Priority of Liens Relating to Construction and Development

By Michelle C. Eller and Jackson D. Glisson, III

I. Mechanic's Liens

By way of general background concerning Missouri mechanic’s lien law, the right of a contractor, subcontractor or material supplier to assert a lien derives solely from legislative enactment found at Missouri Revised Statutes Chapter 429, et seq. A mechanic’s lien is a remedy in the nature of an encumbrance on land to secure a priority of payment for the performance of labor or the supply of materials to buildings or other improvements, enforced against the land, improvements and appurtenances among which they have become incorporated. Such right to enforce a mechanic’s lien is based on the principle that those who have contributed labor or material to the improvement of property are entitled to look to the property for compensation.1

II. Introduction to Priority

When two persons or entities have lien claims in respect to the same property, the order in which such lien claims may be satisfied out of the sale of the property is based on priority. In this regard, a recorded Deed of Trust is considered a lender’s lien, and a proper mechanic’s lien statement filed by a contractor, subcontractor or material supplier is a mechanic’s lien. Liens are generally ranked in the order in time in which they are perfected; i.e., a perfected lien ordinarily has priority over a subsequently perfected lien. Priority, however, can be waived under certain circumstances.

III. Date of Perfection of Mechanic’s Liens – the First Spade Rule

In Missouri, the date of perfection of a properly-filed mechanic’s lien “relates back” to the date of the first visible act of furnishing lienable labor, materials or work by any project participant. This is known as the “First Spade Rule”. Under the First Spade Rule, mechanic’s liens attach with the first delivery of material or commencement of work for that project.2

Each mechanic’s lien for the furnishing of labor, materials and work for the same construction project relates back to the single date established by the First Spade Rule, regardless of when any particular lien claimant furnished materials or performed its work. In other words, the mechanic’s lien of a contractor who first performs work on a project nearing completion of the project shares the same priority as a contractor who performed work at the commencement of the project -- conceivably years earlier. This principle


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places contractors, subcontractors, suppliers and others that have furnished valuable labor, materials, work or services for the same project on an equal footing when it comes to priority among their respective mechanic’s liens.3

IV. Priority of Mechanic’s Liens

Missouri’s mechanic’s lien law contains two sections that express the Legislature’s intent on the subject of the priority of a mechanic’s lien versus another lien, such as a lien created by a deed of trust. Those two sections are Mo. Rev. Stat. §§ 429.050 and 429.060.

A. Perfected Mechanic’s Liens have Priority Over Subsequent Liens

Section 429.060 addresses the priority of the mechanic’s lien to liens recorded subsequent to the First Spade (or commencement of visible work) and reads as follows:

The lien for work and materials as aforesaid [i.e., the mechanic’s lien] shall be preferred to all other encumbrances which may be attached to or upon such buildings, bridges or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements.

This statute is consistent with the notion that upon the commencement of work, similarly to the recording of a deed of trust, a prospective lender is given notice of existing or potential mechanics’ liens and, therefore, a lender’s subsequent lien is properly inferior.4

The concept of notice brought about by the application of § 429.060, a statute originally adopted in 1855, formulated the long-standing First Spade Rule, the theory being that there is no injustice brought to one dealing with and relying upon the property for security, for the reason the work itself is notice to everyone of the claim of mechanic’s lien. By examination of the property, it may be ascertained whether one may safely buy or take a mortgage against the property. It is of no consequence in imposing the First Spade Rule that certain improvements have not yet occurred. The key factor being that the lender is put on notice or otherwise aware that improvements to the property for which the lender is seeking security may be encumbered or may potentially be encumbered by mechanics’ liens and that there are materialmen or laborers in existence who expect to be paid because the property has been improved.5

Thus, a properly filed mechanic’s lien attaches to the land and all improvements thereon in preference to all subsequent liens. A contractor or materialman, however, should be aware that a purchase money deed of trust recorded subsequent to the perfection of a mechanic’s lien might be deemed to have priority insofar as the improvements were commenced without the knowledge or consent of the owner of the property.6

B. Mechanic’s Liens have Priority over Preexisting Liens Respecting the Improvements Themselves

Section 429.050 addresses priority of the contractor’s mechanic’s lien in the actual improvements constructed by that contractor as to all other liens whether perfected prior or subsequent to the perfection of the mechanic’s lien. In this regard, § 429.050 states in relevant part:

The lien for the things aforesaid, or work [referring to a mechanic’s lien], shall attach to the buildings, erections or improvements for which they were furnished or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon which said buildings, erections, improvements or machinery have been erected or put . . . .

Thus, § 429.050 provides that mechanic’s liens shall attach to the improvements constructed in preference to any prior lien.

To summarize, the general effect of §§ 429.050 and 429.060 is that mechanic’s liens shall attach to the improvements constructed in preference to any prior lien and all other encumbrances on the improvements or the land subsequent to the commencement of the improvements. Encumbrances perfected prior to the mechanic’s lien have priority with respect to the land itself.

The question then becomes whether or not the mechanic’s lien preference established by § 429.050 applies to mechanics’ liens arising out of the construction of improvements to existing structures as well as those arising out of the construction of newly erected improvements.

While §§ 429.050 and 429.060 were adopted many decades ago at a time when nearly every construction project involved the addition of improvements to undeveloped ground, the obvious intent of the statutes is readily gleaned with respect to how the priority issue should be decided when a contractor adds further improvements to property containing existing improvements. After all, the clear object of § 429.050 is to grant statutory priority to the contractor’s mechanic’s lien as to the value of the contractor’s newly added improvements. Meanwhile, § 429.060 recognizes the lender’s lien (or other lien) -- if recorded prior to the “relation back” effective date of the mechanic’s lien and assuming no waiver -- has priority over whatever was preexisting before the commencement of the new improvements.

This dichotomy makes perfect sense. The lender’s prior lien is protected by maintaining priority over the preexisting property. However, the lender is unjustly enriched by the contractor’s newly added improvements unless the contractor’s mechanic’s lien is granted priority as to the value of those newly added improvements. Section 429.050 pre-

5. Drilling Service Co. v. Baebler, 484 S.W.2d 1, 9 (Mo. 1972).
6. Joplin Cement Co. v. Greene County Bldg. & Loan Ass’n, 74 S.W.2d 250, 251 (Mo. Ct. App. 1934) and Allied Pools, Inc., 735 S.W.2d at 426-427.
vents the lender from being placed in a better position than it would have been in absent the new improvements. Arguably, this demarcation applies (assuming no lender waiver of priority) regardless of whether the contractor is adding improvements to bare ground or to already improved property.

There are no reported Missouri cases (excluding dicta) that have ruled on the relative priority between a lender’s lien and a mechanic’s lien relating to new improvements, or enhancements, furnished by the mechanic’s lienor to already improved property.

The Missouri Court of Appeals, however, in Trout’s Investments, Inc. v. Davis, 482 S.W.2d 510, 515 (Mo. Ct. App. 1972), concluded that § 429.050 does not apply to a mechanic’s lien based on work to remodel existing building improvements (in contrast to furnishing, building or erecting new improvements). Yet, the appellate court’s discussion in that regard was dicta; i.e., the discussion on that point was unnecessary to the court’s holding because the court held that the bank had waived its position, and was estopped from claiming that its lien had priority over the mechanic’s liens.

Thus, the question remains as to whether a mechanic’s lien has priority over a prior lender’s lien to the extent of the value of the enhancements added to the already improved property. Missouri courts have, however, ruled that where a mechanic’s lien claimant merely performs repairs to existing improvements, such mechanic’s liens do not attach to the restored improvements in preference to the prior lien.7

Notably, however, in Elliot & Barry Engineering Co. v. Baker, 114 S.W. 71 (Mo. Ct. App. 1908), the court acknowledged that the contractor’s lien should have priority if it involves completing the improvements to the property but not if the contractor is merely making repairs:

The test of precedence is whether the work and material were done and furnished in the completion of the building, or in making repairs on one already finished when the incumbrance was taken. In the former contingency the lien will have preference as to the building, over the incumbrance, because to do so will not impair the security on which the incumbrancer relied; whereas in the latter contingency, the incumbrance will have the preference, because, otherwise, the incumbrancer might be deprived in favor of lienors, of part of the security he counted on, by repairs made without his consent.8

V. Waiver of Lender’s Deed of Trust Lien

Despite a lender’s recording its deed of trust prior in time to the commencement of the construction work, the doctrine of waiver can deprive

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the lender of its priority with respect to the ground as well as the improvements.9 Waiver of priority is an equitable doctrine without a precise test or rigid legal formula10 and whether waiver has occurred is a question of fact. Such waiver can take place at the time of the making of the loan for which the deed of trust was tendered or thereafter including when the improvements are in progress.11

A. Lender’s Knowledge of Improvements

The Missouri Supreme Court reasoned in H. B. Deal Constr. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940 (Mo. 1967), that a lender’s actual knowledge, on the date the deed of trust is recorded, of (1) the mortgagor’s intention to improve the property and (2) the contemplation of employing contractors and materialmen which should be expected to file mechanics’ liens if their bills are not paid, is sufficient knowledge of anticipated construction, like visually observed construction, to make any subsequent mechanics’ liens paramount to an earlier filed deed of trust. In this regard the court stated as follows:

On the date the deed of trust was recorded the bank not only had actual knowledge that a building was to be constructed on this land, but also the bank then knew that the employment of subcontractors by the general contractor was contemplated and that the mechanics and materialmen whose labor and materials were to create the improvement might be expected to file mechanics’ liens against the property if their bills were not paid. The bank had much more knowledge about the construction of the improvement than it would have had if its officials had merely visually observed excavation for a foundation (which would have constituted “commencement of the building” and would have been notice to the world that a building was to be constructed there and if done prior to the recording of the deed of trust would have made the mechanics’ liens paramount to a subsequently filed deed of trust, under all of the authorities). By its acts and conduct the bank caused, procured and induced all of the direct contractors and the subcontractors to perform the necessary services and to supply the needed materials for the construction of the improvement. Under these circumstances the bank is in no position to insist upon the subordination of the liens of the mechanics and materialmen and is taken to have waived the priority of the lien of the deed of trust in favor of the liens of the mechanic’s lien claimants. The plaintiff and the other mechanic’s lien claimants, therefore, have a paramount mechanic’s lien not only on the improvements (by virtue of § 429.050) but also on the land itself.12

Thus, where a lender has knowledge prior to the perfection of its deed of trust of the intended improvements to the property and the possibility of mechanic’s liens where contractors, subcontractors and suppliers have not been paid for the labor and material used to improve the property, the mechanic’s liens will have priority over the deed of trust.

B. Lender’s Active Participation in Project

The Missouri Supreme Court set forth the applicable rule in H.B. Deal Constr. Co. v. Labor Discount Center, Inc., supra: Under the doctrine of waiver a mortgagee by reason of having induced the furnishing of labor and material may be precluded from asserting the priority of the mortgage over a mechanic’s lien.13

Although the Missouri Supreme Court decisions of Drilling Service Co. and H.B. Deal Constr. are controlling, the Western District in Kranz v. Centropolis Crusher, Inc., 630 S.W.2d 140, 149 (Mo. Ct. App. 1982), requires, in addition to the lender’s knowledge of the contemplated improvements at the time of the loan, “something more by way of participation by the lenders in the construction program” before waiver of the mortgage priority can result. Thus, an emergence has occurred of what some may view as two lines of cases.

It should be noted that the Kranz court relies solely on the ruling in Westinghouse Elec. Co. v. Vann Realty Co., 568 S.W.2d 777 (Mo. 1978), in its holding regarding the requirements for waiver. Significantly, the court in Westinghouse Elec. Co. did not apply the doctrine of waiver in deciding the lien priority issue because the mechanic’s lien claimant in that case failed to introduce adequate

13. Id. at 952.
15. Dave Kolb Grading, Inc. v. Lieberman Corp., 837 S.W.2d at 935.

### C. Deeds of Trust Arising Out of Construction Loans

It follows from the Missouri Supreme Court holding in H.B. Deal Constr. that where a lender claims a lien arising out of moneys loaned for the purpose of constructing improvements on property, the lender necessarily (1) has knowledge of the contemplated employment of mechanics and materialmen whose labor and materials will create the improvements which may result in the filing of mechanic’s liens, and (2) has participated in the construction project. As a result, the cases seem to support the presumption, although not so specifically stated, that the deed of trust securing such a loan is consequently subordinated to the mechanic’s liens arising out of the project, despite commencement of the project after the perfection of the lender’s lien.16

### VI. Future Advances

#### A. Introduction of Advancements

One of the most difficult issues to address when analyzing lien priority is the subject of future advances. Future advances are defined as any advance of funds, disbursement of loan proceeds or other exchange of value or consideration from a lender to, or on behalf of, a borrower that occurs after the date of the security instrument securing such further advance, regardless of whether such advance is made under a note, contract, guarantee or other evidence of indebtedness that was executed prior to or contemporaneously with such security instrument or made under a future obligation.

Mo. Rev. Stat. § 443.055(1) (2007). Typically, a lender will use a deed of trust or similar instrument to secure future advances.

The security instrument may secure future advances or other future obligations of a borrower to a lender, regardless of whether the advances or obligations are optional or obligatory with the lender. Mo. Rev. Stat. § 443.055(2) (2007). The fact that a security instrument secures future advances or future obligations shall be clearly stated within the body of the security instrument.

#### B. Priority Treatment of Advances

Because future advances may be used for a variety of costs related to maintenance or improvements to real property, a number of questions arise regarding the priority treatment of such advances vis-à-vis third parties. This issue is generally addressed in Mo. Rev. Stat. § 443.055 (the “Future Advances Statute”).

On its face, the Future Advances Statute appears to provide an answer to the issue of priority treatment. However, on closer inspection, the reader, particularly a mechanic’s lien claimant, is left with a number of unanswered questions.

Priority treatment of future advances versus third parties is addressed in subsection (5) of the Future Advances Statute:

As to any third party who may acquire any rights in or a lien upon the encumbered real property, the priority of the lien of a security instrument securing future advances or future obligations shall date from the time the security instrument is recorded, whether or not any third party has actual notice of any such advances or obligations and whether or not such advances or obligations are optional or obligatory with the lender. If an amendment to a mortgage, deed of trust, or other real property security instrument securing the repayment of any obligation has been recorded which causes such instrument to become a security instrument or if an amendment to a security instrument has been recorded which increases the total amount of the obligations which may be secured thereby, the priority of advances made or additional obligations incurred thereafter which exceed the original face amount shall date from the date the amendment was recorded, as to any third parties who may acquire any rights in or lien upon the encumbered real property, whether or not any third party has actual notice thereof and whether or not the advances or additional obligations are optional or obligatory with the lender. [Emphasis added.]

On its own, this section appears to support the proposition that the priority of future advances, whether
part of a purchase money loan or construction loan, shall be based on the filing date of the security instrument. However, the analysis becomes murky when the Future Advances Statute is read together with the Missouri’s Mechanic’s Lien Statute, Mo. Rev. Stat. §§ 429.010, et seq. and Missouri cases enforcing that statute.


As addressed in Section IV supra, the Mechanic’s Lien Statute addresses the issue of mechanic’s lien priority versus other types of liens and encumbrances in two sections. Mechanic’s liens attach to the buildings, erections or improvements in preference to any prior lien or encumbrance or mortgage upon the land on which the buildings, erections or improvements have been erected. Mo. Rev. Stat. § 429.050 (2007). Further, a mechanic’s lien is given priority over all other encumbrances which may attach to a building or other improvement subsequent to the commencement of such buildings or improvements. Mo. Rev. Stat. § 429.060 (2007).

In order to assess the priority of liens or encumbrances competing with a mechanic’s lien, it is necessary to divide such liens or encumbrances into two groups, those that attach to the property after construction has commenced and those that attached prior to the start of construction. In the former case, the analysis is easy. Based on § 429.060, the mechanic’s liens are given priority over the liens that attached after the start of construction.

For liens that attach prior to construction, the analysis is more complex. In particular, the doctrine of waiver, discussed above in Section V, may come into play. Future advances usually fall into this category.

The relevant question for purposes of this discussion is how one reconciles Mo. Rev. Stat. § 443.055(5) with Mo. Rev. Stat. §§ 429.050 and 429.060 and the doctrine of waiver. Missouri case law provides little guidance on this specific question.

Although not addressing the issue squarely, the court in H.B. Deal Construction Co. v. Labor Discount Center, Inc., 418 S.W.2d 940 (Mo. 1967), addressed the priority issue of mortgages given for future advances versus mechanic’s liens. The court relied on Mo. Rev. Stat. § 429.050 and the doctrine of waiver to find that the mechanic’s liens attached to a building and improvements in preference to a prior lien of a deed of trust upon the land. In concluding that a deed of trust for future advances was subordinate to the mechanic’s lien, the court stated that “Section 429.050 is written to encompass all prior liens, encumbrances or mortgages and we cannot construe it to apply to less than all of them.” Id. at 952.

The H. B. Deal Construction Co. decision, however, was handed down some 16 years before the enactment of the Future Advances Statute. Nevertheless, one can surmise from subsequent cases that Missouri courts would reach the same decision today. In fact, although it did not specifically address future advances, the court in Dave Kolb Grading, Inc. v. Lieberman Corporation, 837 S.W.2d 924, 934 (Mo. Ct. App. 1992), reiterated that Mo. Rev. Stat. § 429.050 provides that mechanic’s liens shall attach to the improvements constructed in preference to any prior lien.

Of course, in many cases, having priority in the building and improvements may be of little value. Thus, the important question is what kind of preference in the underlying land should be given to advances made pursuant to a deed of trust with a future advance clause.

While no Missouri cases have tackled this question as it relates to advances versus mechanic’s liens, a strong argument can be made that the doctrine of waiver would still apply. In the cases decided since the enactment of the Future Advances Statute, Missouri courts have continued to demonstrate a preference toward protecting those contractors that have been induced into furnishing labor and materials. On the contrary, lenders may argue that the Future Advances Statute addresses the priority of future advances incurred under a construction loan in subsection 3(2): “[f]uture advances or future obligations incurred under a construction loan are secured by the security instrument and shall have the priority specified by subsection 5 . . . .” In other words, they relate back to the date that the security instrument was recorded.

There is an exception to this rule. In the event, that an amendment is recorded increasing the total amount of the obligations, the priority of advances made in excess of the original face amount shall only relate back to the date the amendment was recorded. Therefore, if construction has commenced and the original face amount of the security instrument must be increased, mechanic’s liens shall take priority over any advances paid out above the original amount.

VII. Conclusion

On construction projects that have headed south, lien priority has a significant impact on lenders and contractors alike. While Missouri’s case law and statutes provide a lot of direction, as demonstrated herein, there are plenty of opportunities for the practitioner to argue for or against the priority of liens.