

HOUSE BILL 1366
REPAIRMAN'S LIENS

HB 1366 affects Chapter 35-13 of the North Dakota Century Code, which governs repairman's liens. North Dakota Bankers Association OBJECTS to HB 1366 based upon the following:

**ISSUE #1. FORECLOSURE WITHOUT JUDICIAL ACTION SHOULD BE COMPLETED IN
ACCORDANCE WITH ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE.**

Liens are property interests arising by law or contract and everyone with a property interest is entitled to due process under the law. Article 9 of the Uniform Commercial Code has a non-judicial method of providing that due process when a secured lienholder has possession of the property being foreclosed. The process is clear, reasonable and well established. It provides adequate protection to owners of property and lienholders of record (like the Secured Creditors, other Repairman Lienholders and State and Federal Tax Liens) as well as provides protections for the lienholder selling the property.

North Dakota law currently requires that those with a repairman's lien foreclose said lien by action or proceeding.¹ One goal of the bill is to allow for repairmen to foreclose their liens and sell (or otherwise dispose) of the property without judicial action. For this reason, Section 4 of the bill covers the non-judicial sale of property.

The creation of these new provisions is unnecessary, as Article 9 of the Uniform Commercial Code (adopted in North Dakota as Chapter 41-09, N.D.C.C.) addresses every part of the disposition of personal property in sections 41-09-107 (9-610) through 41-09-123 (9-628). For instance, 41-09-110 (9-613) provides the contents of a notice before disposition, which is similar to the notice proposed as subsection 2 of 35-13-05 in the bill. A sample notice of disposition is attached to this testimony to illustrate how simple it is to create.

Because the law is already settled, it makes sense for the repairman lien statutes to direct the repairman to Article 9 of the UCC for disposition. This is in line with other states. For instance, Minnesota provides for similar liens (for personalty in possession), but specifically states that the lien "shall be considered a security interest under the Uniform Commercial Code and foreclosure thereon shall be in the manner prescribed for security interests under article 9 of the Uniform Commercial Code."²

For this reason, NDBA proposes adding similar language to Chapter 32-13, N.D.C.C., through the creation of a new section 35-13-07. Directing repairmen to the UCC for *non-judicial* disposition will negate the need to create the statute proposed in Section 4 and the need for Section 35-13-06, N.D.C.C.

It is also beneficial to repairmen to be treated as secured creditors because the UCC allows secured creditors to sell the owner's rights in the property, and is therefore never considered an owner of the property. This protects the repairman selling the property, as such property is not sold with warranties and representations of the repairman as owner.

¹ See N.D.C.C. § 35-13-05.

² Minn. Stat. § 514.18, subd. 3.

ISSUE #2. THE CHANGE IN SECTION 1 (FROM “WOULD EXCEED” TO “EXCEEDS”) IS INCONSISTENT WITH SECTIONS 35-13-01 AND 35-13-04.

Both sections 35-13-01 and 35-13-04 require the repairman who seeks a super priority lien for repair costs to give notice of the proposed repair, estimated cost of repair, and estimated value of the property in its repaired condition to lienholders of record. As stated in section 35-13-04, the lienholder has five days to object to the proposed repair costs becoming a super priority lien against the property. In other words, the repairman must give notice of proposed repairs and the lienholder has an opportunity to object to the repair.

In part, Section 1 of the bill amends section 35-13-01, N.D.C.C, in the following manner:

If the cost of repair ~~would exceed~~exceeds four thousand dollars or thirty percent or nine thousand dollars or thirty percent for property used for agricultural or construction purposes, of the value of the property, in the property's repaired condition, whichever is greater, and the repairman intends to have the entire repair bill constitute a lien with priority over the mortgage or financing statement of record, the repairman shall give notice by registered or certified mail to the recordholder of the mortgage or financing statement of the proposed repair, the estimated cost of repair, and the estimated value of the property in its repaired condition.

Using the language “exceeds” rather than “would exceed” implies that the repair has already been completed and the costs have exceeded the statutory limit. “Would exceed” is preferable, because it makes it clearer that the repairman must determine whether a potential repair “would exceed” the statutory amount, thereby requiring notice to other lienholders of record prior to completing the repair.

For this reason, NDBA has proposed that Section 1 of the bill be amended to remove the overstrike over “would exceed” and remove “exceeds”. This will make it clearer that notice must be provided prior to the repairs being done.

ISSUE #3. “STORAGE FEES” SHOULD NOT BE INCLUDED AS PART OF THE REPAIRMAN’S LIEN.

The current version of section 35-13-01 authorizes a repairman’s lien for work done and materials furnished. The bill proposes to add storage fees and transportation costs.

NDBA proposes that “storage fees” not be included because the lien under Ch. 35-13, N.D.C.C.

ISSUE #4. SECTION 5 IS UNNECESSARY BECAUSE THE LAW OF MOTOR VEHICLES ALREADY PROVIDES FOR SUCH SCENARIO.

Section 5 of the bill provides that a lienholder in possession of a motor vehicle subject to 39-05 may obtain a certificate of title from the DOT free and clear of all liens if a lien is not satisfied. This newly proposed

statute should not be created because Chapter 39-05 of the North Dakota Century Code already directly provides how one should go about obtaining a certificate of title for a vehicle when ownership is obtained by other than voluntary means in section 39-05-19. Thus, a new section which is contrary to existing law should not be passed/enacted.

ISSUE #5. TECHNICAL CHANGES ARE REQUIRED THROUGHOUT.

A. The Statutes Should Not Refer to "Mortgages" or "Mortgagees" Because A Repairman's Lien is on Personal Property.

Section 35-13-01 authorizes a repairman's lien on "any automobile, truck, engine, combine, tractor, farm equipment, construction equipment, well machine, aircraft, or watercraft." The property listed falls under the category of *personal property*. Thus, the repairman lien statutes have no effect on *real property*.

Nonetheless, parts of 35-13 refer to "mortgagee," "recordholder of the mortgage," and property encumbered by a "mortgage". The term "mortgage" is associated with *real property*,³ as is the term "mortgagee." The repairman lien statutes should not use such language because they do not deal with *real property*. Referring to a "mortgage" or "mortgagee" is simply confusing and inaccurate. For this reason, NDBA proposes that "mortgage" be replaced with "lien" and "mortgagee" be replaced with "lienholder."

B. Reference to "the Recordholder of the Mortgage or Financing Statement" is Limiting and Should Be Replaced by the Broader Term "Lienholder of Record"

As previously stated, "recordholder of the mortgage" has no place in Chapter 35-13, N.D.C.C., as it does not deal with real property. Moreover, referring to the "recordholder of the mortgage or financing statement" is limiting because other creditors might have liens on the property that do not fit within this language.

A "financing statement" refers to the UCC-1 Financing Statement filed by a secured creditor with the Secretary of State in order to provide notice of its security interest in certain personal property. Thus, the repairman statutes' reference to a "recordholder of the financing statement" means a secured party who has filed a UCC-1 with the SOS.

However, there may be several other creditors with liens on the property that are not required to and have not filed a "financing statement" to provide evidence of their interest. One such creditor is the repairman himself, who files a "lien statement" (rather than a financing statement) with the SOS.⁴ Other creditors with statutory liens would also be excluded by the language, including those with child support liens and federal tax liens. For this reason, it is suggested that a more general term be used, such as "lienholders of record."

³ See N.D.C.C. § 35-03-01.1(1) ("A mortgage is a contract by which specific real property capable of being transferred is hypothecated for the performance of an act without requiring a change in possession, and includes a transfer of an interest in real property, other than a trust, made only to secure the performance of an act.").

⁴ N.D.C.C. § 35-13-02.



TESTIMONY OF RICK CLAYBURGH, PRESIDENT AND CEO OF THE NORTH DAKOTA
BANKERS ASSOCIATION, REGARDING HOUSE BILL 1366

NDBA has also proposed to amend 35-13-04 for consistency.



NOTIFICATION OF DISPOSITION OF COLLATERAL

To: [Name of Debtor, Obligor, or other person to which the notification is sent, address]

From: [Name, address, and telephone number of secured party]

Name of Debtor(s): [Include only if debtor(s) are not an addressee]

[For Public disposition]

We will sell [or lease, or license, as applicable] the [describe collateral] to [the highest qualified bidder] in public as follows:

Day and Date:

Time:

Place:

[For Private disposition]

We will sell [or lease, or license, as applicable] the [describe collateral] privately sometime after [date and date].

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease, or license as applicable] [for a charge of \$_____]. You may request an accounting by calling us at [telephone number]

