

## CONSTRUCTION LIENS: A NATIONAL REVIEW AND TEMPLATE FOR A UNIFORM LIEN ACT

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### I. INTRODUCTION AND GENERAL REVIEW

Although laws creating construction liens, also known in many states as “mechanics’ liens”, originated in the late nineteenth century, many lawyers and law students are unfamiliar with them. This article provides a general analysis of the nature and application of the various construction lien laws in the United States and sets forth a position on how a uniform national construction lien law statute could be structured. Highlighting basic form and function, this review will discuss the origins of the construction lien, the process and general requirements of perfecting and enforcing one, the various defenses to enforcement, and the potential benefits of a uniform construction lien act.

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A “mechanic’s lien” is a statutory remedy intended to secure payment for labor, materials, or machinery furnished in the improvement of specific real property or structures affixed to real property on behalf of another person or entity.<sup>1</sup> While many states use the term “mechanic’s lien,” it is arguably a misnomer since mechanics generally have nothing to do with a construction project. As such, this article uses the more descriptive term “construction lien” interchangeably with the term “mechanic’s lien.”

While statutes vary by state, the construction lien’s basic purpose is to protect those who furnish labor, materials, or equipment for the “improvement” of real property.<sup>2</sup> Construction liens provide the claimant with a non-consensual lien or security interest in the improved real property.<sup>3</sup> In the event of nonpayment, a construction lien claimant may compel the sale of the real property to pay for the labor or materials.<sup>4</sup> Construction lien remedies supplement any other remedies a claimant may possess, including breach of contract, quantum meruit, account stated, or unjust enrichment claims.<sup>5</sup>

## II. HISTORICAL REVIEW

At common law, possessory liens were available to mechanics and laborers who improved personal—rather than real—property.<sup>6</sup> The laborer maintained a possessory lien in the personal property improved, which could be sold in the event of non-payment.<sup>7</sup> However, this remedy provided little benefit if the personal

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1. DAVID A. SCHMUDDE, *A PRACTICAL GUIDE TO MORTGAGES AND LIENS* 331 (2004).

2. *Id.*

3. *Id.*

4. *See, e.g.*, *Elec. Specialties, Inc. v. Siemens Bldg. Techs., Inc.*, 837 N.E.2d 1052, 1055 (Ind. Ct. App. 2005) (citing IND. CODE § 32-28-3-1 (2004)).

5. *See, e.g.*, *MD Drilling & Blasting, Inc. v. MLS Constr., L.L.C.*, 902 A.2d 686, 690 (Conn. App. Ct. 2006) (holding that mechanic’s lien foreclosure is not “an exclusive remedy that would prevent the plaintiff from obtaining judgment on the breach of contract and unjust enrichment claims at the same time it obtains judgment of strict foreclosure”); *Dane Constr., Inc. v. Royal’s Wine & Deli, Inc.*, 480 N.W.2d 343, 345–46 (Mich. Ct. App. 1991) (citing MICH. COMP. LAWS § 570.1117(5) (1990)) (holding that mechanic’s lien “foreclosure is a cumulative remedy that may be pursued simultaneously with an action on the contract from which the lien arose”).

6. STEPHEN ANGLE, EDWARD HORSEY & DAVID ROBERTS, *LANDSCAPE ESTIMATING AND CONTRACT ADMINISTRATION* 190 (2002).

7. *Id.*

property was relinquished without payment. Despite its shortcomings, the possessory lien upon personal property remained a protection not afforded to those who improved real property.<sup>8</sup> A laborer relinquished ownership of any improvements to real property upon providing them, and a judgment was his only means of recovering the value of the contribution.<sup>9</sup>

The construction lien originated in 1791 during the development and construction of Washington, D.C.<sup>10</sup> The commissioners charged with developing the new seat of the national government wished to encourage and stimulate further construction.<sup>11</sup> Attendees at a meeting on September 8 of that year adopted a memorial, which urged Maryland lawmakers to pass a law securing a lien for laborers and material suppliers constructing new houses.<sup>12</sup> Thomas Jefferson and James Madison were among those who endorsed the memorial.<sup>13</sup> On December 19, 1791, Maryland became the first state to enact a construction lien law.<sup>14</sup> Pennsylvania followed suit with its own legislation in 1803.<sup>15</sup> Over the next six decades, more than thirty construction lien statutes were enacted throughout the nation.<sup>16</sup> Originally available only for new construction of homes within specific city limits, construction liens have since evolved to become enforceable for nearly any improvement to any real property.<sup>17</sup>

While a number of economic and social forces likely contributed to the expansion of construction lien legislation, labor movements were perhaps the most significant.<sup>18</sup> Pro-labor organizations and political parties involved with the labor movement were quick to add construction liens to their platforms in their quest to support the urban working class, furthering the spread of construction lien legislation throughout the existing

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8. *Id.*

9. *Id.*

10. HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 153 (1938).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 154.

15. *Id.*

16. *Id.* at 155.

17. *Id.* at 155–56; LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 178 (1985).

18. FARNAM, *supra* note 10, at 155; FRIEDMAN, *supra* note 17, at 178.

states.<sup>19</sup> Interestingly, the motives of these supportive organizations and parties were not germane to the original philosophy behind the construction lien.<sup>20</sup> While the laws were pro-labor, construction lien laws were unique because their initial focus was not the protection of the urban poor, like that of most pro-labor legislation.<sup>21</sup> Rather, construction lien laws protected labor in a more capitalistic sense, by furthering the development of city infrastructures, while consequently providing a safer form of collateral in what historian Lawrence Friedman describes as “an age when cash, hard money, [and] liquid capital was short.”<sup>22</sup> Yet for supporters of the labor movements, construction liens were the answer to a prevalent condition whereby contractors used laborers and materialmen to put up buildings for profit and then refused them their rightfully earned wages.<sup>23</sup>

### III. OBJECT AND CONSTRUCTION

Real property law generally provides that an interest arises in the whole when the various parts constituting the completed object—including a person’s labor, skill, or material—become inextricable.<sup>24</sup> The nature and value of the original object is so changed that it is unsusceptible to division.<sup>25</sup> Construction lien laws are based upon this well-established principle: they provide a vehicle by which the improver may obtain an interest in the whole to secure payment for the value of his contribution.<sup>26</sup>

State courts repeatedly face two issues: 1) whether the character of the work falls within the statute and gives rise to a construction lien, and 2) whether the statutory requirements or procedures have been satisfied to perfect a construction lien. When determining these issues, courts generally employ strict statutory construction.<sup>27</sup> Those claiming a construction lien bear the burden of establishing that their claim lies within the provisions

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19. FARNAM, *supra* note 10, at 155.

20. FRIEDMAN, *supra* note 17, at 178.

21. *Id.*

22. *Id.*

23. FARNAM, *supra* note 10, at 155.

24. *Jerecki Mfg. Co. v. Struther, Wells & Co.*, 8 Ohio Cir. Dec. 5, \*2 (1897).

25. *Id.*

26. 53 AM. JUR. 2D *Mechanics’ Liens* § 12 (2007).

27. *Wind Dance Farm, Inc. v. Hughes Supply, Inc.*, 792 N.E.2d 79, 82 (Ind. Ct. App. 2003); *Mark Twain Kan. City Bank v. Kroh Bros. Dev. Co.*, 798 P.2d 511, 515 (Kan. Ct. App. 1990).

of the statute,<sup>28</sup> and substantial compliance with the statute will not pass strict scrutiny.<sup>29</sup> As a general rule, if courts determine that valid construction liens exist, lien statutes are thereafter liberally construed.<sup>30</sup>

Courts interpret construction lien statutes by following the canons of statutory construction,<sup>31</sup> beginning with the language of the statute. Construction is unnecessary if the statutory language is plain and unambiguous.<sup>32</sup> If the language leaves room for interpretation, courts must examine every word and read every statutory provision in reference to the whole, while being cognizant that remedial statutes are construed broadly to effectuate their purpose and afford the security intended.<sup>33</sup>

#### IV. ELIGIBILITY FOR A CONSTRUCTION LIEN

A construction lien provides statutory protection to parties that supply labor, materials, equipment, and in some cases, professional services used in the improvement of real property.<sup>34</sup> The laws of each state often uniquely define those entitled to claim a construction lien, and no uniform construction lien law exists. While a majority of states provide an umbrella of protection to “every person” who participates in the construction of an improvement to real property,<sup>35</sup> some states are more reserved and systematically distinguish between classes of laborers and material suppliers, determining eligibility based upon status or contractual relationship.

States that distinguish based upon the class of laborer generally afford lien claims to categories of laborers, general or prime contractors, subcontractors, material suppliers, equipment suppliers, and professional service providers.

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28. *Lentz Plumbing Co. v. Fee*, 679 P.2d 736, 744 (Kan. 1984).

29. MICH. COMP. LAWS § 570.1302 (2006); *N. Concrete Pipe, Inc. v. Sinacola Cos.-Midwest, Inc.*, 603 N.W.2d 257, 260 (Mich. 1999).

30. *See Lewis v. Wanamaker Baptist Church*, 692 P.2d 397, 399 (Kan. Ct. App. 1984); *Vulcraft v. Midtown Bus. Park, Ltd.*, 800 P.2d 195, 199–200 (N.M. 1990).

31. ROBERT A. KATZMANN, *COURTS & CONGRESS* 49 (1997).

32. *Robinson v. Shell Oil, Co.*, 519 U.S. 337, 340 (1997).

33. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 323–24 (1994).

34. 53 AM. JUR. 2D, *supra* note 26, § 12.

35. *See* ARIZ. REV. STAT. ANN. § 33-981 (2007); ARK. CODE ANN. § 18-44-101 (2003); CAL. CIV. CODE §§ 3110, 3106 (1993); OKLA. STAT. tit. 42, § 141 (2001); TENN. CODE ANN. § 66-11-102 (Supp. 2007); WIS. STAT. § 779.01(3) (Supp. 2006).

*Laborer.* A laborer is a non-professional who performs work on site.<sup>36</sup> This is one of the most general categories, and any person employed to furnish labor in the improvement of real property may be considered a laborer and, as such, is entitled to a lien.<sup>37</sup>

*Prime or General Contractor.* A prime or general contractor is an entity that performs and oversees improvements to real property under a direct contract with the property owner,<sup>38</sup> and is entitled to a construction lien if it follows the appropriate statutory requirements.<sup>39</sup>

*Subcontractor.* A subcontractor is a contractor that provides labor or materials under a contract or other agreement with the prime contractor,<sup>40</sup> and will be entitled to a construction lien if it follows the appropriate statutory requirements.<sup>41</sup>

*Material Supplier.* An entity that supplies materials in the improvement of real property at the request of a property owner, prime contractor, or subcontractor<sup>42</sup> may be entitled to a construction lien, depending, in many cases, upon how far removed the supplier is from the prime contractor.<sup>43</sup> Some states require the material to be incorporated into the improvement.<sup>44</sup> Others presume that the materials were used if they were delivered to the construction site, even if they were not actually incorporated into the improvement.<sup>45</sup> Supplies delivered to suppliers will generally not qualify for the protection of a construction lien.<sup>46</sup>

*Equipment Supplier.* A party or entity supplying equipment, machinery, tools, or appliances<sup>47</sup> used in constructing improvements to real property is generally entitled to a

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36. See BLACK'S LAW DICTIONARY 1637 (8th ed. 2004).

37. See *id.* at 943.

38. See *id.* at 350–51.

39. See *id.* at 943.

40. See *id.* at 1464.

41. See *id.* at 943.

42. See *id.* at 998.

43. See *id.* at 493.

44. *Farmers' Irrigation Sys. Co. v. Kamm*, 135 P. 766, 767 (Colo. 1913).

45. See IND. CODE ANN. § 32-28-3-1 (2002 & Supp. 2007); *Templeton v. Sam Klain & Son, Inc.*, 425 N.E.2d 89 (Ind. 1981); *Weyerhaeuser Co. v. Twin City Millwork Co.*, 191 N.W.2d 401, 291 Minn. 293 (1971); *Clyborn v. Reeves*, 234 N.E.2d 613 (Ohio Ct. App. 1968).

46. See IOWA CODE ANN. § 45-501 (2007); *Morris County Indus. Park v. Thomas Nicol Co.*, 173 A.2d 414 (N.J. 1961); *Vulcraft v. Midtown Bus. Park, Ltd.*, 800 P.2d 195, 197 (N.M. 1990).

47. See BLACK'S LAW DICTIONARY, *supra* note 36, at 998.

construction lien.<sup>48</sup> When the equipment being supplied is rented, the lien may be asserted for the reasonable value.<sup>49</sup> However, Delaware's statute lacks any provision for rental equipment.<sup>50</sup>

*Professional Service Provider.* The category of professional service providers is broad, with varying lien eligibility depending on the state. In a majority of states, professional service providers such as architects, engineers, landscape architects, and surveyors, who add value to real property by performing preparatory work such as drawings, design, surveying land and landscape design may be entitled to a construction lien.<sup>51</sup> Some states require that a professional service provider use the drawings, plans, or designs in the improvement.<sup>52</sup> Not all professional services are eligible for a lien, and a few states exclude certain professional services. For example, Alabama and South Carolina law provides that a land surveyor is not eligible for a construction lien.<sup>53</sup>

The dissimilarities and nuances among the states regarding exactly who is entitled to claim a lien support the proposition that a uniform lien act would be beneficial. A uniform act would clearly define all those entitled to a construction lien, incorporating myriad case law from the various states where laborers, service providers, and material suppliers have pursued mechanics' liens through the courts throughout our nation's history. In general, a uniform act would define those entitled to a lien based upon the categories stated above. It would draw a bright line demonstrating how far removed a prime contractor may be from a lien claimant. In general, no entity beyond a "third tier" laborer or supplier should be entitled to lien rights. An example of a "third tier" entity would be a supplier to a subcontractor who in turn is under contract with the prime contractor. Allowing lien claims for any entity further removed than a third tier entity would make it nearly

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48. See ARK. CODE ANN. § 18-44-101 (2003); GA. CODE ANN. § 44-14-361(a)(9) (Supp. 2007); KY. REV. STAT. ANN. § 376.010(5), (6) (Supp. 2007).

49. See IOWA CODE ANN. § 572.2(1) (2007); OR. REV. STAT. ANN. § 87.010(1)-(3) (2003); UTAH CODE ANN. § 38-1-3 (2005).

50. Griffin Dewatering Corp. v. B.W. Knox Constr. Corp., No. 98L-09-008, 2001 WL 541476, at \*6 (Del. Super. Ct. 2001).

51. See LA. REV. STAT. ANN. §§ 9:4801-4802 (2007); N.C. GEN. STAT. § 44A-8 (2005); OR. REV. STAT. ANN. § 87.010(5)-(6) (2003); TEX. PROP. CODE ANN. § 53.021(c) (2007); UTAH CODE ANN. § 38-1-3 (2005); Zion First Nat'l Bank v. Carlson, 464 P.2d 387 (Utah 1970); Cain v. Rea, 116 S.E. 478 (Va. 1932).

52. See, e.g., Cubit Corp. v. Hausler, 845 P.2d 125 (N.M. 1992).

53. Wilkinson v. Rowe, 98 So. 2d 435, 438 (Ala. 1957); George A.Z. Johnson, Jr., Inc. v. Barnhill, 241 S.E.2d 747 (S.C. 1983).

impossible for prime contractors and owners to monitor and control payments to those working on the project. An unduly burdensome amount of due diligence and collection of lien waivers would ensue if parties beyond the third tier could assert lien rights.

#### V. IMPROVEMENTS SUBJECT TO CONSTRUCTION LIENS

A party may assert a construction lien for nearly any contribution of material or labor that improves real property.<sup>54</sup> In general, an improvement constitutes labor or materials that, in whole or part, are applied to or used in connection with the erection, alteration, or construction of a value-adding improvement to a structure or the land upon which the structure rests.<sup>55</sup> An improvement need not necessarily be visible to qualify for construction lien protection, but, despite the generally broad definition of “improvement,” not every contribution will qualify. The scope of an “improvement” will generally encompass preparatory work, such as land clearing, well drilling, demolition or removal of debris, other ground work, and professional services including surveying and architectural or engineering work.<sup>56</sup> Contributions found not to be lienable by some jurisdictions include the following: the mining and harvest of matter, mineral, or agricultural produce from the property for purposes of making things;<sup>57</sup> the transportation of goods to the site;<sup>58</sup> gasoline to operate equipment used in the improvement;<sup>59</sup> replacement parts for equipment;<sup>60</sup> and services in obtaining financing, zoning variances, and leasing arrangements.<sup>61</sup>

A uniform lien act would provide that any labor or material contributing to visible improvement of real property would qualify for a construction lien claim. The test for visibility would be objective, and it could mirror the process used by title and closing companies in establishing priority for lenders that is secured

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54. See 53 AM. JUR. 2D, *supra* note 26, § 12.

55. See *id.* § 4.

56. See BLACK'S LAW DICTIONARY, *supra* note 36, at 773.

57. MONT. CODE ANN. § 71-3-522(5)(b)(i)-(ii) (2007).

58. Mammoet USA, Inc. v. Entergy Nuclear Generation Co., 831 N.E.2d 349 (Mass. App. Ct. 2005).

59. Great Plains Equip., Inc. v. Nw. Pipeline Corp., 979 P.2d 627 (Idaho 1999).

60. Johnson v. Starrett, 127 Minn. 138, 149 N.W. 6 (1914).

61. Phillips-Klein Cos., Inc. v. Tiffany P'ship, 474 N.W.2d 370 (Minn. Ct. App. 1991).

through first mortgages on construction projects. In those instances, photos are generally taken of the property prior to the start of construction, clearly indicating a date and showing that no visible improvement has occurred on the subject real property. To qualify as “visible” under a uniform lien act, the labor or material in question would need to be noticeable through photographs or as-built drawings of the construction project. The only exceptions would be groundwork, land surveying, environmental testing, or architectural work that contributed to the improvement. Architectural drawings would need to be specifically incorporated into and used for the project. Those claiming liens for services not readily visible, such as environmental testing necessary for a project to proceed, would be required to provide a pre-lien notice to property owners and the prime contractor before lien rights were afforded.

#### VI. PROPERTY SUBJECT TO CONSTRUCTION LIENS

Construction projects are generally categorized as either private or public. Public projects are those for which the federal, state, or local governments are contracting for improvement to government property. With the exception of Kentucky<sup>62</sup> and Vermont,<sup>63</sup> sovereign immunity and public policy prohibit the enforcement of construction liens against public property. An alternate set of federal and state statutes operates to provide protection to those who contribute to the improvement of public property. The Miller Act provides federal protection, applying to all “public” projects where the federal government is the “owner” and requires prime contractors to furnish a “Payment and Performance Bond” for all contracts exceeding \$25,000.<sup>64</sup> Many states have adopted the Miller Act on a state level (often referred to as “Little Miller Acts”), requiring prime contractors to furnish bonds in the amount of the partial or full contract price to secure payment for those who contribute to public construction projects.<sup>65</sup>

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62. KY. REV. STAT. ANN. § 376.210(1)–(3) (2002).

63. No provision in title 9, sections 1921 through 1928 of the Vermont Statutes differentiates between “public” and “private” property, though one Vermont court held mechanics’ liens unenforceable against a public school. *See* VT. STAT. ANN. tit. 9, §§ 1921–1928 (2006); *Greenough, Cook & Co. v. Nichols*, 30 Vt. 768 (Vt. 1858).

64. 40 U.S.C. § 3131 (2000).

65. DEL. CODE ANN. tit. 29, § 6927(d) (Supp. 2006); GA. CODE ANN. § 13-10-1 (1982 & Supp. 2007); IDAHO CODE ANN. § 54-1926 (2007); MINN. STAT. §§ 574.26-

Private projects are those neither owned by governmental entities nor built for a public use. Private individuals or entities own and construct most private projects, although projects undertaken by quasi-governmental<sup>66</sup> and non-profit organizations may also be considered private projects under state construction lien statutes.<sup>67</sup> As a general rule, if private property is subject to levy and sale, it may be subject to a construction lien. However, a construction lien typically may attach only to the extent of the real property interest owned by the party contracting for the labor or materials.<sup>68</sup> Numerous levels of real property interests exist at law, and any interest in real property, whether fee simple, equitable, leasehold, or life estate, may generally be subject to a construction lien.

Construction liens most commonly attach to an owner's fee simple interest in the improved real property. Many states have extended the construction lien to attach not only the structure that was built or improved, but to the land upon which the building rests, and to any other land around it (such as a parking lot) that may be necessary for convenient use and occupation.<sup>69</sup> Geographical location may limit the portion of land to which a construction lien attaches. In urban areas, the lien may extend to the interest in the entire lot where the improvement rests.<sup>70</sup> In rural areas, a construction lien is often limited to a maximum amount of acreage.<sup>71</sup>

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574.39 (2006 & Supp. 2007); MISS. CODE ANN. § 31-5-51(5) (2005); N.C. GEN. STAT. § 44A-26 (2005); OKLA. STAT. tit. 61, §§ 1-2 (Supp. 2007).

66. A quasi-governmental project uses public property for private or proprietary purposes. *See* Comstock & Davis Inc., v. City of Eden Prairie, 557 N.W.2d 213 (Minn. Ct. App. 1997).

67. *Spaulding v. Thompson Ecclesiastical Soc'y*, 27 Conn. 573 (1858); *Cain v. Rea*, 166 S.E. 478 (Va. 1932) (holding that a church as a non-profit was subject to a lien).

68. S.C. CODE ANN. § 29-5-30 (2007); UTAH CODE ANN. § 38-1-3 (2005); *Norris v. Nitsch*, 325 P.2d 326, 333 (Kan. 1958).

69. *See, e.g.*, ALASKA STAT. § 34.35.055 (2006); CAL. CIV. CODE § 3128 (1993); COLO. REV. STAT. § 38-22-103(1) (2007); MO. REV. STAT. § 429.010 (Supp. 2007); OKLA. STAT. tit. 42, § 141 (2001); TEX. PROP. CODE ANN. § 53.022 (2007).

70. MO. REV. STAT. § 429.010 (Supp. 2007); TEX. PROP. CODE ANN. § 53.022 (2007).

71. *See* MINN. STAT. § 514.03(3) (2006) (stating that a lien extends to maximum of eighty acres, or, if homestead property, to forty acres); MO. REV. STAT. § 429.010 (Supp. 2007) (limiting lien to whole lot, but not more than three acres); TEX. PROP. CODE ANN. § 53.022 (2007) (limiting lien up to fifty acres).

A lien may also arise when a lessee insists upon improvements to the property. Depending on the statute, a lien may attach to the owner's fee simple interest, the lessee's leasehold interest, or neither. Whether a lien attaches and to whose interest it attaches will often turn on whether the owner authorized or consented to the improvements requested by the lessee.

In some cases a construction lien may attach to the owner's fee interest by virtue of a lessee's actions. When improvements are made pursuant to an express agreement between the owner/landlord and lessee, a lien may attach to the owner's fee simple interest in the property.<sup>72</sup> More commonly, a lien will attach only to the leasehold interest in the property. When determining whether a lien attaches to a leasehold interest, state laws generally fall into two categories. Some states require consent of the owner, and others require only a contract entered into by the lessee. In states which adhere to the former category, a lien that arises due to improvements made at the insistence of the lessee can attach only if the owner or landlord consented to the improvement.<sup>73</sup> Absent consent, the lien will be invalid. In states which fall into the latter category, a lien will attach to a leasehold interest in the property so long as the lessee contracts for the improvement.<sup>74</sup> Under this model, an owner's knowledge or consent is irrelevant.

A lien may also attach to equitable interests in property. Where an individual purchases property under a real estate contract and causes improvements to be made to that property, a lien may attach to the person's equitable interest.<sup>75</sup>

A uniform act would clearly define that only "private" real property is subject to a construction lien. The term "private" would include land owned by public entities, but used for private enterprise. Any transferable or assignable interest in private real property would be subject to attachment by a construction lien. Claims regarding public property and projects would continue to

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72. See S.C. CODE ANN. § 11-35-3030(2) (Supp. 2006); N.D. CENT. CODE § 35-27-07 (2004); Stern & Son, Inc. v. Gary Joint Venture, 530 N.E.2d 306, 308 (Ind. Ct. App. 1988); Dunlap v. Hinkle, 317 S.E.2d 508, 512 (W. Va. 1984).

73. See GA. CODE ANN. § 44-7-1 (2007); UTAH CODE ANN. § 38-1-3 (2005); Lentz Plumbing Co. v. Fee, 679 P.2d 736 (Kan. 1984).

74. See, e.g., MONT. CODE ANN. § 71-3-525(3) (2007); S.C. CODE ANN. § 29-5-30 (2007); 49 PA. STAT. ANN. § 1303 (2001); Dunlap, 317 S.E.2d at 511.

75. See Brown v. Gravlee Lumber Co., 341 So. 2d 907, 910 (Miss. 1977); Gibson v. Bostick Roofing & Sheet Metal Co., 148 S.W.3d 482, 495 (Tex. App. 2004); Feuchtenberger v. Williamson, Carroll & Saunders, 120 S.E. 257, 259 (Va. 1923).

be administered through the Miller Act and various Little Miller Acts.

#### VII. PERFECTING A CONSTRUCTION LIEN

Construction lien claims are a statutory remedy, so they must strictly comply with the applicable state statutory requirements. Generally all states require the following to perfect an interest in the improved property: 1) notice to the owner that the claimant intends to assert a lien in the event of nonpayment, and 2) proper filing of a construction lien statement with the appropriate government office. While this process for perfecting a lien is comparatively similar in each state, the individual state requirements vary, demanding potential lienors to pay specific attention and adhere to the applicable state laws. In most cases, the failure to strictly adhere to the statute is fatal.

*Notice.* Notice is important to both the potential lien claimant and the contracting owner. Notice to the owner protects him and his real property and prevents the assertion of unanticipated liens.<sup>76</sup> This notice is often called a “pre-lien notice.” Notice by the potential lien claimant is often essential to perfecting a security interest in the improved property and also generally encourages the owner to make payment and avoid encumbrances on the real property.

A small number of states, including Idaho, New Hampshire, and West Virginia, do not require a pre-lien notice to the property owner.<sup>77</sup> Of the states mandating a pre-lien notice, the requirements typically fall under two categories: states that require notice by all potential lienors, and states that determine whether a pre-lien notice is required based upon the status of the potential claimant. The requirement for notice based upon claimant status revolves around the lien claimant’s contractual relationship (or lack thereof) with the owner. As noted previously, one purpose of a pre-lien notice is to protect owners from the assertion of unanticipated liens against their real property.<sup>78</sup> An owner who

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76. *Schrader Iron Works, Inc. v. Lee*, 103 Cal. Rptr. 106, 111 (Cal. Ct. App. 1972); *Nasseff v. Schoenecker*, 312 Minn. 485, 490–91, 253 N.W.2d 374, 377–78 (1977).

77. These states have no statutory provisions requiring a pre-lien notice. With the exception of residential construction, there are no pre-lien notice filing requirements in New Jersey. N.J. STAT. ANN. § 2A:44A-21 (a) (2000).

78. See *supra* note 76 and accompanying text.

directly contracts with an individual or entity will seldom be surprised by the filing of a lien, and as a result many states that base the notice requirement upon the claimant's status do not require prime contractors to give a pre-lien notice.<sup>79</sup> If notice is required of a prime contractor, it is often required to be given at the time the contract with the owner is formed.<sup>80</sup> If a party has no direct contract with the property owner and is under contract with a prime contractor or subcontractor,<sup>81</sup> notice to the owner is generally required,<sup>82</sup> with few exceptions.<sup>83</sup>

The timing requirements of pre-lien notices vary by state and often depend upon the status of the potential lien claimant. If a state mandates a pre-lien notice as a prerequisite to perfecting a construction lien, the notice deadlines must be strictly followed. Although a handful of states provide for time extensions under certain circumstances, failure to provide pre-lien notices within the specified time requirements will typically invalidate construction lien rights.

States requiring a pre-lien notice generally base the timing requirements upon one of three key dates occurring during the construction process: 1) the date prior to labor commencing or first delivery of materials, 2) the first date on which the labor or materials are provided, or 3) the last date on which labor or materials were provided. Alabama and Arkansas both require notice to be provided before the commencement of labor or delivery of material.<sup>84</sup> Iowa, Minnesota, and Wisconsin, among other states, require notice to be given within a specific number of days from the first date on which the labor or materials are agreed

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79. Section 9-104 of the Maryland Real Property Code only requires notice of subcontractor. MD. CODE ANN., REAL PROP. § 9-104 (2003).

80. MINN. STAT. § 514.011 subd. 1 (2006); WIS. STAT. § 779.02 subd. 2 (Supp. 2006).

81. See WIS. STAT. § 779.02 subd. 1 (Supp. 2006) (stating that no notice is needed for parties employed by a prime contractor already required to give statutory notice).

82. See 770 ILL. COMP. STAT. ANN. 60/21 (2007); MD. CODE ANN., REAL PROP. § 9-104 (2003); MINN. STAT. § 514.011 (2006); WIS. STAT. § 779.02 (Supp. 2006); *Krack Corp. v. Sky Val. Foods, Inc.*, 273 N.E.2d 202, 203 (Ill. App. Ct. 1971).

83. See ME. REV. STAT. ANN. tit. 10, § 3253 (Supp. 2006) (codifying a common law exception to the notice requirement under which the subcontractor need not notify the owner when the original contractor identified the subcontractor and the amount owed to the subcontractor on the original contractor's sworn statement).

84. ALA. CODE § 35.11.210 (2006); ARK. CODE ANN. § 18-44-115(c) (Supp. 2007); TENN. CODE ANN. § 66-11-102 (Supp. 2007).

upon or provided.<sup>85</sup> Other states, such as Maine and Maryland, require notice to be given within a specific number of days from the last date that substantial labor or materials were provided.<sup>86</sup> In other states, the date on which the lien claimant intends to file a construction lien triggers the notice deadlines. North Dakota and Colorado simply require notice be provided prior to filing a construction lien.<sup>87</sup>

The potential lien claimant's status may also affect the time to provide a pre-lien notice. Because of the direct contractual relationship, a prime contractor generally has a significantly shorter time than a subcontractor to provide a pre-lien notice to the owner. For example, in Minnesota the prime contractor must include the pre-lien notice in the written contract.<sup>88</sup> If no written contract exists, notice must be provided within ten days from the date labor or materials were verbally agreed upon.<sup>89</sup> In comparison, a Minnesota subcontractor or supplier under contract with the prime contractor must provide notice within forty-five days of the date they first provided labor or material.<sup>90</sup>

Notice may be given in a number of ways, including service of notice by certified mail or personal service to the property owner<sup>91</sup> and the filing of the notice with the office of the county recorder or registrar of deeds in the county in which the property is located.<sup>92</sup>

The states differ in their notice procedures, but the underlying reasons for providing notices are similar. A uniform lien act would streamline this process and set forth a standardized, mandatory notice procedure for all potential lien claimants. Specifically, statutory language would be developed for a "pre-lien notice,"

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85. IOWA CODE § 572.33(1) (2007) (thirty days from commencement of furnishing labor or material); MINN. STAT. § 514.011 (2006) (within ten days); WIS. STAT. § 779.02(a) (Supp. 2006) (within ten days).

86. ME. REV. STAT. ANN. tit. 10, § 3253 (Supp. 2006) (ninety days from the last contribution of labor or material); MD. CODE ANN., REAL PROP. § 9-104 (2003) (120 days from last contribution of labor or material).

87. N.D. CENT. CODE § 35-27-02 (2004) (requiring notice fifteen days prior to filing); COLO. REV. STAT. § 38-22-109(3) (2007) (requiring notice ten days prior to filing).

88. MINN. STAT. § 514.011 subdiv. 1 (2006).

89. *Id.*

90. *Id.* § 514.011 subdiv. 2.

91. COLO. REV. STAT. § 38-22-109(3) (2007); MD. CODE ANN., REAL PROP. § 9-104 (2007); WIS. STAT. § 779.01(2)(e) (2007).

92. ME. REV. STAT. ANN. tit. 10, § 3253 (2005 & Supp. 2006); N.D. CENT. CODE § 35-27-02 (2004).

usable by any entity that wished to preserve lien rights, whether it is a prime contractor, subcontractor, or supplier. This notice would be required from all potential lien claimants on any project. The notice would be filed and served in the exact same manner as a construction lien claim, within proscribed time periods. The prime contractor would be required to file the pre-lien notice against the property and serve it upon the property owner either within fifteen days of the date any written contract for the work is executed or within fifteen days after a verbal agreement was reached if no written contract is used. Any subcontractor or supplier would be required to serve and file a pre-lien notice within fifteen days after it first works on or supplies material to the project or real property in question.

This uniform procedure would eliminate the numerous questions that arise as to whether a pre-lien notice was required or whether one was properly served. Similar to a construction lien claim, if the pre-lien notice was not served and filed within the requisite time period, no construction lien claim could be asserted at a later date. The county recorder, registrar of titles or deeds, or district court (the filing offices vary by state) would have a clear record of those who had filed pre-lien notices. Thereafter, the only additional necessary evidence would be establishing proof of service.

Because it is often burdensome for a subcontractor or supplier to determine the exact identity and address of the correct property owner, a uniform lien act would require a prime contractor to furnish to the subcontractors and suppliers the name and correct address of the property owner in any written contract, or within five days after a verbal agreement is reached. Absent this information from the prime contractor, a subcontractor or supplier would be entitled to serve its pre-lien notice upon the prime contractor, who in turn would have a legal obligation to pass the information on to the property owner.

The proposed verbiage of a uniform pre-lien notice would be as follows:

This notice is to advise you of your rights under \_\_\_\_\_ law in connection with the improvement to your property.

Any person or company supplying labor, materials, or equipment for the improvement to your real property

may file a lien against your property if that person or company is not paid for the contributions. We have been:

\_\_\_\_ hired by you to provide labor, materials, or equipment for the improvement.

\_\_\_\_ hired by your prime or general contractor to provide the following type of service or materials to the improvement: \_\_\_\_\_

\_\_\_\_ hired by \_\_\_\_\_ to provide the following type of service of materials to the improvement: \_\_\_\_\_

Under \_\_\_\_\_ law, you have the right to pay persons who supplied labor or materials for this improvement directly and deduct this amount from your contract with the general contractor, or withhold the amounts due to the general or prime contractor for 120 days after completion of the improvement unless you are supplied with a lien waiver signed by the persons or entities who supplied any labor or materials for the improvement and who gave you a timely pre-lien notice such as this one.

A person or entity who fails to provide and file a pre-lien notice shall not have the right to assert a lien against your property.

*Filing.* Since a construction lien is a security interest in real property, recording or filing the lien is necessary to provide notice of the encumbrance to those having an interest in the property. Filing requirements are specific to each state but generally begin with drafting a construction lien document, sometimes referred to as a verified lien statement, claim of lien, or claim of account. The construction lien typically requires the claimant to provide some or all of the following information: 1) a description of the property, 2) the name of the claimant, 3) the name of the person to whom the claimant is furnishing labor, material, equipment, and services, 4) a description of the labor, material, and/or equipment that was furnished, 5) the contract price, or in the absence of a written contract, the estimated value of the labor or material furnished, 6) the amount due to the claimant, and 7) the date the labor, material, and/or equipment was furnished.<sup>93</sup> Most states will

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93. See, e.g., ALASKA STAT. § 34.35.070 (2006); CAL. CIV. CODE § 3084 (1993); IDAHO CODE ANN. § 45-507 (2003); MINN. STAT. § 514.08 (2006); N.Y. LIEN LAW § 9

require that the construction lien be verified by a signed affidavit or notarized signature of the claimant or claimant's agent.<sup>94</sup>

The time in which to file a construction lien requires special attention. Failure to adhere to filing deadlines may render a construction lien invalid. Generally, the last date that labor or materials were provided governs the filing period.<sup>95</sup> Courts have interpreted the last day of labor to mean either the last date of substantial contribution of labor or materials to the construction improvement project<sup>96</sup> or the date when the requirements of the contract are fulfilled.<sup>97</sup> Still, what constitutes a last contribution is not always clear. Courts have held that *de minimus* work<sup>98</sup> such as adjusting a screen door, work not authorized by the owner,<sup>99</sup> warranty work, replacement of defective items, periodic testing,<sup>100</sup> and contributions made for the purpose of extending the filing period do not qualify.<sup>101</sup> Filing periods range from ninety days<sup>102</sup> to eight months<sup>103</sup> from the last contribution of labor or material.

The time period in which to file a construction lien may also be affected by the status of a potential lienor. Similar to notice requirements, state filing requirements may be divided into two categories: 1) states that distinguish between classes of potential lienors, basing the time to file on the lienor's status, and 2) states that make no such distinction, requiring the same filing time for all potential lien claimants regardless of status. While some

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(2007); WYO. STAT. ANN. § 29-1-301(b) (2007).

94. See, e.g., ARK. CODE ANN. § 18-44-117(a)(2) (Supp. 2007); COLO. REV. STAT. § 38-22-109 (2007); IDAHO CODE ANN. § 45-507 (2003); IOWA CODE ANN. § 572.8 (Supp. 2007).

95. See, e.g., ALASKA STAT. § 34.35.068(a) (2006); IOWA CODE § 572.9 (Supp. 2007); N.D. CENT. CODE § 35-27-13 (2004).

96. See *Ark. La. Gas Co. v. Moffitt*, 436 S.W.2d 91, 97 (1969) (holding that adjustment of installed equipment did not extend the date for work done past the date of installation).

97. *Tym v. Ludwig*, 538 N.W.2d 600, 604 (Wis. Ct. App. 1985) (holding that the time for filing a lien is measured by the original installation).

98. See, e.g., *Geo. Sedgwick Heating & Air Conditioning Co. v. Riverwood Cos.*, 409 N.W.2d 289, 290-91 (Minn. Ct. App. 1987).

99. See, e.g., *Guy T. Bisbee Co. v. Granite City Investing Corp.*, 159 Minn. 442, 446, 199 N.W. 17, 18 (1924).

100. See, e.g., *Thorson v. Pfeifer*, 145 N.W.2d 438, 439-40 (S.D. 1966).

101. See *R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 374 N.W.2d 493, 498 (Minn. Ct. App. 1985).

102. See ALASKA STAT. § 34.35.068 (2006); IND. CODE § 32-28-3-3(a)(2) (Supp. 2007); N.J. STAT. ANN. § 2A:44A-6 (2000); N.D. CENT. CODE § 35-27-13 (2004).

103. See N.Y. LIEN LAW § 10(1) (2007).

subcontractors and other laborers may have longer periods of time to provide pre-lien notice to the owner, some states afford them significantly less time than that given to prime contractors. In Maine, New Mexico, and Wyoming, for example, prime contractors have 120 days from the date of last contribution, but all others have only ninety days.<sup>104</sup>

An owner of improved property may in some circumstances take steps that affect the time in which a construction lien must be filed. In some states, a property owner may shorten the time period to file construction liens through special notice filings. For example, Alaska provides a potential lien claimant ninety days from the date of last contribution.<sup>105</sup> However, a property owner may file a “notice of completion” and thereby reduce the time period to fifteen days from the date he files it.<sup>106</sup> Because Alaska does not require the owner to serve the notice of completion, a potential lienor may not be aware that one has been filed and could easily miss the deadline to file a construction lien.<sup>107</sup> California law has a similar provision, stating that all claimants have ninety days from completion of the project to file a construction lien.<sup>108</sup> However, if an owner files a “notice of completion,” he may shorten the filing period, leaving prime contractors with sixty days to file and all other claimants thirty days from the date the notice of completion is filed.<sup>109</sup>

A construction lien statement must also be filed with the proper county office as prescribed by statute. Most commonly, construction liens are filed with the office of the county clerk<sup>110</sup> or registry of deeds<sup>111</sup> in the county where the real property is located or in some cases the district court.<sup>112</sup> The amount of the claim may

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104. See ME. REV. STAT. ANN. tit. 10, § 3255(1) (Supp. 2006); N.M. STAT. ANN. § 48-2-6 (2003); WYO. STAT. ANN. § 29-2-106(a) (2007).

105. ALASKA STAT. § 34.35.068(a)(2) (2006).

106. *Id.* § 34.35.068(b).

107. Protection will be afforded to lienors who choose to file a notice of intent to file lien despite no requirement, which in turn requires the owner to give notice to the potential lienor of his intent to file a notice of completion. *Id.* § 34.35.068.

108. CAL. CIV. CODE §§ 3115, 3116 (1993).

109. *Id.* § 3117.

110. See, e.g., COLO. REV. STAT. ANN. § 38-22-109(12) (2007); IDAHO CODE ANN. § 45-507(1) (2003); N.M. STAT. § 48-2-6 (2003); W. VA. CODE ANN. § 38-2-8 (2005); WYO. STAT. ANN. § 29-1-301(a) (2007).

111. See, e.g., S.D. CODIFIED LAWS § 44-9-15 (2004).

112. See, e.g., IOWA CODE ANN. § 572.8 (Supp. 2007); KAN. STAT. ANN. § 60-1102 (2005); ME. REV. STAT. ANN. tit. 10, § 3255 (2005 & Supp. 2006); MD. CODE ANN., REAL PROP. § 9-105 (2003); N.D. CENT. CODE § 35-27-25 (2004).

dictate the filing location. For example, in Delaware, claims for less than \$100 are filed with the justice of the peace.<sup>113</sup>

Filing offices are not charged with determining the legal validity of a claimant's lien.<sup>114</sup> At most, recording clerks are charged only with ensuring that the document meets the statutory content requirements.

Under a uniform act, the construction lien claim document would contain the following general information:

- A description of the property;
- The name of the claimant;
- The name of the person to whom the claimant is furnishing labor, material, equipment, and/or services;
- A description of the labor, material, and/or equipment that was furnished;
- The contract price, or in the absence of a written contract, the estimated value of the labor or material furnished;
- The amount due to the claimant; and
- The date the labor, material, and/or equipment was furnished.

The universal time in which to file a construction lien would be 120 days from the last date of work or contribution of materials. Service of the construction lien would also need to occur within the 120-day period and would be effective upon mailing, by certified mail or registered mail with a return receipt requested, within the 120-day period (provided it can be demonstrated that the mailing was addressed to the last known or discoverable address for the party being served). All potential lien claimants would be subject to the same time requirements with no distinction based upon the nature of the entity or contribution provided.

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113. DEL. CODE ANN. tit. 25, § 2731 (2006).

114. Filing a construction lien against property by which state law does not provide for can result in a "slander of title" issue.

Property owners would have the ability to file a “notice of completion” document against the subject property to shorten the filing time for a construction lien. This document would also need to be served upon every person or entity whose rights the owner wishes to affect. A properly served and filed notice of completion would reduce the construction lien filing time from 120 days to sixty days from the last date of labor or materials provided by the applicable person or entity. However, any affected entity could challenge a notice of completion as premature, and a lien claimant could attempt to prove that the project was unfinished at the time the notice of completion was served. The standard for determining completion would be the “substantial completion” standard, which would generally provide that the following has occurred:

Performance of all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering the cost of remedying the same can be made from the contract price.<sup>115</sup>

#### VIII. OWNER REMEDIES OR DEFENSES

A property owner may have a number of defenses to a construction lien claim, including traditional defenses such as breach of contract or defective workmanship. The property owner, however, may also assert defenses unique to construction liens, typically focusing upon the lien claimant’s alleged failure to strictly comply with the applicable lien statute. These defenses might include:

- The lien claimant is not a person belonging to a class protected by a construction lien;
- No lienable “improvements” were made;
- The owner did not consent to or have knowledge of the improvement;<sup>116</sup>

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115. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 18 (Minn. 1982). *See also Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (holding that the measure of allowance is not the cost of replacement, but the difference in value).

116. *See* N.Y. LIEN LAW § 3 (2007) (stating lien amount is for principal and

- The amount claimed in the lien was fraudulently overstated;<sup>117</sup>
- No money is owed;<sup>118</sup>
- The possession of a lien waiver signed by the party who made the improvement;<sup>119</sup>
- Failure to give statutory notice;
- Failure to file in a timely manner;
- Failure to comply with service requirements;
- Failure to join the necessary parties; and
- Failure to comply with any other statutorily mandated provision.<sup>120</sup>

An owner may also, in many cases, pursue the remedy of bonding. An owner may often protect his property against liens or dissolve liens that have already attached by filing a bond.<sup>121</sup> The amount of the bond is typically the contract price, or in the case of no contract, for the fair value of the labor and/or material contributed to the construction project.<sup>122</sup> Other states require a cash deposit with the court to discharge a construction lien.<sup>123</sup>

Under a uniform act, property owners or prime contractors would be entitled to post with the court cash or a payment bond equal to one and a half times the amount of the applicable construction liens. Upon posting of the requisite cash or bond, the

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interest of the value or agreed upon price of the material and or labors).

117. A lien that fraudulently overstates or exaggerates the amount of a lien, whether willfully or negligently will be invalid. *See, e.g.*, FLA. STAT. § 713.31 (Supp. 2007); MINN. STAT. § 514.10 (Supp. 2007); N.J. STAT. ANN. § 2A:44A-15 (2000).

118. *See* N.D. CENT. CODE § 35-27-02 (2004); N.Y. LIEN LAW § 3 (2007).

119. *See* N.D. CENT. CODE § 35-27-02 (2004).

120. *See* MASS. GEN. LAWS ANN. ch. 254, § 15A (2004).

121. *See* N.H. REV. STAT. ANN. § 511:48 (2007); N.C. GEN. STAT. § 44A-20(f) (2005); WASH. REV. CODE ANN. § 60.04.161 (2004).

122. *See* MASS. GEN. LAWS ANN. ch. 254, § 12 (2004); WASH. REV. CODE ANN. § 60.04.161 (2006).

123. *See* MINN. STAT. § 514.10 (Supp. 2007).

court would issue an order discharging the property from the effect of the construction lien, and the lien would thereafter attach the funds or bond on deposit with the court.

#### IX. ACTION FOR FORECLOSURE

A filed construction lien does not encumber the real property forever. The lien must typically be enforced by filing a complaint to foreclose upon it with the appropriate court and within the statutory period, naming all necessary parties and setting forth all allegations supporting the claim for lien.

*What to File.* In general, a summons and complaint are drafted and filed to commence foreclosure of a construction lien. The complaint requests that the court determine the validity and amount of the lien, determine the validity and amount of other liens or encumbrances on the property, order the property to be sold to satisfy the debt, and determine the priority of the various lien holders.

In addition to the complaint, filing a notice of lis pendens is also often required.<sup>124</sup> The document gives notice that the property is the subject of pending litigation, and it will generally contain the names of the parties to the action, the nature of the action, and the legal description of the property.<sup>125</sup>

*Where to File.* The complaint is filed with the appropriate court, in most cases the circuit, district, or superior court of the county in which the property is located. The appropriate court, however, may differ based upon the amount of the claim. In Florida, claims for less than \$15,000 must be filed with the county court while claims for \$15,000 or more are filed with the circuit court.<sup>126</sup> The amount necessary to secure the unpaid contract price determines the amount of the lien.<sup>127</sup> If a contract price was not previously agreed upon, the amount due becomes the “reasonable value” of all labor, material, services or equipment provided.<sup>128</sup>

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124. See, e.g., 770 ILL. COMP. STAT. 60/34 (2006); LA. REV. STAT. ANN. § 9:4833(F) (2007); N.J. STAT. ANN. § 2A:44A-14(c) (2000); MINN. STAT. § 514.12 (2002).

125. E.g. N.Y. LIEN LAW § 17 (2007).

126. *Alexdex Corp. v. Nachon Enter.*, 641 So. 2d 858, 862 (Fla. 1994).

127. MONT. CODE. ANN. § 71-3-526(1) (2007); NEB. REV. STAT. § 52-136(1)(a)(3) (2002); N.M. STAT. ANN. § 48-2-12 (2003); N.D. CENT. CODE § 35-27-06 (2004).

128. ALASKA STAT. § 34.35.120.5 (2006); NEB. REV. STAT. § 52-127(2) (2002).

All parties deemed “necessary” by statute must be named as parties to the foreclosure action. Where some states require only the owner of the property be made party to the action<sup>129</sup> and joinder of other interested parties is optional,<sup>130</sup> other states mandate that all persons having an interest in the property be named as parties.<sup>131</sup> In the states where naming other interested parties is optional, the judgment will not be binding on unnamed parties.<sup>132</sup>

*When to file.* The foreclosure action must be commenced within the statute of limitations. The time in which to file a complaint is often dictated by the date the construction lien was filed,<sup>133</sup> but may be determined by the date of the debt’s maturity,<sup>134</sup> or the date labor or materials were last contributed to the project.<sup>135</sup> The date a debt matures has been construed to mean the date the debt is contractually due.<sup>136</sup> If the parties did not contract for that date, courts will use the date of the last contribution of labor or material.<sup>137</sup>

In some states a property owner may shorten the time in which to file a complaint by filing a written demand to commence suit or notice of contest.<sup>138</sup> In such cases, a lien claimant typically has thirty days from receiving the commencement or notice of contest demand to enforce the lien by filing a complaint.<sup>139</sup> If a lien holder

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129. *E.g.*, Stuart Enter. v. MRM Constr. Co., 449 S.E.2d 20 (N.C. Ct. App. 1994); Cascade Elec. Co. v. Associated Creditors, Inc., 224 P.2d 146 (Mont. 1950).

130. *E.g.*, ALA. CODE § 35-11-223 (2006); MONT. CODE ANN. § 71-3-561 (2007).

131. *E.g.*, KAN. STAT. ANN. § 60-1106 (2005); N.Y. LIEN LAW § 44 (2007); Monterey S.P. P’ship v. W.L. Bangham, 777 P.2d 623 (1989).

132. *E.g.*, ALA. CODE § 35-11-223 (2006).

133. *See, e.g.*, IDAHO CODE ANN. § 45-510 (2003); IND. CODE ANN. § 32-28-3-6 (2002); KAN. STAT. ANN. § 60-1105 (2005); N.M. STAT. ANN. § 48-2-10 (2003); N.D. CENT. CODE § 35-27-25 (2004); OKLA. STAT. ANN. tit. 42, § 172 (2001); 49 P.A. CONS. STAT. ANN. § 1701 (2006).

134. *See, e.g.*, ALA. CODE § 35-11-221 (2006).

135. *See, e.g.*, MINN. STAT. § 514.12 (2006); N.J. STAT. ANN. § 2A: 44A-14(a)(1) (2000); N.C. GEN. STAT. ANN. § 44A-13 (2005); S.D. CODIFIED LAWS § 44-9-24 (2004).

136. *See* Coastal Millwork, Inc., v. Yeager, 510 So. 2d 188, 189 (Ala. 1987).

137. *E.g., id.* at 189.

138. *See, e.g.*, 770 ILL. COMP. STAT. ANN. 60/24 (Supp. 2007); IND. CODE ANN. § 32-28-3-10 (2002); N.D.CENT. CODE § 35-27-25 (2004); S.D. CODIFIED LAWS § 44-9-26 (Supp. 2007).

139. *See, e.g.*, IND. CODE ANN. § 32-28-3-10 (2002); N.D. CENT. CODE § 35-27-25 (2004); S.D. CODIFIED LAWS § 44-9-26 (Supp. 2007).

does not enforce the lien within the statutory time allotment, the lien will expire and no longer encumber the property.<sup>140</sup>

If a lien claimant succeeds at trial, a court will generally order the county sheriff to auction either the entire property, or as much of the real property as is needed, to satisfy the debt.<sup>141</sup> In most states the sale will be contingent upon the owner's right to "redeem" the property by satisfying the outstanding debt in full within a certain time period from the date of the sale.<sup>142</sup>

It would be difficult to create a uniform standard for construction lien foreclosures and litigation because each state incorporates different rules of civil procedure and local rules. Further, each state's independent case law dictates certain local procedures. A uniform act, however, would provide for a standard time period within which to serve and file a foreclosure action. A reasonable time period under a uniform act would be one year from the date a construction lien is filed against the subject property, as opposed to having that time period run from the last date of work.

#### X. LIEN PRIORITIES

A construction lien is a filed claim against real property and is often just one of many encumbrances of record. As such, the seniority or priority of the various encumbrances filed against the land is an important element when attempting to enforce a construction lien. For example, if the property is heavily encumbered with senior liens to the point that no equity exists from which to satisfy the construction lien amount, then a foreclosure proceeding might be a futile exercise.

Traditionally, real estate encumbrances are prioritized through the "first in time, first in right" theory, meaning that the encumbrances take priority in the chronological order of their filing. This rule is not absolute when dealing with construction liens. While some states apply the "first to file" rule, many states

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140. *See, e.g.*, N.M. STAT. ANN. § 48-2-10 (2003); N.Y. LIEN LAW § 19(2), 21(2)(b) (2007); OKLA. STAT. ANN. tit. 42, § 177 (2001); R.I. GEN. LAWS § 34-28-10 (Supp. 2006); S.D. CODIFIED LAWS § 44-9-26 (Supp. 2007).

141. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 254, § 18 (2004); N.H. REV. STAT. ANN. § 529:19 (2006).

142. *See, e.g.*, ALA. CODE § 11-48-54 (2006); MASS. GEN. LAWS ANN. ch. 254, § 20 (2004); MICH. COMP. LAWS ANN. § 600.3140 (Supp. 2007); MINN. STAT. §§ 514.15, 550.24 (2006).

differ in their approaches when prioritizing a construction lien in comparison with mortgages, tax liens, judgment liens, and other construction liens.

*Construction Liens versus Miscellaneous Liens and Encumbrances.* As a general rule, a construction lien takes priority over all other liens or encumbrances attaching after the first date that labor or material were contributed<sup>143</sup> or after the first date of actual physical improvement.<sup>144</sup> Federal and state tax liens take priority in some jurisdictions.<sup>145</sup>

*Competing Construction Liens.* While a few jurisdictions apply the “first to file” rule to construction liens,<sup>146</sup> most states either provide that construction liens have equal priority or follow a hierarchy that determines priority based upon the class of the lien claimant.

The states giving construction lien claimants equal standing do so regardless of who first gave notice, who first performed labor or supplied material, or who first filed their construction lien.<sup>147</sup> Subsequently if the proceeds of the property sale are insufficient to satisfy all liens in full, they are distributed pro rata among each of the claimants with a perfected lien.<sup>148</sup> This approach makes sense from an equitable view. If the “first to file” rule applied, the excavator would nearly always have priority over the roofing contractor simply because the excavator began and finished his work first and was, therefore, forced to file his construction lien sooner.

Other jurisdictions rank priority based upon the class of the lien holder. With minor variations, the hierarchy of classes is relatively uniform. Commonly, the laborer has first priority,

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143. ALA. CODE § 35-11-211 (2006); CONN. GEN. STAT. ANN. § 49-33(b) (2006); KAN. STAT. ANN. § 60-1101 (2005); KY. REV. STAT. ANN. § 376.010 (Supp. 2007); MD. CODE ANN., REAL PROP. § 9-108 (2003); MINN. STAT. § 514.05 (2006); MO. REV. STAT. § 429.060 (1992); MONT. CODE ANN. § 71-3-542(1) (2007); N.D. CENT. CODE § 35-27-03 (2004); S.C. CODE ANN. § 29-5-70 (2007).

144. MICH. COMP. LAWS ANN. § 570.1119(2) (2006).

145. *E.g.*, ALA. CODE § 11-48-29(a) (2006); GA. CODE ANN. § 44-14-361.1 (2002); HAW. REV. STAT. ANN. § 507-46 (2006); *Williams v. Rabren*, 431 So. 2d 505, 508 (Ala. 1983).

146. ALASKA STAT. § 34.35.255 (2006); IOWA CODE ANN. § 572.18 (Supp. 2007).

147. *See* ARIZ. REV. STAT. ANN. § 33-1000 (2007); GA. CODE ANN. § 44-14-361 (Supp. 2007); KAN. STAT. ANN. § 60-1101 (2005); MD. CODE ANN., REAL PROP. § 9-108 (2003); MO. REV. STAT. § 429.260 (1992); MONT. CODE ANN. § 71-3-541 (2007).

148. *See* ALA. CODE § 35-11-228 (2006); ARIZ. REV. STAT. ANN. § 33-1000(B) (2007); N.H. REV. STAT. ANN. § 447:12 (2002); S.C. CODE ANN. § 29-5-360 (2007).

followed by the material supplier, the subcontractor, and finally the prime contractor.<sup>149</sup> Upon sale of the real property, if the proceeds are insufficient to satisfy the debts of all classes, the funds are applied to the debts of the first class before any distributions to subsequent classes. If funds are insufficient to pay all claims in any given class, they are dispersed pro rata among the lien holders in that class.<sup>150</sup>

*Construction Liens versus Mortgages.* In many circumstances, a construction lien will enjoy priority over other encumbrances. However, this may not be true with regard to mortgages or other financing instruments in place prior to the commencement of construction.

In determining the priority of a mortgage lien, some states review factors such as whether the mortgagee had knowledge of the extent of the improvements or of the effective date of the mortgage in relation to the date the construction lien was filed. Others provide that a mortgage lien trumps a construction lien if the mortgage was filed prior to the commencement of actual visible improvement on the subject real property.

When knowledge of the improvement is an element affecting a mortgagor's priority, a construction lien will not take priority over a mortgage unless the lien claimant can establish that the mortgagee consented to, and had knowledge of, the extent of the improvements.<sup>151</sup>

A construction lien may also be subordinate to a mortgage if it is filed subsequent to a mortgage or deed of trust.<sup>152</sup> The priority date for a mortgage may be based upon the date the mortgage is executed and funds dispersed,<sup>153</sup> the date the mortgage is recorded,<sup>154</sup> the date work commences,<sup>155</sup> or the date of actual

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149. See, e.g., COLO. REV. STAT. § 38-22-108 (2007); FLA. STAT. ANN. § 713.06(4) (Supp. 2007); IDAHO CODE ANN. § 45-512 (2003); NEV. REV. STAT. ANN. § 108.236 (2007); N.Y. LIEN LAW § 13(1) (2007); N.D. CENT. CODE § 35-27-22 (2004).

150. See, e.g., IDAHO CODE ANN. § 45-512 (2003); KY. REV. STAT. ANN. § 376.010(1) (Supp. 2007); Valley Fed. Sav. & Loan Ass'n v. T-Bird Home Ctrs., Inc., 741 P.2d 826, 829 (N.M. 1987).

151. Carey v. Boulette, 182 A.2d 473, 478 (1962).

152. See, e.g., IOWA CODE ANN. § 572.18(2) (Supp. 2007); MICH. COMP. LAWS ANN. § 570.1119 (2006); MO. REV. STAT. § 429.050 (1992); MONT. CODE ANN. § 71-3-542 (2007); N.H. REV. STAT. ANN. § 447:12-a (2002); R.I. GEN. LAWS § 34-28-25(a)(2) (2006); S.C. CODE ANN. § 29-5-70 (2007).

153. E.g., Kilgore Hardware & Bldg. Supply, Inc., v. Mullins, 387 So. 2d 834 (Ala. 1980).

154. E.g., S.C. CODE ANN. § 29-5-70 (2007); Richmond v. Malkin, 6 Conn. Supp.

improvement to the property.<sup>156</sup> The date work commences and the date of actual improvement are distinguishable. Commencement is established based upon the first application of any labor or delivery of material to the site while actual improvement requires some visible physical alteration that adds value.<sup>157</sup> A construction lien filed prior to the execution or recording of a mortgage will take priority. Therefore, a mortgagor will typically request lien waivers from all potential lien claimants to establish first priority before disbursing funds.

*Subsequent Purchasers.* A purchaser of real property upon which a construction lien has been filed might take the property free and clear of such encumbrances, depending upon two important factors: 1) if the purchaser did so without actual or constructive knowledge of the outstanding debt, and 2) if title was conveyed prior to the date the construction lien was filed.<sup>158</sup> In some jurisdictions, a construction lien might still attach to the real property after transfer to a subsequent purchaser if notice was provided prior to the commencement of actual and visible improvement<sup>159</sup> or if a lien claimant has already filed a lien claim.<sup>160</sup> In a few states, a lien may also attach after a sale to an innocent bona fide purchaser, but only as long as the lien claimant is still within its time parameters to file a construction lien.

Since lien priorities are generally a creature of common law rather than statute, providing for such priorities in a uniform lien act would be difficult. Therefore, determining the priorities and standing of various lien claimants in each state would be best left to the laws and procedures already in place. In the event a uniform practice emerged, it would likely involve a presumption that all interests of record prior to the filing of a construction lien would have seniority. To rebut this presumption, the construction lien claimant would need to establish that visible improvement on the

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97 (Conn. Super. Ct. 1938); Peoples Bank & Trust Co. v. L & T Developers, 434 So. 2d 699, 708 (Miss. 1983).

155. *E.g.*, N.D. CENT. CODE § 35-27-03 (2004); Simmons First Bank of Ark. v. Bob Callahan Servs., Inc., 13 S.W.3d 570 (Ark. 2000).

156. *E.g.*, MICH. COMP. LAWS ANN. § 570.1119 (2006).

157. *See* Portage Realty Corp. v. Baas, 298 N.W.2d 892 (Mich. Ct. App. 1980).

158. *See, e.g.*, ME. REV. STAT. ANN. tit. 10, § 3255 (2005 & Supp. 2006); Ball v. Vogtner, 362 So. 2d 894 (Ala. 1978); Green v. Clyde, 97 S.W. 437 (Ark. 1906); Willingham-Tift Lumber Co. v. Barnes, 93 S.E. 201 (Ga. 1917).

159. *See* MINN. STAT. § 514.05 (2006); Kloster-Madsen, Inc., v. Tafi's, Inc., 226 N.W.2d 603 (Minn. 1975).

160. *See* ME. REV. STAT. ANN. tit. 10, § 3255(2) (Supp. 2006).

subject project commenced prior to the recording or filing of the mortgage or other lien over which the construction claimant wishes to establish priority. Further, all mechanic's lien claimants working on the same project would have equal standing. To provide otherwise would reward the excavator over the painter simply because the former began work earlier in the project by necessity.

#### XI. CONCLUSION

The origins and principles underlying construction lien claims are similar throughout the nation, but the rules and procedures for perfecting them are not uniform. Careful attention must be paid to the statutory requirements in any jurisdiction where a construction lien is sought, because failure to follow the letter of the law is often fatal to a construction lien claim.

A uniform lien act would easily enable parties in the construction industry to know their rights and responsibilities, particularly parties who work in multiple states. Similar to the Uniform Commercial Code, a uniform lien act would have universal applicability and create a situation where parties knew their rights and deadlines no matter where the work was performed. This uniformity would reduce litigation over nuances or loopholes in various state laws and lead to a standardized system for asserting, enforcing, and litigating construction lien claims.