STATE OF KANSAS

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July 16, 1987

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ATTORNEY GENERAL OPINION NO. 87- 104

Rubie M. Scott
Register of Deeds
Office of the Register of Deeds
Johnson County Courthouse
Olathe, Kansas 66061

Re: Taxation--Floating and Federal Liens--Federal Non-Tax Liens

Synopsis: Written instruments representing liens arising pursuant to the provisions of CERCLA, 42 U.S.C.S. §9601 et seq., or ERISA, 29 U.S.C.S. §1001 et seq., which are properly proved or acknowledged and certified are entitled to recording by the register of deeds in the county in which the real property affected by the instrument is located. Such instruments which do not meet these initial filing requirements should be filed in the office of the clerk of the United States District Court for the district in which the real property is located. The filing fees prescribed by K.S.A. 28-115 are appropriate for the filing of such instruments, and the instruments should be filed so as to provide notice to third parties. Cited herein: K.S.A. 28-115; 58-2221; 79-2601; 79-2607; 79-2608; 26 U.S.C.S. §6323; 29 U.S.C.S. §§1001, 1362, 1363, 1364, 1368; 42 U.S.C.S. §§9601, 9607.

* * *

Dear Ms. Scott:

As Register of Deeds of Johnson County, you request our opinion regarding the responsibility of registers of deeds to record certain federal non-tax liens. The two types of liens you question are those arising under the provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.S. §9601 et seq., and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. §1001 et seq.

Pursuant to CERCLA, a lien is created for nonpayment of costs and damages as provided in 42 U.S.C.S. §9607(a). 42 U.S.C.S. §9607(l)(3) provides in part as follows:

> "The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest or judgment lien creditor whose interest is perfected under applicable state law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. . . . If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. . . ."

29 U.S.C.S. §1368(a) creates a lien for nonpayment of liability arising under 29 U.S.C.S. §§1362, 1363 and 1364. Subsection (c) of §1368 states that "the priority of a lien imposed under subsection (a) shall be determined in the same manner as under section 6323 of the Internal Revenue Code of 1954 [26 U.S.C.S. §6323]. . . ." 26 U.S.C.S. §6323(f)(1) contains essentially the same provision as that contained in 42 U.S.C.S. §9607(l)(3), quoted above.

26 U.S.C.S. §6323 provides for the priority status of federal tax liens. Kansas has adopted the uniform federal tax lien registration act, K.S.A. 79-2601 et seq., which specifically provides that registers of deeds are to accept, file and record notices and releases of federal tax liens

upon real property and certain personal property. K.S.A. 79-2607; 79-2608. The Kansas statutes are silent as to the accepting, filing and recording of federal non-tax liens such as those described above. However, K.S.A. 58-2221 states generally that "[e]very instrument in writing . . . whereby any real estate may be affected, proved or acknowledged, and certified . . . may be recorded in the office of register of deeds of the county in which the real estate is situated: Provided, it shall be the duty of the register of deeds to file the same for record. . . ."

Though 26 U.S.C.S. §6323 applies to federal tax liens, the ERISA provisions refer to it and its language relevant to filing is virtually identical to that contained in the CERCLA provisions. Thus, case law analyzing the provision now contained in 26 U.S.C.S. §6323(f)(1) is useful to our analysis. In United States v. Union Cent. Life Ins. Co., 368 U.S. 291, 82 S.Ct. 349, 7 L.Ed.2d 294 (1961), the United States Supreme Court traced the history of the section:

> "In 1893 this Court decided in United States v Snyder, 149 US 210, 37 L ed 705, 13 S Ct 846, that the federal tax lien could be enforced against bona fide purchasers who had no notice of the lien, despite a state law attempting to defeat the lien unless it has been recorded. In order to grant relief from the Snyder rule, Congress in 1913 passed an Act requiring, much as the provision here in question did, that the tax liens should not be 'valid as against any mortgagee, purchaser, or judgment creditor' until notice was filed with the clerk of an appropriate District Court or, whenever a State authorized such filing, in the office of a county recorder of deeds. This statute was amended in 1928 by adding that the lien would not be valid until notice was filed 'in accordance with the law of the State of Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice . . . .' (Emphasis supplied.) Following this in United States v Maniaci (DC Mich) 36 F Supp 293, affd (CA6) 116 F2d 935, both a

> United States District Court and a Court of Appeals refused to enforce a federal tax lien on Michigan property because the notice of lien, although filed both in a District Court and in the office of the proper Michigan register of deeds, did not contain the description of the property required by Michigan law. In this holding emphasis was placed on the clause added in 1928, requiring notice to be filed 'in accordance with the law of the State or Territory in which the property subject to the lien is situated . . . .'
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> "Less than two years after the Maniaci holding Congress again amended the lien notice provisions, struck out ' in accordance with the law of the State or Territory' and substituted the language in the section here controlling that notice was not valid until filed 'In the office in which the filing of such notice is authorized by the law of the State or Territory.' The reports of the House and Senate Committee reporting this amendment point strongly to a purpose to get away from the ruling in the Maniaci Case and make it clear that, while notice of a federal lien must be filed in a state office where authorized by a State, the notice is sufficient if given in the form long used by the Department 'without regard to other general requirements with respect to recording prescribed by the law of such State or Territory.'" 368 U.S. at 294, 295, 296; 7 L.Ed.2d at 297, 298.

Thus, according to the Court, the requirement that federal tax liens be "filed in the appropriate office in the State (or county or other governmental subdivision) as designated by State law" is intended to provide notice to third parties, not to be a substantive requirement affecting the validity of the lien. We would have to conclude that the use by Congress of nearly identical language in CERCLA and the reference to §6323 in ERISA indicates a similar intent. Since this provision's principal purpose is to provide notice and since registers of deeds are required to accept for filing every written instrument "whereby any real estate may be affected"

if properly proved or acknowledged and certified, it is the opinion of this office that the notice of lien arising under CERCLA or ERISA should be filed with the register of deeds in the county in which the real property is located. If, however, the notice sought to be filed is not sufficient for filing, it will be valid for purposes of determining priority if filed in the office of the clerk of the United States district court for the district in which the real property is located.

You have further asked whether, if registers of deeds are required to record such liens, the fee of five dollars for the first page and one dollar for additional pages as prescribed by K.S.A. 28-115 is the appropriate fee. We can find no provision in the State or Federal statutes which would provide a different fee, nor an exemption from the payment of fees for the administrative expenses of the registry. We therefore conclude that the fee prescribed by K.S.A. 28-115 would be appropriately charged.

Finally, you question whether, absent a legal description of the land in the instrument, these notices of liens should be recorded under miscellaneous records. For federal tax liens, Kansas statutes provide for alphabetical filing. While there is no similar provision for federal non-tax liens, we would suggest that the registers of deeds file in the best way possible to insure notice to third parties as this is what the filing is intended to provide.

In conclusion, written instruments representing liens arising pursuant to the provisions of CERCLA, 42 U.S.C.S. §9601 et seq., or ERISA, 29 U.S.C.S. §1001 et seq., which are properly proved or acknowledged and certified are entitled to recording by the register of deeds in the county in which the real property affected by the instrument is located. Such instruments which do not meet these initial filing requirements should be filed in the office of the clerk of the United States district court of the district in which the real property is located. The filing fees prescribed by K.S.A. 28-115 are appropriate for the filing of such instruments, and the instruments should be filed so as to provide notice to third parties.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

RTS:JLM:jm