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## Comment

### COMBATTING WAGE THEFT: ESTABLISHING EMPLOYEES AS SECURED CREDITORS UNDER THE MARYLAND UNPAID WAGE LIEN LAW

REBECCA LINEBERRY\*

#### I. INTRODUCTION

Elvira Orellana (“Ms. Orellana”) worked seventy-two hours in a convenience store located in Princess Anne, Maryland.<sup>1</sup> Though her employer was supposed to pay her time and a half for every hour that exceeded forty hours per week,<sup>2</sup> she was paid only \$648 per week when she worked seventy-two hours every week.<sup>3</sup> If Ms. Orellana’s employer paid her what was required under overtime laws, she should have been making \$972 per week.<sup>4</sup> When Ms. Orellana confronted her employer and asked for her overtime wages, he threatened to cut her wages even more and then fired her.<sup>5</sup> Afraid of someone taking advantage of her because she is an immigrant, Ms. Orellana did not speak up for months.<sup>6</sup> Eventually a friend encouraged Ms. Orellana to pursue legal action against her employer. Ms. Orellana, represented by Maryland Legal Aid Bureau, sued her employer and recovered an \$18,000 judgment.<sup>7</sup> In order to recover these unpaid wages, Ms. Orellana needed the help of legal counsel to bring suit in federal

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\* J.D. Candidate, 2019, University of Maryland Francis King Carey School of Law. The author wishes to thank her extraordinary editors at the *Maryland Law Review*. She also would like to thank Professor Martha Ertman for her incredible ability to make secured transactions seem simple and Professor Sally Dworak-Fisher who provided valuable knowledge about her practice of advocating for workers in and around Baltimore City. The author is grateful to all friends, family members, and classmates who provided support, especially Danny Lineberry, Sharon Lineberry, Sarah Lineberry, Beverly Sick, Marie Lineberry, Alex Belman, Katherine Rodriguez, and Kali Rodriguez.

1. Yvonne Wenger, “*Wage Theft*” Prevails in a Post-Recession Economy, *BALT. SUN* (Feb. 2, 2013), <http://www.baltimoresun.com/news/maryland/bs-md-wage-theft-20130202-story.html>.

2. MD. CODE ANN., LAB. & EMPL. §§ 3-415, 3-420 (LexisNexis 2016); Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (a)(2) (2012).

3. Wenger, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

court.<sup>8</sup> Cases similar to Ms. Orellana's, however, are extremely rare for several reasons.<sup>9</sup> First, employees are too scared to report employers who are stealing their wages.<sup>10</sup> Second, of those employees who muster the courage and resources to report their employers, many of them will never see any of their owed wages.<sup>11</sup> To avoid paying the order, employers hide assets, shut down and reorganize as a new entity, or simply disappear.<sup>12</sup> Thus, the court order that the employee won "can easily become a meaningless piece of paper."<sup>13</sup>

Donald Sloat ("Mr. Sloat") started working for Hill Enterprises as a carpenter, working his way up to a project engineer, a career that spanned twenty-two years of faithful employment.<sup>14</sup> After his bosses stopped paying him, Mr. Sloat quit his job at Hill Enterprises.<sup>15</sup> Then Hill Enterprises declared bankruptcy just days after Mr. Sloat filed a complaint with state authorities in an attempt to recover some of the \$17,000 of unpaid wages that Hill Enterprises owed him.<sup>16</sup> Though Mr. Sloat remained a creditor of Hill Enterprises in the bankruptcy proceedings, he will not recover any of these overdue wages because Hill Enterprises exhausted all remaining assets paying other creditors.<sup>17</sup> Because of the downturn in the economy and lack of employment opportunities, Mr. Sloat had to take a lower-paying job and was unable to help pay for his daughter's college education.<sup>18</sup>

Wage theft is not a new concept in Maryland or the United States.<sup>19</sup> Although scholars and policymakers have not shied away from suggesting

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8. *Id.*

9. See *Lien for Unpaid Wages—Establishment: Testimony Regarding Maryland SB. 758 Before the S. Judicial Proceedings Comm.*, 2013 Leg., 433d Sess. 1 (Md. 2013) (statement of Catherine Ruckelshaus, Legal Co-director of the National Employment Law Project) [hereinafter *Lien for Unpaid Wages: Ruckelshaus Testimony*] (stating "[w]orkers face barriers to retrieving their unpaid wages, and those who are able to file an enforcement action seeking payment are often stymied by their employer's refusal to pay").

10. Wenger, *supra* note 1 (stating "[s]peaking up can be job suicide" because "[t]here are 10 people waiting in line to take your job. Oftentimes, workers grin and bear it.").

11. See DEP'T OF LEGIS. SERVS., MD. GEN. ASSEMB. FISCAL AND POLICY NOTE, S.B. 758, at 4, [http://mgaleg.maryland.gov/2013RS/fnotes/bil\\_0008/sb0758.pdf](http://mgaleg.maryland.gov/2013RS/fnotes/bil_0008/sb0758.pdf) (stating that of the eighty-nine wage orders the commissioner ordered, seventy-nine were not paid and had to be sent to Central Collection Unit).

12. *Lien for Unpaid Wages: Ruckelshaus Testimony*, *supra* note 9, at 3.

13. *Id.*

14. Wenger, *supra* note 1.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See Peter Cole, *The Law That Changed the American Workplace*, TIME (June 24, 2016), <http://time.com/4376857/flsa-history/> (explaining President Roosevelt's long and strenuous battle to create and pass the first version of the Fair Labor Standards Act, signed on June 25, 1938).

innovative solutions to combat wage theft,<sup>20</sup> policymakers face a multitude of obstacles when attempting to pass effective legislation to combat wage theft.<sup>21</sup> First, it is very difficult to precisely measure the pervasiveness of wage theft.<sup>22</sup> Second, individuals who consider themselves to be “pro-business” are fearful that these measures will harm business owners and ultimately the economy by creating barriers that make it more difficult for employers to hire employees and discourage entrepreneurs from creating new businesses.<sup>23</sup>

Recognizing the need for a simple mechanism that would allow workers like Ms. Orellana and Mr. Sloat to collect owed wages without the need for costly and time-consuming litigation,<sup>24</sup> Maryland became one of the first states to enact an unpaid wage lien law.<sup>25</sup> Simply put, the Maryland Unpaid

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20. See Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 120–26 (2016) (suggesting legal reforms to ensure that there are no immigration consequences for those who report employment violations, to create policies that focus on making aggrieved employees whole, increased educational outreach for employees, and mobilization of local grassroots organizations to combat wage theft in their own communities); Luz M. Molina et al., *Vulnerabilities of Low-Wage Workers and Some Thoughts on Improving Workplace Protections: The Experience of the Workplace Justice Project*, 17 LOY. J. PUB. INT. L. 215, 246–55 (2016) (suggesting increasing workers' access to enforcement and strengthening relationships with federal agencies); see also NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 17, 37, 55, 113–20 (2011), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf> (proposing increased punishments for employers who violate wage and hour laws, creating more effective agencies to regulate employers, implementing better protections for workers against retaliation, and adopting wage liens, wage bonds, and wage pools to ensure that employees are actually able to collect the wages that they are owed); Omer Kimhi, *Getting More Than Justice on Paper: Bankruptcy Priorities and the Crisis of Unpaid Wages*, 44 HOFSTRA L. REV. 107, 109 (2015) (proposing an insurance-based model for victims of wage theft).

21. See CMTY. DEV. PROJECT AT THE URBAN JUSTICE CTR. ET AL., EMPTY JUDGMENTS: THE WAGE COLLECTION CRISIS IN NEW YORK 4, 8–9 (2015), <http://nclaj.org/wp-content/uploads/2015/11/Empty-Judgments-The-Wage-Collection-Crisis-in-New-York.pdf> (explaining how New York does not have a wage lien).

22. See Wenger, *supra* note 1 (noting “[t]allying the extent of wage law violations is difficult”).

23. *Id.*

24. See generally MD. CODE ANN., LAB. & EMPL. §§ 3-1101–3-1110 (West 2016) (laying out the necessary procedures for an employee to file a lien on their employers' property).

25. The following states have some form of wage liens, though some are more protective of workers than others: ALASKA STAT. ANN. §§ 34.35.435–34.35.445 (West 2016); IDAHO CODE ANN. §§ 45-620–45-621 (West 2014); IND. CODE ANN. §§ 32-28-12-1–32-28-12-4 (West Supp. 2016); KY. REV. STAT. ANN. §§ 376.150–376.160 (West 2006); TENN. CODE ANN. §§ 66-13-101–66-13-103 (LexisNexis 2002); TEX. LAB. CODE ANN. §§ 61.081–61.085 (West 2015); WIS. STAT. ANN. §§ 109.01–109.12 (West 2002). Though these ten states all have unpaid wage liens on the books, the nuances of those liens vary greatly. For example, Wisconsin's law is similar to the MUWLL in that employees can place the lien on their employer's property without any help from the Wisconsin Department of Labor. WIS. STAT. ANN. §§ 109.01–109.12. The Kentucky unpaid wage lien law, one of the oldest employee lien laws, may only be placed on employers who have mining or railroad operations. KY. REV. STAT. ANN. § 376.150.

Wage Lien Law (“MUWLL”) allows employees to place a lien on an employer’s property to collect the wages their employer owes them.<sup>26</sup> Though the statute was intended to be a simple and effective tool for employees, the phrasing of the statute<sup>27</sup> and the lack of legislative history have left an open question as to what priority employees with liens on their employers’ property are afforded in relation to other claims on the employers’ property.<sup>28</sup> Indeed, the law empowers employees by providing them with a simple mechanism to collect unpaid wages without the need for counsel or a formal complaint.<sup>29</sup> Additionally, if used on a large scale, the MUWLL will relieve some of the overwhelmed state agencies<sup>30</sup> by reducing the number of investigations and subsequent litigation these agencies must complete.<sup>31</sup>

This Comment analyzes the MUWLL to determine what priority employees’ liens are afforded under the statute. This Comment argues that employees with liens under the MUWLL have perfected security interests.<sup>32</sup> Though there is no smoking gun that indicates the statute affords employees this status, this Comment uses a holistic approach to analyze the text of the statute, the procedure that the law mandates, the little legislative history of the law, and other states’ lien laws to show that employees are considered to be secured creditors with priority under the MUWLL.

## II. BACKGROUND

Before diving into the text of the statute to understand the priority afforded to employees under the MUWLL, this Section explains types of wage theft to provide context for legislative intent. Because the law allows employees to place a lien on personal property, we must examine the rules laid out in the Uniform Commercial Code (“UCC”).<sup>33</sup> The UCC systematically uses rules to determine an order for creditors who have interests in

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26. See *infra* Part I.B; MD. CODE ANN., LAB. & EMPL. §§ 3-1101–3-1110.

27. See LAB. & EMPL. § 3-1105(e) (stating “[a] lien for unpaid wages recorded under this section shall be considered a *secured claim that has priority*” (emphasis added)).

28. *Id.* §§ 3-1101–3-1110.

29. Lien for Unpaid Wages: Ruckelshaus Testimony, *supra* note 9, at 4.

30. The Division of Labor and Industry Employment Standards Service is the division of the Department of Labor, Licensing and Regulation that investigates all wage theft claims.

31. See DAVID COOPER & TERESA KROEGER, ECON. POLICY INST., EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR (2017), <https://www.epi.org/files/pdf/125116.pdf> (finding at the federal level, the Wage and Hour Division, which is responsible for investigating minimum wage violations, has the same number of investigators as it did seventy years ago, though today’s workforce is nearly six times larger than it was in 1948).

32. See *infra* Part III.A.

33. MD. CODE ANN., COM. LAW § 9-109(a)(1) (West 2013) (stating “this title applies to . . . [a] transaction, regardless of its form, that creates a security interest in personal property”).

collateral.<sup>34</sup> Therefore, it is necessary to break down the MUWLL's procedure and its origin to grasp how the law fits into the pecking order prescribed by the UCC. Part II.A defines wage theft and provides relevant statistics. Part II.B provides the MUWLL's history and its procedure. Part II.C explains how Maryland determines the priority of secured transactions. Part II.D examines how other states with unpaid wage lien laws have prioritized employees' liens.

#### A. Wage Theft Background

Wage theft, or the "failure to pay what workers are legally entitled to"<sup>35</sup> has been said to be a "widespread and deep-rooted"<sup>36</sup> issue throughout the United States.<sup>37</sup> Wage theft is the umbrella term for committing minimum wage and overtime violations, denying mandated breaks, failing to pay for all hours worked, withholding tips, and misclassifying workers as independent contractors.<sup>38</sup> Though wage theft can affect any employee,<sup>39</sup> many times low-wage workers, women, immigrants (specifically those who are undocumented), those who are not fluent in English, and the undereducated are especially susceptible of being the victim of wage theft.<sup>40</sup> Foreign-born immigrants are almost twice as likely to experience minimum wage violations than people born in the United States.<sup>41</sup> Additionally, African Americans are three times more likely to experience minimum wage violations than Caucasians.<sup>42</sup>

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34. See *id.* § 9-322 (explaining the rules to determine priority).

35. BRADY MEIXELL & ROSS EISENBREY, ECON. POLICY INST., ISSUE BRIEF NO. 385, AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR I (2014), <http://www.epi.org/files/2014/wage-theft.pdf>.

36. See COOPER & KROEGER, *supra* note 31, at 1.

37. See H.R. 3467, 115th Cong. § 2 (2017) (finding "[w]age theft poses a serious and growing problem across industries for working individuals of the United States"); MEIXELL & EISENBREY, *supra* note 35, at 2 (finding that wage theft costed workers \$50 billion in lost wages annually).

38. H.R. 3467 § 2 (proposing amendments to the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947 "to prevent wage theft and assist in the recovery of stolen wages").

39. See, e.g., *Gastro Ctr. of Md., LLC v. Tignor*, No. 00815, 2007 WL 2829298 (Md. Ct. Spec. App. June 30, 2017). Dr. Tignor was a physician who utilized the MUWLL to collect \$104,058.00 from her employer, Gastro Center. *Id.* at \*1.

40. COOPER & KROEGER, *supra* note 31, at 3 (estimating "[y]oung workers, women, people of color, and immigrant workers are more likely than other workers to report being paid less than the minimum wage, but this is primarily because they are also more likely than other workers to be in low-wage jobs. . . . [T]he majority of workers with reported wages below the minimum wage are over 25 and are native-born U.S. citizens, nearly half are white, more than a quarter have children, and just over half work full time."); see H.R. 3467 § 2 (finding "[w]age theft is closely associated with employment discrimination, with women, immigrants, and minorities being disproportionately affected").

41. H.R. 3467 § 2.

42. *Id.*

The effects of wage theft are crippling on individuals.<sup>43</sup> According to the Economic Policy Institute (“EPI”), the poverty rate among workers paid less than minimum wage is over twenty-one percent.<sup>44</sup> If these workers were paid all of their entitled wages, less than fifteen percent would be living below the poverty level.<sup>45</sup> Additionally, wage theft indirectly affects other workers because it puts “downward pressure on hourly wages in affected industries and occupations.”<sup>46</sup> This downward pressure on wages in an industry translates into employers who are abiding by the law—paying their employees the wages that are owed—not being able to compete economically with employers who are stealing from their employees.<sup>47</sup> Even further, the less money workers bring home, the less money they have to spend. This imbalance can further dilapidate local economies.<sup>48</sup>

The pervasiveness of wage theft is hard to define with absolute precision.<sup>49</sup> There are, however, some reports available that give an idea to the ubiquity of wage theft. The EPI estimates that employees were cheated out of \$8 billion annually in the ten most populous states in the country from the years 2013 to 2015.<sup>50</sup> Extrapolating this data, the EPI estimated that employers stole \$15 billion each year just from minimum wage violations alone.<sup>51</sup> Another report estimated that workers in New York, Chicago, and Los Angeles lose over \$56 million every week due to wage theft.<sup>52</sup> A 2009 report indicated that of 4,500 low-wage workers surveyed, twenty-six per-

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43. *See id.* (“Wage theft . . . depresses the wages of working families who are already struggling to make ends meet . . . . A Department of Labor study of wage theft in California and New York found that wage theft deprived workers of 37 percent to 49 percent of their income, pushing at least 15,000 families below the poverty line and driving another 50,000 to 100,000 families deeper into poverty.”).

44. COOPER & KROEGER, *supra* note 31, at 3.

45. *Id.*

46. *Id.* at 2; *see* H.R. 3467 §2 (finding “[w]age theft . . . places law-abiding employers at a competitive disadvantage with noncompliant employers”).

47. H.R. 3467 § 2 (stating “[w]age theft . . . diminishes consumer spending power and hurts local economies”); *see* Lien for Unpaid Wages: Ruckelshaus Testimony, *supra* note 9, at 3 (stating “[w]ell-meaning businesses often can’t compete with wage cheats that shave their operating costs by breaking the law”).

48. KAI FILION, ECON. POLICY INST., ISSUE BRIEF NO. 255, A STEALTHY STIMULUS: HOW BOOSTING THE MINIMUM WAGE IS HELPING TO SUPPORT THE ECONOMY 1 (2009), <https://www.epi.org/publication/ib255/>.

49. *See* COOPER & KROEGER, *supra* note 31, at 2 (noting “suitable public data sources are limited”).

50. *Id.* (using data from California, Florida, Georgia, Illinois, Michigan, New York, North Carolina, Ohio, Pennsylvania, and Texas).

51. *See id.* The study focused on wage violations in the ten most populous states to provide an adequate sample size to estimate the severity of minimum wage violations and account for the differences in each state’s minimum wage policy. *Id.*

52. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>.

cent of workers were paid less than the minimum wage and seventy-six percent of workers who worked more than forty hours per week were not paid the overtime that they were legally owed.<sup>53</sup> In another study, almost one quarter of workers were required to come in early or stay late, and of those workers, seventy percent were not paid for the additional time worked.<sup>54</sup>

Employees in Maryland are not immune to the effects of wage theft.<sup>55</sup> The Center for Popular Democracy estimates that, in Maryland, 580,000 workers are cheated out of \$875 million in wages every year.<sup>56</sup> In the 2012 fiscal year alone, the Maryland Division of Labor and Industry received 887 wage payment claims from employees or former employees.<sup>57</sup> Most of those cases were “resolved informally,” but the commissioner issued eighty-nine wage orders.<sup>58</sup> Of those eighty-nine wage orders, all but ten were referred to the Central Collection Unit due to nonpayment.<sup>59</sup> These judgments go unenforced for a variety of reasons, “including an inability by workers and their advocates to navigate the collections process.”<sup>60</sup> Additionally, employers use a plethora of creative tactics to avoid paying the judgments entered against them, such as dissolving corporations, filing for bankruptcy, or moving out of state.<sup>61</sup> According to the Public Justice Center, one of the key supporters of the MUWLL, employers who avoid judgments entered against them not only hurt employees crippled by the harsh effects of wage theft, but also future victims of wage theft.<sup>62</sup> Because many attorneys know that they will never be able to collect unpaid wages for

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53. NAT’L EMP’T LAW PROJECT, WINNING WAGE JUSTICE: A SUMMARY OF RESEARCH ON WAGE AND HOUR VIOLATIONS IN THE UNITED STATES 2 (2012), <http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf>

54. BERNHARDT ET AL., *supra* note 52, at 3.

55. *See* Lien for Unpaid Wages: Ruckelshaus Testimony, *supra* note 9, at 2 (stating that “violations are similarly widespread in Maryland”).

56. RACHEL DEUTSCH & KATE HAMAJI, CTR. FOR POPULAR DEMOCRACY, COMBATING WAGE THEFT WITH THE MARYLAND PAYSTUB TRANSPARENCY ACT OF 2016, at 1, <https://populardemocracy.org/sites/default/files/MD%20Pay%20Stub-web.pdf>.

57. DEP’T OF LEGIS. SERVS., MD. GEN. ASSEMB. FISCAL AND POLICY NOTE, S.B. 758, at 4, [http://mgaleg.maryland.gov/2013RS/fnotes/bil\\_0008/sb0758.pdf](http://mgaleg.maryland.gov/2013RS/fnotes/bil_0008/sb0758.pdf)

58. *Id.*

59. *Id.*

60. JONATHAN HARRIS & MOLLY THEOBALD, PUB. JUSTICE CTR. COLLECTING UNPAID WAGES AND ENFORCING JUDGMENTS IN MARYLAND 6 (2012), [http://www.publicjustice.org/uploads/file/pdf/MD\\_Wage\\_Collection\\_Judgment\\_Enforcement\\_Guide\\_PJC\\_FINAL.pdf](http://www.publicjustice.org/uploads/file/pdf/MD_Wage_Collection_Judgment_Enforcement_Guide_PJC_FINAL.pdf).

61. *Id.*

62. *See Testimony in Support of S.B. 758*, 2013 Leg., 433d Sess. 1 (Md. 2013) (Letter from Brian Markovitz, Partner at Joseph, Greenwald & Laake, P.A.) (stating that his firm routinely is forced to deny representation of employees, even those with strong cases, because the firm knows that the employer is not economically viable and will not pay the judgment to the employee).

many prospective clients, private attorneys will not represent employees in wage claim cases, even in the most egregious cases.<sup>63</sup> Additionally, legal aid services cannot always represent workers, even those who have strong claims against their employers, because the amount of money owed is negligible compared to the cost of litigating the case, and collecting a favorable judgment for an employee can cost thousands more dollars.<sup>64</sup> Without the help of an attorney, it is almost impossible for these employees to navigate the daunting process of filing a wage claim.<sup>65</sup>

Because of the complexity of filing claims and the unlikely chance that employers will repay employees,<sup>66</sup> wage theft victims face two separate but equally challenging hurdles. First, victims of wage theft face substantial barriers to effectively pursuing a claim. These barriers include the high costs for obtaining legal counsel,<sup>67</sup> complicated and time-consuming legal proceedings,<sup>68</sup> and lack of knowledge of available remedies.<sup>69</sup> Second, many workers who are able to clear the first set of hurdles and win favorable judgments against employers for unpaid wages will never collect the money from the judgment.<sup>70</sup>

#### *B. Establishment of the Maryland Unpaid Wage Lien Law*

Recognizing that wage theft was a rampant problem,<sup>71</sup> the Maryland legislature created a tool to help victims of wage theft recover owed wag-

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63. *See id.* (stating that when potential clients want to bring claims against their employer who is economically dilapidated, “we almost uniformly decline to pursue those cases because the chances of collecting are slim”).

64. *Support for S.B. 758*, 2013 Leg., 433d Sess. 2 (Md. 2013) (Letter from Nathaniel Norton, Attorney at Maryland Legal Aid Bureau) [hereinafter Norton Testimony].

65. *Id.*

66. *Id.*

67. *See Testimony in Support of S.B. 758 Lien for Unpaid Wages—Establishment*, 2013 Leg., 433d Sess. 1 (Md. 2013) (Statement of Muriel Peters, victim of wage theft) (explaining that she did not have a lawyer to help her with her case, so she was forced to represent herself and ended up losing her case).

68. *See Norton Testimony*, *supra* note 64, at 2 (“The process of collecting on a judgment is not easy. It cannot practically be done by a non-lawyer and it is a process which is confusing and intimidating even for lawyers. Most lawyers who do not specialize in it, will not attempt it.”).

69. *See H.R. 3467* 115th Cong. § 2 (2017) (finding that “[p]artnerships between regulators, workers, nonprofit organizations, and businesses can increase compliance by educating workers about their rights, collecting evidence, reporting violations, identifying noncompliant employers, and modeling good practices.”).

70. HARRIS & THEOBALD, *supra* note 60, at 6.

71. DEP’T OF LEGIS. SERVS., MD. GEN. ASSEMB. FISCAL AND POLICY NOTE, S.B. 758, at 4, [http://mgaleg.maryland.gov/2013RS/fnotes/bil\\_0008/sb0758.pdf](http://mgaleg.maryland.gov/2013RS/fnotes/bil_0008/sb0758.pdf) (explaining the ineffectiveness of the current policies).

es.<sup>72</sup> Through the enactment of the MUWLL, Maryland created an enforcement tool to help with both the first and the second set of hurdles employees face when trying to collect unpaid wages.<sup>73</sup> First, the MUWLL eliminates the need for employees to obtain counsel and endure expensive and lengthy litigation.<sup>74</sup> Instead of having to file a formal complaint, employees file a simple notice with the Department of Labor Licensing and Regulation (“DLLR”).<sup>75</sup> Employees can easily file using a sample notice on the DLLR website.<sup>76</sup> Second, because the MUWLL gives employees a security interest in their employers’ property, the law increases the chances that an employer will actually pay instead of disappearing.<sup>77</sup>

The use of liens to collect judgments is a well-established practice in Maryland.<sup>78</sup> When designing the MUWLL, the Maryland legislature modeled the law after one of these established liens, the Maryland Contract Lien Act (“MCLA”).<sup>79</sup> On May 16, 2013, then-Maryland Governor Martin O’Malley signed the MUWLL<sup>80</sup> making Maryland one of the first states to pass legislation of this kind.<sup>81</sup>

The process to record a lien on an employer’s property is as follows. (1) Notice: An employee must serve his or her employer a Notice of Intent to establish a lien.<sup>82</sup> This notice must be served within three years of the date the wages were due.<sup>83</sup> Additionally, the notice must be served by per-

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72. *Lien for Unpaid Wages—Establishment: Hearing on S.B. 758 Before the S. Judicial Proceedings Comm.*, 2013 Leg., 433d Sess. (Md. 2013) (statement of Sally Dworak-Fisher) [hereinafter *Lien for Unpaid Wages: Dworak Statement*].

73. Norton Testimony, *supra* note 64, at 2.

74. *Id.*

75. See the sample forms at *Maryland Lien for Unpaid Wages*, DEPARTMENT OF LABOR, LICENSING, AND REGULATION, <https://www.dllr.state.md.us/labor/wages/essunpaidwageslien.shtml> (follow “Maryland Lien for Unpaid Wages Statement of Wage Lien” and “Employer Complaint to Dispute Lien for Unpaid Wages” hyperlinks).

76. *Id.*

77. See *Lien for Unpaid Wages: Ruckelshaus Testimony*, *supra* note 9, at 2 (stating “[w]age liens are a simple and tested tool that encourage employers to comply with pay requirements efficiently”).

78. *Lien for Unpaid Wages: Dworak Statement*, *supra* note 72; *Lien for Unpaid Wages: Ruckelshaus Testimony*, *supra* note 9, at 4.

79. *Lien for Unpaid Wages: Dworak Statement*, *supra* note 72 (stating that the MUWLL was modeled after the MCLA); see also MD. CODE ANN., REAL PROP. §§ 14-201–14-206 (West 2012).

80. *Labor and Employment—Lien for Unpaid Wages—Establishment*, MD. GEN. ASSEMB. (Oct. 24, 2017, 1:10 PM), <http://mgaleg.maryland.gov/webmga/firmMain.aspx?pid=billpage&stab=03&id=sb0758&tab=subject3&ys=2013rs> (showing that the governor signed the bill on May 16, 2013).

81. See *supra* note 25.

82. MD. CODE ANN., LAB. & EMPL. § 3-1102 (West 2016).

83. *Id.* § 3-1102 (2); MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (West 2013)..

sonal service and contain information about what wages are claimed and what property against which the lien is sought.<sup>84</sup> (2) Complaint: Once the notice is served, the employer has thirty days to file a complaint disputing the lien.<sup>85</sup> The complaint must be filed in the circuit court of the county where the property is located.<sup>86</sup> (3) Establishment of the Lien: If the employer disputes the lien, the court has forty-five days from the date the complaint is filed to decide whether the lien will be established on the property.<sup>87</sup> If the employer does not file a complaint, the lien is automatically established after thirty days from the date of service.<sup>88</sup> (4) Recording the Lien: If the lien is established, either automatically thirty days after service or by court order, the employee may record the lien.<sup>89</sup> How the lien is recorded depends on whether the lien is on real property or on personal property. If the employer is recording the lien on real property, the employee must record the lien by filing a Wage Lien Statement in the circuit court of the county where the property is located.<sup>90</sup> If the employer is filing the lien on personal property, the employee must record the lien by filing a financing statement with the State Department of Assessment and Taxation.<sup>91</sup> A lien becomes a secured claim from the date of the court order establishing the lien, or if no complaint was filed, the lien becomes a secured claim from the date that the employee filed the Wage Lien Statement.<sup>92</sup> If the employee does not record the lien within 180 days after the lien was established, the lien will be extinguished without prejudice.<sup>93</sup> If the employer pays the employee their owed wages, the lien will be released.<sup>94</sup> Finally, subsequent lenders are presumed to have constructive notice of the lien for unpaid wages from the date the Wage Lien Statement was recorded.<sup>95</sup> (5) Enforcement of the Lien: After the lien becomes established, the order for the lien for the unpaid wages can be enforced in the same manner as any other judgment under state law.<sup>96</sup> The employee must enforce the lien within twelve years of the date the lien was recorded.<sup>97</sup>

84. LAB. & EMPL. § 3-1102; MD. R. 2-121.

85. LAB. & EMPL. § 3-1103(b)(1).

86. *Id.* § 3-1103(a).

87. *Id.* § 3-1103(d).

88. *Id.* § 3-1104.

89. *Id.* § 3-1105.

90. *Id.* § 3-1105(c)(1).

91. *Id.* § 3-1105(c)(2); *see* MD. CODE ANN., COM. LAW § 9-501(a)(2) (West 2013) (mandating that all financing statements are filed with the State Department of Assessment and Taxation).

92. LAB. & EMPL. § 3-1105(e).

93. *Id.* § 3-1105(d)(1).

94. *Id.* § 3-1105(d)(2).

95. *Id.* § 3-1105(f).

96. *Id.* § 3-1106(a).

97. *Id.* § 3-1106(b).

Though the self-help process described above was created with intentions of creating a relatively simple process that employees can utilize without the help of an attorney, the DLLR published regulations in 2014 that further simplified and clarified the process of enforcing the lien.<sup>98</sup> First, the regulations specified exactly what information needed to be included in the notice to the employer.<sup>99</sup> Second, the regulations specified what the employers must include in the complaint if they chooses to dispute the lien.<sup>100</sup> Finally, the regulations clarified what needs to be included in the Wage Lien Statement if the employer does not dispute the lien.<sup>101</sup> To ensure that employees utilizing the MUWLL can easily comply with these new regulations, DLLR published forms that employees filing liens can print and complete independently.<sup>102</sup>

### C. Creditors' Priority Under Maryland Law

The MUWLL leaves open the priority of employee liens in relation to other claims on an employer's property.<sup>103</sup> This Section reviews how the laws of Maryland determine priority contests among claims to property to determine where wage liens will fall. The statute designates wage liens as "secured" but does not specify the priority of these liens, especially in relation to competing perfected security interests.<sup>104</sup> This inquiry is critical because, as explained in further detail below, if employees are not considered to have perfected security interests, they will likely fall in line behind all other creditors and potentially never see any of their unpaid wages.<sup>105</sup>

Recall that employees have the option of placing the lien on either the employer's personal or real property.<sup>106</sup> Accordingly, if an employee chooses to place the lien on real property, the employee must "fil[e] a wage lien statement, in a form prescribed by the Commissioner, with the clerk of the circuit court for the county where any portion of the property is located."<sup>107</sup> If the employee instead places a lien on a piece of personal property, the employee must "fil[e] a wage lien statement in the same manner, form, and place as a financing statement under Maryland Title 9, Subtitle 5

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98. MD. CODE REGS. 09.12.39.02 (2014).

99. *Id.* Specifically, the regulations mandated that employees include a brief summary of their employment history, their employer's name, and the property on which they are placing a lien in the Notice to Employer of Intent to Claim a Lien for Unpaid Wages. *Id.*

100. MD. CODE REGS. 09.12.39.03 (2014).

101. MD. CODE REGS. 09.12.39.04 (2014).

102. MD. CODE REGS. 09.12.39.02 (2014).

103. *See supra* notes 27–28 and accompanying text.

104. MD. CODE ANN., LAB. & EMPL. §§ 3-1101–3-1110 (West 2016).

105. *See supra* note 17 and accompanying text.

106. *See supra* notes 90–91 and accompanying text.

107. LAB. & EMPL. § 3-1105(c)(1).

of the Commercial Law Article.”<sup>108</sup> If they so choose, Article 9 of the UCC governs the transaction.<sup>109</sup> Article 9 establishes a complex priority scheme that allocates property among creditors.<sup>110</sup> Finally, if the debtor—or in this case the employer—files for bankruptcy, the bankruptcy code provides additional priority.<sup>111</sup>

### 1. *Personal Property Priority Under the UCC*

Beginning on the personal property side, an employee holding a wage lien could occupy one of three positions: (1) a lien creditor, (2) an attached security interest, or (3) a perfected security interest. A lien creditor can be a creditor that has acquired a lien on property, an assignee for benefit of creditors, a trustee in bankruptcy, or a receiver in equity.<sup>112</sup> UCC 9-317(a) establishes priority rules for lien creditors.<sup>113</sup> Generally speaking, the interests of lien creditors are subordinate to perfected secured creditors.<sup>114</sup> Conversely, lien creditors generally prevail over unsecured creditors. Simply put, a lien creditor will be one of the last in the line of creditors, prevailing only over unsecured creditors.<sup>115</sup>

The second possible status for wage liens is as an attached but unperfected security interest. Under Section 9-203, attachment occurs when the parties, via contract, create a link between a debt and the debtor’s property.<sup>116</sup> It has three elements: (1) the creditor gives value, (2) the debtor has rights in the collateral, and (3) there is evidence that the debtor agreed to create the security interest.<sup>117</sup> Usually, the evidence consists of a security agreement that contains a description of the collateral and the debtor’s signature.<sup>118</sup>

The third possible status for a wage lien claim is a perfected security interest. Perfection essentially puts the world on notice of the security interest and assigns each perfected security interest a place in line to satisfy

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108. *Id.* § 3-1105(c)(2).

109. MD. CODE ANN., COM. LAW § 9-109 (West 2013). Note that because this Comment is evaluating a Maryland statute, it will use the UCC as codified in the Maryland Commercial Law section of the Maryland Annotated Code.

110. *See generally id.* § 9-301 (explaining the rules that govern secured transactions).

111. 11 U.S.C. § 1501 (2012); *see* 11 U.S.C. § 544 (2012) (explaining what interests a bankruptcy trustee may avoid).

112. COM. LAW § 9-102(a)(53).

113. *Id.* § 9-317(a).

114. *Id.*

115. *See id.* (explaining that a lien creditor is usually beaten out by a perfected security interest).

116. *Id.* § 9-203.

117. *Id.*

118. *Id.*

its interest in the collateral.<sup>119</sup> Generally speaking, the first to file recovers first, and if there is any value left, the second to file recovers, and so forth, until no value remains.<sup>120</sup> In bankruptcy proceedings, only perfected secured creditors are entitled to the value of the collateral in which they hold security interests, and all other creditors take only a pro rata basis with all other unperfected interests.<sup>121</sup> Article 9 provides five different ways for a security interest to become perfected.<sup>122</sup> The most common method is filing a UCC-1 financing statement with the Maryland Department of Assessments and Taxation (“SDAT”).<sup>123</sup>

Having established the three types of interests a wage lien creditor could hold, the discussion in this Comment turns to the priority rules laid out in Section 9-322.<sup>124</sup> According to the “first in time, first in line” nature of the rule, Section 9-322(a)(1) gives priority to the first party to file a financing statement or the first party to perfect by another method.<sup>125</sup> In other words, the first-to-file or first-to-perfect has provided first notice of its interest to anyone else with an interest in the collateral.<sup>126</sup> This notice contains specific information so other creditors know exactly what interest the party has.<sup>127</sup> A creditor considering taking a security interest in a debtor’s collateral can search the UCC-1 files at SDAT to see if any other creditors already have priority to the collateral.<sup>128</sup> Thus, after a creditor has filed a financing statement, other creditors can search and access records of filing statements in SDAT’s database.<sup>129</sup> The first creditor to file a financing statement with SDAT generally has priority to both collateral and proceeds of the collateral over any other claimant to the collateral.<sup>130</sup>

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119. *Id.* § 9-322.

120. *Id.*

121. 11 U.S.C. § 726(b) (2012).

122. Md. Code Ann., COM. LAW §§ 9-308–9-314.

123. *Id.* § 9-310 (stating that security interests can be perfected: (1) automatically, (2) through filing, (3) through compliance with other applicable law, (4) through possession or delivery, or (5) through control).

124. *Id.* § 9-322.

125. *Id.* § 9-322(a)(1).

126. U.C.C. § 9-322 cmt. 4 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

127. *See* COM. LAW § 9-502 (stating the name of the debtor, the name of the secured party, and the collateral covered must be included in the filing statement).

128. *Id.* § 9-501(a)(2).

129. *See* MD. DEP’T OF ASSESSMENTS & TAXATION, UCC ELECTRONIC FILING, SEARCH & RETRIEVAL, <https://egov.maryland.gov/sdat/uccfiling/uccmainpage.aspx> (last visited Apr. 23, 2018) (explaining how to access all of the filing statements on the SDAT web site).

130. *Id.* § 9-322.

## 2. Real Property Priority Determinations

Real property is governed by a different set of statutes.<sup>131</sup> The guidelines of the MCLA help determine what priority employees with liens will have.<sup>132</sup> The MCLA, originally enacted in 1985, has been analyzed and upheld in various Maryland court opinions.<sup>133</sup> The MCLA pertains particularly to employees who choose to place liens on their employers' real property.<sup>134</sup>

The MCLA and other interests in property, like UCC Article 9, generally assign priority to creditors who filed first.<sup>135</sup> The MCLA states “[a] lien imposed under this subtitle has priority from the date the statement of lien is filed.”<sup>136</sup> Importantly, there are two different types of liens, statutory and judicial, that have different treatment in bankruptcy proceedings. Statutory liens “aris[e] solely by force of a statute on specified circumstances or conditions.”<sup>137</sup> Conversely, judicial liens are “obtained by judgment, levy, sequestration, or other legal or equitable process of proceeding.”<sup>138</sup>

Determining whether a lien is statutory or judicial is important when the debtor goes bankrupt. While examining contract liens in the bankruptcy context, bankruptcy courts have found that liens established under contract lien acts are not judicial liens,<sup>139</sup> and therefore, are not subject to avoidance under Section 522 of the Bankruptcy Act.<sup>140</sup> In *In re Wiltcher*,<sup>141</sup> the court clarified, “[t]he requirement of a judicial action to enforce the lien and establish its particular priority does not transform its essential character to a judicial lien; the existence of the lien is not dependent on judicial action.”<sup>142</sup> Similarly, in *In Re King*,<sup>143</sup> the court found that a lien established under the contract lien act was considered a statutory lien, not a judicial lien, because the lien was filed with the county records department.<sup>144</sup> Therefore, the

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131. *Id.* § 9-109.

132. *See generally* MD. CODE ANN., REAL PROP. §§ 14-201–14-206 (West 2012) (promulgating the MCLA).

133. *See, e.g.,* Golden Sands Club Condo., Inc. v. Waller, 313 Md. 484, 495, 545 A.2d 1332, 1337–38 (1988); D’Aoust v. Diamond, 424 Md. 549, 36 A.3d 941 (2012).

134. MD. CODE ANN., LAB & EMPL. § 3-1105(c)(1) (West 2016).

135. REAL PROP. § 14-203(h)(4).

136. *Id.*

137. 11 U.S.C. § 101(53) (2012).

138. *Id.* § 101(36).

139. *Id.* § 101(53).

140. Stern v. Munroe, 44 B.R. 15 (Bankr. D. Mass. 1984); *In re Wiltcher*, 204 B.R. 488 (Bankr. S.D. Miss. 1996).

141. 204 B.R. 488 (Bankr. S.D. Miss. 1996).

142. *Id.* at 491 (quoting *In re Stern*, 44 B.R. at 18).

143. 208 B.R. 376 (Bankr. D. Md. 1997).

144. *Id.* at 380.

debtor could not avoid the lien under Section 522(f) of the Bankruptcy Code.<sup>145</sup>

In Maryland, courts have examined the MCLA and elaborated as to what events must occur in order for a lien to be established under the MCLA. In *Select Portfolio Servicing v. Saddlebrook West Utility*,<sup>146</sup> the Court of Appeals of Maryland found that Saddlebrook West Utility's ("Saddlebrook") Declaration clarifying that a lien may be established did not actually create a lien.<sup>147</sup> Instead, in order for a lien to be established under the MCLA, the Declaration had to have been filed with the county land records department and "must [have] expressly provide[d] for the creation of a lien, identif[ied] the party entitled to establish and enforce the lien, and identif[ied] the property against which a lien may be imposed."<sup>148</sup> Saddlebrook's Declaration did not follow these precise guidelines laid out in Section 14-202, and thus, they had not established a lien under the MCLA.<sup>149</sup> Judge McDonald emphasized, "a lien under the statute always relates to a breach of the contract. A lien is not created on the date of the recording of the contract because presumably it has not yet been breached and there are no damages to secure."<sup>150</sup> Therefore, in order to establish the lien, Saddlebrook had to file the lien in the county records with the necessary details of the lien.<sup>151</sup>

#### *D. Other States' Unpaid Wage Lien Laws*

Though the MUWLL was an innovative piece of legislation in Maryland, there are a few other states that have similar laws that allow an employee to place liens on their employer's property.<sup>152</sup> This Section explores other states' unpaid wage lien laws and what priority these laws afford workers with liens under its respective laws.

##### *1. Wisconsin's Unpaid Wage Lien Law*

The current version of the Wisconsin unpaid wage lien law was enacted in 1977, but Wisconsin has a long history of allowing employees to

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145. *Id.*

146. 455 Md. 313, 167 A.3d 606 (2017).

147. *Id.* at 335, 167 A.3d at 619.

148. *Id.* at 335, 167 A.3d at 618 (citing MD. CODE ANN., REAL PROP. § 14-202(a) (West 2012)).

149. *Id.* at 335–36, 167 A.3d at 619.

150. *Id.* at 335, 167 A.3d at 619.

151. *Id.* at 336, 167 A.3d at 619.

152. WIS. STAT. ANN. § 109.09 (West 2002).

place liens on their employers' property to recover unpaid wages.<sup>153</sup> The Wisconsin unpaid wage lien law states that an employee must file a petition claiming the lien with the clerk of the circuit court.<sup>154</sup> Additionally, the statute gives wage claim liens a "super priority" status over preexisting liens, except those excluded by statute.<sup>155</sup> Thus, a lien, "takes precedence over all other debts, judgments, decrees, liens, or mortgages against the employer," except a lien of a commercial lending institution or a lien placed on the property after the government had to do environmental clean-up, regardless of whether those other debts, judgments, decrees, liens, or mortgages originate before or after the wage claim lien takes effect.<sup>156</sup>

Because employees are granted this super priority status, employees who file liens can recover up to \$3,000 of wages for the six-month period preceding the date on which the employee files their claim, even if a commercial lending institution has a lien in place.<sup>157</sup> Thus, the presence of a secured lien with priority on the employer's property is not a complete bar to recovery under the Wisconsin statute.<sup>158</sup>

## 2. *Indiana's Unpaid Wage Lien Law*

In Indiana, an employee of an Indiana corporation may place a lien on the corporation's property to collect unpaid wages.<sup>159</sup> Similar to the MUWLL, an employee must provide notice to the employer with the specifics of their claim, and the employee must file this notice with the county recorder.<sup>160</sup> After the employee has filed their lien, "[t]he lien has priority over all liens suffered or created after the time elected by the employee, except other employees' liens, over which the lien has no priority."<sup>161</sup> Section (c)(2) reiterates that the lien "remains otherwise perfected."<sup>162</sup> Apply-

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153. See *Paine v. Woodworth*, 15 Wis. 298, 303 (1862) (commenting "it was the intention of the [wage lien] statute to give such workmen an absolute lien . . . as against everybody").

154. WIS. STAT. ANN. § 109.09(2)(b).

155. *SEC v. Wealth Mgmt., LLC*, No. 09-C-506, 2010 WL 3701784, at \*2 (E.D. Wis. Sept. 15, 2010).

156. WIS. STAT. ANN. § 109.09(2)(c)(1m).

157. *Id.* § 109.09(2)(c)(2).

158. *Id.*; see *Wealth Mgmt.*, 2010 WL 3701 784, at \*10 (finding that the fact that a commercial lender had a perfected security interest in the employer's assets did not mean that the commercial lender had priority over the employee's wage claims but instead, "[u]nder the Wage Claim Act, up to \$3,000 of an employee's claim for wages earned within the six-month period prior to the date on which the employee either files a claim with the Wisconsin Department of Workforce Department ("DWD") or brings suit against the employer can take precedence over a lien of a commercial lending institution.").

159. IND. CODE ANN. § 32-28-12-1 (LexisNexis 2016).

160. *Id.* § 32-28-12-2.

161. *Id.* § 32-28-12-2(b).

162. *Id.* § 32-28-12-2(c)(2)(B).

ing the law, the Indiana Bankruptcy Court found “a majority of cases from other jurisdictions hold that, barring specific statutory provisions to the contrary, the giving of formal notice is necessary and generally sufficient to perfect a statutory lien.”<sup>163</sup> The court explained because the lien was perfected, that was all that was required to make the lien unavoidable in the bankruptcy proceedings.<sup>164</sup>

### 3. *Kentucky’s Unpaid Wage Lien Law*

Kentucky’s unpaid wage lien law was originally created in 1876, though it only applies to railroad, coal mine, and public improvement companies.<sup>165</sup> Kentucky courts have found that the lien is of statutory origin, not judicial origin.<sup>166</sup> Additionally, the statute does not contain a filing statement requirement,<sup>167</sup> an omission which the Kentucky Court of Appeals has interpreted as ensuring the existence of a lien in favor of the employee.<sup>168</sup> Under the statute, there are two distinct priorities afforded to employees’ liens.<sup>169</sup> First, an employees’ lien is superior to any other debt “thereafter created.”<sup>170</sup> Second, employees’ liens are given priority over any mortgage or encumbrance “theretofore or thereafter created,” but only for wages owed to the employees within the six months preceding the event which activated the lien.<sup>171</sup>

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163. *Petr v. Wheeler (In re Florline Corp.)*, 190 B.R. 342, 345 (Bankr. S.D. Ind. 1996) (holding that filing gives notice of the existence of a mechanics lien and perfects it (citing *Meek Lumber Yard, Inc. v. Houts (In re Houts)* 23 B.R. 705 (Bankr. W.D. Mo. 1982)); *King Road Materials, Inc. v. Severson Acres Dev. Corp. (In re Severson Acres Dev Corp.)*, 142 B.R. 59, 60 (Bankr. N.D.N.Y. 1992) (holding that a mechanics’ liens duly filed pursuant to state law are not avoidable); *In re J.B. Winchells, Inc.*, 106 B.R. 384, 390 (Bankr. E.D. Pa. 1989) (finding that the IRS’s tax lien was unavoidable as preference to the extent notice regarding the lien was filed and thus perfected prepetition).

164. *In re Florline Corp.*, 190 B.R. at 345.

165. KY. REV. STAT. ANN. § 376.150 (West 2006).

166. *Superior Elkhorn Coal Co. v. Allen*, 37 S.W. 2d 52, 55 (Ky. 1931).

167. KY. REV. STAT. § 376.150.

168. *Turner v. Randolph*, 280 S.W. 462, 463 (Ky. 1926). The court commented:

The statute is based upon a well-recognized policy, which is written into the statutes of many states and of the federal government, and that is to protect the wage earner in many forms of public endeavor who is necessarily dependent upon his daily labor for the sustenance and the support of himself and family, and particularly in such forms as are recognized to be primarily for the benefit of the public good.

*Id.*

169. KY. REV. STAT. § 376.160.

170. *Id.*

171. *Id.*

## III. ANALYSIS

The MUWLL states that employee claims with a recorded lien “shall be considered a secured claim that has priority.”<sup>172</sup> This Part explains how the procedure of the MUWLL aligns with the procedure established in Article 9 of the UCC to grant employees’ liens the status of a perfected security interest. It is critical that employees’ liens under the MUWLL are considered perfected security interests because if they are not, then all employees with liens will be in the same position as Mr. Sloat.<sup>173</sup> In bankruptcy proceedings, these employees will remain creditors, but they will likely never see any of their unpaid wages.<sup>174</sup>

This Part analyzes the language of the MUWLL and explains why employees with liens established under the MUWLL should have perfected security interests. Section III.A explains that employees have perfected security interests by using statutory construction analysis, and examines the similarities between the procedures of the MUWLL and the steps necessary to perfect a security interest promulgated in Article 9 of the UCC. Section III.B analyzes the sparse legislative history behind the MUWLL. Section III.C examines how other courts have found contract liens and financing statements to constitute perfection. Section III.D explains how other states have found employees’ liens to have been perfected when they filed financing statements. Finally, Section III.E explains that federal bankruptcy law already recognizes the need to prioritize employee’s claims.

A. *Statutory Construction*

Both the language of the MUWLL and the overall procedure the MUWLL mandates indicate that employees who have properly filed unpaid wage liens are secured creditors with priority.

When analyzing ambiguous statutes, judges and scholars rely on the canons of construction.<sup>175</sup> Canons of construction are not the means to an end themselves, but they are guideposts that can be used to determine legislative intent.<sup>176</sup> Though scholars disagree as to what weight should be given to which canon of construction, most academics fall into one of the following three schools of thought: intentionalism, new textualism, or pragmatism.<sup>177</sup> Examining each of these theories is beyond the scope of this

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172. MD. CODE ANN., LAB. & EMPL. § 3-1105(e) (West 2016).

173. See *supra* text accompanying notes 14–18.

174. See *supra* text accompanying note 17.

175. Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 343 (2012).

176. *Id.*

177. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 403–08 (2010).

Comment, but these canons are helpful in deciphering the intention of the legislature when examining the text of the MUWLL.<sup>178</sup> To begin to examine the statute, “[t]he search for the intention of the Legislature must start and end with the words of the statute considered in light of the background of the enactment and its purpose, aided by established presumptions and rules of statutory construction.”<sup>179</sup>

To determine what legislators intended when constructing the MUWLL, there are different tools of statutory interpretation that can be used. One of these tools is the rule against surplusage.<sup>180</sup> The rule against surplusage states that when analyzing legislation, one should “[a]void interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary.”<sup>181</sup> The Supreme Court has interpreted the rule against surplusage, stating “one of the most basic interpretative canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”<sup>182</sup> This canon can be applied to determine what the legislature intended by the language, “considered a secured claim that has priority.”<sup>183</sup> Applying the rule against surplusage to the MUWLL, the specific phrase “considered a secured claim that has priority” would be superfluous—even meaningless—if lienholders under the MUWLL are not secured creditors with priority.<sup>184</sup>

For example, Sections (c)(1) and (c)(2) would be unnecessary if employees are not considered secured creditors with priority.<sup>185</sup> These Sections provide explicit instructions on where to file the lien, and have the effect of giving other lenders notice that the employee has a lien on a piece of the employer’s property.<sup>186</sup> Because the UCC centers around the importance of notice filing,<sup>187</sup> if employees with liens were only lien creditors,<sup>188</sup> there would be no need to file with the clerk of the court or with SDAT.<sup>189</sup> Under the rule of surplusage, an interpretation that employees are

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178. *See id.* (detailing the interplay and the meaning of intentionalism, new textualism, and pragmatism).

179. *St. Joseph Hosp. v. Quinn*, 241 Md. 371, 376, 216 A.2d 732, 734 (1966).

180. *Scott*, *supra* note 177, at 368.

181. *Id.*

182. *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

183. MD. CODE ANN., LAB. & EMPL. § 3-1105(e) (West 2016).

184. LAB. & EMPL. § 3-1105(e).

185. *Id.* §§ 3-1105(c)(1)–(2).

186. *Id.*

187. *See* MD. CODE ANN., COM. LAW § 9-310 (West 2013) (explaining the filing system).

188. *Id.* § 9-102(a)(52).

189. LAB. & EMPL. §§ 3-1105(c)(1)–(2); *see* COM. LAW § 9-102(a)(53) (West 2013) (defining a lien creditor as a creditor that has acquired a lien from attachment or levy).

not secured creditors would render the aforementioned provisions of the MUWLL unnecessary.<sup>190</sup>

Next, the MUWLL states that the claim will have priority.<sup>191</sup> As explained earlier, whether a security interest has priority is determined by whether the security interest is attached or perfected.<sup>192</sup> An attached lien does not usually have priority, where a perfected lien usually does.<sup>193</sup> The MUWLL states the lien will be “considered a secured claim that has priority: (1) from the date of the court order establishing the lien for unpaid wages, or (2) if no complaint disputing the lien for unpaid wages is filed, from the date that the employee filed the wage lien statement.”<sup>194</sup> Therefore, the key question here is whether the court order and the wage lien statement satisfy the filing statement requirements stated in Section 9-501 of the Maryland Commercial Law Code.<sup>195</sup> Under Section (c)(2), employees file the lien at SDAT.<sup>196</sup> All other filing statements in Maryland are filed with SDAT as well.<sup>197</sup> Thus, the filing of the lien is confirmatory, and other creditors and lenders have access to the lien filing statement at SDAT.<sup>198</sup> Considering that the filing method of perfection centers around the notice filing system, an employee filing a lien financing statement at SDAT will give other creditors notice that the employee has a lien on the particular collateral.<sup>199</sup> Because other creditors have the ability to determine that an employee has a lien on the employer’s property, the notice requirement is met.<sup>200</sup> Furthermore, the DLLR published regulations and forms for employees attempting to file liens to collect unpaid wages.<sup>201</sup> With these sample forms, it is even easier for employees seeking liens to ensure that they provide the information needed in the financing statement to perfect a lien. Additionally, the Court of Appeals issued new rules on January 1, 2018, to make the lien process “clearer and more predictable.”<sup>202</sup> Specifically, Mar-

190. *See* LAB. & EMPL. §§ 3-1105(c)(2) (mandating that the employers file with SDAT).

191. *Id.* § 3-1105(e).

192. COM. LAW § 9-310.

193. *Id.*

194. LAB. & EMPL. § 3-1105(e).

195. COM. LAW § 9-501.

196. LAB. & EMPL. § 3-1105(c)(2).

197. COM. LAW § 9-501(a)(2).

198. *See* MD. DEP’T OF ASSESSMENTS & TAXATION, UCC ELECTRONIC FILING, SEARCH & RETRIEVAL, <https://egov.maryland.gov/sdat/uccfiling/uccmainpage.aspx> (last visited Apr. 23, 2018) (providing access to all financing statements that have been filed).

199. *See* LAB. & EMPL. § 3-1105(c)(2) (stating that “by filing a wage lien statement in the same manner, form, and place as a financing statement under Title 9, Subtitle 5 of the Commercial Law Article” will record a wage lien statement).

200. *See id.* (explaining that all of the requirements of the commercial law code must be met).

201. *See supra* note 75.

202. Martha M. Ertman & Doris N. Weil, *Maryland’s New Remedy for Wage Theft*, MD. BAR J., Jan.–Feb. 2018, at 16, 21.

yland Rule 15-1404 reiterates “[a] Wage Lien Statement that includes a lien against personal property shall be filed in the same manner, form, and place as a financing statement under Code, Commercial Law Article, Title 9, Subtitle 5.”<sup>203</sup>

Because employees are required to file lien statements in the same manner that UCC financing statements are filed and because other creditors can search SDAT for these filing statements, it seems that the liens filed under the MUWLL should be considered perfected.

### *B. The Legislative History of the MUWLL*

Looking at the legislative history of the statute, the intent of the legislature is silent on what priority it afforded employees with liens.<sup>204</sup> By including the phrase, “[a] lien for unpaid wages recorded under this section shall be considered a secured claim that has priority,” it is clear that the legislature intended employees who filed liens against their employers to have some sort of secured status or preferred status.<sup>205</sup> Though the legislative history is silent on the perfection status of the liens, the legislative history clearly demonstrates the law was passed with the intention of protecting employees, as victims of wage theft and workers’-rights advocates testified in support of the MUWLL.<sup>206</sup> In sum, the legislative history, in conjunction with the statutory language,<sup>207</sup> indicate that legislators intended employees’ to have perfected security interests.

### *C. Relevant Maryland Decisions Interpreting the MCLA*

In the real property sphere, it is well established that liens under the MCLA are considered statutory liens in bankruptcy proceedings.<sup>208</sup> The MCLA uses similar language to the unpaid wage lien law.<sup>209</sup> In a previous decision, the Court of Appeals of Maryland analyzed the contract lien act as a “super lien.”<sup>210</sup> Like the MUWLL, the contract lien law lays out a specific procedure to create a lien on the property of the party who breaches a contract.<sup>211</sup> In *Saddlebrook*, the Court of Appeals held that a Declaration on

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203. MD. R. 15-1404(d).

204. See LAB. & EMPL. § 3-1105.

205. *Id.* § 3-1105(e).

206. See Lien for Unpaid Wages: Ruckelshaus Testimony, *supra* note 9, at 1 (testifying that the MUWLL would provide workers with a tool to help them recover unpaid wages)..

207. LAB. & EMPL. § 3-1105; see *supra* Section III.A.

208. *King v. Cherrywood Residents Ass’n (In Re King)*, 208 B.R. 376, 380 (1997).

209. See MD. CODE ANN., REAL PROP §§ 14-201–14-206 (West 2012) (explaining the necessary procedure to file a lien under the MCLA).

210. *Select Portfolio Servicing v. Saddlebrook W. Util. Co.*, 455 Md. 313, 334–35, 167 A.3d 606, 618 (2017).

211. REAL PROP. §§ 14-201–14-206.

a property did not create a lien with priority over the deed of trust on lots in a subdivision.<sup>212</sup> The court did explain how liens are created and how the priority is established.<sup>213</sup> The court specifically stated, “With some exceptions, the priority of a lien is determined by the date it is recorded in the land records.”<sup>214</sup> Under the procedures established in the MUWLL, if the employee intends to file a lien on real property, they must “fil[e] a wage lien statement, in a form prescribed by the Commissioner, with the clerk of the circuit court for the county where any portion of the property is located.”<sup>215</sup> Thus, the MUWLL is more detailed than the contract lien law in that it specifies the lien must be filed with the circuit court.<sup>216</sup> Using the court’s rationale in *Saddlebrook*, when an employee files under the MUWLL, they must file the notice with the clerk of the county circuit court in which the employer’s property is located.<sup>217</sup> The Court of Appeals of Maryland reaffirmed employees seeking liens had to file with the clerk of the county circuit court and “[t]he lien shall be recorded among the land records of the county.”<sup>218</sup> Thus, upon filing the wage lien statement with the clerk of the circuit court, the employee has perfected their lien.<sup>219</sup>

*D. How Other States’ Courts Have Afforded Priority to Unpaid Wage Lien Holders*

Since the MUWLL is relatively new and has not been cited in many judicial opinions, it is beneficial to examine how other states have determined the status of lienholders under their respective unpaid wage lien laws.

First, Kentucky’s lien law is absolutely silent as to what priority employees have after establishing a lien under the act.<sup>220</sup> The law does not re-

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212. *Select Portfolio Servicing*, 455 Md. at 313, 167 A.3d at 606.

213. *Id.* at 315, 167 A.3d at 607.

214. *Id.*

215. MD. CODE ANN., LAB. & EMPL. § 3-1105(c)(1) (West 2016).

216. Compare *id.*, with REAL PROP. §§ 14-201–14-206 (demonstrating that the MUWLL states where employees must file financing statements while the MCLA does not).

217. LAB. & EMPL. § 3-1105(c)(1).

218. MD. R. 15-1404.

219. See *Select Portfolio Servicing*, 455 Md. at 313, 167 A.3d at 606 (stating “[t]he priority of that lien is determined by the date of its recording in the land records”).

220. Richard H. Nowka & Jeff S. Taylor, *Kentucky Employees’ Wage Liens: A Sneak Attack on Creditors, but Beware of the Bankruptcy Trustee*, 84 KY. L.J. 317, 321 (1995); KY. REV. STAT. ANN. § 376.150 (West 2006) (“When the property or effects of any mine, railroad or canal, or other public improvement company, or of any rolling mill, foundry or other manufacturing establishment, or of any other business, whether incorporated or not, are assigned for the benefit of, or are to be distributed among creditors, whether by operation of law or by its own act, the employees of the owner or operator of the business shall have a lien upon the property and effects which have been involved in the business and upon the accessories connected therewith, including any interest in real property used in carrying on the business.”).

quire an employee to file a financing statement, nor does it require an employee to possess their employer's property.<sup>221</sup> Kentucky courts have interpreted the statute to mean that employees do not need to file a financing statement.<sup>222</sup> Even without a filing statement requirement, Kentucky courts found "[t]he statute is based upon a well-recognized policy . . . that is to protect the wage earner in many forms of public endeavor who is necessarily dependent upon his daily labor for the sustenance and the support of himself and family."<sup>223</sup> Thus, Kentucky courts still gave wage liens priority over other secured claims because the courts recognized the importance of the policy behind the law.<sup>224</sup> Additionally, under Kentucky's law, the statute describes two distinct priorities that the employees may receive: (1) a first-to-file rule, and (2) a super priority that grants employees unpaid wages for up to six months preceding the lien, even if other secured liens were on the collateral.<sup>225</sup> Though Kentucky's statutory language is very different from the MUWLL, Maryland courts have held that other states' statutes may be persuasive in Maryland courts.<sup>226</sup>

Second, Wisconsin's unpaid wage lien law is much more detailed than Maryland's and provides for even more elevated protection of lienholders, including protection over purchase money interests.<sup>227</sup> Even though Wisconsin's wage lien law is one of the oldest examples of wage lien laws, because the law provides employees additional protection, many cases that analyze the law center around issues that are not analogous to the MUWLL.

Third, Indiana's unpaid wage lien law contains similar language to and was established before the MUWLL. Therefore, because courts have analyzed the law, it is the most helpful in determining what priority lienholders are awarded under the MUWLL. Looking at the explicit case law, it is apparent that lienholders under the Indiana law have perfected security interests.<sup>228</sup> Like Maryland employees, Indiana employees must file a specific notice with the county recorder.<sup>229</sup> The text of the Indiana unpaid wage lien law is more detailed than the MUWLL and states, "The lien has priority over all liens suffered or created after the time elected by the employee, ex-

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221. Nowka & Taylor, *supra* note 220, at 321.

222. *Id.*; Rockcastle Lumber Co. v. Burns, 194 S.W. 95, 100 (Ky. 1917);

223. *Id.* at 322 (quoting Turner v. Randolph, 280 S.W. 462 (Ky. 1926)).

224. *Id.*

225. *Id.* at 323–24.

226. Harris v. State, 331 Md. 137, 156–57, 626 A.2d 946, 955–56 (1993); St. Joseph Hosp. v. Quinn, 241 Md. 371, 377, 216 A.2d 732, 735 (1966).

227. See WIS. STAT. ANN. § 109.09 (West 2002) (providing priority to liens, even over purchase money interests for up to \$3,000 of unpaid wages per employee).

228. *In re Florline Corp.*, 190 B.R. 342, 345 (Bankr. S.D. Ind. 1996).

229. IND. CODE ANN. § 32-28-12-2 (LexisNexis 2016).

cept other employees' liens, over which the lien has no priority."<sup>230</sup> The statute then states an employee's lien "remains otherwise perfected."<sup>231</sup> Thus, courts have found liens established under this law were perfected and unavoidable in bankruptcy proceedings.<sup>232</sup>

Because the MUWLL is so similar to the Indiana unpaid wage lien law, there is strong evidence that lienholders under the MUWLL will also be considered to have perfected security interests.<sup>233</sup> Though the MUWLL's language is not as explicit as the language of the Indiana statute, there are two key similarities between the statutes. First, both the MUWLL and the Indiana law state that employees' liens have priority.<sup>234</sup> Second, both laws use similar procedures that require employees to file a notice containing the specificities of a financing statement with the governmental entity that typically collects financing statements.<sup>235</sup>

### E. *Parallels in Federal Law*

Scattered throughout federal law, the rights of employees are recognized as rights that deserve protection. Though there is no mention of these laws in the legislative history of the MUWLL, these pieces of legislation demonstrate that providing employees with increased protection—as employees with liens will have if they are treated as secured creditors—is not a new concept. Particularly, in bankruptcy law, Sections 507(a)(4) and (5) give employees' wage claim lawsuits priority over other unsecured claims, up to \$12,475.<sup>236</sup> The rationale behind prioritizing employees' claims stems from the recognition that employees are unfairly harmed by employers' malfeasance and insolvency.<sup>237</sup> Employees who are not paid are the least fit to cope with an employer's default.<sup>238</sup> Applying this logic to the MUWLL, Maryland employees are unfairly harmed when their employers do not pay them the wages they are rightfully owed.<sup>239</sup> Thus, just as the bankruptcy code recognizes the need to attempt to guarantee employees' claims, the

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230. *Id.* § 32-28-12-2(b).

231. *Id.* § 32-28-12-2(c)(2)(B).

232. *In re Florline Corp.*, 190 B.R. at 345.

233. Compare IND. CODE ANN. § 32-28-12-1, with MD. CODE ANN., LAB. & EMPL. §§ 3-1101–3-1110 (West 2016) (comparing the two statutes' similar structure and language).

234. IND. CODE ANN. § 32-28-12-2(b)(3); MD. CODE ANN. LAB. & EMPL. § 3-1105(e).

235. See IND. CODE ANN. § 32-28-12-2 (requiring filing with the county records department); LAB. & EMPL. §§ 3-1101–3-1105.

236. 11 U.S.C. § 507(a)(4)–(5) (2012).

237. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 790 (1987).

238. *Id.* ("Employees are among the creditors least likely to have spread the risks of default. They seldom are able to contract with several different employers, and losing a paycheck will quickly deplete modest savings. The Bankruptcy Code reflects a concern for these creditors, granting a priority to limited employee wage and retirement fund payments.").

239. Lien for Unpaid Wages: Ruckelshaus Testimony, *supra* note 9.

Maryland legislature attempted to give employees an elevated status in the order of security interests.

#### IV. CONCLUSION

Though the MUWLL was not written with precise clarity, after examining the statutory construction, the legislative intent, interpretations of the MCLA, and lien statutes from other states, there is a strong argument that employees with liens on their employers' property should be considered perfected secured creditors under Article 9.<sup>240</sup> This priority is crucial for the law to work as intended and to give employees a realistic chance at recovering owed wages. If lienholders are considered to have perfected claims, then an employee could potentially use the same remedies as other secured creditors under Article 9.<sup>241</sup> An example would be an employee with a recorded wage lien hiring a repossession company to seize personal property and then selling that property to satisfy the unpaid wages.<sup>242</sup> On the other hand, if employees are not considered to have perfected security interests they will likely never recover any of their stolen wages. Instead, their claims will be beaten out by secured claims, and the employee will not recover any of the wages they deserve.

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240. *See supra* Part III.

241. Martha M. Ertman & Doris N. Weil, *supra* note 202, at 16, 21.

242. *Id.*