section 779.48(2) provides that "Every person given a lien by [Section 779.413] may in case the claim remains unpaid for 2 months after the debt is incurred, . . . enforce such lien by sale of the property substantially in conformity with subch. VI of ch. 409 and the lien claimant shall have the rights and duties of a secured party thereunder."

Enforcing a lien for unpaid fees must follow all of the rules and procedures set forth in Chapter 409, Subchapter VI, of the Wisconsin Statutes. This article highlights some of the relevant sections of Chapter 409, Subchapter VI, for enforcing lien rights involving an aircraft. Please make sure you review the entirety of Chapter 409, Subchapter VI carefully before proceeding.

To begin, Wisconsin Statute Section 409.610(1) provides that upon default by the debtor, a secured party (the creditor) may "sell . . . any or all of the collateral in its present condition or following any commercially reasonable preparation or processing."

Prior to the sale of an aircraft, the creditor must give notice to the debtor(s), and to any secondary obligors (if known), that the creditor intends to dispose of the collateral (the aircraft) through a sale. See Wis. Stat. § 409.611. This notice must be timely. Wis. Stat. § 409.612. Unfortunately, the Wisconsin Statutes do not specify what is "timely" under the notice requirement; it merely indicates that timeliness may be a question of fact for a fact-finder to decide if the issue is litigated.

The purpose of the notice is to give the debtor an opportunity to cure the debt or time to make necessary arrangements in

the event of disposition. In that way, the notice requirement operates similar to due process, ensuring that the disposition of the aircraft is conducted with the debtor's knowledge, and to provide the debtor with a final opportunity to cure the debt prior to losing their property.

The contents and the form of the notification are controlled by Wisconsin Statute Section 409.614. The notification must do the following:

- (1) describe the debtor and the secured party;
- (2) describe the collateral that is the subject of the intended disposition;
- (3) state the method of intended disposition;
- (4) state that the debtor is entitled to an accounting of the unpaid indebtedness and state the charge, if any, for an accounting;
- (5) state the time and place of a public disposition or the time after which any other disposition is to be made;
- (6) provide a description of any liability for a deficiency of the person to which the notification is sent;
- (7) provide a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Wisconsin Statute Section 409.623 is available; and
- (8) provide a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

A template of the notice can be found under Wisconsin Statute Section 409.614, under the heading "NOTICE OF OUR PLAN TO SELL PROPERTY."

Another important factor is "every aspect of [the sale], including the method, manner, time, place, and other terms must be commercially reasonable." Wis. Stat. § 409.610(2). A disposition is made in a commercially reasonable manner if it is made:

- (1) in the usual manner on any recognized market;
- (2) at the price current in any recognized market at the time of the disposition; or
- (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Wis. Stat. § 409.627. It is crucial to follow the "commercially reasonable" criteria very carefully.

Unfortunately, there is not a bright-line test for what is "commercially reasonable." Rather, it depends on the circumstances and context. Wisconsin court decisions provide some examples that illustrate what may be deemed "commercially reasonable," or not. *See, i.e., In re Linton*, 1981 Wisc. App. LEXIS 4313 (Ct. App. 1981) (holding that the sale of a truck was not commercially reasonable where the creditor sold the truck to himself at a wholesale price); *CIT Group Equip. Fin., Inc. v. FRS Farms, Inc.*, 2007 Wisc. App. LEXIS 1121 (sale of specialized equipment was found not commercially reasonable where the seller failed to obtain formal appraisals of the equipment, and sold the equipment to a party who was not the ultimate purchaser); *First Wisconsin Nat'l Bank v. Johnson*, 1992 Wisc. App. LEXIS 1231 (Ct. App. 1992) (holding that the sale of a vehicle was commercially reasonable where the vehicle was placed on a public lot, had a "for sale" sign in the window, advertised the vehicle for sale in the newspaper, and took multiple bids under consideration).

It is important to recognize that some of the procedures under Wisconsin Statutes Chapter 409 will vary depending on whether or not the subject aircraft is considered a "consumer good," and the transaction at issue is considered a "consumer-goods transaction." To make this determination, the purpose for which the debtor used the aircraft may be important. Determinative questions may include whether or not the aircraft was used exclusively for personal/family trips; or did the debtor conduct some

type of business with the aircraft? The exact requirements of Chapter 409, Subchapter VI may vary depending on the answers to these sorts of questions.

Once the sale has taken place, a transfer statement must be authenticated by the creditor. The transfer statement must state that:

- (1) the debtor has defaulted in connection with an obligation secured by the specified collateral;
- (2) the secured party has exercised its post-default remedies with respect to the collateral;
- (3) by exercising those remedies, a transferee has acquired the rights of the debtor in the collateral; and
- (4) the name and mailing address of the secured party, debtor, and transferee.

Wis. Stat. § 409.619. The transfer statement entitles the transferee to the “transfer of record of all rights of the debtor in the collateral specified in the statement in any [official filing office] covering the collateral.”

After the sale of the aircraft occurs, the proceeds from the sale may be applied to the remaining debt, if any. Any remaining debt owed to the creditor creates a deficiency judgment that the debtor is liable for, and for the creditor to collect upon. The proceeds from the sale must be applied in the following order:

- (1) First, the proceeds may be applied to the “reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing of, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney fees and legal expenses incurred by the secured party.”
- (2) Second, the proceeds may then be applied to the obligations secured by the security interest (i.e., the rent owed).
- (3) Third, the proceeds may next be applied to any subordinate security interest, provided that the subordinate creditor provides the secured party with a demand for proceeds prior to disposition.
- (4) Fourth, the proceeds may finally be applied to a cosigner of the collateral if the cosigner demands proceeds prior to the completion of the distribution of proceeds.

Wis. Stat. § 409.615(1). If any proceeds from the sale remain after the application as described above (the “surplus”), that surplus is to be paid to the debtor. Generally, Wisconsin Statute Section 409.615 and other provisions of Chapter 409 contain fee shifting and allow for recovery of reasonable attorney fees incurred by the secured party.

If any deficiency remains on the debtor’s account following the distribution of proceeds, i.e., the debtor still owes money after the sale of the aircraft, the debtor is still liable for that deficiency. If that were the case, the creditor would be able to bring a deficiency claim against the debtor under Wisconsin Statute Section 409.615(4)(b). In other words, the creditor would be able to sue the debtor for the remainder of the deficiency in Wisconsin Circuit Court. However, if the sale does not conform to Subchapter VI of the code, the deficiency amount may be reduced in accordance with Wisconsin Statute Section 409.626.

In conclusion, it is good news for the Wisconsin aviation community that Wisconsin has joined the list of almost 40 other states with mechanic’s lien laws that allow persons who work on and/or store aircraft to have their liens registered with the FAA Aircraft Registry.

I would like to recognize Corey Swinick for his great assistance in the preparation of this article.

EDITOR’S NOTE: Russ Klingaman is a partner with the law firm of Hinshaw & Culbertson LLP in Milwaukee, Wis. As an instrument-rated private pilot and aircraft owner, he has a special interest in aviation law. Klingaman teaches aviation law at Marquette Law School, and is a past-president of the Lawyer Pilots Bar Association. Klingaman handles a broad range of business disputes involving contracts and intellectual property. He also handles FAA enforcement cases and lawsuits involving serious personal injuries and/or property loss. Questions and comments about the foregoing topic may be directed to Russ Klingaman at rklingaman@hinshawlaw.com 