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Testimony in Support of Senate Bill 58
Presented to the Senate Judiciary Committee
By Assistant Attorney General Steve Phillips
February 3, 2021

Chair Warren and Members of the Committee:

I am Steve Phillips, an employee of the Kansas Attorney General's office. On behalf of the Office of Attorney General Derek Schmidt, I offer the following written testimony in favor of Senate Bill 58.

Senate Bill 58 is intended to strengthen Kansas statutes concerning "bogus" or fraudulent liens and other filings with the Secretary of State and local Registers of Deeds located in 105 Kansas counties.

Bogus liens are wrongful lien filings intended to harass various public officials and employees, often judges, law enforcement officers, county officials, but also various state officials including the Governor. Those who file bogus liens have included convicted murderers who seek retribution upon prosecutors and judges from their prison cell, but may also include those who do not recognize the legitimacy of our current system of Kansas government. Within the last year, we had to file an action to lift a bogus lien filed against two Sedgwick County District Court judges and the court clerk. It was filed by a family member of a criminal defendant. The defendant's family members had been making threats against the judges. The lien was not filed in good faith. It was a bogus lien.

I have attached a copy of an article on fraudulent liens that was written by the then-Nebraska Secretary of State, John C. Gale that provides a good explanation of why fraudulent liens are a concern and what other states have done to attempt to address them.¹

Like many states, Kansas has a statutory mechanism providing for an expedited judicial review process to review bogus liens, K.S.A. 58-4301. That expedited process has worked well for getting liens promptly reviewed. The way the process works is that the bogus lien is not removed from the file, but the Court order which reviewed the lien is placed with it in the filing officer's system.

¹ Gale, *Nebraska Law Protects Officials from Rogue Filers of Fraudulent Liens*, Vol. 22, No. 12, Stateline Midwest—The Midwestern Office of the Council of State Governments, p 9 (December 2013).

While the current system provides a mechanism for notifying those who search lien records that the bogus liens are not valid (assuming the person being filed against becomes aware of the bogus lien and seeks relief in court), the system does nothing to deter rogue filers from simply filing another bogus lien, leading to a repetitive and continuous process.

In order to address the problem of repeat rogue filers, in 2010, the Legislature added a provision, K.S.A. 58-4302, which, following a separate legal proceeding, would allow a court to award damages against a rogue filer. While that legislation was well intentioned, it suffered from the flaw that most rogue filers (such as prison inmates), are “judgment proof,” and the threat of a damages award against them has no significance to them and is not a deterrent.

Senate Bill 58 proposes two amendments to deal with the problem of repeat rogue filers.

Primarily, New Section 1 of Senate Bill 58 makes it a crime to knowingly file a false lien. The language of this provision is modeled after federal legislation making it a federal crime to file a lien against a federal official, 18 U.S.C. § 1521. The proposed amendment would make it a severity level 8, nonperson felony. A conviction would, of course, require a separate criminal charge and trial brought by a county or district attorney, or the Attorney General’s office.

Secondly, it includes a provision that when a court sets aside a fraudulent lien, the court must include a provision prohibiting the rogue filer from filing any future liens without the permission of the court. The intent here is to provide the rogue filer with actual knowledge that future bogus liens are wrongful.

We appreciate the Committee’s consideration of this proposal.

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Nebraska law protects officials from rogue filers of fraudulent liens

State can now remove credit-damaging claims from public record

by Nebraska Secretary of State John Gale (sos.info@nebraska.gov)

During our state's 2013 legislative session, the Nebraska Legislature approved a measure to prevent needless injury to judges, attorneys, law enforcement officers, and state and local government officials at the hands of rogue filers of false or fraudulent financial statements.

The bill, LB 210, was signed into law in March. It provides a mechanism for the secretary of state's office to terminate "bogus" filings from its records.

As in many other states, Nebraska's secretary of state serves as the administrator of state records and of the provisions in the Uniform Commercial Code — a group of laws adopted by states to bring nationwide consistency, clarity and reliability to commercial transaction laws.

As in other states, too, our office has seen an increase in the filing of bogus financial statements that serve no legitimate purpose.

Over the last few years, my office has received filings that improperly name federal judges, Nebraska Supreme Court judges, attorneys, law enforcement officers and county officials as "debtors" and the bogus filer as the "secured party."

This filing of fraudulent liens can have a severe and long-term impact on the ability of its victims to secure credit or apply for loans.

But our office had been limited in what it could do to address the problem. The law required that if these documents were in the proper format, my office must accept them and index them in the official records — where they could be viewed online by anyone doing a records search.

The sole purpose of these bogus filings has been to harass the public officials and citizens named in them.

Important lending procedure abused

In their scheme of retaliation and harassment, the bogus filers leaned on Article 9 of the Uniform Commercial Code. Article 9 provides a crucial set of procedures for lending institutions to protect their interests in personal property. Typically, a lending institution files these documents and names itself as the secured party and the borrower as the debtor.

Most of the time, there is an underlying lending agreement between the parties, and the purpose of these filings is to establish priority among lenders and to provide notice to other lenders. The filings give lenders a method of protecting their interests in certain assets of the debtor in order to allow for an orderly attachment and disposition of the assets if the debtor defaults.

The assets involved may be things like inventory and equipment or crops and cattle. Generally, these assets are untitled property, so the protections afforded by Article 9 to the lenders are very important.

Left unprotected, though, were the victims of bogus filings, which our office could not reject.

We turned some of these filings over to law enforcement offices, and when a recognized public official was named, we notified the official.

However, there was no redress for the individuals

State strategies to combat 'bogus' Uniform Commercial Code (UCC) filings		
Strategy	Description	Where used
Pre-filing administrative remedy	Gives the secretary of state's office broader discretion in rejecting a materially false or fraudulent UCC record submitted for filing	At least 15 states, including Illinois, Michigan, Nebraska, North Dakota and Ohio in the Midwest
Post-filing administrative remedy	Gives the filing office the authority to take corrective action with respect to existing UCC financing statements	At least nine states, including Illinois, Michigan and Nebraska in the Midwest
Post-filing expedited judicial relief	Authorizes corrective action on an existing financing statement through an accelerated judicial review process, without a fee required to trigger the action	At least seven states, including Kansas and Minnesota in the Midwest
Post-filing criminal/civil penalties	Deters and punishes those who attempt to file spurious claims using UCC financing statements	At least 10 states, including Illinois, Kansas, Michigan, Minnesota and North Dakota in the Midwest

Sources: National Association of Secretaries of State, "State Strategies to Subvert Fraudulent Uniform Commercial Code (UCC) Filings," April 2013; International Association of Commercial Administrators

named in the filing of a bogus financial statement — except to seek legal action at their own expense.

What legal action? The secretary of state could be sued to remove the filing, subjecting the state to legal costs as well.

In one instance, a person who filed for bankruptcy became upset when his property was sold by the county in a tax sale. His response: File a UCC statement against the federal judge, the county registrar of deeds, a state Supreme Court judge and several other federal employees.

My office recognized that the filing was bogus, but since we had no authority by law to reject the document, we filed it and notified all of the individuals involved. The result was a lawsuit against my office by the United States of America! We welcomed the lawsuit so that the names of the individuals involved could be cleared.

After the sheer madness of having to have the federal government sue our office to clear our records, we sought legislative action. After all, how could we allow a rogue individual upset with "the system" to use a government office to improperly affect the credit of public officials doing the jobs they were elected or appointed to do?

The first bill we drafted in 2012 to address the problem was simple. It would have allowed our office to reject improper or fraudulent filings either at the time of filing or after filing by removing them from the records. This proposal met initial opposition from lawyers and bankers, who said extending such authority was too extreme.

Before the bill was even introduced, we had to drop the portion of it that allowed us to reject bogus filings in advance, due to concerns that we would reject legitimate filings. But we forged ahead with the part of the bill that let us remove a bogus filing from the record. To our surprise, though, the bill received further opposition because it did not specify how filings would be treated in the case of an appeal of our office's decision to remove a filing.

After the 2012 legislative session ended, we spent the summer meeting with interested parties to find a solution that was agreeable to all. Other states had laws in place to address bogus filings, but the laws varied greatly. We wanted an administrative solution that did not place the burden to correct the record

on the victim at his or her expense.

Illinois law a model for solution

We found a recently enacted law in Illinois (Public Act 97-0836) that seemed to fit.

The Nebraska version of the law, LB 210, established procedures for the secretary of state to file for termination of an improper financing statement after receiving an affidavit from the named debtor indicating that the statement was improper.

The bill was more cumbersome than the process we originally envisioned. However, the additional procedures set forth in LB 210 gave comfort to legitimate filers that we would not be exercising our discretion haphazardly and that should any legal challenges be filed regarding our actions, the parties involved would have clear guidance on the priority ramifications for the filing.

It took us two legislative sessions, some compromise and some serious collaboration, but we were able to design a fair, workable solution to the situation.

We believe a clean and reliable Uniform Commercial Code system is vitally necessary for our state. It protects our many farmers, ranchers and small-business owners who rely upon loans from financial institutions. It protects our lenders so they know they can rely on the system to establish priority on liens and rights to collateral.

We hope that other states will examine LB 210 as a model for dealing with this issue. ★

John Gale has served as Nebraska secretary of state since 2000. General counsel Colleen Byelick of the secretary of state's office assisted him in writing this article.

Submissions welcome

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