

CHAPTER 779

LIENS

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SUBCHAPTER I

CONSTRUCTION LIENS

779.01 Construction liens. (1) NAME OF LAW. This subchapter may be referred to as the construction lien law.

(2) DEFINITIONS. In this subchapter unless the context or subject matter requires otherwise:

(a) "Improve" or "improvement" includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing, landscaping, repairing, or remodeling which is built, erected, made or done on or to land for its benefit. This enumeration is intended as an extension rather than a limitation of the normal meaning and scope of "improve" and "improvement".

(am) "Labor" includes any wages and related contributions for state employment taxes, worker's compensation and unemployment compensation insurance, and other fringe benefits.

(b) "Lien claimant" means any person who claims a lien under this section pursuant to a contract for improvement of land entered into by an owner of the land.

(bm) "Materials" includes any construction materials, supplies, tools, fixtures, equipment, machinery, vehicles, fuel, and energy.

(c) "Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract, express or implied, for the improvement of the land. Agency will be presumed, in the absence of clear and convincing evidence to the contrary, between employer and employee, between spouses, between joint tenants and among tenants in common, but there shall be a similar presumption against agency in all other cases.

(d) "Prime contractor" means any of the following:

1. A person, other than a laborer, but including an architect, professional engineer, construction manager, surveyor, or other service provider, employed by the owner, who enters into a contract with an owner of land who is not personally the prime contractor as defined in subd. 2. to improve the land, or who takes over from a prime contractor the uncompleted contract.

2. An owner of land who acts personally as prime contractor in improving such land.

(e) "Serve" or "served" means personal delivery, delivery by registered or certified mail, service in a manner described for ser-

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vice of a summons under s. 801.14, or any other means of delivery in which the recipient makes written confirmation of the delivery; except that in s. 779.15, with respect to serving the state, “serve” or “served” means delivery by registered or certified mail.

(3) **EXTENT AND CHARACTER OF LIEN.** Any person who performs, furnishes, or procures any work, labor, service, materials, plans, or specifications, used or consumed for the improvement of land, and who complies with s. 779.02, shall have a lien therefor on all interests in the land belonging to its owners. The lien extends to all contiguous land of the owner, but if the improvement is located wholly on one or more platted lots belonging to the owner, the lien applies only to the lots on which the improvement is located.

(4) **PRIORITY OF CONSTRUCTION LIEN.** The lien provided in sub. (3) shall be prior to any lien which originates subsequent to the visible commencement in place of the work of improvement, except as otherwise provided by ss. 215.21 (4) (a), 292.31 (8) (i), 292.81 and 706.11 (1) and (1m). When new construction is the principal improvement involved, commencement is considered to occur no earlier than the beginning of substantial excavation for the foundations, footings or base of the new construction, except where the new construction is to be added to a substantial existing structure, in which case the commencement is the time of the beginning of substantial excavation or the time of the beginning of substantial preparation of the existing structure to receive the added new construction, whichever is earlier. The lien also shall be prior to any unrecorded mortgage given prior to the commencement of the work of improvement, if the lien claimant has no actual notice of the mortgage before the commencement. Lien claimants who perform, furnish, or procure any labor, services, materials, plans, or specifications for an improvement prior to the visible commencement of the work of improvement shall have lien rights, but shall have only the priority accorded to other lien claimants.

(5) **ASSIGNMENT OF LIEN, GARNISHMENT.** Assignment of a claim or right to a lien or any part thereof by a prime contractor, or garnishment by the creditor of a prime contractor, subcontractor, supplier, service provider, laborer or mechanic, shall not operate to compel the owner, prime contractor, subcontractor, supplier, or service provider to pay the assignee or creditor until the lien claims of subcontractors, suppliers, service providers, and laborers under this subchapter have either been paid in full, matured by notice and filing or expired. If such claims become liens, the owner, prime contractor, subcontractor, supplier, or service provider shall be compelled to pay such assignee or creditor only what remains due in excess of such liens.

History: 1973 c. 231; 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.01; 1983 a. 189; 1993 a. 453; 1995 a. 225, 227; 1997 a. 27, 35, 44, 252; 2005 a. 204.

A lien did not accrue by virtue of a surveyor’s placement of stakes indicating the street layout, although performed before the mortgage was recorded, as staking is not a visible commencement of improvement work. *Mortgage Associates v. Monona Shores*, 47 Wis. 2d 171, 177 N.W.2d 340 (1970).

Public policy does not require that financial institutions notify contractors that the owner is or may be in default. *Mortgage Associates v. Monona Shores*, 47 Wis. 2d 171, 177 N.W.2d 340 (1970).

In a complaint seeking to foreclose a construction lien on a municipal arena, allegations that the lessee of the arena was acting as the city’s agent in contracting for improvements to the arena was sufficient to withstand demurrer. *James W. Thomas Construction Co., Inc. v. Madison*, 79 Wis. 2d 345, 255 N.W.2d 551 (1977).

An architects’ lien was unenforceable prior to the visible commencement of construction. *Goebel v. National Exchangers, Inc.* 88 Wis. 2d 596, 277 N.W.2d 755 (1979).

A prospective buyer under a purchase contract was not an “owner” under sub. (2) (d). *C. R. Stocks, Inc. v. Blakely’s Matterhorn, Inc.* 90 Wis. 2d 118, 279 N.W.2d 499 (Ct. App. 1979).

A lien for work performed after the owner’s ex-spouse docketed a judgment against the owner related back to earlier work completed and paid in full under a different contract. *Estate of Riese v. Weber*, 132 Wis. 2d 215, 389 N.W.2d 640 (Ct. App. 1986).

Construction lien claimants’ rights against purchase contract interests: The role of equitable conversion. 1980 WLR 615.

779.02 Notice required to preserve lien rights; exceptions; saving clause; obligations of contractors.

(1) **EXCEPTIONS TO NOTICE REQUIREMENT.** The notice required to

be given by lien claimants under sub. (2) shall not be required to be given in the following cases only:

(a) By any laborer or mechanic employed by any prime contractor or subcontractor.

(b) By any lien claimant who has contracted directly with the owner for the labor, services, materials, plans, or specifications performed, furnished, or procured, unless the claimant is a prime contractor subject to the notice requirement of sub. (2) (a).

(c) By any lien claimant performing, furnishing, or procuring labor, services, materials, plans, or specifications for an improvement in any case where more than 4 family living units are to be provided or added by such work of improvement, if the improvement is wholly residential in character, or in any case where the improvement is partly or wholly nonresidential in character.

(d) By any prime contractor who is personally an owner of the land to be improved, by any corporate prime contractor of which an owner of the land is an officer or controlling shareholder, by any prime contractor who is an officer or controlling shareholder of a corporation which is an owner of the land or by any corporate prime contractor managed or controlled by substantially the same persons who manage or control a corporation which is an owner of the land.

(e) By any lien claimant, other than a prime contractor, who performs, furnishes, or procures labor, services, materials, plans, or specifications for an improvement on a project on which the prime contractor is not required to give notice under this section.

(2) **NOTICE TO OWNER, LENDER, AND SUPPLIER.** (a) Every prime contractor who enters into a contract with the owner for a work of improvement on the owner’s land and who has contracted or will contract with any subcontractors, suppliers, or service providers to perform, furnish, or procure labor, services, materials, plans, or specifications for the work of improvement shall include in any written contract with the owner the notice required by this paragraph, and shall provide the owner with a copy of the written contract. If no written contract for the work of improvement is entered into, the notice shall be prepared separately and served on the owner or authorized agent within 10 days after the first labor, services, materials, plans, or specifications are performed, furnished, or procured for the improvement by or pursuant to the authority of the prime contractor. The notice, whether included in a written contract or separately given, shall be in at least 8–point bold type, if printed, or in capital letters, if typewritten. It shall be in substantially the following language: “As required by the Wisconsin construction lien law, claimant hereby notifies owner that persons or companies performing, furnishing, or procuring labor, services, materials, plans, or specifications for the construction on owner’s land may have lien rights on owner’s land and buildings if not paid. Those entitled to lien rights, in addition to the undersigned claimant, are those who contract directly with the owner or those who give the owner notice within 60 days after they first perform, furnish, or procure labor, services, materials, plans or specifications for the construction. Accordingly, owner probably will receive notices from those who perform, furnish, or procure labor, services, materials, plans, or specifications for the construction, and should give a copy of each notice received to the mortgage lender, if any. Claimant agrees to cooperate with the owner and the owner’s lender, if any, to see that all potential lien claimants are duly paid”.

(b) Every person other than a prime contractor who performs, furnishes, or procures labor, materials, plans, or specifications for an improvement shall have the lien and remedy under this subchapter only if within 60 days after performing, furnishing, or procuring the first labor, services, materials, plans, or specifications the person serves a written notice, in 2 signed copies, on the owner or authorized agent at the last-known post-office address. The owner or agent shall provide a copy of the notice received, within 10 days after receipt, to any mortgage lender who is furnishing or is to furnish funds for construction of the improvement to which the notice relates. The notice to the owner shall be in substantially

the following language, with blanks accurately filled in: “As a part of your construction contract, your prime contractor or claimant has already advised you that those who perform, furnish, or procure labor, services, materials, plans, or specifications for the work will be notifying you. The undersigned first performed, furnished, or procured labor, services, materials, plans, or specifications on (give date) for the improvement now under construction on your real estate at (give legal description, street address or other clear description). Please give your mortgage lender the extra copy of this notice within 10 days after you receive this, so your lender, too, will know that the undersigned is included in the job”.

(c) If any prime contractor required to give the notice prescribed in par. (a) fails to give notice as required, the prime contractor does not have the lien and remedy provided by this subchapter unless the prime contractor pays all of the prime contractor’s obligations to its subcontractors, suppliers, and service providers in respect to the work of improvement within the time periods under s. 779.06 and until the time for notice under par. (b) has elapsed and either none of its subcontractors, suppliers, or service providers gives notice as a lien claimant under par. (b) or all of its subcontractors, suppliers, and service providers have waived all lien rights in full under s. 779.05.

(d) Every mortgage lender making an improvement or construction loan shall make reasonable inquiry of the owner as to whether any notices required by this subsection have been given. A lender is not required to pay out any loan proceeds unless or until the prime contractor has given any notice required of the prime contractor by this subsection.

(e) If the owner or lender complains of any insufficiency of any notice, the burden of proof is upon the owner or lender to show that he or she has been misled or deceived by the insufficiency. If there is more than one owner, giving the notice required to any one owner or authorized agent is sufficient. In addition, every prime contractor and subcontractor, at the time of purchasing or contracting for any materials to be used in any of the cases enumerated in s. 779.01, shall upon request deliver to the supplier a description of the real estate upon which the materials are to be used and the name and post-office address of the owner and authorized agent, if any. Failure to receive such description and name and address does not relieve a supplier who asserts a lien from the requirement of giving timely notice.

(3) FAILURE TO GIVE NOTICE; SAVING CLAUSE. Any lien claimant, other than the prime contractor, who fails to give a notice as required by sub. (2) (b) shall have no lien on the land or improvement to which the failure relates. Any claimant who serves a late but otherwise proper notice on the owner or authorized agent shall have the lien provided by s. 779.01 for any labor, services, materials, plans, or specifications performed, furnished, or procured after the late notice is actually received by the owner. The burden of proving that labor, services, materials, plans, or specifications for which a lien is claimed were furnished after that date is on the lien claimant.

(4) NOTICE AND FILING REQUIREMENTS IN S. 779.06 UNAFFECTED. Nothing in this section shall be construed to relieve any lien claimant of the notice and filing requirements under s. 779.06.

(5) THEFT BY CONTRACTORS. The proceeds of any mortgage on land paid to any prime contractor or any subcontractor for improvements upon the mortgaged premises, and all moneys paid to any prime contractor or subcontractor by any owner for improvements, constitute a trust fund only in the hands of the prime contractor or subcontractor to the amount of all claims due or to become due or owing from the prime contractor or subcontractor for labor, services, materials, plans, and specifications used for the improvements, until all the claims have been paid, and shall not be a trust fund in the hands of any other person. The use of any such moneys by any prime contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount

actually in dispute, have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor or subcontractor of moneys so misappropriated and is punishable under s. 943.20. If the prime contractor or subcontractor is a corporation, limited liability company, or other legal entity other than a sole proprietorship, such misappropriation also shall be deemed theft by any officers, directors, members, partners, or agents responsible for the misappropriation. Any of such misappropriated moneys which have been received as salary, dividend, loan repayment, capital distribution or otherwise by any shareholder, member, or partner not responsible for the misappropriation shall be a civil liability of that person and may be recovered and restored to the trust fund specified in this subsection by action brought by any interested party for that purpose. Except as provided in this subsection, this section does not create a civil cause of action against any person other than the prime contractor or subcontractor to whom such moneys are paid. Until all claims are paid in full, have matured by notice and filing or have expired, such proceeds and moneys shall not be subject to garnishment, execution, levy or attachment.

(6) PRIME CONTRACTORS TO DEFEND LIEN ACTIONS. Where a lien is filed under this subchapter by any person other than the prime contractor, the prime contractor shall defend any action thereon at personal expense, and during the pendency of the action the owner may withhold from the prime contractor the amount for which the lien was filed and sufficient to defray the costs of the action. In case of judgment against the owner, the owner may deduct from any amount due to the prime contractor the amount of the judgment and if the judgment exceeds the amount due, the owner may recover the difference from the prime contractor. This subsection does not apply if the lien is the result of the failure of the owner to pay the prime contractor.

(7) WRONGFUL USE OF MATERIALS. Any prime contractor or any subcontractor furnishing materials who purchases materials on credit and represents at the time of making the purchase that the materials are to be used in a designated building or other improvement and thereafter uses or causes them to be used in the construction of any improvement other than that designated, without the written consent of the seller, may be fined not more than \$300 or imprisoned not more than 3 months.

(8) WAGE PAYMENTS TO LABORER APPLY TO EARLIER WORK. In any situation where a laborer or mechanic employed by any prime contractor or subcontractor has wage payments due and has worked on more than one improvement for the employer during the period for which the wages are due, and a payment of less than all wages due is made, the payment is deemed to apply to the unpaid work in chronological sequence starting with the earliest unpaid time, unless the laborer agrees in writing that the payment shall be applied in a different way.

History: 1973 c. 229, 231; 1975 c. 409; 1979 c. 32 ss. 57, 92 (9); 1979 c. 110 s. 60 (12); 1979 c. 176, 355; Stats. 1979 s. 779.02; 1983 a. 362; 1995 a. 395; 2005 a. 204.

It is not necessary to show that the defendant received benefits from a misappropriation of trust funds in order for the plaintiff to recover. A showing of wrongful intent is not required to establish civil liability under sub. (5). *Burmeister Woodwork Co. v. Friedel*, 65 Wis. 2d 293, 222 N.W.2d 647 (1974).

When the defendant lessor had not paid the lessee for improvements to the lessor’s property by the lessee’s contractor, the contractor had a claim for unjust enrichment against the defendant even though the contractor lost its lien rights against the defendant by failing to give the notice required under sub. (2) (a). *S & M Rotogravure Service, Inc. v. Baer*, 77 Wis. 2d 454, 252 N.W.2d 913 (1977).

Intent to defraud must be proved when criminal sanctions are sought under sub. (5). *State v. Blaisdell*, 85 Wis. 2d 172, 270 N.W.2d 69 (1978).

Because an entire project was covered by one contract, 3 buildings on 3 adjoining lots constituted a single improvement under sub. (1) (c). *Cline-Hanson, Inc. v. Esselman*, 107 Wis. 2d 381, 319 N.W.2d 829 (1982).

“Improvement” in sub. (1) (c) applies to remodeling. “Usable square footage” in sub. (1) (c) includes all floor area within the outside walls; columns, walls, stairs, and partitions are not deducted. *Sullivan Brothers, Inc. v. State Bank of Union Grove*, 107 Wis. 2d 641, 321 N.W.2d 545 (Ct. App. 1982).

Sub. (5) does not require that payments be made directly from the owner to subcontractors for a trust to be created. Money deposited into a bank did not lose its trust fund status. *Kraemer Bros. v. Pulaski State Bank*, 138 Wis. 2d 395, 406 N.W.2d 379 (1987).

A trust fund under sub. (5) is created when an owner constructively pays an insolvent contractor by delivering money to the clerk of court seeking a declaratory judgment.

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ment as to distribution. A subcontractor need not preserve lien rights. *Wis. Dairies Coop. v. Citizens Bank*, 160 Wis. 2d 758, 467 N.W.2d 124 (1991).

A violation of sub. (5) may be found without showing that the prime contractor intended to permanently deprive laborers and suppliers of compensation. The intent required is to use the moneys subject to a trust inconsistent with the purpose of the trust. *State v. Sobkowiak*, 173 Wis. 2d 327, 496 N.W.2d 620 (Ct. App. 1992).

Under sub. (5), a corporate officer who had the power and authority to ensure that corporate affairs were properly managed and who did not receive a personal benefit may be personally responsible for a misappropriation. *Capen Wholesale, Inc. v. Probst*, 180 Wis. 2d 354, 509 N.W.2d 120 (Ct. App. 1993).

The prime contractor's duty under sub. (6) to defend the property owners against subcontractors' lien claims is not altered because the prime contractor is also owed money. *Torke/Wirth/Pujara v. Lakeshore Towers*, 192 Wis. 2d 481, 531 N.W.2d 419 (Ct. App. 1995).

The exemption under sub. (1) (c) to the notice requirement for improvements when more than 4 residential units are provided is not restricted to the actual provision of the dwellings, but also applies to improvements that facilitate providing the dwellings when the improvements are not provided to each living unit separately but are provided to a project as a whole. *Riverwood Park, Inc. v. Central Ready-Mixed Concrete, Inc.* 195 Wis. 2d 821, 536 N.W.2d 722 (Ct. App. 1995), 94–2413.

The test for a violation of sub. (5) is whether all the money received by the contractor was paid for labor and materials used for contracted improvements. It is not whether an individual subcontractor received its full billed amount. *Capital City Sheet Metal, Inc. v. Voytovich*, 217 Wis. 2d 683, 578 N.W.2d 643 (Ct. App. 1998), 97–1588.

When a lien claimant's work was essential to allow an improvement to be used for its intended purpose and the improved area exceeded 10,000 square feet, the work "provided" 10,000 square feet of space to the facility under sub. (1) (c) and the claimant was exempt from the sub. (2) lien notice requirement. *U.S. Fire Protection v. St. Michael's Hospital*, 221 Wis. 2d 410, 585 N.W.2d 659 (Ct. App. 1998), 97–3426.

Under sub. (5), a misuse of contractor trust funds can form the basis of a prosecution for criminal theft by contractor under s. 943.20. Because s. 943.20 qualifies for treble damages under s. 895.80, treble damages are available for theft by contractor under sub. (5), provided that the elements of both the civil and the criminal statutes, including the specific criminal intent element required by s. 943.20, are proven to the civil preponderance burden of proof. *Tri-Tech Corporation of America v. Ameri-comp Services, Inc.* 2002 WI 88, 254 Wis. 2d 418, 646 N.W.2d 822, 00–3195.

While money cannot be used for purposes outside of the project, that does not end contractors' responsibilities under the statute. Using the money to pay themselves in full while other subcontractors have not been paid proportionally constitutes using money for a non-statutory purpose. *State v. Keyes*, 2008 WI 54, 309 Wis. 2d 516, 750 N.W.2d 30, 04–1104.

Monies paid to the trustee in bankruptcy of an insolvent contractor are not trust funds. *In re Mercury Heating Co.* 322 F. Supp. 1161 (1971).

Wisconsin's Construction Trust Fund Statute: Protecting Against Theft by Contractor. *Hinkston*. Wis. Law. May 2005.

779.03 Lien valid unless waived by claimant personally, or unless payment bond furnished. (1) NO AGREEMENT BY OTHER THAN CLAIMANT MAY INVALIDATE LIEN. Subject to s. 779.05, a lien claimant may waive the lien given by s. 779.01 by a writing signed by the lien claimant, but no action by nor agreement between any other persons shall invalidate the lien, other than payment in full to the claimant for the labor, services, materials, plans, or specifications to which the lien claim relates.

(2) PAYMENT BOND MAY ELIMINATE LIEN RIGHTS. In any case where the prime contractor, pursuant to agreement with the owner, has furnished a payment bond under s. 779.035, all liens provided by s. 779.01 except those of any prime contractor do not exist, ss. 779.02 (1) to (4) and (6) and 779.06 do not apply and all claimants who have no lien shall follow the requirements and procedures specified in ss. 779.035 and 779.036.

History: 1973 c. 230; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.03; 1993 a. 486; 2005 a. 204.

779.035 Form of contract; payment bond; remedy.

(1) To eliminate lien rights as provided in s. 779.03 (2), the contract between the owner and the prime contractor for the construction of the improvement shall contain a provision for the payment by the prime contractor of all claims for labor, services, materials, plans, or specifications performed, furnished, procured, used, or consumed, except plans or specifications furnished by the architect, professional engineer or surveyor employed by the owner, in making such improvement and performing the work of improvement. The contract shall not be effective to eliminate lien rights unless the prime contractor gives a bond issued by a surety company licensed to do business in this state. The bond shall carry a penalty for unpaid claims of not less than the contract price, and shall be conditioned for the payment to every person entitled thereto of all the claims for labor, services, materials, plans, and specifications performed, furnished, or procured under the contract and subsequent amendments thereto, to be used or consumed

in making the improvement or performing the work of improvement as provided in the contract and subsequent amendments thereto. The bond shall be approved by the owner and by any mortgage lender furnishing funds for the construction of the improvement. No assignment, modification or change in the contract, or change in the work covered thereby, or any extension of time for completion of the contract shall release the sureties on the bond.

(2) (a) Except as provided in par. (b), any party in interest may, not later than one year after the completion of the contract for the construction of the improvement, maintain an action in his or her own name against the prime contractor and the sureties upon the bond for the recovery of any damages sustained by reason of the failure of the prime contractor to comply with the contract or with the contract between the prime contractor and subcontractors. If the amount realized on the bond is insufficient to satisfy all of the claims of the parties in full, it shall be distributed among the parties proportionally.

(b) 1. Except as provided in subd. 2., a subcontractor, supplier, or service provider may maintain an action under par. (a) only if the subcontractor, supplier, or service provider has notified the prime contractor in writing that the subcontractor, supplier, or service provider was performing, furnishing, or procuring labor, services, materials, plans, or specifications for the construction of the improvement. The notice must be provided no later than 60 days after the date on which the subcontractor, supplier, or service provider first performed, furnished, or procured the labor, services, materials, plans, or specifications.

2. A notice under subd. 1. is not required if any of the following applies:

a. The contract for performing, furnishing, or procuring the labor, services, materials, plans, or specifications does not exceed \$5,000.

b. The action is brought by an employee of the prime contractor, the subcontractor or the supplier.

c. The subcontractor, supplier, or service provider is listed in a written contract, or in a document appended to a written contract, between a subcontractor, supplier, or service provider and the prime contractor.

(3) In any case in which the improvement contract and bond have been prepared and executed pursuant to sub. (1) upon inquiry by any subcontractor, supplier, service provider, laborer, or mechanic performing, furnishing, or procuring labor, services, materials, plans, or specifications for said improvement, the prime contractor and the owner shall so advise the person making the inquiry and shall give the person reasonable opportunity to inspect and examine the contract and bond.

History: 1973 c. 230; 1979 c. 32 ss. 57, 92 (9); 1979 c. 110 s. 60 (12); 1979 c. 176; Stats. 1979 s. 779.035; 1991 a. 200; 1993 a. 213; 1995 a. 395; 2005 a. 204.

A provision in a contractor's payment bond requiring a supplier of a subcontractor to provide notice to the prime contractor within 90 days after supplying materials in order to secure his rights under the payment bond was not inconsistent with the one-year statute of limitations provided by sub. (2), which was also incorporated into the agreement, and hence was not contrary to public policy. *R.C. Mahon Co. v. Hedrich Construction Co.* 69 Wis. 2d 456, 230 N.W.2d 621 (1975).

The liability of a prime contractor for damages to employees of a subcontractor under s. 779.14 (2) did not include wage penalties under s. 66.293 [now 66.0903] (3). Consent to be a named party under s. 66.293 (3) may occur after one year when the action is for damages under s. 66.293 in the name of the plaintiffs and other similarly situated employees and was filed within the one-year time period. *Strong v. C.I.R., Inc.* 184 Wis. 2d 619, 516 N.W.2d 719 (1994).

779.036 Contracts with payment bond; lien; notice; duty of owner and lender. (1)

In any case in which an improvement is constructed or to be constructed pursuant to a contract and payment bond under s. 779.035, any person performing, furnishing, or procuring labor, services, materials, plans, or specifications to be used or consumed in making the improvement, to any prime contractor or subcontractor shall have a lien on the money or other payment due or to become due the prime contractor or subcontractor therefor, if the lienor, before payment is made to the prime contractor or subcontractor, serves a written notice of the lienor's claim on the owner or authorized agent and on any

mortgage lender furnishing funds for the construction of the improvement. Upon receipt of the notice, the owner and lender shall assure that a sufficient amount is withheld to pay the claim and, when it is admitted or not disputed by the prime contractor or subcontractor involved or established under sub. (3), shall pay the claim and charge it to the prime contractor or subcontractor as appropriate. Any owner or lender violating this duty shall be liable to the claimant for the damages resulting from the violation. There shall be no preference among lienors serving such notices.

(2) A copy of the notice provided in sub. (1) also shall be served by the lienor, within 7 days after service of the notice upon the owner and lender, upon the prime contractor or subcontractor.

(3) If the prime contractor or subcontractor does not dispute the claim by serving written notice on the owner and the lien claimant within 30 days after service of written notice under sub. (2), the amount claimed shall be paid over to the claimant on demand and charged to the prime contractor or subcontractor pursuant to sub. (1). If the prime contractor or subcontractor disputes the claim, the right to a lien and to the moneys in question shall be determined in an action brought by the claimant or the prime contractor or subcontractor. If the action is not brought within 3 months from the time the notice required by sub. (1) is served, the lien rights under this section are barred.

(4) (a) When the total lien claims exceed the sum due the prime contractor or subcontractor concerned and where the prime contractor or subcontractor has not disputed the amounts of the claims filed, the owner with the concurrence of the lender shall determine on a proportional basis who is entitled to the amount being withheld and shall serve a written notice of the determination on all claimants and the prime contractor or subcontractor. Unless an action is commenced by a claimant or by the prime contractor or subcontractor within 20 days after the service of said notice, the money shall be paid out in accordance with the determination and the liability of the owner and lender to any claimant shall cease.

(b) If an action is commenced, all claimants, the owner and the lender shall be made parties. Such action shall be brought within 6 months after completion of the work of improvement or within the time limit prescribed by par. (a), whichever is earlier.

(c) Within 10 days after the filing of a certified copy of the judgment in any such action with the owner and lender, the money due the prime contractor or subcontractor shall be paid to the clerk of court to be distributed in accordance with the judgment.

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 110 s. 60 (11); 1979 c. 176; Stats. 1979 s. 779.036; 2005 a. 204.

The initial availability to the supplier of a lien under this section on payments made to a subcontractor, did not preclude the bringing of an action on the payment bond since nothing in the statute itself indicates it is to be an exclusive remedy, and the legislative history indicates it was intended as a supplementary remedy to the supplier's rights under the payment bond provided for in s. 779.035. *R.C. Mahon Co. v. Hedrich Construction Co.* 69 Wis. 2d 456, 230 N.W.2d 621 (1975).

A construction lien protects employee benefits in addition to hourly wages. *Plumber's Local 458 v. Howard Immel*, 151 Wis. 2d 233, 445 N.W.2d 43 (Ct. App. 1989).

779.04 Claims assignable; notice; prior payment. All claims for liens and right to recover therefor under this subchapter are assignable. Notice in writing of such assignment may be served upon the owner of the property affected and all payments made by the owner before service of such notice shall discharge the debt to the amount paid. The assignee may file petitions for such liens and may bring an action in the assignee's name to enforce the same, subject to the limitations in s. 779.01 (5).

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.04.

779.05 Waivers of lien. (1) Any document signed by a lien claimant or potential claimant and purporting to be a waiver of construction lien rights under this subchapter, is valid and binding as a waiver whether or not consideration was paid therefor and whether the document was signed before or after the labor, services, materials, plans, or specifications were performed, furnished, or procured, or contracted for. Any ambiguity in such document shall be construed against the person signing it. Any

waiver document shall be deemed to waive all lien rights of the signer for all labor, services, materials, plans, or specifications performed, furnished, or procured, or to be performed, furnished, or procured, by the claimant at any time for the improvement to which the waiver relates, except to the extent that the document specifically and expressly limits the waiver to apply to a particular portion of such labor, services, materials, plans, or specifications. A lien claimant or potential lien claimant of whom a waiver is requested is entitled to refuse to furnish a waiver unless paid in full for the labor, services, materials, plans, or specifications to which the waiver relates. A waiver furnished is a waiver of lien rights only, and not of any contract rights of the claimant otherwise existing.

(2) A promissory note or other evidence of debt given for any lienable claim shall not be deemed a waiver of lien rights unless the note or other instrument is received as payment and expressly declares that receipt thereof is a waiver of lien rights.

History: 1979 c. 32 s. 57; Stats. 1979 s. 779.05; 2005 a. 204.

Public improvement liens under this section are subject to the waiver provision of s. 289.05 (1) [now s. 779.05 (1)]. Since waiver of a public improvement lien disposes of the lien itself, the refile of a claim for lien after a waiver was a nullity and the fact that the claim was not disputed following refile did not revive the lien. *Druml Co., Inc. v. New Berlin*, 78 Wis. 2d 305, 254 N.W.2d 265 (1977).

Section 779.135 (1) voids a contract provision that requires a subcontractor to waive its right to a construction lien before it can get paid. Section 779.05 (1) specifically allows a subcontractor who has signed a contract containing a lien waiver provision to refuse to furnish the waiver unless paid in full for the work or material to which the waiver relates. Thus a subcontractor facing a void construction lien waiver contract provision has a choice: it can either tender a lien waiver prior to being paid or refuse to do so until it is paid. *Tri-State Mechanical, Inc. v. Northland College*, 2004 WI App 100, 273 Wis. 2d 471, 681 N.W.2d 302, 03–2182.

779.06 Filing claim and beginning action; notice required before filing; contents of claim document.

(1) No lien under s. 779.01 shall exist and no action to enforce a lien under s. 779.01 shall be maintained unless within 6 months from the date the lien claimant performed, furnished, or procured the last labor, services, materials, plans, or specifications, a claim for the lien is filed in the office of the clerk of circuit court of the county in which the lands affected by the lien lie, and unless within 2 years from the date of filing a claim for lien an action is brought and summons and complaint filed. A lien claimant shall serve a copy of the claim for lien on the owner of the property on which the lien is placed within 30 days after filing the claim. A claim for a lien may be filed and entered in the judgment and lien docket, and action brought, notwithstanding the death of the owner of the property affected by the action or of the person with whom the original contract was made, with like effect as if he or she were then living.

(2) No lien claim may be filed or action brought thereon unless, at least 30 days before timely filing of the lien claim, the lien claimant serves on the owner a written notice of intent to file a lien claim. The notice is required to be given whether or not the claimant has been required to and has given a previous notice pursuant to s. 779.02. Such notice shall briefly describe the nature of the claim, its amount and the land and improvement to which it relates.

(3) Such a claim for lien shall have attached thereto a copy of any notice given in compliance with s. 779.02 and a copy of the notice given in compliance with sub. (2), and shall contain a statement of the contract or demand upon which it is founded, the name of the person against whom the demand is claimed, the name of the claimant and any assignee, the last date of performing, furnishing, or procuring any labor, services, materials, plans, or specifications, a legal description of the property against which the lien is claimed, a statement of the amount claimed and all other material facts in relation thereto. Such claim document shall be signed by the claimant or attorney, need not be verified, and in case of action brought, may be amended, as pleadings are.

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.06; 1995 a. 224; 2005 a. 204.

Personal service under sub. (2) is subject to a less stringent standard than service of a summons. Notice under sub. (2) may be given by an agent of a claimant. *Kruse v. Miller Brewing Co.* 89 Wis. 2d 522, 279 N.W.2d 198 (1979).

779.06 LIENS

The limitation period under sub. (1) commenced on the date the claimant furnished the last materials for the project, although the claimant supplied 2 succeeding subcontractors and the 2nd subcontractor paid in full. *Fredrick Redi–Mix, Inc. v. Thomson*, 96 Wis. 2d 715, 292 N.W.2d 528 (1980).

When a contractor gave a lien notice to the initial owner when work commenced and had no notice of a subsequent transfer of title, the contractor's lien rights prevailed against subsequent owners who received no lien notice. *Wes Podany Const. Co., Inc. v. Nowicki*, 120 Wis. 2d 319, 354 N.W.2d 755 (Ct. App. 1984).

Mail service under sub. (2) is completed upon mailing. *Torke/Wirth/Pujara v. Lakeshore Towers*, 192 Wis. 2d 481, 531 N.W.2d 419 (Ct. App. 1995).

Sub. (3) does not restrict when amendments to lien claims can be made. It only provides that if an amendment is made after an action is brought, the lien claim may be amended in the same manner as pleadings. *Torke/Wirth/Pujara v. Lakeshore Towers*, 192 Wis. 2d 481, 531 N.W.2d 419 (Ct. App. 1995).

A subcontractor's liens are not protected by incorporation into the prime contractor's lien if the subcontractor makes an independent claim. If the subcontractor creates a lien claim independent from the prime contractor, it is required to follow the procedures required for all claimants under the statutes. *Torke/Wirth/Pujara v. Lakeshore Towers*, 192 Wis. 2d 481, 531 N.W.2d 419 (Ct. App. 1995).

779.07 Judgment and lien docket. (1) Every clerk of circuit court shall keep a judgment and lien docket in which shall be entered, immediately upon filing, the proper entries under the appropriate headings specified in this subsection, relative to each claim for lien filed, opposite the names of the persons against whom the lien is claimed. The names shall be entered alphabetically. Each page in the judgment and lien docket shall be divided into 9 columns, with headings in the following sequence to the respective columns, as follows:

- (a) Name of person against whom lien is claimed.
- (b) Name of claimant or assignee.
- (c) Attorney for claimant.
- (d) Last date of performing, furnishing, or procuring labor, services, materials, plans, or specifications.
- (e) Description of copies of notices attached to claim when filed.
- (f) Date and time of filing claim.
- (g) Description of property.
- (h) Amount claimed.
- (i) Satisfaction.

(2) The judgment and lien docket shall be presumptive evidence of the correctness of its entries.

History: 1979 c. 32 s. 57; Stats. 1979 s. 779.07; 1993 a. 486; 1995 a. 224; 2005 a. 204.

779.08 Release of lien; undertaking. (1) The person against whom a lien is claimed or any other interested party may file with the clerk of court in whose office the claim for lien is filed an undertaking executed by a surety to the effect that the person against whom the lien is claimed shall pay the amount of the claim and all costs and damages which may be awarded against that person on account of the lien or in lieu thereof deposit with the clerk of the court a sum of money, certified check or negotiable government bonds in par value equal to 125% of the claim for lien. The court in which any action to foreclose the lien may be brought shall determine any question of sufficiency of the surety if exception is taken thereto by the lien claimant within 10 days after notice of the filing of such undertaking or deposit of other security and may upon notice and upon motion of any party, order any sum of money deposited to be invested. The clerk of court shall remove the lien from the judgment and lien docket upon the court's order approving the surety in substitution for the lien. The depositor shall be entitled to any income from the investments, certified check or negotiable U.S. government bonds deposited and the clerk shall pay the income to the depositor without order when received or, in the case of coupons, as the income becomes due.

(2) If an undertaking is furnished, it shall be accompanied by the affidavit of the surety which states that the surety is worth, over and above all debts and liabilities in property within this state not exempt from execution, an amount in the aggregate equal to 125% or more of the amount of the claim for lien.

(3) The person against whom the lien is claimed or other interested party depositing the security shall cause to be served upon the lien claimant a notice of the filing of the undertaking or deposit of other security and, if an undertaking, a copy thereof, which notice shall state where and when the undertaking was filed or the security was deposited.

(4) Any action brought after the furnishing of security or pending at the time of the furnishing thereof in accordance with this section shall proceed as if no security had been furnished, except that after the time within which exceptions may be taken to the security, or pursuant to order of the court upon any exception so taken, the clerk shall satisfy the claim for lien of record and discharge any lis pendens filed, and except that the lien thereupon shall attach to the security and the amount adjudged due in the proceeding for foreclosure thereof shall be satisfied out of the security, and the property described in the lien claim shall thenceforth be entirely free of the lien and shall in no way be involved in subsequent proceedings.

(5) If no action to foreclose the lien is brought within the time specified by s. 779.06 (1), the clerk of circuit court in whose office the undertaking or other security was filed or deposited shall on request, and without notice, return the undertaking or security to the party filing or depositing it.

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.08; 2005 a. 204. By its plain language, the patent purpose of the release bond is to allow a property owner whose property is the subject of a construction lien or a general contractor, acting on the owner's behalf, to substitute a bond for the property. Because the effect of the release bond procedure is to free the real property from the effect of the claim and lien and any action brought to foreclose such a lien and because a lien foreclosure action is an in rem proceeding, unless personal judgment can otherwise be rendered against the property owner, the owner of the lien property is entitled to a judgment of dismissal from a lien foreclosure action. *Hunzinger Construction v. SCS of Wisconsin*, 2005 WI App 47, 280 Wis. 2d 230, 694 N.W.2d 487, 04–0657.

779.09 Foreclosure of lien; procedure; parties. In the foreclosure of liens mentioned in s. 779.01, ch. 846 shall control as far as applicable unless otherwise provided in this subchapter. All persons having filed claims for liens under s. 779.01 may join as plaintiffs, and if any do not join they may be made defendants. All persons having liens subsequent to such lien may be joined as defendants. If any person who is a proper party is not a party to the action the person may, at any time before judgment, be made a defendant, and any person who after the commencement of the action obtains a lien or becomes a purchaser may, at any time before judgment, be made a defendant.

History: 1973 c. 189 s. 20; Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1975 c. 218; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.09.

Section 840.10 (1) (a) imposes the requirement of recording a lis pendens on the plaintiff who files a complaint and on a defendant seeking relief on a counterclaim or a cross-complaint, which contains a legal description of the real estate. A defendant construction lien claimant is not a plaintiff, and no cross-claim is necessary in order for a defendant construction lien claimant to obtain a determination of the amount due it and an order for sale in a lien foreclosure action. There is no logical rationale for imposing the requirements of s. 840.10 (1) (a) on a defendant construction lien claimant because it unnecessarily files a cross-claim seeking relief it is entitled to under ss. 779.09 to 779.11. *Carolina Builders Corporation v. Dietzman*, 2007 WI App 201, 304 Wis. 2d 773, 739 N.W.2d 53, 06–3180.

779.10 Judgment. The judgment shall adjudge the amount due to each claimant who is a party to the action. It shall direct that the interest of the owner in the premises at the commencement of the performing, furnishing, or procuring the labor, services, materials, plans, or specifications for which liens are given and which the owner has since acquired, or so much thereof as is necessary, be sold to satisfy the judgment, and that the proceeds be brought into court with the report of sale to abide the order of the court. If the premises can be sold in parcels without injury to the parties, the court may adjudge that the sale be so made. If the plaintiff fails to establish a lien upon the premises but does establish a right to recover for labor, services, materials, plans, or specifications, the plaintiff may have a judgment against the party liable.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.10; 2005 a. 204.

779.11 Distribution of proceeds of sale. The several claimants whose liens were established in the action shall be paid

without priority among themselves. If the sum realized at the sale under s. 779.10 is insufficient after paying the costs of the action and the costs of making the sale to pay the liens in full they shall be paid proportionally.

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 110 s. 60 (12); Stats. 1979 s. 779.11.

779.12 Sale; notice and report; deficiency judgment; writ of assistance. (1) All sales under judgments in accordance with s. 779.10 shall be noticed, conducted and reported in the manner provided for the sale of real estate upon execution and shall be absolute and without redemption. In case such sale is confirmed, the deed given thereon shall be effectual to pass to the purchaser all that interest in the premises which is directed to be sold.

(2) If any deficiency arises upon the sale in the payment of the sums adjudged to be due to any lien claimant, the court, upon confirming the sale, may render judgment for the deficiency if demanded in the pleadings against the defendant legally liable to pay the deficiency. The judgment may be entered in the judgment and lien docket and enforced in the same manner that ordinary judgments are. The purchasers at the sale shall be entitled to a writ of assistance under s. 815.63 to obtain possession of the premises sold.

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.12; 1995 a. 224.

779.13 Satisfaction of judgment or lien; correction of errors. (1) Every lien claimant, or the attorney who executed and filed a claim for lien on the claimant's behalf, who has received satisfaction or tender of the claim with the costs of any action brought on the claim shall, at the request of any person interested in the premises affected and on payment of the costs of satisfying the same, execute and deliver the necessary satisfaction to the interested person. On filing the satisfaction with the clerk of circuit court, the clerk of circuit court shall enter satisfaction of the claim on the judgment and lien docket. Failure to execute and deliver the satisfaction or to satisfy the lien on the judgment and lien docket shall render the person so refusing liable to pay to the person requiring the satisfaction a sum equal to one-half of the sum claimed in the claim for lien.

(2) Every lien claimant, or the attorney who executed and filed a claim for lien on the claimant's behalf, who has received from any person interested in the premises described in the claim a written statement that the premises described in the claim are not in fact the premises on which the claimant performed, furnished, or procured the labor, services, materials, plans, or specifications to which the claim relates together with a written demand that the claim be satisfied of record shall, if in fact the statement of such person about the mistaken description is true, promptly satisfy the lien claim of record at the lien claimant's expense. Failure to satisfy the lien claim of record within a reasonable time, if in fact the statement asserting the mistaken description is true, shall render the person so failing liable to pay to the person demanding the satisfaction a sum equal to one-half of the sum claimed in the claim for lien.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.13; 1995 a. 224; 2005 a. 204.

779.135 Construction contracts, form of contract. The following provisions in contracts for the improvement of land in this state are void:

(1) Provisions requiring any person entitled to a construction lien to waive his or her right to a construction lien or to a claim against a payment bond before he or she has been paid for the labor, services, materials, plans, or specifications that he or she performed, furnished, or procured.

(2) Provisions making the contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state.

(3) Provisions making a payment to a prime contractor from any person who does not have a contractual agreement with the subcontractor, supplier, or service provider a condition precedent

to a prime contractor's payment to a subcontractor, supplier, or service provider. This subsection does not prohibit contract provisions that may delay a payment to a subcontractor until the prime contractor receives payment from any person who does not have a contractual agreement with the subcontractor, supplier, or service provider.

History: 1993 a. 213 ss. 164, 165; Stats. 1993 s. 779.135; 2005 a. 204.

Section 779.135 (1) voids a contract provision that requires a subcontractor to waive its right to a construction lien before it can get paid. Section 779.05 (1) specifically allows a subcontractor who has signed a contract containing a lien waiver provision to refuse to furnish the waiver unless paid in full for the work or material to which the waiver relates. Thus a subcontractor facing a void construction lien waiver contract provision with a choice: it can either tender a lien waiver prior to being paid or refuse to do so until it is paid. *Tri-State Mechanical, Inc. v. Northland College*, 2004 WI App 100, 273 Wis. 2d 471, 681 N.W.2d 302, 03-2182.

A contractual forum selection clause requiring litigation in another state contravened sub. (2) and was void. *McCloud Construction, Inc. v. Home Depot USA, Inc.* 149 F. Supp. 2d 695 (2001).

779.14 Public works, form of contract, bond, remedy.

(1) **DEFINITION.** In this section, "subcontractor, supplier, or service provider" means the following:

(a) Any person who has a direct contractual relationship, expressed or implied, with the prime contractor or with any subcontractor of the prime contractor to perform, furnish, or procure labor, services, materials, plans, or specifications, except as provided in par. (b).

(b) With respect to contracts entered into under s. 84.06 (2) for highway improvements, any person who has a direct contractual relationship, expressed or implied, with the prime contractor to perform, furnish, or procure labor, services, materials, plans, or specifications.

(1e) **CONTRACT REQUIREMENTS REGARDING DUTIES OF PRIME CONTRACTOR.** (a) All contracts involving \$10,000 or more for performing, furnishing, or procuring labor, services, materials, plans, or specifications, when the same pertains to any public improvement or public work shall contain a provision for the payment by the prime contractor of all claims for labor, services, materials, plans, or specifications performed, furnished, procured, used, or consumed that pertain to the public improvement or public work.

(b) All contracts that are in excess of \$30,000, as indexed under sub. (1s), and that are for performing, furnishing, or procuring labor, services, materials, plans, or specifications for a public improvement or public work shall contain a provision under which the prime contractor agrees, to the extent practicable, to maintain a list of all subcontractors, suppliers, and service providers performing, furnishing, or procuring labor, services, materials, plans, or specifications under the contract.

(1m) **PAYMENT AND PERFORMANCE ASSURANCE REQUIREMENTS.** (c) *State contracts.* The following requirements apply to contracts with the state for performing, furnishing, or procuring labor, services, materials, plans, or specifications for a public improvement or public work:

1. In the case of a contract with a contract price exceeding \$10,000, as indexed under sub. (1s), but not exceeding \$100,000, as indexed under sub. (1s):

a. The contract shall include a provision which allows the state to make direct payment to subcontractors or to pay the prime contractor with checks that are made payable to the prime contractor and to one or more subcontractors. This subd. 1. a. does not apply to any contract entered into by the state under authority granted under chs. 84, 85 and 86. This subd. 1. a. also does not apply to any contract with a town, city, village, county or school district for the construction, improvement, extension, repair, replacement or removal of a transportation facility, as defined under s. 84.185 (1) (d); bikeway, as defined under s. 84.60 (1) (a); bridge; parking lot or airport facility.

b. The contract shall comply with written standards established by the department of administration. Written standards established under this subd. 1. b. shall include criteria for determining whether the contract requires payment or performance

assurances and, if so, what payment or performance assurances are required.

2. In the case of a contract with a contract price exceeding \$100,000, as indexed under sub. (1s), but not exceeding \$250,000, as indexed under sub. (1s):

a. The contract shall include a provision which allows the state to make direct payment to subcontractors or to pay the prime contractor with checks that are made payable to the prime contractor and to one or more subcontractors. This subd. 2. a. does not apply to any contract entered into by the state under authority granted under chs. 84, 85 and 86. This subd. 2. a. also does not apply to any contract with a town, city, village, county or school district for the construction, improvement, extension, repair, replacement or removal of a transportation facility, as defined under s. 84.185 (1) (d); bikeway, as defined under s. 84.60 (1) (a); bridge; parking lot or airport facility.

b. The contract shall require the prime contractor to provide a payment and performance bond meeting the requirements of par. (e), unless the department of administration allows the prime contractor to substitute a different payment assurance for the payment and performance bond. The department of administration may allow a prime contractor to substitute a different payment and performance assurance for the payment and performance bond only after the contract has been awarded and only if the substituted payment and performance assurance is for an amount at least equal to the contract price and is in the form of a bond, an irrevocable letter of credit or an escrow account acceptable to the department of administration. The department of administration shall establish written standards under this subd. 2. b. governing when a different payment and performance assurance may be substituted for a payment and performance bond under par. (e).

3. In the case of a contract with a contract price exceeding \$250,000, as indexed under sub. (1s), the contract shall require the prime contractor to obtain a payment and performance bond meeting the requirements under par. (e).

(d) *Local government contracts.* The following requirements apply to contracts, other than contracts with the state, for performing, furnishing, or procuring labor, services, materials, plans, or specifications for a public improvement or public work:

1. In the case of a contract with a contract price exceeding \$10,000, as indexed under sub. (1s), but not exceeding \$50,000, as indexed under sub. (1s):

a. The contract shall include a provision which allows the governmental body that is authorized to enter into the contract to make direct payment to subcontractors or to pay the prime contractor with checks that are made payable to the prime contractor and to one or more subcontractors. This subd. 1. a. does not apply to any contract with a town, city, village, county or school district for the construction, improvement, extension, repair, replacement or removal of a transportation facility, as defined under s. 84.185 (1) (d); bikeway, as defined under s. 84.60 (1) (a); bridge; parking lot or airport facility.

b. The contract shall comply with written standards established by the public body authorized to enter into the contract. Written standards established under this subd. 1. b. shall include criteria for determining whether the contract requires payment or performance assurances and, if so, what payment or performance assurances are required.

2. In the case of a contract with a contract price exceeding \$50,000, as indexed under sub. (1s), but not exceeding \$100,000, as indexed under sub. (1s):

a. The contract shall include a provision which allows the governmental body that is authorized to enter into the contract to make direct payment to subcontractors or to pay the prime contractor with checks that are made payable to the prime contractor and to one or more subcontractors. This subd. 2. a. does not apply to any contract with a town, city, village, county or school district for the construction, improvement, extension, repair, replacement or removal of a transportation facility, as defined under s. 84.185

(1) (d); bikeway, as defined under s. 84.60 (1) (a); bridge; parking lot or airport facility.

b. Except as provided in sub. (4), the contract shall require the prime contractor to provide a payment and performance bond meeting the requirements of par. (e), unless the public body authorized to enter into the contract allows the prime contractor to substitute a different payment assurance for the payment and performance bond. The public body may allow a prime contractor to substitute a different payment and performance assurance for the payment and performance bond only if the substituted payment and performance assurance is for an amount at least equal to the contract price and is in the form of a bond, an irrevocable letter of credit or an escrow account acceptable to the public body. The public body shall establish written standards under this subd. 2. b. governing when a different payment and performance assurance may be substituted for a payment and performance bond under par. (e).

3. Except as provided in sub. (4), in the case of a contract with a contract price exceeding \$100,000, as indexed under sub. (1s), the contract shall require the prime contractor to obtain a payment and performance bond meeting the requirements under par. (e).

(e) *Bonding requirements.* 2. A bond required under par. (c) or (d) shall carry a penalty of not less than the contract price, and shall be conditioned for all of the following:

a. The faithful performance of the contract.

b. The payment to every person, including every subcontractor, supplier, or service provider, of all claims that are entitled to payment for labor, services, materials, plans, or specifications performed, furnished, or procured for the purpose of making the public improvement or performing the public work as provided in the contract and sub. (1e) (a).

3. A bond required under par. (c) shall be approved for the state by the state official authorized to enter the contract. A bond required under par. (d) shall be approved for a county by its corporation counsel, for a city by its mayor, for a village by its president, for a town by its chairperson, for a school district by its president and for any other public board or body by the presiding officer thereof.

4. No assignment, modification or change of the contract, change in the work covered thereby or extension of time for the completion of the contract may release the sureties on a bond required under par. (c) or (d).

5. Neither the invitation for bids nor the person having power to approve the prime contractor's bond may require that a bond required under par. (c) or (d) be furnished by a specified surety company or through a specified agent or broker.

(f) *Direct purchase contracts.* Paragraphs (c) and (d) do not apply to a contract for the direct purchase of materials by the state or by a local unit of government.

(1s) INDEXING OF CONTRACT THRESHOLDS. If a dollar amount is to be indexed under this subsection, the department of workforce development shall adjust the dollar amount biennially, the first adjustment to be made not sooner than December 1, 1998. The adjustment shall be in proportion to any change in construction costs since the effective date of this subsection under this subsection, or the last adjustment whichever is later. No adjustment shall be made for a biennium, if the adjustment to be made would be less than 5%.

(2) ACTIONS ON A PERFORMANCE AND PAYMENT BOND. (a) Except as provided in par. (am), no later than one year after the completion of work under the contract, any party in interest, including any subcontractor, supplier, or service provider, may maintain an action in that party's name against the prime contractor and the sureties upon the bond for the recovery of any damages sustained by reason of any of the following:

1. Failure of the prime contractor to comply with the contract.

2. Except as provided in subd. 3., failure of the prime contractor or a subcontractor of the prime contractor to comply with a contract, whether express or implied, with a subcontractor, sup-

plier, or service provider for performing, furnishing, or procuring labor, services, materials, plans, or specifications for the purpose of making the public improvement or performing the public work that is the subject of the contract with the governmental entity.

3. With respect to contracts entered into under s. 84.06 (2) for highway improvements, failure of the prime contractor to comply with a contract, whether express or implied, with a subcontractor, supplier, or service provider of the prime contractor for performing, furnishing, or procuring labor, services, materials, plans, or specifications for the purpose of making the highway improvement that is the subject of the contract with the governmental entity.

(am) 1. Except as provided in subd. 2., a subcontractor, supplier, or service provider may maintain an action under par. (a) only if the subcontractor, supplier, or service provider has served a written notice on the prime contractor that the subcontractor, supplier, or service provider has performed, furnished, or procured, or will perform, furnish, or procure labor, services, materials, plans, or specifications to the public work or improvement. The notice must be served no later than 60 days after the date on which the subcontractor, supplier, or service provider first performed, furnished, or procured the labor, services, materials, plans, or specifications.

2. A notice under subd. 1. is not required if any of the following applies:

a. The contract for performing, furnishing, or procuring the labor, services, materials, plans, or specifications does not exceed \$5,000.

b. The action is brought by an employee of the prime contractor, subcontractor, supplier, or service provider.

c. The subcontractor, supplier, or service provider is listed in the list required to be maintained under sub. (1e) (b) or in a written contract, or in a document appended to a written contract, between a subcontractor, supplier, or service provider and the prime contractor.

(b) If the amount realized on the bond is insufficient to satisfy all claims of the parties in full, it shall be distributed among the parties proportionally.

(3) ACTIONS BY A COUNTY. In an action by a county upon the bond all persons for whose protection it was given and who make claim thereunder may be joined in the action. The county highway commissioner may take assignments of all demands and claims for labor, services, materials, plans, or specifications and enforce the same in the action for the benefit of the assignors, and the judgment may provide the manner in which the assignors shall be paid.

(4) BONDING EXEMPTION. A contract with a local professional football stadium district under subch. IV of ch. 229 is not required under sub. (1m) (d) 2. b. or 3. to include a provision requiring the prime contractor to provide or obtain a payment and performance bond or other payment assurance.

History: 1973 c. 90; 1975 c. 147 s. 54; 1975 c. 224; 1977 c. 418; 1979 c. 32 s. 57; 1979 c. 110 s. 60 (12); 1979 c. 176; Stats. 1979 s. 779.14; 1985 a. 225; 1987 a. 399; 1989 a. 31, 290; 1995 a. 395, 432; 1997 a. 27, 39, 237; 1999 a. 167; 2005 a. 204.

Cross Reference: See also ch. DWD 293, Wis. adm. code.

A subcontractor can maintain an action against the prime contractor and the prime contractor's surety if the claim is brought within one year after completion of work on the principal contract. Honeywell, Inc. v. Aetna Casualty & Surety Co. 52 Wis. 2d 425, 190 N.W.2d 499 (1971).

In a complaint seeking to foreclose a construction lien on a municipal arena, an allegation that the lessee of the arena was acting as the city's agent in contracting for improvements to the arena was sufficient to withstand a demurrer. James W. Thomas Const. Co., Inc. v. Madison, 79 Wis. 2d 345, 255 N.W.2d 551 (1977).

The liability of a prime contractor for damages to employees of a subcontractor under s. 779.14 (2) did not include wage penalties under s. 66.293 (3) [now 66.0903 (3)]. Consent to be a named party under s. 66.293 (3) may occur after one year when the action is for damages under s. 66.293 in the name of the plaintiffs and other similarly situated employees and was filed within the one-year time period. Strong v. C.I.R., Inc. 184 Wis. 2d 619, 516 N.W.2d 719 (1994).

A prime contractor is responsible for and must provide a bond in the amount of its own contract, not in the amount of the total of all prime contractors together. Golden Valley Supply Company v. American Insurance Company, 195 Wis. 2d 866, 537 N.W.2d 58 (Ct. App. 1995), 95–0357.

Completion of work under a contract under sub. (2) occurs when a contractor has completed the work, not when the work is accepted. Arbor Vitae–Woodruff Joint School District No. 1 v. Gulf Insurance Co. 2002 WI App 24, 250 Wis. 2d 637, 639 N.W.2d 788, 01–0993.

The deletion of sub. (1m) (b) 1., 1995 stats., which specifically required a municipality to require a prime contractor to furnish a bond did not eliminate municipal liability in the event the municipality fails to ensure the existence of a contractor's bond. Holmen Concrete Products v. Hardy Construction Co. 2004 WI App 165, 276 Wis. 2d 126, 686 N.W.2d 705, 03–3335.

779.15 Public improvements; lien on money, bonds, or warrants due the prime contractor; duty of officials.

(1) Any person who performs, furnishes, procures, manages, supervises, or administers any labor, services, materials, plans, or specifications used or consumed in making public improvements or performing public work, to any prime contractor, except in cities of the 1st class, shall have a lien on the money or bonds or warrants due or to become due the prime contractor therefor, if the lienor, before payment is made to the prime contractor, serves a written notice of the claim on the debtor state, county, town, or municipality. The debtor shall withhold a sufficient amount to pay the claim and, when it is admitted by the prime contractor or established under sub. (3), shall pay the claim and charge it to the prime contractor. Any officer violating the duty hereby imposed shall be liable on his or her official bond to the claimant for the damages resulting from the violation. There shall be no preference between the lienors serving the notices.

(2) Service of the notice under sub. (1) shall be made upon the clerk of the municipality or in the clerk's absence upon the treasurer. If any of the money due the prime contractor is payable by the state, service of the notice under sub. (1) shall be served upon the state department, board, or commission having jurisdiction over the work. A copy of the notice shall be served concurrently upon the prime contractor.

(3) If a valid lien exists under sub. (1) and the prime contractor does not dispute the claim within 30 days after service on the prime contractor of the notice provided in sub. (2), by serving written notice on the debtor state, county, town, or municipality and the lien claimant, the amount claimed shall be paid over to the claimant on demand and charged to the prime contractor pursuant to sub. (1). If the prime contractor disputes the claim, the right to a lien and to the moneys in question shall be determined in an action brought by the claimant or the prime contractor. If the action is not brought within 3 months from the time the notice required by sub. (1) is served, and notice of bringing the action filed with the officer with whom the claim is filed, the lien rights are barred.

(4) (a) When the total of the lien claims exceeds the sum due the prime contractor and where the prime contractor has not disputed the amounts of the claims filed, the debtor state, county, town or municipality, through the officer, board, department or commission with whom the claims are filed, shall determine on a proportional basis who is entitled to the money and shall notify all claimants and the prime contractor in writing of the determination. Unless an action is commenced by a claimant or by the prime contractor within 20 days after the mailing of the notice, the money shall be paid out in accordance with the determination and the liability of the state, county, town or municipality to any lien claimant shall cease.

(b) If an action is commenced, all claimants shall be made parties and the action shall be commenced within 3 months after acceptance of the work by the proper public authority except as otherwise herein provided.

(c) Within 10 days after the filing of a certified copy of judgment in any such action with the officers with whom the notice authorized by sub. (1) is filed, the money due the prime contractor shall be paid to the clerk of court to be distributed in accordance with the judgment.

History: 1975 c. 147 s. 54; 1975 c. 199, 224, 422; 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.15; 1997 a. 39; 2005 a. 204.

779.15 LIENS

A public improvement lien under this section is subject to the waiver provision of s. 289.05 (1) [now s. 779.05 (1)]. Since waiver of a public improvement lien disposes of the lien itself, the refile of a claim for a lien after a waiver was a nullity and the fact that the claim was not disputed following the refile did not revive the lien. *Druml Co., Inc. v. New Berlin*, 78 Wis. 2d 305, 254 N.W.2d 265 (1977).

In a complaint seeking to foreclose a construction lien on a municipal arena, an allegation that the lessee of the arena was acting as the city's agent in contracting for improvements to the arena was sufficient to withstand a demurrer. *James W. Thomas Const. Co., Inc. v. Madison*, 79 Wis. 2d 345, 255 N.W.2d 551 (1977).

779.155 Judgment creditors, attachment of funds due to public contractors. (1) LIMITATIONS. This section does not apply to cases covered by s. 812.42. Demands covered by s. 779.15 have priority over judgments filed under this section. The remedies afforded by s. 779.15 and by this section are complementary.

(2) CERTIFIED COPIES OF JUDGMENTS FILED. In this section, "municipality" includes city, village, county, town, school district, technical college district and any quasi municipal corporation. When the state or any municipality is indebted to any prime contractor, the owner of a judgment against the prime contractor may attach the debt by filing a certified copy of his or her judgment in the manner and subject to the conditions and limitations of this section. If the debt is owed by the state upon a contract for public improvements, the certified copy shall be filed with the officer, board, department or commission having jurisdiction over the work. Otherwise, the copy shall be filed with the department of administration. If the debt is owed by a municipality, the copy shall be filed with the municipal clerk or corresponding officer. The judgment creditor shall promptly notify the judgment debtor of the filing, within the time and as provided by s. 812.07 for service upon the defendant.

(3) PAYMENT TO JUDGMENT CREDITOR; EXCEPTION. Except as to prime contractors on public works, the proper officers of the state or municipality shall pay the judgment out of moneys due the prime contractor or which become due the prime contractor, but no payment shall be made until 30 days after the creditor has filed with such officers proof that the contractor had been notified of the filing of a copy of the judgment against the contractor.

(4) SAME; FUNDS DUE PUBLIC PRIME CONTRACTORS. When the state or a municipality is indebted to a prime contractor for public improvements, payment shall not be made to the judgment creditor until 3 months after final completion and acceptance of the public work and then only out of moneys due the prime contractor in excess of unpaid lienable claims having priority under s. 779.15.

(5) ADJUSTMENT OF LIEN CLAIMS. (a) For the purpose of administering this section, sworn statements of the prime contractor setting forth the unpaid lien claims that have been or may be filed under s. 779.15 may be accepted by the proper officer, board, department, or commission, unless the judgment creditor or other interested person gives written notice that an action is pending to determine whether specified lien claims were incurred in performing the public work and the amount thereof, or to determine priorities in which event payments shall await the result of the action.

(b) Within 10 days after filing the certified copy of the judgment under sub. (2), the prime contractor shall file the sworn statement in duplicate, with the proper officer, board, department or commission, who shall immediately furnish the judgment creditor with one of the statements. The judgment creditor shall have 10 days from the receipt thereof in which to serve the notice of pendency of the court action.

(6) PAYMENTS TO JUDGMENT CREDITOR. After the expiration of the 3-month period, the moneys due the prime contractor in excess of unpaid lienable expenses and claims incurred in performing the public work shall be paid to the judgment creditor, but not exceeding the amount due on the judgment.

(7) PRIORITY OF JUDGMENTS OVER ASSIGNMENTS. Any judgment filed under this section has priority over an assignment made

by the prime contractor after the commencement of the action in which the judgment was obtained.

History: 1971 c. 154; Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1975 c. 218; 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.155; 1993 a. 80, 399, 486; 1999 a. 185; 2001 a. 38; 2005 a. 204.

779.16 Theft by contractors. All moneys, bonds or warrants paid or to become due to any prime contractor or subcontractor for public improvements are a trust fund only in the hands of the prime contractor or subcontractor to the amount of all claims due or to become due or owing from the prime contractor or subcontractor for labor, services, materials, plans, and specifications performed, furnished, or procured for the improvements, until all the claims have been paid, and shall not be a trust fund in the hands of any other person. The use of any such moneys by any prime contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount actually in dispute, have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor or subcontractor of moneys so misappropriated and is punishable under s. 943.20. If the prime contractor or subcontractor is a corporation, limited liability company, or other legal entity other than a sole proprietorship, such misappropriation also shall be deemed theft by any officers, directors, members, partners, or agents responsible for the misappropriation. Any of such misappropriated moneys which have been received as salary, dividend, loan repayment, capital distribution or otherwise by any shareholder, member, or partner not responsible for the misappropriation shall be a civil liability of that person and may be recovered and restored to the trust fund specified in this subsection by action brought by any interested party for that purpose. Except as provided in this subsection, this section shall not create a civil cause of action against any person other than the prime contractor or subcontractor to whom such moneys are paid or become due. Until all claims are paid in full, have matured by notice and filing or have expired, such money, bonds and warrants shall not be subject to garnishment, execution, levy or attachment.

History: 1973 c. 231; 1975 c. 409; 1979 c. 32 s. 57; Stats. 1979 s. 779.16; 2005 a. 204.

A fiduciary relationship exists between a prime contractor and subcontractor when the prime contractor has received payment for a public improvement. *Loehrke v. Wanta Builders*, 151 Wis. 2d 695, 445 N.W.2d 717 (Ct. App. 1989).

Misappropriation of funds under this section was a nondischargeable debt in bankruptcy. *Matter of Thomas*, 729 F.2d 502 (1984).

779.17 Release of funds on filing bond. At any time after the service of a notice of lien claim or filing of judgment or pending the determination of any action commenced thereunder, the prime contractor shall be entitled to the release of any moneys due the prime contractor under the contract upon filing a bond, executed by a surety company duly authorized to transact business in this state, with the public authority having jurisdiction over the work, guaranteeing that the prime contractor will pay any judgment of the court rendered in favor of the lien claimant and all judgments filed. Such bond shall be in an amount sufficient to insure payment of the lien claims and judgments, and shall be approved as to form and amount by the public authority.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.17; 2005 a. 204.

SUBCHAPTER II

OTHER LIENS

779.18 Log liens; priority. (1) Any person who, personally or by a beast or machine or vehicle, performs any services in cutting, hauling, running, felling, piling, driving, rafting, booming, cribbing, towing, sawing, peeling, kiln drying or manufacturing logs, timber, stave bolts, heading staves, pulp wood, cordwood, firewood, railroad ties, piling, telegraph poles, telephone poles, fence posts, paving timber, tan or other barks or in preparing wood

for or manufacturing charcoal shall have a lien upon the material for the amount owing for the services, which shall take precedence of all other claims, liens or encumbrances thereon or sales thereof.

(2) The right of lien given by this section survives any change in the property through manufacture and the lienor has a lien upon the manufactured product as though the services had been performed directly thereon.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.18; 1981 c. 370.

779.19 Petition for log lien; filing same. No demand for the services may become a lien unless a petition therefor is signed and verified by the claimant or by someone in the claimant's behalf setting forth the nature of the demand, the amount claimed, a description of the property upon which the lien is claimed and that the petitioner claims a lien thereon. The petition shall be filed in the office of the clerk of the circuit court of the county in which the services or some part thereof were performed within 3 months after the last day of performing continuous services, and the services shall be deemed continuous notwithstanding a change of ownership in the property on which the lien is claimed. The clerk shall receive the fee prescribed in s. 814.61 (5) for filing the petition.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.19; 1981 c. 317.

779.20 Action to enforce log lien; parties; costs; change of venue. (1) An action to enforce any lien under s. 779.18 may be brought in the circuit court of the county where the petition is filed. This claim shall cease to be a lien unless an action to foreclose it is commenced within 4 months after filing the petition. If the claim is not due at the time of filing the petition the time when the claim will become due shall be stated in the petition, and in this case the claim shall not cease to be a lien until 30 days after the claim has become due and until 4 months after the filing of the petition.

(2) Where the property subject to such lien has been taken from the county where such work was done the lienor may bring an action to foreclose the lien in any county where said property may be found. In all foreclosure actions the person liable for such claim shall be made defendant and any other person claiming to own or have any interest in such property may be made a defendant, but shall not be liable for costs unless defending the action. In actions appealed from municipal court no change of venue shall be allowed except for prejudice of the judge or of the people.

History: 1977 c. 449; 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.20.

779.21 Attachment, affidavit for; undertaking; service of writ. (1) The plaintiff in this action may have remedy by attachment of the property upon which the lien is claimed as in personal actions; this attachment may be issued, served and returned and like proceedings had thereon including the release of any attached property as in personal actions. The affidavit for the attachment must state that the defendant who is personally liable is indebted to the plaintiff in the sum named, above all setoffs, for services which entitle the plaintiff to a lien, describe the property on which it is claimed that the services were performed and that the plaintiff has filed the petition for a lien pursuant to law. No other fact need be stated. No order may be made by any court or any judge thereof requiring an undertaking or security for costs except upon 10 days' notice to the plaintiff.

(2) The writ of attachment shall direct the officer to attach the property described or so much thereof as shall be necessary to satisfy the sum claimed to be due and to hold the same subject to further proceedings in the action. The officer shall make return but it shall not be necessary for the officer to make an inventory or appraisal of the property attached; the officer shall pay any charges that may be due for booming or driving the property attached, and the amount paid shall be taxed as costs. Where personal service of the summons and writ of attachment cannot be made service shall be made as provided for service of summons

on nonresidents or persons who cannot be found as in other actions.

History: 1977 c. 449; 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.21.

779.24 Lien for camp supplies. All persons furnishing supplies necessary for the performing of the labor and services upon any property mentioned in s. 779.18, at the request of the person engaging such labor or services, shall have the right of lien therefor and may enforce the same by action as herein provided for the enforcement of liens upon logs and timber.

History: 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.24.

779.25 Lien for joint log driving. When logs or timber of different owners are so intermixed that they cannot be conveniently separated for driving and either owner neglects to make the necessary provision for driving them any other owner may drive all such logs or timber to the destination and shall receive reasonable compensation for driving the logs of the owner so neglecting and shall have a lien for such compensation and may enforce the same as provided for the enforcement of liens upon logs or timber.

History: 1979 c. 32 s. 57; Stats. 1979 s. 779.25.

779.26 Lien of improvement companies. Every company whose charter authorizes it to collect tolls on logs, lumber or timber shall have a lien thereon, with the remedies herein given to enforce liens for labor and services in respect to logs or timber.

History: 1979 c. 32 s. 57; Stats. 1979 s. 779.26.

779.28 Execution. In actions to enforce liens on property mentioned in s. 779.18 the execution, in addition to the directions of ordinary executions upon judgments for money, shall direct that the property upon which a lien is found to exist or so much thereof as may be necessary for such purpose be sold to satisfy the judgment.

History: 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.28.

779.29 Intervention. In an action for the enforcement of a lien upon property under s. 779.18 a person not a party may, at any time before sale of the property upon which a lien is claimed, become a party defendant by filing with the clerk of the court where the action is pending an affidavit made in behalf of or by the person that the person is the owner of or of some interest in the property upon which a lien is claimed and believes that the claim for lien is invalid. Upon filing this affidavit the person may defend this action so far as a claim for a lien is concerned. If judgment has been previously rendered for a lien, the person may move the court for relief from the judgment within 20 days after the filing of the affidavit. The right to file an affidavit shall not extend beyond one year from the rendition of the judgment.

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.29; 1983 a. 219.

Judicial Council Note, 1983: This section is amended by repealing an appeal procedure and substituting the right to move the trial court for relief from its judgment. [Bill 151-S]

779.30 Undertaking by intervenor; procedure. The filing of an affidavit under s. 779.29 shall not stay execution unless the intervenor files an undertaking, with 2 or more sureties, who shall each justify in a sum equal to double the amount of the judgment, conditioned that if the plaintiff establishes the right to a lien on the property they will pay the amount of judgment in the plaintiff's favor with costs; the undertaking shall be approved by the judge of the court; and upon filing it all proceedings upon the judgment shall be stayed during the pendency of the proceedings. If execution has been previously issued the same shall, upon presenting to the officer in whose custody it may be a certified copy of the affidavit and undertaking, be returned, and all property in which the intervenor claims an interest that may have been levied upon shall be released from the levy. If upon the trial the plaintiff recovers judgment of lien upon this property the judgment may be entered against the intervenor and sureties; but if the plaintiff does

779.30 LIENS

not establish the right to a lien the intervenor shall recover judgment for costs.

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.30; 1983 a. 219.

779.31 Cook's lien. The person who prepares or serves the food for persons while they are performing lienable services upon any property mentioned in s. 779.18, at the request of their employer shall have the right of lien therefor the same as those persons.

History: 1975 c. 94 s. 91 (9); 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.31.

779.32 Commission liens. (1) DEFINITIONS. In this section:

- (a) "Broker" means a real estate broker licensed under ch. 452.
- (b) "Commercial real estate" means any real property other than any of the following:
 1. Real property containing 8 or fewer dwelling units.
 2. Real property that is zoned for residential purposes and that does not contain any buildings or structures.
 3. Real property that is zoned for agricultural purposes.
- (c) "Financial institution" has the meaning given in s. 214.01 (1) (jn).

(2) LIEN. If a broker complies with the notice requirements under sub. (3) and perfects the lien under sub. (4), all of the following apply:

- (a) If the broker has earned a commission under a written commercial real estate listing contract, the broker has a lien for the unpaid amount of the commission against the commercial real estate, or the interest in commercial real estate, that is listed with the broker under the contract.
- (b) If the broker has earned a commission under a written commercial real estate buyer agency agreement, the broker has a lien for the unpaid amount of the commission against the commercial real estate, or the interest in commercial real estate, that is acquired as a result of the agreement.
- (c) If the broker has earned compensation under a written agreement for the lease or management of commercial real estate, the broker has a lien for the unpaid amount of the compensation against the commercial real estate for which the leasing or management services were provided under the agreement.

(3) NOTICE OF INTENT TO CLAIM LIEN. A broker has a lien under sub. (2) (a) or (b) only if the broker files or records a written notice of intent to claim a lien under this section at the office of the register of deeds for the county in which the commercial real estate is located and delivers a copy of the notice to the person owing the commission under sub. (2) (a) or (b). A broker has a lien under sub. (2) (c) only if the broker provides a written notice of intent to claim a lien under this section to the person owing the compensation under sub. (2) (c). All notices required under this subsection shall contain the name of each party to the agreement under which the lien is claimed, the date that the agreement was entered into and a brief description of the commercial real estate on which the lien is intended to be claimed. All notices required under this subsection shall be provided within the following time periods:

- (a) In the case of a lien under sub. (2) (a), at least 30 days before the conveyance of the commercial real estate subject to the listing contract.
- (b) In the case of a lien under sub. (2) (b), at least 30 days before the conveyance of the commercial real estate subject to the buyer agency agreement.
- (c) In the case of a lien under sub. (2) (c), before the date that the written agreement for the lease or management of commercial real estate is entered into.

(4) PERFECTION OF LIEN. (a) A lien under this section is perfected when a broker files a notice of lien in the office of the register of deeds for the county in which the commercial real estate is located. The lien must be perfected no later than the following:

- 1. In the case of a lien under sub. (2) (a) or (b), 3 days prior to the date that the conveyance documents are recorded with the

register of deeds in the county where the real property, that is the subject of the listing contract or buyer agency contract, is located.

2. In the case of a lien under sub. (2) (c), 90 days after the later of the following:

a. The date that the broker earns a commission or compensation that gives rise to a lien under this section. For purposes of this subd. 2. a., a commission or compensation is considered earned on the date that payment of it is due under the lease or management agreement.

b. The date that the broker receives notice that he or she has earned a commission or compensation that gives rise to a lien under this section. For purposes of this subd. 2. b., a commission or compensation is considered earned on the date that the payment of it is due under the lease or management agreement.

(b) The notice of lien shall be signed by the broker and shall include all of the following information:

1. The name and license number of the broker.
2. The name of the owner or acquirer of the commercial real estate that is subject to the lien.
3. The legal description of the commercial real estate that is subject to the lien.
4. The amount of the lien at the time the notice is filed.

(c) A broker shall mail a copy of the notice of lien to the owner or acquirer of the commercial real estate that is subject to the lien within 72 hours after the filing of the notice of lien under par. (a). A lien under this section is effective only from the date that it is perfected under this subsection.

(d) A lien that is perfected under this subsection by a broker secures all unpaid commissions or compensation that is due that broker with respect to the commercial real estate subject to that lien, regardless of whether the commission or compensation was earned at the time the lien was filed.

(4m) DUTY OF REGISTER OF DEEDS. If a notice of lien meets the requirements under sub. (4), the register of deeds shall accept the notice of lien for filing. The register of deeds shall index the notice of lien under the name of the owner or acquirer of the commercial real estate who is subject to the lien. If the register of deeds maintains a tract index, the register of deeds shall also index the notice of lien under the legal description of the real estate against which a lien is claimed.

(5) PRIORITY. A lien under this section shall have priority over all other liens on the commercial real estate, except tax and special assessment liens, liens created under subch. I of ch. 779, purchase money mortgages, liens that are filed or recorded before the lien under this section is perfected and any other lien given priority under the law.

(8) SATISFACTION OF THE LIEN. (a) Upon the request of any person interested in the real estate that is the subject of a lien under this section, the broker shall execute and deliver a satisfaction of lien to the interest party, if one of the following conditions is met:

1. The person owing the commission or compensation pays the broker in full the amount specified in the notice of lien.
2. The person owing the commission or compensation pays an amount equal to 125% of the commission or compensation owed into the trust account of the broker or the trust account of any attorney who does not represent any party to the dispute and who is in good standing with the State Bar of Wisconsin. The moneys shall be held in escrow until disbursed pursuant to the written mutual agreement of the parties or pursuant to a court order.

3. If the parties to the contract or agreement giving rise to the lien agree to binding arbitration regarding the disputed commission or compensation and if the parties to the contract or agreement, other than the broker, agree to pay all of the costs of the arbitration.

(b) Upon the filing of a satisfaction of lien under par. (a) with the register of deeds, the register of deeds shall index the satisfaction under the name of the owner or acquirer of the commercial real estate who was subject to the satisfied lien. If the register of

deeds maintains a tract index, the satisfaction shall also be indexed under the legal description of the real estate against which the lien was claimed.

(c) A broker is liable to a person requesting a lien satisfaction under this subsection for a sum equal to 50% of the sum claimed in the lien claim, if the broker does not provide the requested satisfaction within 30 days of the later of the following:

1. The date on which the request is received by the broker.
2. If the satisfaction is required under par. (a) 1., the date on which the broker receives payment in full of the amount specified in the notice of lien.
3. If the satisfaction is required under par. (a) 2., the date on which the broker receives evidence that the requirements under par. (a) 2. have been met.
4. If the satisfaction is required under par. (a) 3., the date on which the broker receives the agreement to binding arbitration.
5. If the satisfaction is required under par. (a) 3., the date on which the broker receives evidence of payment of the arbitrator's fee.

(9) **EXTINGUISHMENT OF LIEN.** A lien under this section is extinguished if an action to enforce the lien is not commenced within 2 years after the lien is perfected under sub. (4) (a).

History: 1997 a. 309; 2001 a. 103.

SUBCHAPTER III

MINING LIENS, ETC.

779.35 Mining liens. Any person who performs any labor or services for any employer engaged in or organized for the purpose of mining, smelting or manufacturing ores or minerals, and any bona fide holder of any draft, time check or order for the payment of money due for that labor, issued or drawn by the employer, shall have a lien for the wages due in the amount due on the draft, check or order. The lien shall be upon all of the personal property connected with the mining, smelting or manufacturing industry belonging to the employer, including the ores or products of the mine or manufactory, and, subject to s. 779.36 (2), all of the employer's interest in any real estate connected with the mining, smelting or manufacturing business. The lien under this section shall take precedence of all other debts, judgments, decrees, liens or mortgages against the employer, except liens accruing for taxes, fines or penalties and liens under ss. 292.31 (8) (i) and 292.81, subject to the exceptions and limitations contained in this subchapter.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.35; 1993 a. 453; 1995 a. 227; 1997 a. 27, 254.

779.36 Extent of lien; filing claim. (1) Subject to sub. (2), the lien under s. 779.35 extends only to the amount of the interest in the real property held by the employer. In case of the employer's death or insolvency, or of the sale or transfer of the employer's interest in the works, mines, manufactories or business, all moneys that may be due for wages to any miner, mechanic or laborer shall be a lien upon all of the property and shall be preferred and first paid out of the proceeds of the sale.

(2) No claim for wages shall be a lien under s. 779.35 upon any real estate unless the claim is filed in the office of the clerk of the circuit court of the county in which the real estate, upon which a lien is claimed, is situated. The claim shall be filed within 60 days after the draft, time check or order upon which the claim is founded is due and payable, in the manner that claims for mechanics' liens are required to be filed.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.36; 1997 a. 254.

779.37 Satisfaction of lien. If an attachment, execution or similar writ shall be issued against any employer engaged in a business described in s. 779.35, any miner, laborer, mechanic or other person who is entitled to claim a lien under s. 779.35 may give notice in writing of the lien claim and the amount of the lien

claimed, verified by affidavit, to the officer holding the writ at any time before the actual sale of the property that is subject to the writ. The officer shall retain out of the sale proceeds a sufficient sum to satisfy all lien claims, which sum shall be held by the officer, subject to the order of the circuit court.

History: 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.37; 1993 a. 486; 1997 a. 254.

779.38 Effect of mortgage. No mortgage or other instrument by which a lien is created shall operate to impair or postpone the lien and preference given and secured to the wages and moneys mentioned in s. 779.35; provided, that no lien of any mortgage or judgment entered before such labor is performed shall be affected or impaired by such lien.

History: 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.38.

779.39 Foreclosure of lien. The liens and preferences given by ss. 779.35 to 779.38 may be foreclosed in the same manner as mechanics' liens, and all provisions of these statutes relating to the foreclosure thereof shall apply to the foreclosure of the liens so given, so far as such provisions are applicable.

History: 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.39.

779.40 Liens for labor in quarry. (1) Any person who shall perform any labor for an employer not the owner of the real estate, engaged in quarrying, crushing, cutting or otherwise preparing stone for use or for manufacturing lime and any bona fide holder of any draft, time check or order for the payment of money due for any such labor issued by such employer, shall have a lien for wages owed and for the amount due on such draft, check or order upon the personal property connected with such industry owned by such employer, including interest in the product of such quarry or factory and machinery and other personal property used in the operation of such quarry or factory, and all interest in any lease of the real estate connected with such business, which lien shall take precedence of all other debts, judgments, decrees, liens or mortgages against such employer, except taxes, fines or penalties and mortgages or judgments recorded or entered before such labor is performed and except liens under ss. 292.31 (8) (i) and 292.81.

(2) The wages shall become a lien upon the property and material mentioned in this section upon filing with the clerk of the circuit court of the county in which the labor is performed within 60 days after the first of the services shall be rendered, a petition signed by the claimant and verified in behalf of or by the claimant under oath, setting forth the nature of the debt for which the lien is claimed, the amount claimed, a description of the property upon which the lien is claimed and that the petitioner claims a lien thereon pursuant to law. The clerk shall receive the fee prescribed in s. 814.61 (5) for filing the petition.

(3) The provisions of ss. 779.20 and 779.21 shall govern the foreclosure of the liens here given so far as such provisions are applicable.

History: 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.40; 1981 c. 317; 1993 a. 453; 1995 a. 225, 227; 1997 a. 27, 35, 252.

SUBCHAPTER IV

MECHANIC'S LIENS, ETC.

779.41 Mechanic's liens. (1) Every mechanic and every keeper of a garage or shop, and every employer of a mechanic who transports, makes, alters, repairs or does any work on personal property at the request of the owner or legal possessor of the personal property, has a lien on the personal property for the just and reasonable charges therefor, including any parts, accessories, materials or supplies furnished in connection therewith and may retain possession of the personal property until the charges are paid. The lien provided by this section is subject to the lien of any security interest in the property which is perfected as provided by law prior to the commencement of the work for which a lien is claimed unless the work was done with the express consent of the holder of the security interest, but only for charges in excess of \$1,500 except if the personal property is:

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(a) A trailer or semitrailer designed for use with a road tractor, for charges in excess of \$4,500.

(b) Road machinery, including mobile cranes and trench hoes, farm tractors, machines of husbandry, or off-highway construction vehicles and equipment, for charges in excess of \$7,500.

(c) A motor vehicle not included under par. (a) or (b) with a manufacturer's gross weight rating, including, with respect to road tractors, a manufacturer's gross weight rating for the combined carrying capacity of the tractor and trailer, of:

1. More than 10,000 and less than 20,000 pounds, for charges in excess of \$3,000.

2. 20,000 pounds or more but less than 40,000 pounds, for charges in excess of \$6,000.

3. 40,000 pounds or more but less than 60,000 pounds, for charges in excess of \$9,000.

4. 60,000 pounds or more, for charges in excess of \$12,000.

(1m) Annually, on January 1, the department of agriculture, trade and consumer protection shall adjust the dollar amounts identified under sub. (1) (intro.), (a), (b) and (c) 1. to 4. by the annual change in the consumer price index, as determined under s. 16.004 (8) (e) 1., and publish the adjusted figures.

NOTE: The department will publish the adjusted mechanic's lien limits in the December 31st issue of the Wisconsin Administrative Register.

(1s) (a) Subsection (1), as it applies to a mechanic, mechanic's employer or keeper of a garage or shop, applies to a boat mechanic, boat mechanic's employer, person who tows a boat or keeper of a marina or shop at which boats are repaired, except as follows:

1. The lien provided by this subsection is subject to the lien of any security interest in the boat that is perfected as provided by law prior to the commencement of the work for which the lien is claimed unless the work was done with the express consent of the holder of the security interest, but only for charges in excess of \$1,200.

2. Within 30 days after the charges for the work become past due, the person claiming a lien under this subsection shall send written notice to the owner of the boat and the holder of the senior lien on the boat informing them that they must take steps to obtain the release of the boat. To reclaim the boat, the owner or the senior lienholder must pay all charges that have a priority over other security interests under this subsection and all reasonable storage charges on the boat that have accrued after 60 days from the date that the charges for the work became past due. A reasonable effort to notify the owner and the holder of the senior lien satisfies the notice requirement under this subdivision. Failure to make a reasonable effort to notify the owner and the senior lienholder renders void any lien to which the person may be entitled under this subsection.

(b) A lien under this subsection is in addition to any remedy available under ch. 780.

(2) Every keeper of a garage or repair shop who alters, repairs, or does any work on any detached accessory, fitting, or part of an automobile, a truck, a motorcycle, a moped, a motor bicycle or similar motor vehicle, a bicycle, or an electric personal assistive mobility device, at the request of the owner or legal possessor thereof, shall have a lien upon and may retain possession of any such accessory, fitting, or part until the charges for such alteration, repairing, or other work have been paid. If the detached article becomes attached to such motor vehicle, bicycle, or electric personal assistive mobility device while in the possession of the keeper, the keeper has a lien on the motor vehicle, bicycle, or electric personal assistive mobility device under sub. (1).

(3) Insofar as the possessory right and lien of the person performing labor and services under this section are released, relinquished and lost by the removal of property upon which a lien has accrued, it is prima facie evidence of intent to defraud if upon the removal of such property, the person removing the property issues any check or other order for the payment of money in payment of

the indebtedness secured by the lien, and thereafter stops payment on the check or order. This subsection does not apply when a check is stopped because the product is improperly repaired or improperly serviced and the product has been returned to the person performing the labor or services for proper repair or service.

History: 1971 c. 333; 1979 c. 32 s. 57; 1979 c. 176, 252; Stats. 1979 s. 779.41; 1983 a. 243; 1987 a. 399; 1995 a. 107, 331; 1997 a. 35; 2001 a. 90.

Cross-reference: See s. 779.48 (2) for method of enforcing a mechanics' lien.

The lien of a garage keeper who did not obtain the consent of the lienholder to make the repairs was limited to the statutory amount, and the garage keeper could not claim more under a theory of unjust enrichment. *Industrial Credit Co. v. Inland G. M. Diesel*, 51 Wis. 2d 520, 187 N.W.2d 157 (1971).

Upon a conditional release of personal property by the lienor, the lien is enforceable against all parties except a bona fide purchaser for value or a subsequent levying creditor with no notice of the lien. *M&I Western State Bank v. Wilson*, 172 Wis. 2d 357, 493 N.W.2d 387 (Ct. App. 1992).

The legislature did not create a crime or invoke criminal penalties in enacting sub. (3), which renders stopping payment on a check used to pay for certain repairs to personal property "prima facie evidence of intent to defraud." This section could operate to establish prima facie evidence of only one of the elements of the crime of theft defined in s. 943.20 (1) (d). 63 Atty. Gen. 81.

779.415 Liens on motor vehicles for towing and storage.

(1) (a) Every motor carrier holding a permit to perform vehicle towing services, every licensed motor vehicle salvage dealer and every licensed motor vehicle dealer who performs vehicle towing services or stores a motor vehicle, when such towing or storage is performed at the direction of a traffic officer or the owner of the vehicle, shall, if the vehicle is not claimed as provided herein, have a lien on the motor vehicle for reasonable towing and storage charges, and may retain possession of the vehicle until such charges are paid. If the vehicle is subject to a lien perfected under ch. 342, a towing lien shall have priority only to the extent of \$75 for a motor vehicle having a gross weight of 20,000 pounds or less and \$250 for a motor vehicle having a gross weight of more than 20,000 pounds and a storage lien shall have priority only to the extent of \$7 per day but for a total amount of not more than \$420 for a motor vehicle having a gross weight of 20,000 pounds or less and \$20 per day but for a total amount of not more than \$1,200 for a motor vehicle having a gross weight of more than 20,000 pounds. If the value of the vehicle exceeds \$500, the lien may be enforced under s. 779.48 (2). If the value of the vehicle does not exceed \$500, the lien may be enforced by sale or junking substantially as provided in sub. (2).

(b) If the vehicle is towed or stored under the directions of a traffic officer, any personal property within the vehicle shall be released to the owner of the vehicle as provided under s. 349.13 (5) (b) 2. No additional charge may be assessed against the owner for the removal or release of the personal property within the vehicle.

(1m) Within 30 days after taking possession of a motor vehicle, every motor carrier, licensed motor vehicle salvage dealer and licensed motor vehicle dealer under sub. (1) shall send written notice to the owner of the vehicle and the holder of the senior lien on the vehicle informing them that they must take steps to obtain the release of the motor vehicle. To reclaim the vehicle, the owner or the senior lienholder must pay all towing and storage charges that have a priority under sub. (1) (a) and all reasonable storage charges that have accrued after 60 days from the date on which possession of the motor vehicle was taken. A reasonable effort to so notify the owner and the holder of the senior lien satisfies the notice requirement of this subsection. Failure to make a reasonable effort to so notify the owner and the senior lienholder renders void any lien to which the motor carrier, licensed motor vehicle salvage dealer or licensed motor vehicle dealer would otherwise be entitled under sub. (1).

(2) At least 20 days prior to sale or junking, notice thereof shall be given by registered mail to the person shown to be the owner of the vehicle in the records of the department of transportation and to any person who has a lien on such vehicle perfected under ch. 342, stating that unless the vehicle is claimed by the owner or the owner's agent within said 20 days the vehicle will be exposed for sale or junked, as the case may be. If the proceeds of

the sale exceed the charges, the balance shall be paid to the holder of the senior lien perfected under ch. 342, and if none, then to the owner as shown in the records of the department of transportation.

History: 1977 c. 29 s. 1654 (7) (b); 1977 c. 273; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.415; 1983 a. 213, 445; 1989 a. 320; 1995 a. 62.

779.42 Obtaining mechanic's services by misrepresentation of interest in personal property. Any person who, for the purpose of inducing any mechanic, or keeper of a garage or shop, or the employer of a mechanic to transport, make, alter, repair or do any work on any personal property, makes any misrepresentation as to the nature or extent of the person's interest in said property or as to any lien upon said property shall be fined not more than \$200 or imprisoned not more than 6 months or both.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.42.

779.43 Liens of keepers of hotels, livery stables, garages, marinas and pastures. (1) As used in this section:

(a) "Boarding house" includes a house or other building where regular meals are generally furnished or served to 3 or more persons at a stipulated amount for definite periods of one month or less.

(b) "Lodging house" includes any house or other building where rooms or lodgings are generally rented to 3 or more persons received or lodged for hire, or any part of a house or other building that is let for sleep at stipulated rentals for definite periods of one month or less, whether any or all of the rooms or lodgings are let or used for light housekeeping or not, except that duplex flats or apartment houses actually divided into residential units shall not be considered lodging houses.

(c) "Marina" includes any property used for the storage, repair or mooring of boats, whether on land or in water.

(2) (a) Except as provided in par. (b), every keeper of an inn, hotel, boarding house or lodging house shall have a lien upon and may retain possession of all baggage and other effects brought into the place by any guest, boarder or lodger, whether the baggage and effects are the property of or under the control of the guest, boarder or lodger, or are the property of any other person liable for the board and lodging for the proper charges owing the keeper for board, lodging and other accommodation furnished to or for a guest, boarder or lodger, and for all moneys loaned, not exceeding \$50, and for extras furnished at the written request signed by the guest, boarder or lodger, until the charges are paid. Any execution or attachment levied upon the baggage or effects shall be subject to the lien given by this section and the costs of satisfying it.

(b) The lien given by this section does not cover charges for alcohol beverages nor the papers of any soldier, sailor or marine that are derived from and evidence of military or naval service or adjusted compensation, compensation, pension, citation medal or badge.

(3) Subject to sub. (4), every keeper of a garage, marina, livery or boarding stable, and every person pasturing or keeping any carriages, automobiles, boats, harness or animals, and every person or corporation, municipal or private, owning any airport, hangar or aircraft service station and leasing hangar space for aircraft, shall have a lien thereon and may retain the possession thereof for the amount due for the keep, support, storage or repair and care thereof until paid. But no garage or marina keeper shall exercise the lien upon any automobile or boat unless the keeper gives notice of the charges for storing automobiles or boats on a signed service order or by posting in some conspicuous place in the garage or marina a card that is easily readable at a distance of 15 feet.

(4) (a) The lien of a marina keeper under this section is subject to the lien of any security interest in the boat that is perfected as provided by law prior to the commencement of the services for which the lien is claimed unless the services were done with the express consent of the holder of the security interest, but only for charges in excess of \$1,200.

(b) Within 30 days after the charges for the services of a marina keeper become past due, the marina keeper shall send written notice to the owner of the boat and the holder of the senior lien on the boat informing them that they must take steps to obtain the release of the boat. To reclaim the boat, the owner or the senior lienholder must pay all charges that have a priority over other security interests under par. (a) and all reasonable storage charges on the boat that have accrued after 60 days from the date that the charges for the services became past due. A reasonable effort to notify the owner and the holder of the senior lien satisfies the notice requirement under this paragraph. Failure to make a reasonable effort to notify the owner and the senior lienholder renders void any lien to which the marina keeper may be entitled under this section.

(c) A lien of a marina keeper under this section is in addition to any remedy available under ch. 780.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.43; 1981 c. 79 s. 17; 1995 a. 331; 1997 a. 254.

No garage keeper's lien is imposed under sub. (3) when storage occurs without an owner's consent. *Bob Ryan Leasing v. Sampair*, 125 Wis. 2d 266, 371 N.W.2d 405 (Ct. App. 1985).

779.44 Liens of consignees. Every consignee of property shall have a lien thereon for any money advanced or negotiable security given by the consignee to or for the use of the person in whose name the shipment of such property is made, and for any money or negotiable security received by such person for personal use unless the consignee shall, before advancing any such money, or giving such security, or before it is so received for personal use, have notice that such person is not the actual owner thereof.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.44.

A consignment need not be for the purpose of sale. A tender of the amount due must be made and is not waived merely by an excessive demand for payment made in good faith and in ignorance of the scope of the lien. *Power Transmission Equipment Corp. v. Beloit Corp.* 55 Wis. 2d 540, 201 N.W.2d 13 (1972).

779.45 Liens of factors, brokers, etc. Every factor, broker or other agent entrusted by the owner with the possession of any bill of lading, customhouse permit, warehouse receipt or other evidence of the title to personal property, or with the possession of personal property for the purpose of sale or as security for any advances made or liability incurred by the factor, broker or agent in reference to such property, shall have a lien upon such personal property for all such advances, liability incurred or commissions or other moneys due for services as such factor, broker or agent, and may retain the possession of such property until such advances, commissions or moneys are paid or such liability is discharged.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.45.

779.46 Jeweler's lien. Every jeweler, watchmaker or silversmith who shall do any work on any article at the request of the owner or legal possessor of such property, shall have a lien upon and may retain the possession of such article until the charges for alteration, repair or other work have been paid.

History: 1979 c. 32 s. 57; Stats. 1979 s. 779.46.

779.47 Plastics fabricator's lien. (1) DEFINITIONS. In this section:

(a) "Plastics fabricator" means a person who uses toolings to fabricate or manufacture plastic products or a person who makes or provides toolings for use in the fabrication or manufacture of plastic products.

(b) "Toolings" includes masters, models, patterns, tools, dies, molds, jigs, fixtures, forms and designs that are used in the fabrication or manufacture of plastic products.

(2) LIEN. Subject to sub. (2m), a plastics fabricator shall have a lien on all toolings and plastic products in the plastics fabricator's possession that belong to the customer for the amount owed the plastics fabricator by the customer for toolings or for plastics fabrication processing or work. The plastics fabricator may retain

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possession of the toolings until the amount owed is paid or satisfied.

(2m) ATTACHMENT AND PERFECTION. A lien under sub. (2) attaches and is perfected 30 days after the date on which plastic products are delivered to the customer unless the customer notifies the plastics fabricator within that time period that the products failed to meet an approved quality control plan, the products deviated from approved samples or the products deviated from previously accepted parts and the customer returns the products within 60 days after the date on which the products are delivered to the customer.

(3) PRIORITY. A lien under sub. (2) does not take priority over an existing perfected security interest.

History: 1993 a. 328.

779.48 Enforcement. (1) Every person given a lien by ss. 779.43 to 779.46, except s. 779.43 (3), or as bailee for hire, carrier, warehouse keeper or pawnee or otherwise, by common law, may, in case the claim remain unpaid for 3 months and the value of the property affected thereby does not exceed \$100, sell such property at public auction and apply the proceeds of such sale to the claim and the expenses of such sale. Notice in writing, of the time and place of the sale and of the amount claimed to be due shall be given to the owner of such property personally or by leaving the same at the owner's place of abode, if a resident of this state, and if not, by publication thereof, in the county in which such lien accrues, as a class 3 notice, under ch. 985. If such property exceeds in value \$100, then such lien may be enforced against the same by action.

(2) Every person given a lien by ss. 779.41 and 779.43 (3) may in case the claim remains unpaid for 2 months after the debt is incurred, and a person given a lien under s. 779.47 (2) may if the claim remains unpaid 90 days after the lien is perfected, 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. When such sections are applied to the enforcement of such lien the word debtor or equivalent when used therein shall be deemed to refer to the owner of the property and any other person having an interest shown by instrument filed as required by law or shown in the records of the department of transportation, and the word indebtedness or equivalent shall include all claims upon which such lien is based.

History: 1977 c. 29 s. 1654 (7) (b); 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.48; 1983 a. 500 s. 43; 1993 a. 328; 2001 a. 10; 2005 a. 336.

Requirements of a common law lien are discussed. Even though some of the goods are returned, the lien may exist on the balance retained for the whole amount due. *Moynihan Associates, Inc. v. Hanisch*, 56 Wis. 2d 185, 201 N.W.2d 534 (1972).

779.485 Special tools. (1) DEFINITIONS. In this section:

- (a) "Customer" means a person who does any of the following:
1. Causes a special tool builder to design, develop, manufacture, assemble, or otherwise make a special tool.
 2. Orders a product from a manufacturer that is produced with a special tool or causes a manufacturer to use a special tool.
- (b) "Intellectual property" means a design, program, or process.
- (c) "Manufacturer" means a person who uses a special tool as part of the person's manufacturing process.
- (d) "Manufacturer's lien" means a lien described in sub. (3) (b).
- (e) "Special tool" means a tool, die, jig, gauge, gauging fixture, metal casting, pattern, forging, machinery, ferrous or nonferrous machined part, or intellectual property used for the purpose of designing, developing, manufacturing, assembling, or fabricating a metal part.
- (f) "Special tool builder" means a person who designs, develops, manufactures, fabricates, or assembles a special tool.
- (g) "Special tool builder's lien" means a lien described in sub. (2) (a) 1.

(2) SPECIAL TOOL BUILDERS. (a) *Lien*. 1. A special tool builder who does all of the following has a lien on a special tool in the

amount that a customer or manufacturer owes the special tool builder for designing, developing, manufacturing, fabricating, assembling, repairing, or modifying the special tool:

a. Permanently records on the special tool the special tool builder's name, street address, city, and state, or other traceable identification.

b. Files a financing statement for the special tool under subch. V of ch. 409.

2. A special tool builder's lien attaches and is perfected on the date that both of the requirements specified in subd. 1. a. and b. are satisfied.

3. A special tool builder retains a special tool builder's lien even if the special tool builder does not have physical possession of the special tool for which the lien is claimed.

4. A special tool builder's lien remains valid until the first of any of the following occurs:

a. The customer or manufacturer pays the special tool builder the amount for which the special tool builder's lien is claimed.

b. The financing statement is terminated.

(b) *Priority*. An attached and perfected special tool builder's lien has priority over any other lien that subsequently attaches to the special tool.

(c) *Enforcement*. 1. A special tool builder may not enforce a special tool builder's lien unless the builder provides notice in writing to the customer, manufacturer, or both that owes the builder the amount for which the special tool builder's lien is claimed. The notice shall be delivered personally or by registered mail, return receipt requested, to the last-known address of the customer, manufacturer, or both and shall state that the builder is claiming a lien for the amount that customer, manufacturer, or both owes the special tool builder for designing, developing, manufacturing, fabricating, assembling, repairing, or modifying the special tool and that the builder demands payment for the amount. Except as provided in subd. 2., if the special tool builder is not paid the amount claimed within 90 days after either the customer or, if applicable, the manufacturer receives the notice, whichever is later, the builder has the right to possession of the special tool and the builder may enforce the right by any available judicial procedure or by taking possession of the special tool without judicial process, but only if the taking is done without breach of the peace.

2. If the postal service returns any notice required under subd.

1. as undeliverable, the special tool builder may enforce the right to possession under subd. 1. no sooner than 90 days after the special tool builder publishes, under ch. 985, a class 1 notice of the intended enforcement of the right to possession in a newspaper of general circulation in the place where the special tool is last known to be located and in the place of the last-known address of any person for which the postal service returns a notice as undeliverable.

(3) MANUFACTURERS. (a) *Transfer of interest*. 1. Unless otherwise agreed by a customer and manufacturer in writing, all rights, title, and interest of a customer in a special tool that a manufacturer has used to produce parts ordered by the customer or that the customer has caused a manufacturer to use are transferred to the manufacturer for the purpose of destroying the special tool, if all of the following are satisfied:

a. The special tool has been in the possession of the manufacturer during the one-year period beginning after the manufacturer's last use of the special tool.

b. The customer has not claimed possession of the special tool before the expiration of the one-year period specified in subd. 1. a.

c. After the expiration of the one-year period specified in subd. 1. a., the manufacturer provides written notice by registered mail, return receipt requested, to an address designated in writing by the customer or, if the customer has made no such designation, to the customer's last-known address, that indicates that the manufacturer intends to terminate the customer's rights, title, and

interest in the special tool and transfer those rights, title, and interest to the manufacturer as provided in this paragraph.

d. The customer has not, within 120 days after the date that the manufacturer receives the return receipt of notice specified in subd. 1. c. or within 120 days after the manufacturer provides notice if no return receipt is received within that period, claimed possession of the special tool or agreed to other arrangements with the manufacturer for storage of the special tool.

2. The one-year period specified in subd. 1. a. applies retroactively to special tools last used before April 29, 2006.

3. This paragraph does not apply to a special tool that is titled to, and in the possession of, a manufacturer. This paragraph may not be construed to grant a customer any right, title, or interest in a special tool.

(b) *Lien.* A manufacturer has a lien on any special tool in the manufacturers' possession belonging to a customer for the amount due the manufacturer from the customer for work performed with the special tool or for making or improving the special tool. A manufacturer may retain possession of the special tool until the amount due is paid.

(c) *Enforcement.* 1. A manufacturer may not enforce a manufacturers' lien unless the manufacturer provides notice in writing to the customer, delivered personally or by registered mail to the last-known address of the customer, that states that the manufacturer is claiming a lien for the amount due described in par. (b). Except as provided in subd. 2., if the manufacturer is not paid the amount due within 90 days after the customer receives the notice, and if the manufacturer is still in possession of the special tool, the manufacturer may sell the special tool at public auction under par. (d).

2. If the postal service returns a notice under subd. 1. as undeliverable and if the manufacturer is still in possession of the special tool, the manufacturer may sell the special tool at public auction under par. (d) no sooner than 90 days after the special tool builder publishes, under ch. 985, a class 1 notice of the sale in a newspaper of general circulation in the place of the last-known address of the customer.

(d) *Public auction.* 1. A manufacturer may not sell a special tool at public auction unless the manufacturer has provided, by registered mail, return receipt requested, the customer and any other person, including a special tool builder, who has perfected by filing a security interest in the special tool, a notice that includes all of the following:

- a. A statement that the manufacturer intends to sell the special tool no sooner than 60 days after receipt of the notice.
- b. A description of the special tool.
- c. The time and place of the public auction.
- d. An itemized statement of the amount for which the manufacturer's lien is claimed.

e. A statement that any product produced by the manufacturer with the special tool complies with the quality and quantity ordered by the customer.

2. Except as provided in subd. 3., a manufacturer may sell a special tool at public auction no sooner than 60 days after the customer's or other person's receipt of the notice specified in subd. 1., whichever is later, except that, if the postal service returns any of the notices as undeliverable, the manufacturer may sell the special tool no sooner than 60 days after the manufacturer publishes, under ch. 985, a class 1 notice of the intended sale, that includes the information specified in subd. 1., in a newspaper of general circulation in the place where the manufacturer is holding the special tool for sale, in the place of the customer's last-known address, and in the place of the other person's last-known address.

3. If a customer disagrees with the statement specified in subd. 1. e. that is included in a notice, the customer may notify the manufacturer of the disagreement in writing by registered mail, return receipt requested. If a manufacturer receives a notification under this subdivision before the date of the public auction, the

manufacturer may not sell the special tool at public auction until after the disagreement is resolved.

(e) *Proceeds.* The proceeds of a sale of a special tool under par. (d) shall, if applicable, first be paid to a prior lienholder who has perfected a lien in an amount sufficient to extinguish that lien. Any excess proceeds shall next be paid to the manufacturer in an amount sufficient to extinguish the manufacturer's lien. Any remainder shall be paid to the customer.

History: 2005 a. 336.

SUBCHAPTER V

BREEDING ANIMAL, THRESHING LIENS, ETC.

779.49 Lien of owner of breeding animal or methods.

(1) (a) Except as provided in par. (b), every owner of a stallion, jackass or bull, or semen from a stallion, jackass or bull, kept and used for breeding purposes shall have a lien upon any dam served and upon any offspring gotten by the animal, or by means of artificial insemination for the sum stipulated to be paid for the service of the dam. The owner of the stallion, jackass or bull, used to service, or semen used to artificially inseminate, the dam may seize and take possession of the dam and offspring or either without process at any time before the offspring is one year old, in case the price agreed upon for the service remains unpaid, and sell the offspring at public auction. The sale of the offspring shall be upon 10 days' notice, to be posted in at least 3 public places in the town where the service was rendered. The proceeds of the sale shall be applied to the payment of the amount due for the service and the expenses of the seizure and sale. The residue, if any, shall be returned to the party entitled to it.

(b) No lien given under this subsection shall be effective for any purpose against an innocent purchaser or mortgagee of the offspring or the dam of the offspring for value unless the owner having a claim for the service records with the register of deeds of the county where the owner of the dam served resides a statement showing that the service has been rendered and the amount due for the service.

(2) Any person who sells, disposes of or gives a mortgage upon any dam which to the person's knowledge has been served by a stallion, jackass or bull, or artificially inseminated with semen owned by another, the fee for which has not been paid, and who has not given written information to the purchaser or mortgagee of the fact of the service or artificial insemination, shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$10 or imprisoned for not more than 60 days.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.49; 1993 a. 301; 1997 a. 254.

779.50 Lien for threshing, husking, baling; enforcement.

(1) (a) Every person who threshes grain, cuts, shreds, husks or shells corn or bales hay or straw by machine for another shall have a lien upon the grain, corn, hay or straw for the value of the services to the extent that the person contracting for the services has an interest in the grain, corn, hay or straw, from the date of the commencement of the service.

(b) The lien given under par. (a) may be foreclosed at any time within 6 months from the date of the last charge for the services described in par. (a) as long as the charges remain unpaid. For the purpose of foreclosing the lien, the lien claimant may take possession of so much of the grain, corn, hay or straw as shall be necessary to pay for the services and the expenses of enforcing the lien, for the services, and sell the grain, corn, hay or straw at public auction. The auction shall be held upon notice of not less than 10 nor more than 15 days from the date of the seizure of the grain, corn, hay or straw under this paragraph.

(2) Notice of such sale shall be given personally and by posting in at least three public places in the town where the debtor resides, and also in the town where such sale is to be made; and if such debtor is a nonresident of the state, in the town where such

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grain, corn, hay or straw, or some part thereof, was threshed, cut, husked, shelled or baled, and apply the proceeds of such sale to the payment of such service, together with the expenses of such seizure and sale, returning the residue to the party entitled thereto.

(3) The lien created by this section shall be preferred to all other liens and encumbrances, but does not apply to an innocent purchaser for value unless such lien is recorded in the office of the register of deeds of the county where the services were performed within 15 days from the date of the completion of such service.

(4) The costs and expenses of seizure and sale under this section shall be as follows:

- (a) For seizing grain, corn, hay or straw, 50 cents.
- (b) For posting each notice, 12 cents.
- (c) For serving each notice of sale, 25 cents.
- (d) For every copy of a notice of sale delivered on request, 12 cents.
- (e) For each mile actually traveled, going and returning to serve any notice; or to give or post notices of sale, 10 cents.
- (f) For conducting the sale of the grain, corn, hay or straw, 50 cents.
- (g) For collecting and paying over all sums upon the sale, 5 percent of the sums collected or \$10, whichever is less.
- (h) All necessary expenses incurred in taking possession of and preserving any grain, corn, hay or straw.

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.50; 1993 a. 301; 1997 a. 254; 2007 a. 96.

SUBCHAPTER VII

MAINTENANCE LIENS

779.70 Maintenance liens. (1) Any corporation organized under the laws of this state as a nonprofit, membership corporation for the purpose of maintaining, improving, policing or preserving properties in which its members shall have common rights of usage and enjoyment, including, without limitation because of specific enumeration, private (not public) parks, plazas, roads, paths, highways, piers, docks, playgrounds, tennis courts, beaches, water pumping plant and connecting pipes or sewer plant and connecting pipes, shall have the power to prepare and annually submit to its membership a budget of the expenditures which it proposes to make for the ensuing year. Such budget shall include the expenses of maintaining the necessary organization of the corporation including salaries to officers, fees paid for auditing the books of the corporation and for necessary legal services and counsel fees to the governing board thereof.

(2) (a) Upon the adoption and approval of the annual budget by a majority of the members entitled to vote as established by the articles of incorporation and bylaws of the corporation and by rules validly adopted by resolution of the governing board of the corporation, at a regular meeting or adjournment thereof, or upon the approval of a special assessment under par. (e), the governing board of the corporation may levy an assessment not in excess of 8 mills on each dollar of assessed valuation, to be known as a maintenance assessment, against all of the lots, the ownership of which entitles the owner thereof to the use and enjoyment of the properties controlled by the corporation, but the limitation of 8 mills on each dollar of assessed valuation shall not apply in any case in which the property owners or their predecessors in title have, by written contract, or by the terms of their deeds of conveyance, assumed and agreed to pay the costs of maintaining those properties in which the owners have common rights of usage and enjoyment.

(b) The assessment levied under this section shall be equal in amount against each parcel of contiguous lots under common ownership and with one dwelling house in a parcel, with the assessment prorated among the lots in the parcel, or equal in rate

against the assessed value of each lot or equal in amount against each lot, at the option of the governing board as it directs each year, except as provided in pars. (c) and (d), and shall be levied at the same time once in each year upon all lots. Assessed value shall include the value of the land comprising the lot and the improvements thereon.

(c) The governing board shall apportion the cost of operating water or sewer plants and facilities thereof and separate such costs from the other expenses of the budget and shall include the expenses of water and sewer plant maintenance only in the levy against those lots which may be improved with a dwelling house on the date when the levy is ordered, and no portion of such cost shall be assessed against the vacant lots or the owners thereof. In computing the cost of operating water or sewer line facilities thereof, reasonable reserves may be set up for depreciation of facilities.

(d) If property owners or their predecessors in title have, by written contract, or by the terms of their deeds of conveyance, agreed to pay unequal amounts, dues or assessments to maintain those properties in which the owners have common rights of usage and enjoyment and if those amounts, dues or assessments which are not based on assessed valuations do not vary more than \$25 between lots, then the governing board may apportion the costs of maintaining those properties in proportion to the amounts, dues or assessments specified in the agreement.

(e) The governing board of a corporation may call a special meeting upon at least 5 days' written notice for the purpose of making a special assessment. The nature of the proposed special assessment shall be included in the notice. A majority of members entitled to vote shall constitute a quorum for a special meeting, and a majority of members entitled to vote who are present at the special meeting shall determine a question.

(3) The governing board of a corporation described in sub. (1) shall declare the assessments levied under sub. (2) due and payable at any time after 30 days from the date of the levy. The corporation's secretary or other officer shall notify the owner of every lot so assessed of the action taken by the board, the amount of the assessment of each lot owned by such owner and the date on which the assessment becomes due and payable. The secretary shall mail the notice by U.S. mail, postage prepaid, to the owner at the owner's last-known post-office address.

(4) In the event that an assessment levied under sub. (2) against any lot remains unpaid for a period of 60 days from the date of the levy, the governing board of the levying corporation may, in its discretion, file a claim for a maintenance lien against the lot. All of the following apply to a claim for lien under this subsection:

(a) The claim may be filed at any time within 6 months from the date of the levy.

(b) The claim shall be filed in the office of the clerk of the circuit court of the county in which the lands affected by the levy lie.

(c) The claim shall contain a reference to the resolution authorizing the levy and the date of the resolution, the name of the claimant or assignee, the name of the person against whom the assessment is levied, a description of the property affected by the levy and a statement of the amount claimed.

(d) The claim shall be signed by the claimant or the claimant's attorney, need not be verified, and may be amended, in case an action is brought, by court order, as pleadings may be.

(5) The clerk of circuit court shall enter each claim for a maintenance lien in the judgment and lien docket immediately after the claim is filed in the same manner that other liens are entered. The date of levy of assessment will appear on the judgment and lien docket instead of the last date of performance of labor or furnishing materials.

(6) When the corporation, described in sub. (1) has so filed its claim for lien upon a lot it may foreclose the same by action in the circuit court having jurisdiction thereof, and ss. 779.09, 779.10,

779.11, 779.12 and 779.13 shall apply to proceedings undertaken for the enforcement and collection of maintenance liens as described in this subsection.

History: 1977 c. 316, 449; 1979 c. 32 ss. 57, 92 (9); 1979 c. 176; Stats. 1979 s. 779.70; 1989 a. 31; 1995 a. 224; 1997 a. 254.

SUBCHAPTER VIII

DISPOSITION OF UNCLAIMED ARTICLES

779.71 Disposition of articles left for laundering, dry cleaning, repair, storage. (1) Any garment, clothing, wearing apparel or household goods remaining in the possession of a person, firm, partnership or corporation, on which laundering, cleaning, pressing, glazing or dyeing has been done or upon which alteration or repairs have been made, or on which materials or supplies have been used or furnished, for a period of 6 months or more, may be sold to pay the reasonable or agreed charges and the cost of notifying the owner, after giving notice of said sale as specified in sub. (3) to such owner. Property that is to be placed in storage after any of the services or labors mentioned herein are performed shall not be affected by the provisions of this subsection.

(2) All garments, clothing, wearing apparel or household goods placed in storage, or on which any of the services or labors mentioned in sub. (1) have been performed and then placed in storage by agreement and remaining in the possession of a person without the reasonable or agreed charges having been paid for a period of more than 18 months, may be sold to pay said charges after giving notice of said sale as specified in sub. (3) to such owner, provided that where property was delivered to be cleaned, pressed, glazed or dyed, and left for storage in addition to having such work done, it shall not be so sold unless at the time of delivery the owner was given a receipt for such property containing a statement that the property will be sold when such 18 months have elapsed unless called for within such 18 months' period. Persons operating as warehouses or warehouse keepers shall not be affected by this subsection.

(3) The mailing of a registered letter, with a return address marked thereon, addressed to the owner at their address given at the time of the delivery of the article or articles to a person, firm, partnership or corporation rendering any of the services or labors as set out in this section, stating the time and place of sale, shall constitute notice. Said notice shall be posted or mailed at least 30 days before the date of sale. The costs of posting or mailing said letter shall be added to the charges.

(4) The person, firm, partnership or corporation to whom the charges are payable, shall, from the proceeds of sale, deduct the charges due plus the costs of notifying the owner and shall hold the overplus, if any, subject to the order of the owner and shall immediately thereafter mail to the owner at the owner's address, if known, a notice of the sale, the amount of overplus, if any, due the owner, and at any time within 12 months, upon demand by the owner, pay to the owner said sums of overplus.

(5) All persons, firms, partnerships or corporations taking advantage of this section must keep posted in a prominent place in their receiving office or offices at all times 2 notices which shall read as follows: "All articles cleaned, pressed, glazed, laundered, washed, altered or repaired and not called for in 6 months will be sold to pay charges". "All articles stored by agreement and charges not having been paid for 18 months will be sold to pay charges".

History: 1979 c. 32 s. 57; 1979 c. 176; Stats. 1979 s. 779.71; 1983 a. 500 s. 43.

SUBCHAPTER IX

HOSPITAL LIENS

779.80 Hospital liens. (1) Every corporation, association or other organization operating as a charitable institution and main-

taining a hospital in this state shall have a lien for services rendered, by way of treatment, care or maintenance, to any person who has sustained personal injuries as a result of the negligence, wrongful act or any tort of any other person.

(2) Such lien shall attach to any and all rights of action, suits, claims, demands and upon any judgment, award or determination, and upon the proceeds of any settlement which such injured person, or legal representatives might have against any such other person for damages on account of such injuries, for the amount of the reasonable and necessary charges of such hospital.

(3) No such lien shall be effective unless a written notice containing the name and address of the injured person, the date and location of the event causing such injuries, the name and location of the hospital, and if ascertainable by reasonable diligence, the names and addresses of the persons alleged to be liable for damages sustained by such injured person, shall be filed in the office of the clerk of circuit court in the county in which such injuries have occurred, or in the county in which such hospital is located, or in the county in which suit for recovery of such damages is pending, prior to the payment of any moneys to such injured person or legal representatives, but in no event later than 60 days after discharge of such injured person from the hospital.

(a) The clerk of circuit court shall enter all hospital liens in the judgment and lien docket, including the name of the injured person, the date of the event causing the injury and the name of the hospital or other institution making the claim. The clerk of circuit court shall receive the fee prescribed in s. 814.61 (5) for entering each lien.

(b) Within 10 days after filing of the notice of lien, the hospital shall send by certified mail or registered mail or serve personally a copy of such notice with the date of filing thereof to or upon the injured person and the person alleged to be liable for damages sustained by such injured person, if ascertained by reasonable diligence. If such hospital fails to give notice if the name and address of the person injured or the person allegedly liable for the injury are known or should be known, the lien shall be void.

(c) The hospital shall also serve a copy of such notice, as provided in par. (b), to any insurer which has insured such person alleged to be liable for the injury against such liability, if the name and address may be ascertained by reasonable diligence.

(4) After filing and service of the notice of lien, no release of any judgment, claim or demand by the injured person shall be valid as against such lien, and the person making any payment to such injured person or legal representatives as compensation for the injuries sustained shall, for a period of one year from the date of such payment, remain liable to the hospital for the amount of such lien.

(5) Such lien shall not in any way prejudice or interfere with any lien or contract which may be made by such injured person or legal representatives with any attorney or attorneys for legal services rendered with respect to the claim of the injured person or legal representatives against the person alleged to be liable for such injury. Said lien shall also be subservient to actual taxable court costs, and actual disbursements made by the attorney in prosecuting the court action.

(6) No hospital is entitled to any lien under this section if the person injured is eligible for compensation under ch. 102 or any other worker's compensation act.

History: 1975 c. 147 s. 54; 1979 c. 32 s. 57; 1979 c. 89; 1979 c. 102 s. 236 (3); 1979 c. 176; Stats. 1979 s. 779.80; 1981 c. 317; 1991 a. 179; 1995 a. 224.

Under s. 609.91, an HMO enrollee has no personal liability for the costs of covered health care received. A hospital only has recourse against the HMO and may not assert its lien rights under this section against insurance proceeds paid by a tortfeasor's insurer to the HMO enrollee. *Dorr v. Sacred Heart Hospital*, 228 Wis. 2d 425, 597 N.W.2d 462 (Ct. App. 1999), 98–1772.

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SUBCHAPTER X

PREPAID MAINTENANCE LIEN

779.85 Definitions. In ss. 779.85 to 779.94:

- (1) “Creditor” has the meaning set forth in s. 421.301 (16).
- (2) “Customer” means a person who seeks or acquires maintenance on behalf of himself or herself or another person for personal, family, household or agricultural purposes.
- (3) “Goods” has the meaning set forth in s. 402.105 (1) (c) except that this term does not include a “motor vehicle” as defined in s. 218.0101 (22).
- (4) “Maintenance” means any repair or other services to be performed on goods after the goods have been initially delivered to the premises designated by a customer following its sale, but this term does not include installation, set up charges or delivery charges.
- (5) “Prepaid maintenance agreement” means any agreement in which a customer agrees to make prepayment for maintenance to be performed by a seller.
- (6) “Prepayment” means any full or partial payment received by a seller or an obligation incurred by a customer to a creditor or to a seller or to a seller’s assignee for maintenance to be performed by a seller if payment is made before the maintenance is rendered or received. This term does not include prepayment for maintenance under an insurance policy. Except with regard to a warranty under s. 101.953, this term does not include prepayment for maintenance to be provided under a manufacturer’s warranty on goods or maintenance unless there is a prepayment made for maintenance to be rendered under the warranty separate from the payment for the goods themselves.
- (7) “Regulated prepaid maintenance agreement” means a prepaid maintenance agreement meeting the following requirements:
 - (a) The total prepayment exceeds \$100; and
 - (b) The total period during which the seller is obligated to provide maintenance exceeds one year whether the obligation is initially for more than one year or is extended or renewed beyond one year.

History: 1977 c. 296; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.85; 1983 a. 189 s. 329 (24), (30); 1999 a. 9, 31.

779.86 Records. A seller shall retain records for 60 days following completion of the time period for which prepaid maintenance is to be performed under a prepaid maintenance agreement including but not limited to records showing the amount of prepayment, the period for which maintenance is to be performed, all contracts relating to such maintenance and all records pertaining to the escrow account or bond required under s. 779.87.

History: 1977 c. 296; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.86.

779.87 Escrow account or bond requirement.

(1) **REQUIREMENT.** A seller who enters a regulated prepaid maintenance agreement shall either maintain an escrow account or maintain a bond.

(2) **ESCROW ACCOUNT.** (a) *Surety.* If a seller maintains an escrow account, all proceeds received under any regulated prepaid maintenance agreement shall be deposited in the escrow account for the benefit of any customer who suffers a loss of prepayments for maintenance due to the bankruptcy or cessation of business by the seller.

(b) *Not to be commingled.* The seller shall not commingle the proceeds received under a regulated prepaid maintenance agreement with any other funds and any other funds which are commingled become a part of and shall be deposited in the escrow account. The seller may aggregate the proceeds received under several prepaid maintenance agreements in one escrow account.

(c) *Interest.* The seller may withdraw and retain for his or her own use any interest payments received on the escrow account.

(d) *Not to be used prior to discharge.* The seller may not withdraw or use the proceeds received under a regulated prepaid maintenance agreement which are deposited in an escrow account prior to the discharge of the prepaid maintenance lien under s. 779.91.

(e) *Not subject to attachment.* Until all prepaid maintenance liens are discharged, the escrow account is not subject to garnishment, execution, levy, attachment or foreclosure except as provided under s. 779.92.

(3) **BOND.** (a) *Surety.* If a seller maintains a bond, it shall be issued by a surety company licensed to do business in this state.

(b) *Amount; filed.* The principal sum of the bond shall be \$25,000 at all times. A copy of the bond shall be filed with the department of financial institutions.

(c) *For benefit of customer.* The bond shall be in favor of the state for the benefit of any customer who suffers a loss of prepayments for maintenance due to the bankruptcy or cessation of business by the seller. Any customer claiming against the bond may maintain an action against the seller and the surety.

(d) *Surety’s obligation.* If the seller fails to perform maintenance under a regulated prepaid maintenance agreement, the surety shall either perform or procure the performance of that maintenance or pay the customer the amount of the prepayment made under the agreement.

(e) *No lien.* If a seller maintains a bond under this subsection, a customer does not have a prepaid maintenance lien under s. 779.88.

History: 1977 c. 296; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.87; 1995 a. 27.

779.88 Prepaid maintenance lien. Except as provided under s. 779.87 (3), a customer who makes a prepayment under a regulated prepaid maintenance agreement has a lien designated as a prepaid maintenance lien in the amount of the prepayment on all the proceeds contained in the escrow account, including all after acquired proceeds. This lien is preferred to all other liens, security interests and claims on such proceeds except other prepaid maintenance liens which attached at an earlier time.

History: 1977 c. 296; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.88.

779.89 Attachment and preservation. All prepaid maintenance liens attach at the time of the first prepayment and shall be preserved from the time the lien attaches. It is not necessary to file or record any notice of the lien in order to preserve or perfect the lien although a customer may file this lien in the manner prescribed for perfecting liens under subch. III of ch. 409 regarding debtors who are located in this state.

History: 1977 c. 296; 1979 c. 32 s. 57; Stats. 1979 s. 779.89; 2001 a. 10.

779.90 Notice of existence of lien. A person is deemed to have notice of a prepaid maintenance lien if:

- (1) That person has actual knowledge or reason to know that the lien exists on the seller’s property;
- (2) That person has reason to know that the seller regularly demands or accepts prepayments for maintenance;
- (3) The seller engages in a type of business that generally requests or demands prepayment for maintenance; or
- (4) The lien was filed as permitted in s. 779.89.

History: 1977 c. 296; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.90.

779.91 Discharge of lien. (1) A prepaid maintenance lien is discharged by:

- (a) Returning the amount of the prepayment to the customer who made the prepayment;
- (b) The expiration of the time period for the performance of all contract or other obligations secured by the prepayment; or
- (c) Lapse of the right to maintain an action.

(2) Upon discharge of a prepaid maintenance lien, any customer who filed the lien as permitted in s. 779.89 is subject to the requirements of s. 409.513.

History: 1977 c. 296; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.91; 2001 a. 10.

779.92 Enforceability of lien. A prepaid maintenance lien is enforceable from the time it attaches until it is discharged. Any enforcement and foreclosure of a prepaid maintenance lien shall be in one civil action and shall be against the proceeds of the escrow account.

History: 1977 c. 296; 1979 c. 32 s. 57; Stats. 1979 s. 779.92.

779.93 Duties of the department of agriculture, trade and consumer protection. (1) The department of agriculture, trade and consumer protection shall investigate violations of this subchapter and attempts to circumvent this subchapter. The department of agriculture, trade and consumer protection may subpoena persons and records to facilitate its investigations, and may enforce compliance with such subpoenas as provided in s. 885.12.

(2) The department of agriculture, trade and consumer protection may in behalf of the state or in behalf of any person who holds a prepaid maintenance lien:

(a) Bring an action in any court of competent jurisdiction to enforce and foreclose a prepaid maintenance lien under s. 779.92.

(b) Bring an action for temporary or permanent injunctive or other relief in any court of competent jurisdiction for any violation of this chapter or attempt to circumvent this chapter. The court may in its discretion, prior to the entry of final judgment, award restitution to any customer suffering loss because of violations of this subchapter if proof of that loss is submitted to the satisfaction of the court.

(c) Bring an action in any court of competent jurisdiction for recovery of civil forfeitures against any seller who violates this subchapter.

History: 1977 c. 296; 1979 c. 32 ss. 57, 92 (9); Stats. 1979 s. 779.93; 1995 a. 27.

779.94 Penalties. (1) GENERALLY. A person who violates this subchapter shall forfeit not less than \$100 nor more than \$10,000 for each violation.

(2) MISUSE OF ESCROW FUNDS. The use of the proceeds in an escrow account by a seller for any purpose prior to the discharge of the prepaid maintenance lien is theft by the seller and is punishable under s. 943.20. If the seller is a corporation, such misuse is also deemed theft by any officer, director or agent of the corporation responsible for the misappropriation. Any of the misappropriated proceeds which have been received as salary, dividend, loan repayment, capital distribution or otherwise by any shareholder of the corporation not responsible for the misappropriation is a civil liability of the shareholder and may be recovered and restored to the escrow account by action brought by any interested party.

History: 1977 c. 296; 1979 c. 32 s. 57; Stats. 1979 s. 779.94.

SUBCHAPTER XI

FEDERAL LIEN REGISTRATION

779.97 Uniform federal lien registration act. (1) SCOPE. This section applies only to:

(a) Federal tax liens; and

(b) Other federal liens, if any act of congress or any regulation adopted under an act of congress requires or permits notices of such liens to be filed in the same manner as notices of federal tax liens.

(2) PLACE OF FILING. (a) Notices of liens, certificates and other notices affecting federal tax liens or other federal liens shall be filed under this section.

(b) Notices of liens upon real property for obligations payable to the United States, and certificates and notices affecting the liens shall be filed in the office of the register of deeds of the county in which real property subject to the liens is situated.

(c) Notices of liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates and notices affecting the liens shall be filed as follows:

1. If the person against whose interest the lien applies is a partnership or a corporation, as defined in 26 USC 7701 (a) (2) and (3), whose principal executive office is in this state, with the department of financial institutions.

2. If the person against whose interest the lien applies is a trust not covered under subd. 1., with the department of financial institutions.

3. If the person against whose interest the lien applies is the estate of a decedent, with the department of financial institutions.

4. In all other cases in the office of the register of deeds of the county where the person against whose interest the lien applies resides at the time of filing of the notice of lien.

(3) EXECUTION OF NOTICES AND CERTIFICATES. Certification of notices of liens, certificates or other notices affecting federal liens by the secretary of the U.S. treasury, by the secretary's designee or by any other official or entity of the United States responsible for filing or certifying notice of any other lien entitles them to be filed and no other attestation, certification or acknowledgment is necessary.

(4) DUTIES OF FILING OFFICER. (a) If a notice of federal tax lien or a notice of revocation of a certificate of release is presented to the filing officer who is:

1. With the department of financial institutions, the filing officer shall cause the notice to be dealt with in accordance with s. 409.519 as if the notice were a financing statement within the meaning of chs. 401 to 411; or

2. Any other officer described in sub. (2), the officer shall make the endorsements required under s. 59.43 (1) (e) and (f) and forthwith file or record the notice and enter it in the index under s. 59.43 (9). Notices under this subdivision are subject to s. 59.43 (4) (a).

(b) 1. If a refiling of a notice of lien is presented to the department of financial institutions for filing, the filing officer shall cause the refiled notice of federal lien to be dealt with in accordance with s. 409.519 as if the refiling were a continuation statement within the meaning of chs. 401 to 411.

2. If a certificate of release is presented to the department of financial institutions for filing, the filing officer shall cause the certificate to be dealt with in accordance with s. 409.513 as if the certificate were a termination statement within the meaning of chs. 401 to 411, and the filing officer may remove the notice of federal lien and any related refiling of a notice of lien, certificate of nonattachment, discharge or subordination from the files at any time after receipt of the certificate of release, but the department of financial institutions shall keep the certificate of release or a microfilm or other photographic record or optical disk or electronic record of the certificate of release in a file, separate from those containing currently effective notices of liens, for a period of 30 years after the date of filing of the certificate of release.

3. If a certificate of discharge is presented to the department of financial institutions for filing, the filing officer shall cause the certificate to be dealt with as if the certificate were an amendment that deletes collateral within the meaning of chs. 401 to 411.

4. If a certificate of nonattachment or subordination of any lien is presented to the department of financial institutions for filing, the filing officer shall cause the certificate to be dealt with as if the certificate were an amendment that deletes collateral within the meaning of chs. 401 to 411.

(c) 1. If a refiled notice of federal lien or a certificate of nonattachment, discharge or subordination is presented for filing to any other filing officer specified in sub. (2), the officer shall permanently attach the refiled notice or the certificate to the original notice of lien and shall enter the refiled notice or certificate with the date of filing in any alphabetical federal lien index on the line where the original notice of lien is entered.

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2. Except as otherwise provided in this subdivision, if a certificate of release or other document associated with a recorded notice of federal tax lien is presented for filing or recording with any other filing officer specified in sub. (2), the officer shall treat the certificate or document in the same manner as a notice filed or recorded under par. (a) 2. The officer shall also reference the certificate or document to the recorded notice of federal lien by document number in the index maintained under s. 59.43 (9).

(e) Upon request of any person, the filing officer shall issue a certified copy of any notice of federal lien or any related refiling of a notice of lien, certificate of nonattachment, discharge or subordination filed on or after February 1, 1968. The officer may charge the fee specified under s. 59.43 (2) (b) for the copy. If the filing officer is the department of financial institutions, the filing officer shall include the information concerning the notice of federal lien, or notice or certificate affecting a federal lien, in the information communicated or otherwise made available in response to a request under s. 409.523 (3), and the fee charged shall be that charged in accordance with s. 409.525.

(5) FEES. (a) The fee for filing and indexing each notice of lien or certificate or notice affecting the lien is the fee specified under s. 59.43 (2) (ag).

(b) The officer shall bill the district directors of internal revenue on a monthly basis for fees for documents filed by them.

(6) UNIFORMITY OF APPLICATION AND CONSTRUCTION. This section shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this section among those states which enact it.

(7) SHORT TITLE. This section may be cited as the Uniform Federal Lien Registration Act.

(8) TAX LIENS AND NOTICES FILED ON OR BEFORE FEBRUARY 1, 1968. Filing officers with whom notices of federal tax liens, certificates and notices affecting such liens have been filed on or before February 1, 1968 shall, after that date, continue to maintain a file labeled “federal tax lien notices filed prior to” containing notices and certificates filed in numerical order of receipt. If a notice was filed on or before February 1, 1968 any certificate or notice affecting the lien shall be filed in the same office.

History: 1977 c. 29, 418; 1979 c. 89, 177, 223, 312, 355; Stats. 1979 s. 779.97; 1991 a. 39, 148, 304, 315; 1993 a. 70, 172, 214; 1995 a. 27, 201, 417; 2001 a. 10; 2003 a. 206.

SUBCHAPTER XII

LIENHOLDER; ACQUISITION OF PRIOR LIEN

779.98 Payment of prior real estate liens. (1) Any person having a lien on real estate against which there is a prior lien

may pay any or all of the items in sub. (2). The amounts paid shall be added to the payor’s lien, with interest from the date of payment at the same rate as when paid, or if no rate was provided for prior to such payment, at the legal rate of interest. Interest on amounts paid for items described in sub. (2) (d) shall be computed at the rate under s. 74.77. All sums so paid shall be collected as a part of and in the same manner as is the lien by virtue of which said payments are made and be entitled to the same priority.

(2) The items, any or all of which may be paid under sub. (1), are as follows:

(a) Any past due or defaulted principal or interest of a prior lien.

(b) Any interest or amortized installment due under a prior lien.

(c) Premiums and assessment on insurance policies necessary to protect the security of the lienor making such payments or of any prior lien and authorized under the terms of either such lien.

(d) Taxes or special assessments due and unpaid on any realty covered by the lien with interest, penalties and costs.

(e) Any portion of a prior lien.

(f) Any charge for improvements or any other item authorized by statutes or by the terms of any prior lien.

(3) Payments made under sub. (1) shall be proved by the affidavit of the person making the payment or the person’s agent or attorney, giving the items paid, the dates when paid and the description of the real estate on which the lien is claimed, shall have priority over any liens which were subsequent to the lien of the person making the payment at the date of such payments, and shall also have priority over any lien filed after such affidavit is recorded with the register of deeds of the county where the land is located. Said payments shall also be prior to any liens filed before the recording of such affidavit if such filing was made with knowledge of such payments.

(4) The payments may be made during the period in which any lien is being enforced, or during the redemption period. An affidavit of the payments as provided in sub. (3) may be recorded with the register of deeds, and a copy of the affidavit shall be furnished by the sheriff at least 5 days before the expiration of the redemption period.

(5) If the lienor at the time of making such payment has an equal priority with other lienors, and the property securing such liens does not sell for a sufficient sum to pay all liens, the person making such payments shall be repaid the amounts thereof before the other equal lienors receive any share in the proceeds of such sale.

History: 1987 a. 378 s. 76; Stats. 1987 s. 779.98; 1987 a. 403; 1993 a. 301, 486.