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Construction Liens and the "Secret Lien" Problem

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CONSTRUCTION LIENS AND THE "SECRET LIEN" PROBLEM

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Perhaps the most essential element of a modern scheme of land ownership is a system of records that will allow an owner to show to the world, and particularly to intended transferees, that she or he owns the land in question. It is almost equally important that an owner be able to create a lien or charge on land, putting it up as security for an obligation or debt while retaining possession. And as a concomitant principle, it is critical that an intended transferee be able to detect, in a reliable system of records, whether the land has already been charged with a security interest by its present owner.

Note that the intended transferee might be a new owner, in which case the transferee will, in effect, inherit and become subject to the lien or charge of the preexisting security interest.[1] Alternatively, the transferee might be taking another security interest, in which case, if there is a preexisting security interest, the new interest will be subordinate in priority to the old one under the familiar common-law principal that "first in time is first in right."[2] Either way, it is essential to fairness and justice that a system of records exists that will disclose to the subsequent transferee the existence of the prior security interest. If the system cannot reliably inform the subsequent party of the existence of a prior interest or lien, the subsequent party may be unfairly surprised to its great detriment. This might be termed the "secret lien" problem. It is obvious that a modern system of commerce

* The author wishes to thank Professor Carl Circo and J. B. Cross of the Arkansas Bar for their valuable comments during the preparation of this article. Errors and oversights are those of the author alone, of course.

1. *See* Lawrence Berger, *An Analysis of the Doctrine That "First in Time is First in Right"*, 64 NEB. L. REV. 349, 350 (1985).

2. *Id.*

in land, or in credit secured by land, cannot function successfully if it permits secret liens to any major extent.

I. SECRET LIENS AND THE INVENTION OF THE RECORDING SYSTEM

In the United States, of course, the system upon which we rely to perform the task of avoiding secret liens is the recording system. Surprisingly, England had no recording or land title registration system before the twentieth century.[3] The early English mortgage was typically a conveyance of a fee simple subject to a condition subsequent.[4] The condition, upon occurrence of which the mortgagor could exercise and redeem the land, was payment of the debt on "law day," the date the debt fell due.[5] The equity courts introduced flexibility into this procedure by allowing tardy payment up to a later foreclosure date set by the court.[6] But for our purposes, the salient feature of this system was that there were no public records from which a subsequent purchaser or mortgagee could learn of the existence of a prior mortgage on the land.

If the mortgagee took possession of the land, that possession would likely warn future transferees of the existence of the mortgage. But it was usual for the mortgagor to retain possession, either by virtue of language in the mortgage granting that right, by a leaseback, or simply by custom.[7] Because there was no governmental system of land records, an innocent purchaser who had no knowledge of the preexisting mortgage might buy the land or take a subsequent mortgage on it, and do so subject to the first mortgage, only to learn later of his or her mistake. In other words, the law allowed the existence of secret liens. Such a system, which could punish the innocent purchaser or subsequent

3. Francis R. Crane, *The Law of Real Property in England and the United States: Some Comparisons*, 36 IND. L. J. 282, 290 (1961).

4. *See* GRANT S. NELSON, DALE A. WHITMAN, ANN M. BURKHART & R. WILSON FREYERMUTH, REAL ESTATE FINANCE LAW § 1.2 (6th ed. 2015) [hereafter "REAL ESTATE FINANCE LAW"].

5. *Id.*

6. *Id.* § 1.3.

7. *Id.* § 1.2.

mortgagee, was unacceptable to the American colonists, and they were determined to change it.

Our recording system was invented in the Massachusetts Bay Colony.[8] While some towns apparently had local recording prior to this date, the first colony-wide act was adopted in 1640.[9] It applied to both deeds and mortgages.[10] Unlike modern recording acts, which typically operate only in favor of bona fide purchasers, it simply provided that conveyances were not effective against *any* subsequent third party unless they were recorded. For example, as to mortgages, the act said:

> And that no such bargain, sale, or grant already made in way of mortgage where the grantor remains in possession, shall be of force against any other but the grantor or his heirs, except the same shall be entered, as is hereafter expressed, within one month after the end of this Court, if the party be within this jurisdiction, or else within 3 months after he shall return.[11]

In simple terms, the recording system the colonists invented had two functions. One was to allow owners to demonstrate their ownership. This was useful mainly when they desired to sell or mortgage their land. The system gave purchasers and mortgagees some confidence that the party with whom they were dealing actually had title to the land. The other function, closely related, was to assure such purchasers and mortgagees that the title on which they were relying was not burdened by preexisting mortgages, liens, or other encumbrances—again, to oversimplify a bit, that there were no secret liens.

While the original Massachusetts Bay statute quoted above protected all subsequent takers, nearly all of the recording acts that subsequently evolved protected only subsequent parties who took their interests in the land in good faith and paid value—that is, they were "bona fide purchasers."[12] Moreover, the protection

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8. *See* PHILIP J. NEXON, REAL ESTATE TITLE PRACTICE IN MASSACHUSETTS § 1.4 (Mass. Cont. L. Ed. 2020).

9. *Id.* § 1.4.2.

10. *Id.*

11. *Id.* (citing 1 Mass. Colonial Records 306 (1640) (spelling modernized)).

12. *See* DALE A. WHITMAN, ANN M. BURKHART, R. WILSON FREYERMUTH & TROY A. RULE, THE LAW OF PROPERTY § 11.9 (4th ed. 2019) [hereinafter "THE LAW OF

afforded by the recording acts was and is in some respects weak, partial, and inadequate,[13] a fact that has led in the United States to the rise of title insurance as additional protection to purchasers and mortgagees.[14] But defects in the recording systems are not our focus in the present Article. It remains a fact that one principal objective of those systems is to ensure that purchasers and mortgagees not be entrapped by secret liens, and in that task they are generally quite effective.

II. THE COURTS' ANTIPATHY TO SECRET LIENS: THE VENDOR'S LIEN AS AN ILLUSTRATION

The principal focus of this Article will be the operation of construction liens. However, in this section we will examine, for purposes of illustration, an analogous but much simpler concept: the vendor's lien. Assume that an owner of land sells it but does not receive the full purchase price at the time legal title is passed to the purchaser by deed. A wise seller would demand that the purchaser give the seller a promissory note for the unpaid portion of the price, secured by a purchase-money mortgage on the land. But not all sellers are wise or sophisticated, so let us imagine a case in which the seller does not retain any specific security interest on the land when conveying away the title.

In this setting the courts of equity will find an implied lien on the land in favor of the seller for the remaining purchase price.[15] This seems a fair result; if the purchaser were permitted to keep the land's title free and clear, the purchaser would obviously be unjustly enriched. Even if the purchaser resells the property to a new party, the lien will remain in effect if the new party has notice of the fact that the original purchaser has not yet fully paid for the land. But the courts are a bit suspicious of the

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PROPERTY"]. Only three modern statutes (North Carolina, Louisiana, and Delaware) do not require BFP status to protect the subsequent taker. *Id.*

13. *Id.*

14. *Id.* § 11.14.

15. *Id.* § 10.6. If the seller does reserve an express purchase-money mortgage or other documented express security interest, it is usually held that the vendor's lien has been waived. *See, e.g.*, Russo v. Cedrone, 375 A.2d 906, 909 (R.I. 1977).

lien,[16] and if the land is resold to a bona fide purchaser ("BFP") who lacks notice of it, title will pass free of the lien.

One can explain this result in either of two ways. One explanation is the recording act. The vendor's lien is, of course, unwritten, and therefore unrecorded. Hence, the subsequent purchaser, being a BFP, will take free of the lien.[17] The alternative explanation is the long-standing equitable principle that the legal interest acquired by a BFP will prevail over a prior equitable right.[18] Either way, the result is the same; the law's famous solicitude for BFPs will govern over the claim of the land seller, who might have protected himself or herself by more careful means—taking and recording a purchase-money mortgage. As early as 1822 the U.S. Supreme Court adopted this view, holding:

> There is not perhaps a State in the Union, the laws of which do not make all conveyances not recorded, and all secret trusts, void as to creditors as well as subsequent purchasers without notice. To support the secret lien of the vendor against a creditor who is a mortgagee, would be to counteract the spirit of these laws.[19]

The vendor's lien thus provides us with a good example of courts' unwillingness to foist a secret lien on a BFP, frames the issue nicely, and prepares us to begin our analysis of construction liens.

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16. *See, e.g.*, Brooks v. Thorne, 222 N.W. 916, 917-18 (Minn. 1929).

17. *See, e.g.*, Agri Bank FCB v. Maxfield, 316 Ark. 566, 570-71, 873 S.W.2d 514, 516-17 (1994); Stump v. Swanson Dev. Co., 2014 IL App (3d) 110784, ¶ 95; Bolen v. Bolen, 169 S.W.3d 59, 63-64, 63 n.11 (Ky. Ct. App. 2005); Malco Realty Corp. v. Westchester Condos, LLC, 982 N.Y.S.2d 64, 64 (N.Y. Sup. Ct. 2014). In half the states (those with "race-notice" statutes), this assumes that the subsequent purchaser records his or her own deed, but that is nearly always the case. In the three pure "race" states (see THE LAW OF PROPERTY, *supra* note 12, § 11.9) the subsequent purchaser need not even be a BFP to prevail over the vendor's lien. And at least one state has a special statute dealing with vendors' liens: CAL. CIV. CODE § 3048 (West 2022) states that a vendor's lien is not valid against "a purchaser or incumbrancer in good faith and for value."

18. *See generally* 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 413 (Symons ed., 1941); *see* 4 *id.* § 1253; *see also*, Weaver v. Blake, 300 N.W.2d 52, 54 & n.4 (S.D. 1980); Radke v. Myers, 167 N.W. 360, 361 (Minn. 1918) (apparently adopting both explanations).

19. Bayley v. Greenleaf, 20 U.S. (7 Wheat.) 46, 57-58 (1822).

III. THE STRUCTURE OF CONSTRUCTION LIENS

The concept of construction liens (traditionally termed "mechanics' liens") is simple and attractive. If someone provides labor or materials for a project of construction or improvement on real estate and is not paid for the work or materials supplied, she or he is entitled to a lien on the real property that can be foreclosed to recover the money owed.[20] This seems fair enough; the lien claimant has obviously increased the value of the property, and the owner would be unjustly enriched if he were permitted to retain it in its improved state without paying for the improvement.

There are at least three critical dates in the scheme under which construction liens operate. One of them is the recording date.[21] On this date, usually measured at 60 to 180 days after the claimant completes his or her work on the project, the claimant must record a notice of the claim of lien in the public records, usually mail a copy of the claim to the owner, and sometimes publish a copy in a local newspaper.[22] Within some additional period of time after that, usually six months to a year, if the claim has not been paid, the claimant must file a suit to foreclose the lien, much like the judicial foreclosure of a mortgage or the foreclosure of a judgment lien.[23]

The third critical date occurs long before the two mentioned above. It is the lien priority date. The most common priority date, used in nearly half of the states, is the date that work on the overall project commenced.[24] Under this approach, all lien claimants get the same priority, and their liens share *pro rata* in the security afforded by the real estate.[25] This seems fair enough: why should the happenstance of when a particular claimant did work or provided materials during the course of construction have any effect on the priority of his or her lien?

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20. *See* REAL ESTATE FINANCE LAW, *supra* note 4, §12.4. This source provides citations for all of the general descriptions of construction lien statutes in this section.

21. *See Id.*

22. *See Id.*

23. *Id.*

24. *Id.*

25. *See* REAL ESTATE FINANCE LAW, *supra* note 4, § 12.4.

The second most common approach to the lien priority date is to give each claimant priority based on the date he or she commenced work or first supplied materials on the project.[26] This gives an obvious advantage to those whose involvement was earlier in the construction process. A few states use a variety of other methods, including the date of the general contract, the date of the lien claimant's contract, or the date a notice of the contract was recorded.[27]

All of these priority dates have one thing in common, however: they are early in the construction period, while the lien claim's recording date is likely to be late in the construction period or, in many cases, well after construction is completed.[28] When the lien claim is recorded, it is nearly always said to "relate back" to the priority date.[29] Suppose that at some time between the priority date and the recording date, someone buys the property or lends money and accepts a mortgage or other consensual lien on it. How can such a buyer or lender learn about the impending filing of the lien claim? Obviously, the traditional method of discovering the existence of prior liens—a title search in the public records—will potentially be unavailing, since the lien claimant may not yet have filed his or her claim in the records.

How will a purchaser or lender learn of liens that are yet to be filed? If they are aware that a construction project has recently been completed, or is about to be completed, and if the owner and general contractor are honest and well-organized, the answer is simple. The owner will present the purchaser or lender with a list of all subcontractors and suppliers, along with a set of final lien waivers signed by those who have finished their work. The lien waivers show that they have been fully paid and cannot file liens. Prior to closing of the sale or loan, lien waivers for the remainder of the subcontractors and suppliers will also be provided as they receive final payment.

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

What can go wrong? As it turns out, a great deal. The process of obtaining lien waivers is complicated, time-consuming, and potentially error prone. Even a modest-sized construction project may involve several dozen suppliers and subcontractors. One or more of them may be unpaid but omitted from the lien waiver process inadvertently by the owner or general contractor, and it is easy enough for the buyer or lender (or its title insurer) to fail to notice a missing contractor, subcontractor, or supplier from the list provided by the owner. Second, if cash is running short, the owner may well be tempted to intentionally fail to pay a supplier or subcontractor, and to omit that party from the list of lien waivers given to the buyer or lender. Again, the omission may not be noticeable to the buyer or lender.

Third, will the fact of recent construction be apparent to the buyer or lender? If it is a new building or major work, probably so. But a more minor remodeling job, such as the replacement of a roof, repaving of a parking lot, or replacement of an HVAC unit, may not be obvious at all, and may fail to trigger any further inquiry. At most, the owner may simply sign a (false) affidavit stating that no construction work has occurred on the property during the past X months. No question of lien waivers will ever arise. Yet if a contractor or supplier on such a minor job is in fact not paid, a lien may well be filed.

All in all, there is simply no assurance that a buyer or lender will get notice of an impending, but as yet unrecorded, lien filing on the property. If such a party acquires the property or a mortgage on it after the lien priority date, but before a lien is recorded, that party is at risk of being victimized by a secret lien. Of course, if the courts followed the philosophy we outlined earlier with regard to vendors' liens and other secret liens, they would step in and protect the BFP. But with construction liens, things are not so simple, because construction liens are creatures of statute. The statutes may not make any provision for protection of BFPs, and courts may not feel at all comfortable creating judicial exceptions to statutory language.[30] Hence an innocent

30. Of course, a judicial recognition of such protection is possible. *See* Anderson v. Streck, 378 S.E.2d 526, 528 (Ga. App. 1989); *see also* COLO. REV. STAT. ANN. § 38-22-125

buyer or lender may be subjected to a construction lien. Therein lies the problem this Article intends to address.

At this point we propose to leave the general and examine the specific. We will consider the construction lien statutes of Arkansas and the eight states contiguous to Arkansas to see if the scenario described above can realistically occur in each of them, and whether in each there are any statutory or judicially created protections for the innocent buyer or lender. The choice of these nine states is admittedly arbitrary but will provide a snapshot of the problem in this region of the nation. We will begin with Arkansas.

IV. ARKANSAS CONSTRUCTION LIENS AS ILLUSTRATIVE OF THE SECRET LIEN PROBLEM

Arkansas follows the general pattern for construction liens outlined above. A contractor, subcontractor, or supplier is entitled to file in the public records a lien for labor, goods, or services incorporated into an improvement on real property.[31] The filing, known as a "Statement of Account," may be filed up to 120 days after the last work or material delivery by the lien claimant.[32] At least ten days prior to filing, the lien claimant must send a notice to the owner of the property of the claimant's intent to file the lien.[33] If the claimant is not paid, she or he has fifteen months after filing the lien to file a judicial complaint to foreclose the lien.[34]

The key issue in this process is the priority of the lien. All liens filed by all claimants receive the same priority date, which is the date of commencement of work on the overall project.[35] Commencement is defined by statute as "visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair of an improvement to the real

(2021) (protecting BFPs against certain mechanics liens if filed more than two months after completion of a one-family or two-family dwelling).

31. ARK. CODE ANN. § 18-44-101(a) (2021).
32. ARK. CODE ANN. § 18-44-117(a)(1) (2019).
33. ARK. CODE ANN. § 18-44-114(a) (2009).
34. ARK. CODE ANN. § 18-44-119 (2005).
35. ARK. CODE ANN. § 18-44-110(a)(1) (1995).

estate has begun or will soon begin."[36] As illustrations, the statute mentions delivery of materials, grading or excavating, laying out lines or grade stakes, and demolition of existing structures.[37]

Thus, the stage is set for the secret lien problem. One who buys or takes a mortgage on the property after commencement of the project, but before 120 days have expired after its completion, will take his or her interest subordinate in priority to any construction liens that may be filed. Yet there is no assurance whatsoever that such buyers or mortgagees will have notice that liens are pending. As noted above, they may not even be aware of the construction work or completed repairs. For liens filed by subcontractors and suppliers who participated late in the construction process, there is a period of nearly four months after construction is completed, but before any lien filing need take place, when a buyer or mortgagee might acquire an interest in the property despite no obvious evidence that any recent construction has taken place.[38]

Even if buyers or mortgagees are aware of the recent construction or repair project, and even if they are sophisticated enough to understand the need for lien waivers, they may request waivers but be negligently or intentionally misinformed by the owner as to the identity of the relevant subcontractors and suppliers. They have no practical means of protecting themselves from this eventuality. If they can convince a title insurer to cover them for this risk, which is unlikely, that merely passes any potential loss to the title underwriter—which is no fairer than leaving it with the buyer or mortgagee, although at least it spreads the loss among a broader group.

Arkansas statutes require two specific notices in connection with the eligibility of potential lien claimants to file their liens. The first is required only in the case of construction of residential property of four dwelling units or less.[39] The notice must be sent by the prime contractor to the owner before work on the project commences. Only a single notice is required, and it is effective

36. ARK. CODE ANN. § 18-44-110(a)(2).
37. ARK. CODE ANN. § 18-44-110(a)(2).
38. ARK. CODE ANN. § 18-44-117(a)(1) (2019).
39. ARK. CODE ANN. § 18-44-115(b)(4) (2021).

for all subcontractors and suppliers. If the prime contractor does not give the notice, then any subcontractor, laborer, or supplier may do so (even after the project commences),[40] and such a notice is effective for subcontractors and suppliers for work done thereafter but is not effective for the prime contractor.

If no notice is given, no lien to assist in recovery on any contract may be filed.[41] However, there are two exceptions:[42] (1) if a payment bond is in place (a rare occurrence on small residential projects), and (2) if claim of lien is for materials that have been directly sold to the owner by a supplier.[43] The notice is not required to contain any listing of the subcontractors or suppliers.[44]

The second "extra" notice applies only to properties that the first notice, discussed above, does not apply to—that is, nonresidential property and residential property with five dwelling units or more.[45] The notice is usually termed a "seventy-five day notice" because it requires that each subcontractor or supplier, in order to be eligible to file a lien, must notify the owner that it is unpaid within seventy-five days from the time that it commenced supplying materials or labor to the project.[46] The notice must identify the project or job and the subcontractor or supplier, briefly describe the work or materials, and state the amount unpaid.[47] In effect, this notice is a warning to the owner that if she or he does not take appropriate measures to insure that the claimant is paid, a lien may be filed. If a subcontractor or supplier has not sent a seventy-five-day notice, no lien can be filed.[48]

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40. ARK. CODE ANN. § 18-44-115(a)(5)(b)(i).
41. ARK. CODE ANN. § 18-44-115(a)(4), (a)(5)(C).
42. ARK. CODE ANN. § 18-44-115(a)(8).
43. ARK. CODE ANN. § 18-44-115(8)(A).
44. ARK. CODE ANN. § 18-44-115(b)(6).
45. ARK. CODE ANN. § 18-44-115(b)(4).
46. ARK. CODE ANN. § 18-44-115 (b)(5)(A). The class of persons who must file the seventy-five-day notice is broadened to include "service providers," defined as an architect, an engineer, a surveyor, an appraiser, a landscaper, an abstractor, or a title insurance agent. ARK. CODE ANN. § 18-44-115(b)(2)(B).
47. ARK. CODE ANN. § 18-44-115(b)(6).
48. ARK. CODE ANN. § 18-44-115(b)(4).

Both notices may be useful to owners who are having construction work done on their real estate. Unfortunately, they have no value to prospective BFPs or creditors making loans on that real estate. The primary reason is that they are not recorded in the public records, so that there is no certain way for a BFP to locate them. In the case of a seventy-five day notice, a purchaser or lender can *ask* the owner for a copy of the notices received, but there can be no way to ensure that the owner will provide them, or all of them.[49] Moreover, the owner may receive additional seventy-five day notices after the request is received, and indeed, even after the closing of the sale or loan.[50] The residential pre-commencement notice does not even provide this much assistance, since it does not list the names of potential lienors.[51]

All in all, it is apparent that the Arkansas General Assembly has not considered the problem of the BFP and has provided no practical means for such a party to be protected from secret mechanics' liens. There appears to be no Arkansas judicial authority considering the issue.

V. A COMPARISON WITH THE CONSTRUCTION LIEN STATUTES OF SURROUNDING STATES

In this section we propose to examine the construction lien statutes of the states surrounding Arkansas to see to what extent they too present the problem of secret liens in roughly the same manner as Arkansas. Of course, construction lien statutes are famously individualized, and no two states have identical statutes, so we are looking for overall patterns rather than perfect matches. Bear in mind, as well, that there are many subtle differences among these statutes that have nothing to do with the problem of secret liens and that are outside the scope of our treatment here.

A. Kansas

49. *See supra* notes 26-38 and accompanying text.
50. *See* ARK. CODE ANN. § 18-44-115(b)(5)(A).
51. *See* ARK. CODE ANN. § 18-44-115(a)(3), (a)(5)(B)(i).

At first glance, the Kansas construction lien statute's definitions seem quite different than Arkansas's. The priority date that the first lien attaches to the property is the date that the first individual lien claimant commences work or supplies materials,[52] rather than the date work commences on the project as a whole as in Arkansas.[53] If there are multiple lien claimants, all of them share *pro rata* in that same priority.[54] However, if that earliest lien claimant is paid off, the priority date for all remaining claimants then shifts to the date of commencement of work or supplying of materials of the next earliest claimant.[55]

The result of this somewhat bizarre system is that, until well after construction is completed, it is impossible to tell what the priority date for the construction liens will be. All that one can say for certain is that it will be at some point during the construction period.

When will a prospective mortgagee or buyer be able to tell from an examination of the public records that a lien exists? Unlike Arkansas, the time frame is determined on the basis of the behavior of each individual claimant, rather than by virtue of completion of the overall project. Each contractor or supplier must file a claim of lien, with an itemized statement of the amount owed, within four months after that particular claimant last supplied materials or performed labor on the project.[56]

But despite the differences in definitions, the result in Kansas is much the same as in Arkansas. There is a gap of several months' duration after construction is completed, during which a purchaser or mortgagee may acquire an interest in the property, and despite having performed a thorough title examination, be unaware that title will be subject to one or more construction liens. In Kansas, this is the gap between the date of lien priority, when the earliest unpaid lien claimant commences work or begins supplying materials, and the date when the lien is filed in the

52. KAN. STAT. ANN. § 60-1101 (2005).
53. ARK. CODE ANN. § 18-44-110(a)(1) (2021).
54. KAN. STAT. ANN. § 60-1101 (2005).
55. KAN. STAT. ANN. § 60-1101.
56. KAN. STAT. ANN. § 60-1102 (2005). For subcontractors and materials delivered to subcontractors, the period is reduced to three months. KAN. STAT. ANN. § 60-1103 (2005).

public records, which may be as long as three or four months after the last lien claimant completes work or finishes supplying materials. A BFP or mortgagee who buys or lends during this period is left with no protection by the statute. There appears to be no Kansas judicial decision addressing the rights of BFPs.

B. Kentucky

The rules for establishing and filing a construction lien in Kentucky are similar to those in Kansas. Each claimant's lien relates back, for priority purposes, to the date that the particular claimant began furnishing labor or materials to the job.[57] The claimant must file the claim of lien for record within six months after she or he completes work on the job.[58] Hence it appears that, like Arkansas and Kansas, there is a "gap" during which any buyer or mortgagee, even a good faith taker for value, may be subject to a secret lien.[59] However, the Kentucky statute contains an extremely useful provision for prospective purchasers and mortgagees. It states that:

> The lien shall not take precedence over a mortgage or other contract lien or bona fide conveyance for value without notice, duly recorded . . . unless the person claiming the prior lien shall, before the recording of the mortgage or other contract lien or conveyance, file . . . a statement showing that he has furnished or expects to furnish labor or materials, and the amount in full thereof.[60]

A subsequent buyer or lender[61] might at this point wonder: am I protected by this statute as a bona fide taker for value without notice? The meaning of the value part of this phrase seems simple; I have paid or lent a substantial amount of consideration.

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57. KY. REV. STAT. ANN. § 376.010(1) (West 2002).

58. KY. REV. STAT. ANN. § 376.080 (West 1990).

59. *Compare* KY. REV. STAT. ANN. § 376.010(1) (West 2002), *with* KY. REV. STAT. ANN. § 376.080 (West 1990) (demonstrating the apparent gap between the date of priority and the date when the lien is filed in the public records).

60. KY. REV. STAT. ANN. § 376.010(2).

61. Despite the somewhat ambiguous wording of the statute, it is clear in the cases that the "without notice" phrase applies to takers of mortgages as well as grantees of deeds. *See, e.g.*, Grider v. Mut. Fed. Sav. & Loan Ass'n, 565 S.W.2d 647, 649 (Ky. Ct. App. 1978).

But do I have notice? What does notice mean? Is notice that there was work done or materials supplied to the site sufficient? What about notice that a contractor or supplier did work or supplied materials, but has not yet been paid? Or suppose I have notice that the contractor or materials supplier intends to file a notice of lien? Which of these forms of notice, if any of them—all of which are something short of the actual filing of a notice of lien, which I can discover by means of a title examination—will deprive me of my BFP status?

Fortunately, a Kentucky case provides a clear answer: the grantee or mortgagee will be held to have enough notice to lose BFP status only if she or he knows that there is a prospective lienor who in fact intends to file a claim of lien, or if she or he knows that there are delinquent amounts owed to a prospective lienor and that the owner is unable to pay them.[62] Where does this leave a prospective buyer or mortgagee? Obviously, such a party will perform a title examination in the ordinary course of events. If no recorded statements from potential lienors are found in this search, and if the buyer or mortgagee is not aware of any contractor or supplier performing work or supplying materials to the property within some reasonable prior period—say, eighteen months[63]—the buyer or mortgagee can be reasonably sure of being classified as a BFP and taking free of any liens that might be subsequently filed. Note that only actual knowledge of the subsequent purchaser or mortgagee is relevant; the Kentucky Court of Appeals, at least, has taken the view that constructive notice is not relevant in assessing whether the subsequent party is a BFP.[64]

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62. *Id.* at 649-50.

63. This figure is arrived at by taking the six-month period for filing of liens after completion of the lienor's work or final supplying of material and adding a generous estimate of the time required for construction—say, twelve months. This last figure might be varied depending on the type of property and construction.

64. *Grider*, 565 S.W.2d at 649. This view is not inevitable, however. The court could have said that the subsequent party should be held to have inspected the property, detected that some work had been done on it, and inquired how long ago and by whom the work was done. In the actual case such a discussion would, however, have been dictum, since the subsequent mortgagee was fully aware of the contractor's work on the property, as the loan in question was a construction loan. *Id.* at 648.

If any recorded statements are found, or if the buyer or mortgagee is aware from other information of the existence of any contractors or suppliers, the only safe course of action is to insist on lien waivers from them, showing that they have been paid in full and hence will not file claims of lien. It would make little sense for a subsequent party who knows about a contractor or materials supplier to rely on the definitions of BFP discussed above—that is, that the potential lien claimant is not planning on filing a lien, or that the owner has sufficient funds to pay the claimant's unpaid bill—as a way of achieving priority; it is much simpler and more certain to insist on a lien waiver.

In conclusion, how good is the Kentucky statute's protection of BFPs? Good, but not perfect. There is still some risk. A subsequent buyer or mortgagee might honestly have no knowledge of the existence of a lien claimant, but the lien claimant might assert priority, claiming that the subsequent taker had actual knowledge of the lien claimant's existence and that the claimant intended to file a lien or was unpaid and that the owner lacked the funds to pay the claimant's bill. Conceivably the trier of fact could believe the lien claimant's allegations and the lien could be granted priority over the BFP. After all, lacking subjective knowledge and convincing a court of that lack of knowledge are two different things, potentially with different outcomes. There is no way to prevent this risk, although it might be passed to a title insurer, with a suitable affidavit provided by the purchaser or mortgagee.

Nonetheless, the Kentucky statute provides much better protection against construction liens for BFPs than any of the other statutes we have discussed—provided, of course, that the BFP is willing to go to the trouble of obtaining lien waivers from every contractor and supplier who has filed a recorded notice as provided by the Kentucky statute, as well as every contractor and supplier of whom the BFP is actually aware.

C. Mississippi

The Mississippi legislature radically revised its construction lien statutes in 2014.[65] Under the new statute, liens have no "relation back" priority. An individual lienor's lien arises and takes its priority only from the date that it is recorded.[66] That means that the grantee of any mortgage or deed to the property that is recorded prior to a particular mechanics' lien will take free and clear of that lien.[67] Likewise, the grantee of any mortgage or deed recorded after a particular lien is filed will take subject and subordinate to that lien.[68] Each lien stands on its own and gets its own priority date as of the date it is filed of record, so far as third parties are concerned.[69]

No issue can arise with respect to a grantee or mortgagee having notice (constructive, inquiry, or actual) of a lien that a contractor, subcontractor, or materials supplier intends to file or has the right to file but has not yet filed; the statute provides that the lien simply does not exist until it is actually filed of record. In effect, the statute is a pure "race" recording statute. Notice or BFP status is of no consequence.[70] From the viewpoint of subsequent purchasers or mortgagees, this is the best of all possible worlds; such a party who performs a "clean" title examination can be absolutely certain to take free of construction liens.

D. Missouri

The basic pattern of early priority and late filing of construction liens which we have seen in Arkansas and Kansas is

65. *See* Clyde X. ("Trey") Copeland, III & Robert P. Wise, *Expansion of Mississippi's Construction Lien Laws to Include Mississippi Subcontractors, Materialmen, Consulting Engineers, and Surveyors*, 84 MISS. L.J. 905, 908 (2015).

66. MISS. CODE ANN. § 85-7-405(1)(b) (2014).

67. Copeland, *supra* note 65, at 952-53.

68. *Id.*

69. *Id.*

70. As early as 1906, prior versions of the Mississippi mechanics lien statute protected BFPs by providing that the lien would "take effect as to purchasers or incumbrancers for a valuable consideration, without notice thereof, only from the time of commencing suit to enforce the lien." MISS. CODE ANN. § 3058 (1906). *See* McKenzie v. Fellows, 52 So. 628, 628 (Miss. 1910). The present version of the lien statute drops this language, presumably because it would now be irrelevant, since BFP status is irrelevant in a pure "race" regime.

also applicable in Missouri. The priority date for all liens "relates back" to the date when work on the overall project commences—often termed the "first spade" rule.[71] The claim of lien must be filed within six months after the claim accrues,[72] a phrase that has been construed to mean six months after the last work has been performed or materials delivered.[73] There is thus a wide gap period within which a BFP might buy or take a mortgage (or in Missouri, more likely a deed of trust) on the property, unaware from a title examination or an inspection of the property that there is an impending filing of a lien. How would such a case be handled in Missouri?

There are indeed reported Missouri cases in which a purchaser was held to be subject to a lien that was not yet filed of record at the time of the purchase, but in each of these cases the transferee was fully aware of the construction project, and indeed, construction was still ongoing at the time of the sale.[74] Thus, the purchaser in these cases was emphatically not a BFP. By negative inference, we might suspect that a BFP would take free of an unfiled mechanics' lien in Missouri, but there is no authority to help us determine whether this is so, or if it is, how to define the parameters of BFP status in Missouri.[75] Unfortunately, there is simply no express answer to our question in statutory or case law.

E. Oklahoma

In Oklahoma mechanics' liens follow the "first spade" rule; all liens take their priority from the date the building or project

71. MO. REV. STAT. § 429.060 (1939). Technically, this date establishes priority only for a lien on the land. MO. REV. STAT. § 429.050 (1939) gives the properly perfected lienor a lien on the buildings or improvements even as against preexisting mortgages and other encumbrances. *See* Bob DeGeorge Assocs., Inc. v. Hawthorn Bank, 377 S.W.3d 592, 598-99 (Mo. 2012).

72. MO. REV. STAT. § 429.080 (2007).

73. *See* United Petroleum Serv., Inc. v. Piatchek, 218 S.W.3d 477, 482-83 (Mo. Ct. App. 2007).

74. Lee & Boutell Co. v. C. A. Brockett Cement Co., 106 S.W.2d 451, 459-61 (Mo. 1937); Williams v. Chi., S.F. & C. Ry. Co., 20 S.W. 631, 633, 642 (Mo. 1892); McAdow v. Sturtevant, 41 Mo. App. 220, 224-25, 228, 231 (Mo. Ct. App. 1890).

75. *See supra* notes 63-67 and accompanying text.

commences.[76] It has been said that the recording requirement of the Oklahoma mechanics' lien statute exists to protect BFPs.[77] However, since recording need not occur until four months after the last material or equipment used on said land was furnished or the last labor was performed under the contract,[78] recording is a very ineffectual method of protecting BFPs. Like Arkansas, Kansas, and probably Missouri, there is a wide time gap within which a purchaser or mortgagee might acquire or take a security interest in the property without any protection from the recording system. No judicial decision seems to address protection for BFPs.

F. Tennessee

Tennessee's statutes contain an unusual provision allowing a contractor to record an acknowledged form of the construction contract in the records of the register of deeds in the county where the real estate is located.[79] If such a recording is made, it immediately gives notice to any subsequent purchaser or encumbrancer of a mechanics' lien that may arise in favor of the contractor.[80] If the contract is not thus recorded, the contractor must record a notice of lien within ninety days after the improvement is completed or abandoned.[81] If this time deadline is met, the lien's attachment dates back to the time of visible commencement of operations on the improvement—the "first spade" rule;[82] if it is not met, there is no relation back, and the lien attaches only when it is recorded.[83]

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76. OKLA. STAT. tit. 42, § 141 (2013).

77. Davidson Oil Country Supply Co., Inc. v. Pioneer Oil & Gas Equip. Co., 689 P.2d 1279, 1280 (Okla. 1984).

78. OKLA. STAT. tit. 42, § 142 (1980).

79. TENN. CODE ANN. § 66-11-111 (2007).

80. TENN. CODE ANN. § 66-11-111. The contract may be recorded at any time up to ninety days after the improvement is completed or abandoned. TENN. CODE ANN. § 66-11-112(a) (2007).

81. TENN. CODE ANN. § 66-11-112(a).

82. TENN. CODE ANN. § 66-11-104(a) (2013).

83. TENN. CODE ANN. § 66-11-112(a).

Thus, Tennessee follows the pattern we have already seen in Arkansas, Kansas, likely Missouri, and Oklahoma, with one exception: the possibility that that the lienor will have recorded a copy of the construction contract at an early stage, thus giving notice of his or her potential lien rights to prospective purchasers or lenders. Obviously, anyone considering buying or lending on property and finding, in a title examination, a construction contract recorded recently,[84] will be well advised to obtain a lien waiver from such a contractor.

Hence, if no contract is recorded, the "gap" period, during which a BFP will be subject to a lien that relates back to the commencement of the project, is fairly narrow: ninety days from the time the lien claimant completes or abandons his or her work. Nonetheless, the risk is present, and nothing in the Tennessee statute or judicial decisions appears to protect BFPs against it.

G. Texas

Texas, rather oddly, recognizes two categories of mechanics' liens: constitutional[85] and statutory.[86] A constitutional lien, in principle, is self-executing and takes effect without any filing by the lien claimant unless the property is a homestead.[87] A statutory lien[88] requires compliance with specific procedures, including the filing for record of an affidavit of claim by the fifteenth day of either the third or fourth month after the month the contractor or supplier has completed, terminated, or abandoned work on the improvement, depending on the circumstances.[89]

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84. A prime contractor's lien lasts for one year after completion or abandonment of the improvement. TENN. CODE ANN. § 66-11-106 (2007). Subcontractors' and materials suppliers' liens last for only ninety days after completion of work or the furnishing of materials. TENN. CODE ANN. § 66-11-115(b) (2007).

85. TEX. CONST. art. XVI, § 37.

86. TEX. PROP. CODE ANN. § 53.021 (West 2022).

87. *See* First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 267 (Tex. 1974).

88. TEX. PROP. CODE ANN. § 53.021.

89. TEX. PROP. CODE ANN. § 53.052 (West 2022). The deadlines indicated in the text take effect in 2022. Relevant circumstances include whether the claimant is a prime contractor or a subcontractor or supplier and whether the real estate is residential. The details are not significant for our purposes.

The constitutional lien might seem preferable from the viewpoint of lien claimants, since it takes effect automatically and requires no filing.[90] However, it is subject to several important limitations. It operates only in favor of prime contractors—those who deal directly with the owner of the property—and not for subcontractors.[91] It is available only for improvements to an "article" or "building," while the statutory mechanics' lien can also cover architects, engineers, surveyors, landscape providers and installers, and demolition workers.[92]

Significantly for our purposes, constitutional mechanics' liens are said not to be binding on BFPs.[93] This rule is detrimental to a lien claimant, and is viewed as a reason for a claimant not to rely on a constitutional lien, or to file for record an affidavit of lien in order to prevent BFPs from arising.[94] From the viewpoint of purchasers and lenders the rule seems beneficial, but it is not quite the panacea that they might hope, in part because BFP is narrowly defined. A purchaser or creditor who has seen the construction in process of completion[95] (or presumably, one who has other actual knowledge of it) is deemed to be aware that mechanics' liens may be filed, and thus is not considered a BFP. That seems fair enough. The cases all involve newly constructed houses, and it is reasonable to expect someone who buys a new

90. However, if the property is a homestead, the contractor and owner must enter into a written contract; both spouses must sign if the owner is married, and the contract must be filed for record with the county clerk's office. Additional requirements apply if the contract is for remodeling. *See* TEX. PROP. CODE ANN. § 53.254 (2022); TEX. CONST. art. XVI, § 50; J. PAULO FLORES, TEXAS RESIDENTIAL CONSTRUCTION LAW MANUAL § 6:7 (2021).

91. The latter are covered by the statutory lien. TEX. PROP. CODE ANN. § 53.021.

92. FLORES, *supra* note 90, § 6:2; TEX. PROP. CODE ANN. § 53.021.

93. *See, e.g.*, Tex. Wood Mill Cabinets, Inc. v. Butter, 117 S.W.3d 98, 105 (Tex. App. 2003).

94. *See* FLORES, *supra* note 90, §§ 6:2, 6:12. The affidavit is the same form that is used to perfect a statutory mechanics lien. *See* TEX. PROP. CODE ANN. § 53.054(a) (1997).

95. *See* FLORES, *supra* note 90, § 6:12. The other cases cited by *Tex. Wood Mill Cabinets, Inc.* for this proposition probably all involve fact patterns in which the purchaser actually saw the ongoing construction. *See, e.g.*, Valdez v. Diamond Shamrock Refin. & Mktg. Co., 842 S.W.2d 273, 276 (Tex. 1992); Inman v. Clark, 485 S.W.2d 372, 374 (Tex. Civ. App. 1972). *Wood v. Barnes* does not expressly state that the purchaser saw the construction, but the timing of the purchase, when compared with the date of recording of the affidavit of claim of lien, strongly suggests that the purchasers either saw the construction or were actually aware that it had just been completed. 420 S.W.2d 425, 427 (Tex. Civ. App. 1967)

house to obtain a list of contractors and suppliers from the seller and insist on lien waivers from them.[96] It is not clear what a Texas court would do with a case in which work has recently been completed but the purchaser or creditor is unaware of it; a new roof, a repaved parking lot, or a new HVAC system might provide an example. Would the court hold that the purchaser or creditor should have discovered the construction work, and hence is not a BFP? The answer is uncertain.

If the lienor files for record an affidavit claiming a constitutional lien, but does so after the property has been sold or mortgaged by the owner, the situation becomes even murkier. This is what occurred in *Wood v. Barnes*.[97] Putting aside the notice that the purchaser received from viewing the construction itself, as discussed above, the court in that case seems to hold that the filing of the affidavit gave the purchaser notice of the lien even though it was filed *after* the purchaser bought the property. "The [buyers] having purchased the property before the expiration of the 120-day period [allowed for filing the affidavit] must take constructive notice[98] of [the lienor's] existing right to file his affidavits."[99] In other words, a purchaser has constructive notice of an affidavit that might be recorded in the future![100] Placing this conclusion on the ground of constructive notice seems to make no sense at all; one might as well say that, if the lienor ever files an affidavit of claim within the allowed statutory period, the protection for BFPs is simply nonexistent.[101]

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96. There remains, of course, the problem of the seller who dishonestly fails to disclose a complete list of contractors and suppliers.

97. 420 S.W.2d at 427.

98. *Id.* at 428. It is unclear whether the discussion in the opinion about constructive notice is mere dictum, in light of the fact that the buyers saw the ongoing construction and hence arguably had actual knowledge of the construction contracts. *See Inman*, 485 S.W.2d at 374.

99. *Wood*, 420 S.W.2d at 428.

100. Flores agrees with this interpretation of the case. *See* FLORES, *supra* note 90, § 6.14: "When a lien affidavit is filed after the property is sold by the owner who contracted for the improvements, the purchaser is deemed to have constructive notice of a contractor's right to assert a lien for the statutory period, even where the filing period commenced prior to the purchase." Apparently *contra*, *see* Atkinson v. Swoboda, No. 01-94-00510-CV, 1997 WL 94358 at *6 (Tex. App. Mar. 6, 1997).

101. Incidentally, why the *statutory* time limit for filing the affidavit should be binding in the case of a *constitutional* mechanics lien is a mystery that has not been satisfactorily

One can only conclude that the apparent protection for BFPs against constitutional mechanics' liens in Texas is, to put it mildly, confusing. For statutory mechanics' liens on the other hand, there is no confusion because there is no protection. For priority purposes, both constitutional and statutory liens relate back to the commencement of construction.[102] Thus for statutory liens, Texas is similar to the other "first spade" states we have discussed, and there is ample opportunity for a BFP to suffer an unwarranted loss of priority to a construction-lien claimant.

One additional factor can affect the rights of potential BFPs in Texas. If the property in question is a homestead, a mechanics' lien claimant must execute a written contract with the owner (and if the owner is married, with his or her spouse) before commencement of work or furnishing of materials.[103] The contract must be recorded in the county clerk's records.[104] While the statute states no time deadline for the filing of the contract, it is likely to be filed shortly after its execution.[105] Once recorded, the contract itself will, of course, give subsequent purchasers and mortgage lenders notice of the contractor's identity and the fact of the construction project, and thus preclude them from becoming BFPs as to that project if a constitutional mechanics' lien is claimed.[106] It will also warn them that they will need to obtain a lien waiver from that contractor.[107]

To summarize, can a prospective BFP or mortgagee take free of a mechanics' lien in Texas? In theory the answer is probably yes, but only if a set of conditions is met—conditions which, in

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explained, but it is. *See* Detering Co. v. Green, 989 S.W.2d 479, 481 (Tex. App. 1999); FLORES, *supra* note 90, § 6.14.

102. TEX. PROP. CODE ANN. § 53.124 (West 2021) (statutory liens); Tex. Wood Mill Cabinets, Inc. v. Butter, 117 S.W.3d 98, 105 (Tex. App. 2003) (discussing constitutional liens).

103. FLORES, *supra* note 90, § 5.12.

104. TEX. CONST. art. XVI, § 50(a)(5); TEX. PROP. CODE ANN. § 53.254(a)-(c), (e) (West 2022). See *Cavazos v. Munoz* for a comprehensive explanation. 305 B.R. 661, 666 (S.D. Tex. 2004). *See also* TEX. PROP. CODE ANN. § 53.254(g) (discussing how, for homesteads, additional language must also be included in the affidavit claiming a lien discussed in the text); Morrell Masonry Supply, Inc. v. Loeb, 349 S.W.3d 664, 670 (Tex. App. 2011) (holding a claimed lien invalid for failure to include the required language).

105. TEX. CONST. art. XVI, § 50(a)(5).

106. TEX. CONST. art. XVI, § 50(a)(5).

107. TEX. CONST. art. XVI, § 50(a)(5).

the aggregate, seem quite improbable. They are as follows: (1) the lien claimant opts to claim a constitutional rather than a statutory lien; (2) the property in question is not a homestead, or if it is, the purchaser or mortgagee acquires its interest before the lien claimant records the construction contract; (3) the purchaser or mortgagee does not see the ongoing construction or otherwise gain any actual knowledge of it before acquiring its interest; and (4) the lien claimant does not record an affidavit of lien claim within the time limit allowed by the statute. If these conditions are met, the purchaser or lender will probably prevail unless a Texas court holds that BFP status should be denied because the purchaser or mortgagee *should* have been aware of the recent construction on the property,[108] even though she or he was not. In sum, there is a high risk in Texas that a BFP will be held subject to unrecorded mechanics' liens.

VI. WHAT SHOULD BE DONE?

The survey of Arkansas and surrounding states in the previous section is sufficient to illustrate that the "gap" problem with mechanics' liens is a real problem, and that situations can and do arise in which purchasers and lenders who would ordinarily be considered BFPs can and sometimes do unfairly lose priority to mechanics' liens. Indeed, it is widely assumed that if visible construction is going on or has recently occurred, a purchaser or mortgagee is bound to know about it and cannot be considered a BFP at all.[109] This assumption is simply unjust; it

108. Perhaps such a duty might exist because the purchaser or mortgagee should have made a more careful or thorough inspection of the property. On this point there seems to be no clear Texas case authority. *See, e.g.*, Apex Fin. Corp. v. Brown, 7 S.W.3d 820, 832 (Tex. App. 1999) (remanding this issue to the trial court for finding of fact).

109. This assumption is built into the lien statute in Minnesota. Like a great many states, the Minnesota statute provides for a common priority date for all liens, but with apparent protection for BFPs:

> All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice

fails to consider whether the construction is sufficiently obvious, and whether the subsequent purchaser or creditor can tell that it has occurred recently enough that a legitimate lien can still be filed by a contractor or supplier on account of it. A system that relies on this sort of guesswork is sloppy and unfair to buyers and lenders. To the extent that its risks can be passed on to title insurers, it ends up imposing unnecessary costs on all title insurance customers.

What are the alternatives for reform? There are three possibilities available in existing state law, each of which has both advantages and shortcomings.

A. Abrogate "Relation Back"

Since the fault with the existing system lies in the underlying legal concept of "relation back" of mechanics' liens, the simplest approach is to do away with relation back. In such a regime, a mechanics' lien would take its priority only from the date it was filed of record. In such a system, a purchaser or mortgage lender would determine whether there were any existing liens by performing (or having its title insurer perform) an ordinary title examination. No special risk would be involved. From the viewpoint of buyers and lenders, this sort of system would be ideal.

One might say that moving to such a system would be politically impossible, since the construction industry would oppose it so vigorously. However, it is precisely the system Mississippi adopted in 2014.[110] One of its apparent faults is that each subcontractor and supplier gets its own individual priority date, determined by its recording date. That produces a result that may seem arbitrary, as compared with most states that assign a

> thereof. As against a [BFP], mortgagee, or encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground . . . .

MINN. STAT. § 514.05(1) (2022). The protection for BFPs turns out to be relatively meaningless, since once the beginning of actual and visible construction has occurred, no one can be a BFP! *See* Richards v. Sec. Pac. Nat'l Bank, 849 P.2d 606, 612 (Utah Ct. App. 1993).

110. MISS. CODE ANN. § 85-7-405(1)(b) (2014).

common priority date to all lien claimants—commonly the date of commencement of construction—and allow all claimants *pro rata* claims against the property, an arguably more equitable arrangement. In Mississippi, it was unnecessary to justify moving away from such a *pro rata* system, since prior to the 2014 revamping of the statute, subcontractors had no lien rights at all.[111] In most states, a shift to a Mississippi-type system is difficult to conceive politically.

B. Require Advance Recording of a Notice of Work by Prospective Lienors

Under this concept, a mechanics' lien could relate back to some early, common lien date, such as the date of commencement of construction, but only if the lien creditor had filed for record a notice that she or he was providing labor or materials for the job before a subsequent purchaser or creditor acquired an interest in the property. The notice would not be a claim of lien, but only a sort of placeholder, notifying the world that the party filing it would have the right to claim a lien in the future. Application of this rule would have the effect of allowing any purchaser or lender, by performing a title examination, to compile a list of contractors or suppliers from whom it would be necessary to obtain lien waivers. The Kentucky statute adopts this rule with respect to BFPs.[112]

Such a system would be much preferable, from the subsequent purchaser or lender's viewpoint, to attempting to get a list of contractors and suppliers from the owner of the property or general contractor. It would eliminate the risk that the owner or general contractor might lie or forget to include someone who should have been included on the list, as well as the risk that the job itself might be unnoticeable, so that the subsequent purchaser would not think to ask for a such a list. Instead, the title examination would produce a definitive and reliable list of parties from whom lien waivers needed to be obtained.

111. MISS. CODE ANN. § 85-7-405(1)(b).
112. KY. REV. STAT. ANN. § 376.010(1) (West 2002).

Nonetheless, such a system is not as desirable from the BFP viewpoint as the first solution mentioned above, the abrogation of the "relation back" concept. The reason is that it would still force the subsequent purchaser or lender to go through the administrative burdens of the lien waiver process, which is tedious and fraught with some potential for error. But it would be a great improvement over the present system.

From the viewpoint of prospective lien claimants, the burden of recording a notice of this sort is relatively slight, and one of which they could hardly complain. A contractor or materials supplier could accomplish the filing with a one-page printed form, without the help of a lawyer, and with a minimal fee. This approach would go a long way toward balancing the scales of fairness between construction lien claimants and BFPs.

C. The Uniform Construction Lien Act's Approach

In 1987 the Uniform Law Commission promulgated the Uniform Construction Lien Act ("UCLA"). The act was not the product of independent drafting, but was derived by splitting out Article Five of the Uniform Simplification of Land Transfers Act,[113] which had itself been promulgated in 1977 but which had achieved only one adoption,[114] and publishing it as a separate act. That article in turn had been roughly based on the Florida mechanics' lien statute.

The UCLA takes a novel approach to establishing construction lien priority while at the same time protecting the rights of BFPs and lenders. As will be seen, its approach is complex—indeed, its very complexity may explain its lack of adoptions—but functional. While it seems highly unlikely that the UCLA is going to gain any future adoptions at this point, it provides a rather ingenious point of reference for our discussion

113. NAT'L CONF. OF COMM'RS ON UNIFORM STATE L., AM. BAR ASS'N, UNIFORM CONSTRUCTION LIEN ACT 5 (1987) [hereinafter UCLA]; *see also* Sara E. Dysart, *USLTA: Article 5 "Construction Liens" Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens*, 12 ST. MARY'S L.J. 113, 116-118 (1980).

114. Nebraska adopted the construction lien article of USLTA and adopted it as a free-standing act in 1981; NEB. REV. STAT. §§ 52-125 to -159.

here. It hinges on the concept of a recorded "notice of commencement."

Under the UCLA a notice of commencement may be recorded either by the owner of the property (which would ordinarily be the case) or by a prospective lien claimant. The purpose of the notice is to let parties who acquire interests in the property in the future know that there is construction on the real estate which may give rise to lien claims. The notice itself, however, is general, and does not purport to identify prospective claimants. If the notice remains in effect, it provides a priority date, and all lien claims will relate back to the notice's recording date. If no notice is recorded, the priority date is normally the date of visible commencement of work on the project. Ordinarily it is expected that a notice of commencement will be filed.[115]

If a lien claimant records a lien while a notice of commencement is in effect,[116] the lien's priority relates back to the date the notice of commencement was recorded. However, an owner can terminate a notice of commencement by recording a notice of termination to take effect at least thirty days in the future, and by sending a notice to all prospective lien claimants who have requested notification of termination.[117]

If a purchaser or lender decides to buy or take a mortgage on the property, it will (if well advised) insist that the owner terminate the notice of commencement as described above. When lien claimants receive notice that termination is about to occur, they are warned that they must act promptly to preserve their liens. If they do not record their liens before the thirty-day period expires, they will lose the relation-back benefit. Their priority date instead will become thirty days after the termination date or the date that they actually record, whichever is earlier.[118] Thus,

115. UCLA, *supra* note 113, § 301; *Id.* at 8. If no notice of commencement is filed by the owner, a lien claimant can file one later to have benefits described below. *Id.* at 70.

116. The notice of commencement is good for the time it states, but at least six months and no more than three years (or one year in the case of a buyer of residential real estate); *Id.* § 301(b).

117. *Id.* § 302(a)(1)(iii)-(iv). The owner must also publish notice of the termination and record an affidavit stating that the notice has been sent to all of the claimants who requested it. UCLA, *supra* note 113, § 302(a)(4).

118. *Id.* § 208(c).

they have a strong incentive to record immediately. At the same time, the purchaser or lender who waits until thirty-one days after the termination date of the notice of commencement to close the loan or sale can be certain that its title examination will have identified all construction liens that have any possibility of gaining priority over the new deed or mortgage.

While this system seems complex, it embodies a strong set of benefits:

> (a) All lien claimants who request notice of termination of notice of commencement, and who file their liens promptly, get the benefit of equal relation-back lien priority.
>
> (b) All purchasers and lenders can be assured of priority over all construction liens, provided they insist on termination of notice of commencement and are willing to wait at least thirty-one days after the termination takes effect to close their sale or loan.
>
> (c) The priority of lenders and purchasers does not depend on their going through the administrative burden of obtaining lien waivers from potential lien claimants.

Despite these benefits, however, the UCLA's overall structure is daunting to explain. It represents a radical departure from the existing mechanics' lien systems of most states, and it seems improbable that any groundswell of enthusiasm could be generated for its adoption.

CONCLUSION

As these three alternatives illustrate, the secret lien problem is not insoluble in the context of construction liens. Of the solutions presented, the second is probably the most appealing from a political viewpoint. It requires every subcontractor and supplier who expects to have the benefit of relation-back priority to record a public notice of work. The notice warns future lenders and purchasers that, to be safe from unexpected liens, they must obtain lien waivers from all those who have recorded such notices.

This solution is simple and easy to explain to a legislative committee. Its burdens are not extreme to contractors and suppliers, and it should be highly appealing to the title insurance industry and to real estate investors, banks, and other lenders who must pay title insurance premiums. It seems a much fairer allocation of risks than the present system's secret liens.