

Agriculture Lien Questions E-mails

From: Brian Gryth
Sent: Friday, September 21, 2007 2:04 PM
Subject: Agricultural Lien Questions

Good afternoon,

The Secretary of State's Office would appreciate your assistance in answering the following questions regarding agistors', harvesters', and stud service liens.

- 1) What information is required to be included in an agistor's lien?
- 2) According to section 38-24.5-105, C.R.S., a harvesters' lien is perfected by complying with article 9.5 of title 4 and section 1324 of the Food Security Act of 1985. Therefore, if a person obtains the right to a harvesters' lien, should that person file an EFS? If so, should the filer have the ability to note that the EFS is a harvesters' lien?
- 3) Article 48 of title 35, C.R.S., does not specify a filing office for a stud service lien. Therefore, is the Secretary of State's Office an appropriate office to file a stud service lien? If so, does statutory authority, beyond article 48, exist specifying the Secretary of State as the filing office?
- 4) What information is required to be included in the stud service lien?

Please feel free to contact me if you have any questions or need additional information.

From: Dwight Taylor [mailto:DTaylor@et-law.com]
Sent: Saturday, September 22, 2007 10:34 AM
Subject: RE: Agricultural Lien Questions

Brian; The Agistor's Lien Act is at CRS 38-20-201, et seq., and it does not in any part of the Act prescribe what information has to be included in the lien statement. In Section 20-205, Foreclosure, subsection (4) provides that the foreclosure complaint shall show:

- (a) that the lienor performed a service to the owner;
- (b) that the service provided was performed at the written or verbal request of the owner or owner's agent;
- (c) a description of the livestock, including age, color, sex, markings, scars, brands, earmarks, a statement of the lien's actual value, and if known the registration number upon which the lien is claimed. A livestock group of 20 or more may be identified by common and accepted industry practice;
- (d) that a demand has been made against the owner by personal service;
- (e) an itemized list of the fair market value of the charges that are due and unpaid under the lien;
- (f) that a copy of the complaint has been provided by to the state board of livestock inspection commissioners.

The lien may be filed at the secretary of state's office or the county clerk where the livestock are located.

In the absence of any direction in the statute as to what an agistor's lien should contain or should look like, the Livestock Commission created its own form. I've discussed the form with the Commission, and they are aware of no authority for the creation of the form, but simply made one up. The form is really suitable only for filing with the county clerk, and not suitable for filing with the secretary of state's office. In fact, the current filing form of the secretary of state would leave a filer with a puzzle as to how it should be filed in that office. The Livestock Commission also told me that they required that a copy also be filed with that office, although they admitted that there was no authority for that. The Commission does, however, maintain a database of the liens filed with it. Some of the counties also maintain a searchable website where one can search for agistor's liens, but I don't believe that is done statewide.

The form the Commission created is entitled "Agistor's Lien (CRS Section 38-20-210), and it contains requirements for:

1. Name of and address of lienor;
2. Description of livestock
3. Statement of amount of lien
4. Location of Livestock
5. Owner of Livestock
6. Terms of Agistment Contract
7. Signature of Owner or Agent and signature of Agistor, which signatures are notarized.

The form is available from the Livestock Commission. I think the Commission used Section 20-205(4) for the requirements of the form, but the form goes beyond what the statute requires the foreclosure complaint to contain, i.e., the terms of the agistment contract.

Obviously, this results in a lien situation that is not easily searchable, and subject to dispute between an agistor who has not consented to the removal of livestock from his possession and a perfected secured party. An agistor's lien is not an Agricultural Lien under the UCC because it is a possessory lien, although there are factors that could lead to an argument that it is an Ag Lien. If the livestock are taken from the agistor without his permission, then the lien remains and applies to the proceeds (see Section 38-20-203(2)). I think we discussed this briefly a couple of years ago, but I did not pursue it since my client was perfectly happy with filing at the county clerk's office. I encouraged him to file in both places, but I think he thought I was just trying to earn some additional fees. So I stopped talking about this. I have also seen an agistor's lien filed at the secretary of state's office, but I think that was done as an afterthought and done so because it did not require the notarized signatures that a county filing would have required, and the dispute had already commenced.

I would be happy to engage in some discussions about trying to rationalize this, but I suspect that there are lots of agistor's liens filed locally that would need protection if there were any statutory

changes. I have at least one client that would be effected by any change, and I suspect that any change would have a broad impact. This note has not been peer reviewed – that's your job.

From: Tom Keyse [mailto:tkeyse@bmwllc.com]
Sent: Monday, September 24, 2007 3:55 PM
Subject: RE: Agricultural Lien Questions

I worked with Dwight several years ago on agistor's lien issues and concur with his analysis.

Apparently, not everyone is using the Livestock Commission's form as I recently saw a Statement of Agistor's Lien filed with a county clerk that contained the owner's name and address, the lienor's name and address, a general description of the property to be charged, a statement that the owner agreed to pay the lienor in a written agreement (but no description of the terms), the amount owed and a brief description of services.

I have not worked with harvester's or stud service liens.

From: Dwight Taylor [mailto:DTaylor@et-law.com]
Sent: Tuesday, September 25, 2007 3:37 PM
Subject: RE: Agricultural Lien Questions

Bryan; the Harvester's Lien Statute raises a lot of questions. First, I have not had much experience with these and have not litigated any claims under the statute. But I have some "observations". First, 38-24.5-103(1) provides that a harvester's lien shall be filed in the same locations for farm products and crops as provided in Section 4-9-501. That section, because a harvester's lien appears to be an Ag Lien, causes the harvester's lien to be filed at the secretary of state's office. Going back to section 38-24.5-103, however, that requires that the lien is to contain a statement containing a just and true account...the name of the person, etc. for whom the harvesting was done...a legal description of the land upon which the crop was raised...the price for harvesting...the storage information...the locality of the storage facility...all verified by an affidavit of the person claiming the lien and a copy of the notice of intent to file the lien with an affidavit of service. Then 38-24.5-104 requires that the county clerk and recorder endorse the lien upon the day of its filing and make an abstract of it in a book kept and indexed for that purpose. Finally, 38-24.5-105(2) requires that perfection is had by filing pursuant to article 9.5, of title 4...which is of course is an EFS filing. I don't think there could be a greater mish-mash of filing requirements anywhere. Do you think we ought to try to rationalize this mess?

From: Dwight Taylor [mailto:DTaylor@et-law.com]
Sent: Tuesday, September 25, 2007 6:15 PM
Subject: RE: Agricultural Lien Questions

CRS 35-48-101 Lien for one year. Brian, this is another one I have not dealt with, but I'll give it a shot. It does appear to be to be an Ag Lien, which means that it should be filed with the Secretary of State under CRS 4-9-501. Since it is a lien on the offspring (get) of bulls, rams and boars for the stud services that produced the offspring, it is likely that the provider of the services is not in possession of the offspring. The lien is also only for one year, so the provider will need to act quickly within the year after the offspring is born to foreclose its lien. There is no priority provided for stud services, unlike the agistor's lien, so I presume that it would be junior to any other perfected lien or security interest in the livestock. Since the statute does not prescribe what needs to be included in a filing, then I would suggest that one could be relatively liberal in describing the parties and collateral and just use the information asked for in the UCC-1. However, since the offspring are farm products, I would think an EFS would be required, and that would require the information required for an EFS filing. Of course, I guess there could be an argument that the statute provides automatic perfection without filing, since the statute does not require a filing. That would be a result similar to purchase money security interests in consumer goods, so it is not like it is against public policy to have such liens, even though they might be "secret" liens. The only persons that the lien would be effective against is the owner of the offspring and any other unperfected secured party, so maybe this is no threat to lenders who typically will obtain a perfected security interest, or those lenders whose security interests may be unperfected for some reason. The problem with that argument is that the stud service lien meets the definition of an Ag Lien, so I think the filing of a lien would be required by Article Nine.

As a practical matter, unlike the other liens you have asked about, this is much easier for the Secretary to deal with because we don't have the requirement for signatures, affidavits and the like which makes electronic filing difficult. All the "keeper" (that doesn't seem limited to owner) would have to do would be to check out the birth of the offspring to make sure it was a live birth and get a description of the get (even that may not be required...I suppose a keeper could file the lien in anticipation of the birth of the offspring) and fill out the UCC-1 and the EFS like any normal secured party, and file it electronically with the Secretary. I think the keeper would be wise to add in the comments box that it was a lien filed pursuant to this statute. That's my two cents worth...that may be enough to keep the discussion alive for the next person to correct me.

From: Dwight Taylor [mailto:DTaylor@et-law.com]
Sent: Wednesday, September 26, 2007 8:24 AM
Subject: RE: Agricultural Lien Questions

I noticed...of course after I sent the email...that I had misplaced an insertion in my comment about the stud service lien. I'm sure you will all notice it.

From: Arthur H Travers [mailto:Arthur.Travers@Colorado.EDU]
Sent: Thursday, September 27, 2007 3:11 PM
Subject: Re: Agricultural Lien Questions

Brian, I have little to add to Dwight's comprehensive replies, and I don't do ag financing so what little I do have is probably not worth very much.

It would probably be a good idea to take a hard look at this miscellany of liens since the statutes are incomplete and confusing.

I know I don't understand the Agistor's Lien statute. I had once been certain that it was not an ag lien as defined in Article 9. The initial lien is granted only in livestock held by the agistor which would not be an ag lien under 4-9-102(5)(C), but 38-20-203(2) goes on to say that if the livestock is disposed of from the premises of the lienor by anyone other than the lienor the lien "shall continue and shall attach to the proceeds received or receivable from such disposition." If this shifts the lien from the livestock to the proceeds then it would still not be an ag lien if the proceeds are not "farm products" as I would guess they would not be. But if the lien both continues in the livestock disposed of and attaches to the proceeds, then it would appear to be an ag lien, perhaps even when the livestock is in the agistor's possession.

Dwight has done a fine job in detailing the mess that is the Harvester's Lien statute.

The Stud Service Lien statute is terse to the point of being cryptic. I'm not clear that the statute contemplates a filing at all. All it appears to say is that the owner of the bull etc. has a lien on the get but that this lien is not valid against a BFP without notice. The use of the term "purchaser" makes me wonder if the lien is good against a lien creditor (who would not be a "purchaser" if the Article 9 definition is used). There may be as well problems if the owner of the get goes into bankruptcy. So I might answer your questions (3) and (4) by saying that the statute doesn't seem to contemplate filing anywhere and that moots the last question.

Should it require filing?

You can see that a committee would have its hands full drafting intelligible substitutes for these statutes.

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PS I confess error: It is "agistor" with the accent on the first syllable. Will I be able to shake the habit of mispronouncing the word?

From: Jim Dean [mailto:jim@lawatddp.com]
Sent: Tuesday, October 02, 2007 10:48 AM
Subject: RE: Agricultural Lien Questions

All:

I have watched the exchanges regarding "ag liens" with great interest. Dwight needs to be commended for all of his excellent input.

It does seem to me that a Committee could be useful for examining these. Perhaps that could come from or be sponsored by the CBA Agricultural Law Section. I do think one of the real concerns needs to be how the affected communities might react -- especially with the agistor's lien. Despite how badly the laws are written, would revisions of the laws cause chaos in the affected industries by changing what people in the industries at least "THINK" is proper practice? Would making filing requirements clear cause extra work for people that they would see as just more government intrusion into their business affairs? I also do not see how filing would really work well with harvestor's liens given what they are for and how harvestors operate. That kind of issue would need to be examined closely with respect to all of these liens.

This is a really complex area as we are all seeing.

From: Dwight Taylor [mailto:DTaylor@et-law.com]
Sent: Tuesday, October 02, 2007 12:48 PM
Subject: RE: Agricultural Lien Questions

I don't need commendation, but thanks, Jim. My concern about letting this continue is that at some point a court will rule on these questions, and a bunch of people may be surprised and disadvantaged, and it will then be too late to fix. If we tackle this now, we can provide cure periods to allow people to come into compliance. I would be happy to be involved in a committee to help rationalize these problems.