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Future Advances in Missouri

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COMMENT

FUTURE ADVANCES IN MISSOURI

I. INTRODUCTION	103
II. PRIOR MISSOURI FUTURE ADVANCES STATUTES	104
A. <i>The Mechanics' Lien Statute</i>	104
B. <i>The Uniform Commercial Code</i>	106
III. JUDICIAL HISTORY OF FUTURE ADVANCES CLAUSES	107
A. <i>Validity</i>	107
B. <i>Priority</i>	108
IV. NEW LEGISLATION	114
A. <i>Operation of the Statute</i>	114
B. <i>Effect of the Statute</i>	116
V. CONCLUSION	120

I. INTRODUCTION

Missouri traditionally has accepted the validity of mortgages¹ to secure future advances.² In 1981, the legislature finally offered a workable and definitive technique for resolving priority disputes between a mortgagee making such advances and an intervening lienor. The new legislation, Missouri Revised Statutes section 443.055,³ makes it clear that a mortgage to secure future advances is valid and enforceable for a ten-year period. By complying with the statute, a mortgagee can assure priority for those advances as of the date the mortgage is recorded. A mortgagee⁴ who wishes to avoid the strict requirements of the future advances legislation, or to secure advances for more than ten years, can opt out of the new statute and be controlled by prior Missouri law. This Comment examines prior Missouri statutes and the judicial history of future advances mortgages, sets out the requirements of the new

1. As used in this Comment, the term "mortgage" refers to a real estate mortgage, deed of trust, or any other real property instrument securing a debt. *See also* MO. REV. STAT. § 443.055.1 (Supp. 1983) (defines "instrument" as "any mortgage, deed of trust, or other real property security instrument securing the repayment of any debt").

2. *See, e.g., Foster v. Reynolds*, 38 Mo. 553, 556-57 (1866); *see also Embree v. Roney*, 152 Mo. App. 257, 262-63, 133 S.W. 83, 85 (1910) (chattel mortgage); *Rice v. Davis*, 99 Mo. App. 636, 640, 74 S.W. 431, 432 (1903) (same).

3. (Supp. 1983). The statute originally applied to all real estate mortgages given to secure future advances, whether or not the mortgagee wished to be governed thereby. MO. REV. STAT. § 443.055 (Supp. 1981). It was amended in 1982 to allow mortgagees to opt out of the new legislation and secure advances for periods longer than 10 years. 1982 Mo. Laws 620 (codified at MO. REV. STAT. § 443.055.8 (Supp. 1983)); *see notes 95-116 and accompanying text supra*.

4. As used in this Comment, the term "mortgagee" refers to any lender or creditor under any mortgage, deed of trust beneficiary, or creditor holding a real property security interest.

legislation, and offers some suggestions to guide the mortgagee in making a choice between the new statute and judicial interpretation of the future advances mortgage.

II. PRIOR MISSOURI FUTURE ADVANCES STATUTES

A number of prior Missouri statutes permitted future advances in some form. Some of those statutes merely sanctioned the use of future advances clauses.⁵ Others sanctioned the use of such clauses and set out rules governing priority problems between advances and other liens. Two such statutes, the mechanics' lien statute and the Uniform Commercial Code, are still in effect.

A. *The Mechanics' Lien Statute*

Missouri Revised Statutes sections 429.050⁶ and 429.060⁷ have remained virtually unchanged since their enactment.⁸ They give preference to mechan-

5. See, e.g., MO. REV. STAT. §§ 410.010-060 (1959) (Accounts Receivable Act) (repealed 1963); *id.* §§ 430.260-320 (1949 & 1959) (Factor's Lien Act) (repealed 1963); *id.* §§ 369.010-665 (1969) (Savings and Loan Act). The Accounts Receivable Act permitted the assignment of present and future accounts. *Id.* § 410.010 (repealed 1963). The Factor's Lien Act permitted security interests in shifting stocks of goods and after-acquired property. Comment, *Legislation—Factor's Lien Act of 1945 and Accounts Receivable Act of 1943*, 17 MO. L. REV. 86, 88 (1952). One who advanced money in return for a security interest in merchandise could secure all loans and future advances with a continuing general lien that attached to all merchandise described in the written agreement, whether that merchandise was owned at the time of the agreement or subsequently acquired. MO. REV. STAT. § 430.270 (1959) (repealed 1963).

The Savings and Loan Act gave savings and loan associations the power to make advances necessary to protect security or the lien's priority, to make one thousand dollar advances to equip or furnish the home securing the mortgage, and to make any other advance authorized by a future advances clause in a mortgage. *Id.* § 369.365 (repealed 1971).

6. (1978).

7. (1978).

8. Both sections were originally enacted in 1855. Section 429.050 originally provided: The lien for the things aforesaid, or work, 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 incumbrance [sic], or mortgage, upon the land upon which said buildings, erections or improvements, have been erected or put; and any person enforcing such lien, may have such building, erection or improvement, sold under execution, and the purchaser may remove the same within a reasonable time thereafter. MO. REV. STAT. ch. 109, § 10 (1855). A later revision removed some superfluous commas, corrected the spelling error, and added "machinery." *Id.* ch. 102, § 6707 (1889).

Section 429.060 originally provided:

The liens for work or labor done, or things furnished, as specified in this act, shall have priority in the order of the filing of the accounts thereof, as aforesaid, and shall be preferred to all other liens or incumbrances which may be attached to or upon such building, erection or other improvement, and to the land on which the same is situated, to the extent aforesaid, or either of them, made subsequent to the commencement of said building, erection, or other improvement.

MO. REV. STAT. ch. 109, § 8 (1855). The statute was later clarified: "The lien for work and materials . . . shall be preferred to all other incumbrances which may be attached to or upon such buildings, bridges or other improvements, or to the ground, or either of them, subsequent to the commencement of such buildings or improvements." *Id.* ch. 47, § 3178 (1879).

ics⁹ liens over "any prior lien or encumbrance or mortgage upon the land upon which . . . [the] buildings, erections, improvements or machinery . . . [are] erected or put,"¹⁰ and permits lienors to sell or remove the improvements to satisfy their unpaid debts.¹¹ Mechanics' lienors also can gain priority over subsequent encumbrances on the land under section 429.060.¹² The courts broadly define "subsequent encumbrance" to include future advances, whether the advances are optional or obligatory.¹³

This statute does not set out precise rules of priority between mechanics' liens and future advances made pursuant to a construction mortgage, but such rules have emerged through judicial interpretation. Recognizing the importance of this statutory protection of mechanics, the courts have held that mechanics' liens are superior to all advances made after the mechanics' lien arises, regardless of whether the lender was obligated to make the advance.¹⁴ Missouri follows the "first spade rule,"¹⁵ which dates the priority of all

9. As used in the Comment, the phrase "mechanics' lien" refers to mechanics' and materialmen's liens. These statutory liens give unpaid contractors, workmen, and materials suppliers a foreclosureable security interest in real estate that they have improved. G. OSBORNE, G. NELSON, & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 12.4 (2d ed. 1979) [hereinafter cited as NELSON & WHITMAN]; see R. KRATOVIL & R. WERNER, *MODERN MORTGAGE LAW AND PRACTICE* § 25.27 (2d ed. 1981); Comment, *Mechanics' Liens—Priority Over Mortgages and Deeds of Trust*, 42 Mo. L. REV. 53, 60-61 (1977).

10. Mo. REV. STAT. § 429.050 (1978). This lien has priority over prior liens for improvements but not for the land on which the improvements are made, unless the prior mortgagee has waived priority as to the land. *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940, 953-54 (Mo. 1967); *Union Elec. Co. v. Clayton Center Ltd.*, 634 S.W.2d 261, 263 (Mo. Ct. App. 1982); see notes 44-49 and accompanying text *infra*.

11. Mo. REV. STAT. § 429.050 (1978). It is usually impractical to exercise this right because removal would reduce the value of the improvements to less than the amount of the lien. See, e.g., *Fleming-Gilchrist Const. Co. v. McGonigle*, 338 Mo. 56, 68, 89 S.W.2d 15, 21 (1935), discussed in Comment, *supra* note 9, at 61. If there is a superior mortgage on the land, the mechanics lienor does not have the right to sell the land with the improvements. *McGonigle*, 338 Mo. at 65-66, 89 S.W.2d at 20-21. By securing a mechanics lien on the land under Mo. REV. STAT. § 429.010 (1978), the lienor may sell the land and the improvements subject to the first lien on the land. Comment, *supra* note 9, at 61-62. Some older cases granted the mechanics lienor or foreclosure sale purchaser a cause of action for damages if the land owner refused to permit removal. See, e.g., *Seidel v. Cornwell*, 166 Mo. 51, 55, 65 S.W. 971, 972 (1901).

12. Prior liens of every kind are generally deemed superior to liens arising later. See *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940, 952 (Mo. 1967). Moreover, the courts liberally interpret the mechanics' lien statute to guarantee payment to those who improve property. See *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 12 (Mo. 1972); *Boyer Lumber v. Blair*, 510 S.W.2d 738, 747 (Mo. Ct. App. 1974).

Suppose that *X* hires *M* to install a conveyor system in its factory. While work is progressing, *X* mortgages the property to Bank to raise funds for acquiring adjacent land. If *M* is not paid, its mechanics lien attaches when installation is commenced, and thus is prior to the subsequent mortgage.

13. See, e.g., *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 10-11 (Mo. 1972).

14. See, e.g., *id.*; *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940, 952-53 (Mo. 1967).

15. *Schroeter Bros. Hardware Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 459, 58 S.W.2d 995, 1002-03 (1933); *United Lumber Co. v. Minmar Inv. Co.*, 472 S.W.2d 630, 632-33 (Mo. Ct. App. 1971); *Gardner v. North Kan. City Alfalfa Mills*, 61 S.W.2d 374, 376 (Mo. Ct. App. 1933); see generally Comment, *supra* note 9, at 55-57.

mechanics' liens to the time of the "first visible improvement."¹⁶ Thus, all mechanics' liens receive priority over future advances made after the commencement of work.¹⁷ This legislation will still control if the mortgagee opts out of the new legislation¹⁸ or fails to meet its strict requirements.¹⁹

B. *The Uniform Commercial Code*

The legislature specifically authorized the use of future advances clauses in loans secured by personal property when it adopted the Uniform Commercial Code (UCC) in 1963.²⁰ Missouri Revised Statutes section 400.9-204(5) provides that "[o]bligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."²¹ This section has been broadly interpreted to permit traditional future advances clauses²² (which specify the amount and purpose for which the advance is made) and dragnet clauses²³ (which secure payment of "any other indebtedness heretofore, now or hereafter contracted"²⁴). Priority for advances over intervening liens depends on the circumstances of

16. The first visible improvement

means the visible commencement of actual operations on the grounds for the erection of the building or the making of the improvement which makes it apparent that a building has been commenced or that an improvement is to be made, done with the intention and formed purpose to continue the work until completed.

H.B. Deal Constr. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940, 951 (Mo. 1967). It does not include "laying off the ground for buildings and driving pegs into the ground to mark the location . . . [or] clearing the ground of . . . obstructions, that would render insecure the foundations to be built." *Id.* at 951 (citing L. BOISOT, MECHANICS' LIENS § 179 (1897)). Nor does it include preliminary site inspection. *Id.* (citing Mark's Sheet Metal, Inc. v. Republic Mortgage Co., 242 Ark. 475, 414 S.W.2d 106 (1967)).

17. See, e.g., Drilling Serv. Co. v. Baebler, 484 S.W.2d 1, 9, 12 (Mo. 1972); H.B. Deal Constr. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940, 951-52 (Mo. 1967).

18. See MO. REV. STAT. § 443.055.8 (Supp. 1983).

19. Mortgages must be carefully drawn to comply with the new statute. Thus, if our hypothetical *M* begins to install the conveyor system, then Bank makes an obligatory advance pursuant to a previously executed mortgage without complying with § 443.055, *M*'s lien is still prior to the lien securing the advance. See notes 77-79 and accompanying text *infra*.

20. 1963 Mo. Laws 503. The UCC (1969 version) appears at MO. REV. STAT. §§ 400.1-101 to .9-507 (1978 & Supp. 1983). Before the adoption of the UCC, future advances could be secured by chattel mortgages. See *Graham v. Finnerty*, 232 S.W. 129, 131 (Mo. 1921); *White v. Meiderhoff*, 281 S.W. 98, 100 (Mo. Ct. App. 1926). Value was defined as "any consideration sufficient to support a simple contract . . . [including] [a]n antecedent or preexisting obligation, whether for money or not, . . . where . . . taken either in satisfaction thereof or as security therefor." MO. REV. STAT. §§ 406.010(12), 407.020(12) (1959) (repealed 1972).

21. (1978).

22. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 25-4, at 1038-42 (1980). For priority purposes, advances will relate back to the time the agreement is executed. *Id.* at 1037.

23. See *Kimball Foods v. Republic Nat'l Bank*, 557 F.2d 491, 495 (5th Cir. 1977); *Community Nat'l Bank v. Victory*, 488 F.2d 1369, 1377-78 (10th Cir. 1973); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Vrooman*, 476 F.2d 938, 939 (9th Cir. 1973); *State Bank of Albany v. United States*, 468 F.2d 1211, 1213 (2d Cir. 1972).

24. *Trapp ex rel. First Miss. Bank of Commerce v. Tidwell*, 418 So. 2d 786, 787, 792 (Miss. 1982); see generally W. DAVENPORT & D. MURRAY, SECURED TRANSACTIONS § 3.06 (1978).

the particular case.²⁵

The UCC separately treats "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work, and the like" and any other goods classified by Missouri law as fixtures.²⁶ Section 400.9-313 requires a special fixture filing in the real estate records for goods falling into these two categories.²⁷ This section also contains special rules governing priority conflicts between fixtures and real estate mortgages.²⁸

III. JUDICIAL HISTORY OF FUTURE ADVANCES CLAUSES

Under the new future advances statute, a lender has the option to be controlled by that legislation or to be governed by prior law.²⁹ An examination of prior Missouri law is necessary because lenders may decide that the new statute does not adequately serve their interests in some situations.³⁰

A. *Validity*

Since 1866, Missouri has recognized the validity of mortgages to secure future advances. In *Foster v. Reynolds*,³¹ the Missouri Supreme Court upheld the right of a mortgagee to foreclose a deed of trust that, on its face, secured a sum to be subsequently advanced.³²

25. Usually the first to file has priority under § 9-204. J. WHITE & R. SUMMERS, *supra* note 22, § 25-4, at 1037; see generally Cohen, *Future Advance Interests Under the Code*, 10 B.C.L. REV. 1 (1969); Skilton, *Security Interests in After-Acquired Property Under the Uniform Commercial Code*, 1974 WIS. L. REV. 925.

26. MO. REV. STAT. § 400.9-313 (1978). Fixtures receive special treatment because they mix real and personal property characteristics. W. DAVENPORT & D. MURRAY, *supra* note 24, § 2.08; Henning, *The Impact of Revised Article 9 on Missouri's Fixture Financing Scheme*, 48 MO. L. REV. 63, 64 (1983).

27. A financing statement must be filed to perfect a security interest in fixtures. MO. REV. STAT. §§ 400.9-302, -401(1)(b), -408 (1978); Henning, *supra* note 26, at 82-87.

28. The general rule is that a secured party whose interest attaches before the goods become fixtures has priority over competing real estate interests. MO. REV. STAT. § 400.9-313 (1978); Henning, *supra* note 26, at 90-93. Prior recorded real estate interests take priority over non-purchase money security interests in fixtures. MO. REV. STAT. § 400.9-313(4)(c) (1978). Purchase money security interests perfected by a fixture filing before the goods become a fixture or within ten days thereafter have priority over real estate interests, unless the real estate interest arises and is recorded between the time the goods become fixtures and the fixture filing was made. *Id.* Under the 1972 Code, construction mortgagees are given special protection by § 9-313(6), which generally gives them priority over conflicting purchase money security interests in fixtures. Under Missouri law, however, the construction mortgagee's priority is limited to subsequent advances made or contracted for without knowledge of and prior to the perfection of the purchase mortgagee's security interest. MO. REV. STAT. § 400.9-313(4)(c) (1978); Henning, *supra* note 26, at 92-93.

29. The statute does not apply to instruments that do not clearly state they are to be governed by it. MO. REV. STAT. § 443.055.8 (Supp. 1983).

30. See notes 95-116 and accompanying text *infra*.

31. 38 Mo. 553 (1866).

32. Although the amount on the deed of trust was \$2,625, only \$700 had been advanced. *Id.* at 555. The parties apparently had executed a second agreement providing for future advances. When the mortgagee brought the foreclosure action, the mortgagor denied liability on the note on the grounds that the face amount had not been paid and claimed that the collateral

[A] mortgage or judgment may be given to secure future advances, or as a general security for balances which may become due from time to time from the mortgagor or judgment debtor; and this security may be taken in the form of a mortgage or judgment for a specific sum of money sufficiently large to cover the amount of the floating debt to be secured thereby.³³

The Kansas City Court of Appeals, relying on *Foster*, went even further in *Smith-Wallace Shoe Co. v. Wilson*.³⁴ The *Wilson* court stated that a mortgage to secure future advances is "not only valid between the parties, but as against [subsequent] creditors having notice thereof . . . [and] a mortgage, duly recorded, would be constructive notice."³⁵ After the *Wilson* decision, future advances enjoyed priority over liens arising after the advance.³⁶ No Missouri case, however, has expressly decided whether advances made pursuant to a future advances clause in a mortgage will be given priority over a lien created after the initial mortgage but before the advance.³⁷

B. Priority

Mortgagees secure future advances in construction mortgages, line of credit mortgages, and dragnet mortgages.³⁸ With the exception of the con-

agreement was inadmissible under the parol evidence rule. *Id.* at 555-56. The court rejected both arguments, holding that future advances mortgages are valid and that parol evidence is admissible to show the parties' intent. *Id.* at 556-57.

33. *Id.* (citing *Shirras v. Caig*, 11 U.S. (7 Cranch) 447 (1812) (mortgages may secure future advances)), discussed in Blackburn, *Mortgages to Secure Future Advances*, 21 Mo. L. Rev. 209, 224-25 (1956).

34. 63 Mo. App. 326 (1895), discussed in Blackburn, *supra* note 33, at 225-26. At least four cases were decided after *Foster* but before *Wilson*: *Holmes v. Strayhorn-Hutton-Evans Comm'n Co.*, 81 Mo. App. 97, 101 (1899) (chattel mortgage valid to secure future advances); *Williams v. Alnutt*, 72 Mo. App. 62, 65 (1897) (mortgagee may show that stated amount actually represents non-advanced sums under future advances mortgage); *Russell v. Letton*, 56 Mo. App. 541, 548 (1894) (mortgagor may execute several notes representing one stated amount absent fraud); *Sparks v. Brown*, 33 Mo. App. 505, 508 (1898) (future advances mortgage valid and parol evidence is admissible to show intent); see also *Graham v. Finnerty*, 232 S.W. 129, 131 (Mo. 1921) (debt may be secured with separate instruments); *White v. Meiderhoff*, 281 S.W. 98, 100 (Mo. Ct. App. 1926) (future advances mortgage taken in good faith is not fraudulent as to creditors); *Embree v. Roney*, 152 Mo. App. 257, 263, 133 S.W. 83, 85 (1910) (mortgage valid even though it permits debtor to retain possession and control of collateral).

35. 63 Mo. App. at 330; see also *Rice Bros. v. Davis*, 99 Mo. App. 636, 640, 74 S.W. 431, 432 (1903).

36. See *White v. Meiderhoff*, 281 S.W. 98, 100 (Mo. Ct. App. 1926).

37. The majority rule is that an obligatory advance "takes its priority from the date of the original mortgage, and the subsequent creditor is junior to it. . . . [I]f the advance is optional, and if the mortgagee has notice when the advance is made that a subsequent creditor has acquired an interest in the land, then the advance loses its priority to that creditor." NELSON & WHITMAN, *supra* note 9, § 12.7, at 759; see also R. KRATOVIL & R. WERNER, *supra* note 9, §§ 11.02, 11.03. Missouri may follow the majority approach. See Blackburn, *supra* note 33, at 227.

38. A construction mortgage frequently is denominated as a construction loan. The mortgage is secured by real property and the improvements to be made on it. A line of credit mortgage uses some mortgageable property interest to secure a fluctuating debt that has a specified maximum. Many lenders are currently promoting line of credit second mortgages as an alternative to bank card revolving credit accounts. A dragnet mortgage secures all debts the mortgagor owes or may owe to the mortgagee in the future. Other types of future advances transactions include open-end mortgages to advance additional funds up to the original balance after the loan is paid down,

struction mortgage,³⁹ however, neither the courts nor the legislature has established a procedure for resolving priority conflicts between a mortgagee making such advances and other lienors. A mortgagee who opts out of the new future advances legislation should be aware of this lack of guidance and should either choose a technique to assure that no priority conflict arises⁴⁰ or be willing to gamble that the courts will favorably resolve any conflict.

1. Construction Mortgages

A construction mortgagee who finances new construction or renovations may secure his loan with a mortgage on the land and improvements, and stipulate that after the initial advance the funds will be advanced as construction progresses.⁴¹ This is the most prevalent type of future advances mortgage, and construction mortgagees typically require this type of arrangement to avoid problems, such as the mortgagor's absconding with the funds.⁴² Priority conflicts most often arise between a mortgagee who has advanced all or substantially all of the construction funds and one or more unpaid mechanics' lienors. The latter have a statutory lien on the improvements for the value of materials and the value of labor contributed that dates, for priority purposes, from the first visible improvement.⁴³

The leading Missouri case resolving conflicting priorities between a construction mortgagee and unpaid mechanics' lienors is *H.B. Deal Construction*

mortgages to secure indorsements, guarantees, or accommodations of commercial paper. NELSON & WHITMAN, *supra* note 9, § 12.7

39. See notes 44-49 and accompanying text *infra*.

40. The mortgagee need only search the title to ascertain that there are no intervening liens, then take a new mortgage to secure the advance. The priority of the new mortgage would not, however, relate back to the date of the original mortgage.

41. See generally R. KRATOVIL, MODERN REAL ESTATE DOCUMENTATION §§ 410-453 (1975); NELSON & WHITMAN, *supra* note 9, §§ 25.01-43; Kratovil & Werner, *Mortgages for Construction and the Lien Priorities Problem—The "Unobligatory" Advance*, 41 TENN. L. REV. 311, 311-14 (1974).

42. The construction mortgagee's security includes the land and improvements. Until the improvements are completed, the security is inadequate to cover the whole loan; hence it is necessary to assure that the funds are actually used for the purposes for which they were advanced. NELSON & WHITMAN, *supra* note 9, § 12.1, at 703. Other potential problems include: (1) a contract price inadequate to complete construction; (2) delays that increase costs; (3) casualty losses; (4) problems with the long-term lender; (5) incompetent construction contractors; (6) insolvency, death, or withdrawal of a general contractor or subcontractor; (7) financial problems of the mortgagor; (8) increases in interest rates; (9) unavailability of material or labor; and (10) inability to find a long term lender to "take out" the loan after construction. R. KRATOVIL & R. WERNER, *supra* note 9, § 25.03. The construction mortgagee may also be concerned that the funds will be diverted to other uses or that mechanics and materialmen will not be paid. NELSON & WHITMAN, *supra* note 9, § 12.1, at 703.

43. See, e.g., Westinghouse Elec. Co. v. Vann Realty Co., 568 S.W.2d 777, 780-81 (Mo. 1978) (en banc); Home Bldg. Corp. v. Ventura Corp., 568 S.W.2d 769, 773 (Mo. 1978) (en banc); Drilling Serv. Co. v. Baebler, 484 S.W.2d 1, 8-9 (Mo. 1972); H.B. Deal Constr. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940, 950-51 (Mo. 1967); Byron J. Myers, Inc. v. Bradbury, 595 S.W.2d 724, 727-28 (Mo. Ct. App. 1980); Cinco Enters. v. Lake St. Louis Estates Co., 557 S.W.2d 9, 10 (Mo. Ct. App. 1977); Boyer Lumber v. Blair, 510 S.W.2d 738, 747 (Mo. Ct. App. 1974); Trout's Invs., Inc. v. Davis, 482 S.W.2d 510, 515 (Mo. Ct. App. 1972); St. Louis Flexicore, Inc. v. Lintzenich, 414 S.W.2d 787, 789-90 (Mo. Ct. App. 1967).

*Co. v. Labor Discount Center, Inc.*⁴⁴ The mortgagor and the construction mortgagee executed a two million dollar deed of trust⁴⁵ to be secured by the land and all improvements.⁴⁶ Fifty thousand dollars was advanced on the date the deed of trust was signed, but the six remaining advances were disbursed after the date of the first visible improvements.⁴⁷ The Missouri Supreme Court, relying on sections 429.050 and 429.060, which give mechanics' liens priority over both prior and subsequent liens, held that the mechanics' lienors had priority over the entire construction mortgage.⁴⁸ The court found that the construction mortgagee had waived priority as to the land by becoming involved in construction.⁴⁹

Business-wise lenders have devised several schemes to avoid the operation of the mechanics' lien statutes. Future mortgagees who wish to be governed by prior Missouri law⁵⁰ rather than the new statute may want to utilize one of

44. 418 S.W.2d 940 (Mo. 1967).

45. The lender actually gave up only \$1.9 million, which according to the court, was sufficient consideration for a \$2 million note and deed of trust. *Id.* at 946, 949.

46. *Id.* at 945. The construction loan was executed to build a shopping center. The parties agreed on a general contract, drawings and specifications, and a clause prohibiting alterations without specific approval. Special provisions and requirements were executed to deal with unanticipated additions or changes. *Id.* at 944.

47. *Id.* at 945. The initial advance, for payment to the general contractor, was given to a title company, who agreed to hold the funds in escrow until one year after the completion of construction. All further advances were placed in escrow with the title company to pay for material and labor during construction in accordance with an agreement by the parties. *Id.* at 946. The use of escrow accounts is discussed in notes 51-53 and accompanying text *infra*. The date of the first visible improvement was when the general contractor began erecting the building and improvements, rather than when surveying and general ground work commenced. *Id.* at 951-52.

48. *Id.* at 964. The court concluded that § 429.050 created "a lien in favor of the general contractor and all other lien claimants whose liens were properly filed . . . [that] attached to the building and improvements in preference to the prior lien of the deed of trust upon the land." *Id.* at 952. The mortgagee argued that the statute should not apply to "construction loan arrangements in which the lender is legally obligated to disburse the proceeds of the construction loan for the improvement of the property and the mortgage is taken . . . with the expectation that the improvements to be built thereon will provide a major portion of the security . . . [but will come] into being as the improvements are made and the loan proceeds are disbursed." The court refused to draw such an exception and held that the statute specifically referred to all prior liens. *Id.*

49. *Id.*; see *Magidson v. Stern*, 235 Mo. App. 1039, 1055, 148 S.W.2d 144, 153 (1941) (mortgagee waived priority as to the land by writing checks and paying subcontractors); Comment, *The Missouri Mechanics' Lien Statute—Is it Adequate?*, 26 Mo. L. Rev. 53, 58-59 (1961). Many types of mortgage conduct may support finding a waiver. See, e.g., *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 10 (Mo. 1972) (knowledge and contemplation of employing mechanics); *Byron J. Myers, Inc. v. Bradbury*, 595 S.W.2d 724, 727-28 (Mo. Ct. App. 1980) (advance knowledge of and direct payment to contractors); *Pine Lawn Bank & Trust Co. v. Schnebelen*, 579 S.W.2d 640, 643 (Mo. Ct. App. 1979) (knowledge of potential liens, and inducing improvements); *Cinco Enters. v. Lake St. Louis Estates Co.*, 557 S.W.2d 9, 10 (Mo. Ct. App. 1977) (advance knowledge, and deed of trust contemplated); *Trout's Invs., Inc. v. Davis*, 482 S.W.2d 510, 517 (Mo. Ct. App. 1972) (mortgagee assured payment to mechanics); see also *Dreckshage v. Community Fed. Sav. & Loan Ass'n*, 555 S.W.2d 314, 323-24 (Mo. 1977) (en banc) (subrogation agreement executed with second deed of trust). But cf. *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 546-47 (Mo. Ct. App. 1973) (although lien waiver was legally ineffective, mortgagee showed reliance in paying out funds). Mere consent or failure to object to the construction of improvements does not constitute waiver. *Magidson*, 235 Mo. App. at 1054, 148 S.W.2d at 153.

50. See notes 96-105 and accompanying text *infra*.

these techniques in order to avoid subordination of their mortgages. In the most popular scheme, the mortgagee hires an escrow agent or title company to disburse the funds, requiring all subcontractors providing material or labor to be paid as work progresses and forbidding further advances until such payments are made.⁵¹ Although the Missouri courts have expressly approved this scheme,⁵² its failure results in the construction mortgagee's subordination to all unpaid mechanics' lienors.⁵³

The mechanics' lien statutes also may be avoided if the mortgagee places all the loan funds in a construction account over which the mortgagee retains control and which requires specific approval for withdrawals.⁵⁴ This procedure, although approved by the courts,⁵⁵ is ineffective if mechanics' lienors are not paid⁵⁶ or if the account supervisor lacks the sophistication and experience to control the account.⁵⁷ In another approach, the mortgagee disguises the future advances portion of the mortgage by executing and recording a deed of trust that, on its face, states the total amount of the mortgage and by executing a second, unrecorded agreement regarding advances.⁵⁸ Although no authority exists,⁵⁹ Missouri, like other states, may disregard the absolute language of the deed of trust⁶⁰ and admit extrinsic evidence of the second agreement.⁶¹ If the

51. This technique, termed "control of disbursements," allows the mortgagee to supervise the payment of construction funds and assure that mechanics are paid as their liens arise. *NELSON & WHITMAN, supra* note 9, § 12.1, at 709. Lienors can be paid on the basis of work completed (progress payments) or only upon presentation of bills or vouchers (voucher payments). Both methods may be coupled with spot checks to discourage diversion of funds. *Id.*; see, e.g., *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940, 945-46 (Mo. 1967).

52. *See Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 9-10 (Mo. 1972).

53. Unpaid mechanics' lienors have priority over all prior and subsequent liens, including the construction mortgage. *See* notes 7-19 & 41-49 and accompanying text *supra*. The mortgagor also risks waiving priority as to the land by exercising substantial control over the construction funds. *See* note 49 *supra*.

54. This differs from the title company or escrow agent technique only in that the mortgagee, rather than a third party, retains control over the funds.

55. *See, e.g., Dreckshage v. Community Fed. Sav. & Loan Ass'n*, 555 S.W.2d 314, 317 (Mo. 1977) (en banc); *Trout's Invs., Inc. v. Davis*, 482 S.W.2d 510, 512 (Mo. Ct. App. 1972).

56. If the lienors are not paid, the construction mortgagee will be subordinated as to the improvements, *MO. REV. STAT. §§ 429.050-060* (1978), and possibly as to the land. *See* notes 7-19 & 44-49 and accompanying text *supra*.

57. *See, e.g., National Bank of Wash. v. Equity Investors*, 81 Wash. 2d 886, 905, 506 P.2d 20, 30 (1973) (inadequate lender control over construction funds left mechanics unpaid and resulted in subordination). These procedures can be difficult to implement if the general contractor does not have cash reserves adequate to make payment to the subcontractors and obtain lien waivers before making his request for payment accompanied by the supporting documentation. Frequently, the procedure is altered so that the general contractor furnishes lien waivers from subcontractors to secure the previous progress payment. This way the lien waivers are only one progress payment behind (minimizing exposure to liens), the contractor's cash flow needs are accommodated, and the construction mortgagee is protected from mechanics' liens through the customary 10% payment holdback.

58. *NELSON & WHITMAN, supra* note 9, § 12.7, at 757.

59. *See Graham v. Finnerty*, 232 S.W. 129, 131 (Mo. 1921); *Foster v. Reynolds*, 38 Mo. 553, 556-57 (1866); *White v. Meiderhoff*, 281 S.W. 98, 100 (Mo. Ct. App. 1926); *Smith-Wallace Shoe Co. v. Wilson*, 63 Mo. App. 326, 330 (1895). These cases did not decide, however, what the priority date for such advances would be.

60. The face amount of the mortgage may be rebutted with extrinsic evidence of collateral agreements. *See, e.g., Foster v. Reynolds*, 38 Mo. 553, 556-57 (1866); *Holmes v. Strayhorn-Hut-*

courts follow this approach, the future advances will be subordinated to mechanics' liens just as if the transaction had been undisguised.

2. Line of Credit Mortgages

In a line of credit mortgage, which is used more frequently in chattel transactions than in real estate mortgages,⁶² the lender sets a maximum amount that the debtor, usually a business, can borrow.⁶³ Neither the legislature nor the judiciary has established a method for resolving priority disputes between intervening liens and advances made pursuant to a line of credit agreement. The construction mortgage cases are of doubtful precedential value here. The rationale for subordinating advances in those cases was the strong legislative policy of protecting mechanics' lienors,⁶⁴ and no such statutory policy exists in the line of credit area.

The majority rule, which one commentator has suggested that Missouri would follow,⁶⁵ distinguishes obligatory and optional advances.⁶⁶ Obligatory advances, for priority purposes, relate back to the date of the initial advance and are superior to liens arising after that date.⁶⁷ An advance is obligatory if it is contractually required by the terms of the mortgage. Optional advances, on the other hand, are subordinated to all intervening liens.⁶⁸ Some states treat

ton-Evans Comm'n Co., 81 Mo. App. 97, 101 (1899); Williams v. Alnutt, 72 Mo. App. 62, 65 (1897); Russell v. Letton, 56 Mo. App. 541, 548 (1894); Sparks v. Brown, 33 Mo. App. 505, 508 (1888).

61. See, e.g., Wixom v. Ingham, 21 Ariz. App. 65, 67, 515 P.2d 606, 608 (1973) (to show amount actually loaned); Freese Leasing v. Union Trust & Sav. Bank, 253 N.W.2d 921, 924 (Iowa 1977) (to show parties' intent, situation, and antecedent negotiations); Heath Tecna Corp. v. Zions First Nat'l Bank, 609 P.2d 1334, 1337 (Utah 1980) (dicta) (to construe ambiguous future advances clause).

62. See J. WHITE & R. SUMMERS, *supra* note 22, § 25-4; notes 20-25 and accompanying text *supra*.

63. This is the ideal arrangement. The parties may choose, however, not to specify a maximum. NELSON & WHITMAN, *supra* note 9, § 12.7, at 757-58.

64. E.g., H.B. Deal Constr. Co. v. Labor Discount Center, Inc., 418 S.W.2d 940, 952 (Mo. 1967).

65. Blackburn, *supra* note 33, at 224; see also R. KRATOVIL & R. WERNER, *supra* note 9, § 25.12, at 374 (explains majority rule).

66. The mortgagee may be contractually obligated to make advances, or make them only at his option. See Comment, *Mortgages to Secure Future Advances: Problems of Priority and the Doctrine of Economic Necessity*, 46 Miss. L.J. 433, 434 (1975); see also Meek, *Mortgage Provisions Extending the Lien to Future Advances and Antecedent Indebtedness*, 26 ARK L. REV. 423, 428-35 (1973); Urban, *Future Advances Lending in North Carolina*, 13 WAKE FOREST L. REV. 297, 306-11 (1977); Note, *Consumer Law—Limitations on the Validity of Future Advance Clauses in Mortgage Contracts*, 23 U. KAN. L. REV. 745, 746-53 (1975).

67. See, e.g., Earnshaw v. First Fed. Sav. & Loan Ass'n, 109 N.H. 283, 285, 249 A.2d 675, 676 (1969); House of Carpets v. Mortgage Inv. Co., 85 N.M. 560, 564, 514 P.2d 611, 615 (1973); Central Pa. Sav. Ass'n v. Carpenters of Pa., Inc., 298 Pa. Super. 250, 444 A.2d 755, 758 (1982); Kemp v. Thurmond, 521 S.W.2d 806, 808 (Tenn. 1975); Western Mortgage Loan Corp. v. Cottonwood Constr. Co., 18 Utah 2d 409, 411, 424 P.2d 437, 438-39 (1967). But cf. S & S Ceiling & Partition Co v. Calvon Corp., 63 Ohio App. 2d 150, 154, 410 N.E.2d 777, 780 (1979) (mortgage not given priority over mechanics' liens unless funds are disbursed in certain sums and under definite conditions).

68. See, e.g., Idaho First Nat'l Bank v. Wells, 100 Idaho 256, 260, 596 P.2d 429, 433

optional advances to protect security as obligatory⁶⁹ and grant them superiority, while others refuse to create special rules for such advances.⁷⁰ The line of credit mortgagee choosing to follow prior law rather than the new statute should be aware that unless Missouri adopts the majority rule, the courts may subordinate even obligatory advances to intervening liens.

3. Dragnet Mortgages

Unlike construction and line of credit mortgages, the dragnet mortgage usually does not contemplate future advances.⁷¹ Dragnet clauses, which appear in all types of mortgages, secure any and all debts that the mortgagor owes or may owe to the mortgagee.⁷² It is unclear whether such clauses are valid in Missouri or whether advances claimed under them will enjoy priority over intervening liens. Most jurisdictions recognize the validity of dragnet clauses but construe them strictly,⁷³ often holding the claimed advance to be unsecured by the mortgage.⁷⁴ Even if they find the advances secured, most courts treat them

(1979) (actual notice of other lien and knowledge that advance was optional); *S & S Ceiling & Partition Co. v. Calvon Corp.*, 63 Ohio App. 2d 150, 154, 410 N.E.2d 777, 780-81 (1971) (maximum amount recited did not create obligation to disburse); *Conshohocken Fed. Sav. & Loan Ass'n v. Period & Country Homes, Inc.*, 287 Pa. Super. 520, ___, 430 A.2d 1173, 1178 (1981) (no priority for optional advances); *National Bank of Wash. v. Equity Investors*, 81 Wash. 2d 886, 889-90, 506 P.2d 20, 28 (1973) (priority dates from optional construction mortgage advance). Some states require that the mortgagee have notice of the intervening lien for his advance to be subordinated. *NELSON & WHITMAN*, *supra* note 9, § 12.7, at 759.

69. *NELSON & WHITMAN*, *supra* note 9, § 12.7, at 760; *see also* MO. REV. STAT. § 443.055.3 (Supp. 1983) (gives priority to advances made for real property taxes, hazard insurance premiums, or condominium maintenance charges) (discussed in notes 112-16 and accompanying text *infra*).

70. *Blackburn*, *supra* note 33, at 220-23; *see* *Raymond Int'l, Inc. v. Realbanc, Inc.*, 199 Neb. 607, 612, 260 N.W.2d 484, 487 (1977); *R. KRATOVIL & R. WERNER*, *supra* note 9, § 11.03; *Meek*, *supra* note 66, at 428-29; *Comment*, *supra* note 66, at 438-41.

71. *NELSON & WHITMAN*, *supra* note 9, § 12.8, at 772.

72. *Id.*; *see* *Meek*, *supra* note 66 at 429-43; *Note*, *supra* note 66, at 748-52; *Note*, *The Enforceability of "Dragnet Clauses" in Deeds of Trust: The Current State of the Law in Texas*, 56 TEX. L. REV. 771, 773-74 (1978).

73. *See, e.g.*, *Akamine & Sons, Ltd. v. American Sec. Bank*, 50 Hawaii 304, 312, 440 P.2d 262, 267 (1968); *Farmers Trust & Sav. Bank v. Manning*, 311 N.W.2d 285, 289 (Iowa 1981); *Freese Leasing v. Union Trust & Sav. Bank*, 253 N.W.2d 921, 925 (Iowa 1977); *Emporia State Bank & Trust Co. v. Mounkes*, 214 Kan. 178, 181, 519 P.2d 618, 621 (1974); *Canal Nat'l Bank v. Becker*, 431 A.2d 71, 74 (Me. 1981); *Trapp ex rel. First Miss. Bank of Commerce v. Tidwell*, 418 So. 2d 786, 792 (Miss. 1982); *O'Neill Prod. Credit Ass'n v. Mitchell*, 209 Neb. 206, 210, 307 N.W.2d 115, 118 (1981).

74. Courts have seized on a variety of factors to refuse to uphold dragnet clauses. *NELSON & WHITMAN*, *supra* note 9, § 12.8, at 773-75; *see, e.g.*, *Uransky v. First Fed. Sav. & Loan Ass'n*, 1 Bankr. 640, 644 (M.D. Fla. 1979) (intent unclear); *Underwood v. Jarvis*, 358 So. 2d 731, 735 (Ala. 1978) (same); *Emporia State Bank & Trust Co. v. Mounkes*, 214 Kan. 178, 184, 519 P.2d 618, 623 (1974) (unclear intent and distinct debts); *Farmers Trust & Sav. Bank v. Manning*, 311 N.W.2d 285, 289-90 (Iowa 1981) (advance by only one joint mortgagee); *Freese Leasing v. Union Trust & Sav. Bank*, 253 N.W.2d 921, 926-27 (Iowa 1977) (unrelated debts and intent unclear); *Canal Nat'l Bank v. Becker*, 431 A.2d 71, 74 (Me. 1981) (intent unclear); *Trapp ex rel. First Miss. Bank of Commerce v. Tidwell*, 418 So. 2d 786, 792-93 (Miss. 1982) (transferees of property not warned); *O'Neill Prod. Credit Ass'n v. Mitchell*, 209 Neb. 206, 210, 307 N.W.2d 115, 119 (1981) (advances to subsequent property owner); *Goodfriend v. United Am. Bank*, 637 S.W.2d 870, 872 (Tenn. Ct. App. 1982) (voluntary payment for taxes); *First Sec. Bank v. Shiew*, 609

as optional advances by subordinating them to intervening liens.⁷⁶ It seems likely that Missouri will follow this approach, especially if the optional-obligatory distinction is adopted.

IV. NEW LEGISLATION

In 1981, the legislature enacted Missouri Revised Statutes section 443.055,⁷⁶ which expressly permits the use of future advances clauses in real estate mortgages and, for priority purposes, dates advances made pursuant to such clauses as of the date that the original instrument was filed. This legislation permits any lender under a mortgage, deed of trust, or other real property security instrument to make future advances. The law specifically rejects the optional-obligatory distinction, and assures the priority of advances for a ten-year period so long as the provisions of the statute are followed.

A. Operation of the Statute

To be governed by the statute, a mortgage must clearly state on its face that it secures future advances and must list the total amount that may be secured thereunder.⁷⁷ The mortgage and its amendments must clearly state that they will be governed by section 443.055.⁷⁸ Failure to follow these requirements will place the mortgage under the control of prior Missouri law.⁷⁹

Mortgages under section 443.055 secure optional and obligatory advances, so long as the total indebtedness after the advance does not exceed the face amount of the mortgage or any applicable amendment.⁸⁰ Advances made for the reasonable protection of security and advances made under a construc-

P.2d 952, 957 (Utah 1980) (agreement not negotiated, different type of transaction, and second agreement did not refer back). *But cf.* Kamaole Resort Twenty-One v. Ficke Hawaiian Inv., 60 Hawaii 413, 427, 591 P.2d 104, 112 (1979) (valid when specifically referred back); Creech v. LaPorte Prod. Credit Ass'n, 419 N.E.2d 1008, 1011 (Ind. Ct. App. 1981) (in agreement); First Nat'l Bank & Trust Co. v. Lygrisse, 213 Kan. 595, 602, 647 P.2d 1268, 1273 (1982) (antecedent debts specifically covered); Overland Park Sav. & Loan Ass'n v. Braden, 6 Kan. App. 2d 876, —, 636 P.2d 797, 802 (1981) (unpaid closing costs secured as future advance); State Bank of Albany v. Fioravanti, 51 N.Y.2d 638, 646-47, 417 N.E.2d 60, 64, 435 N.Y.S.2d 947, 951 (1980) (subsequent grantee subject to dragnet clause).

75. See, e.g., Akamine & Sons, Ltd. v. American Sec. Bank, 50 Hawaii 304, 312, 440 P.2d 262, 268 (1968) (debts of different kind or quality will not relate back). *But cf.* ITT Indus. Credit Co. v. Union Bank & Trust Co., 615 S.W.2d 2, 5 (Ky. Ct. App. 1981) (dicta) (subsequent lender has duty to check); New Mex. Bank & Trust Co. v. Lucas Bros., 92 N.M. 2, 4, 582 P.2d 379, 382 (1978) (advances relate back to recorded dragnet clause).

76. (Supp. 1983). 1982 Mo. Laws 621.

77. MO. REV. STAT. § 443.055.2 (Supp. 1983); see also MD. REAL PROP. CODE ANN. § 7-102 (1981); OHIO REV. CODE ANN. § 5301.232 (Page 1981); WASH. REV. CODE ANN. §§ 60.04.210-.220 (Supp. 1983).

78. Section 443.055.8 states: "The provisions of this section shall not govern any instrument or any supplement or amendment to an instrument unless such instrument, supplement or amendment shall clearly state on its face that it is to be governed by this section."

79. See MO. REV. STAT. §§ 443.055.2, .8 (Supp. 1983).

80. *Id.* § 443.055.2. Advances exceeding the amount stated in the agreement are unsecured.

tion mortgage to permit the completion of construction,⁸¹ however, are secured even though the total indebtedness after the advance exceeds the face amount of the mortgage.⁸²

All advances secured by a mortgage under the statute have priority from the time the mortgage is filed, irrespective of whether those advances were optional or obligatory, so long as they do not exceed the face amount of the mortgage.⁸³ In addition, advances made to protect security or permit the completion of construction date from the time the mortgage is recorded, even if they exceed the mortgage amount.⁸⁴ If an amendment has increased the total amount to be secured, however, any advance exceeding the face amount of the mortgage dates from the time the amendment was recorded.⁸⁵

Neither the original mortgage nor its amendments may secure advances made more than ten years after the date of the mortgage.⁸⁶ During that ten-year period, the mortgagor and the mortgagee may not execute any other mortgage securing future advances with the real estate described in the mortgage previously recorded.⁸⁷ A proper future advances mortgage, by operation of the statute, secures only contractual obligations; tort liability and other non-contractual indebtedness do not fall within the scope of permissible advances.⁸⁸

81. Such an advance might be made where an uninsured casualty loss is incurred. Rather than write the loan off, the mortgagee would lend additional funds to restore the security.

82. MO. REV. STAT. § 443.055.3 (Supp. 1983). A majority of states adopt this by common law, treating such advances as obligatory and granting them priority over intervening liens. *See* notes 69-70 and accompanying text *supra*. Although not clear from the statute, advances should not be secured if the mortgage contains no future advances clause.

83. *Id.* § 443.055.6. This section gives priority to the advancing mortgagee regardless of whether third parties have actual notice of the advances. Advances in excess of the face amount of the mortgage should be unsecured only to the extent of the surplus. Section 443.055.2 provides that "the total amount . . . may decrease or increase." This indicates that surplus advances should become secured as the mortgage is paid down, with priority dating back to the date of the mortgage. The "total amount" refers to the balance at any given time, rather than to an absolute maximum determined as of the date of the mortgage.

84. *Id.* § 443.055.6.

85. *Id.* Advances exceeding the amount of the amendment are secured, and paying down an advance to the amount stated in the amendment secures the excess, giving it priority over liens attaching after the advance. It is unclear whether paying down the mortgage after the advance permitted by amendment insures that the mortgagee's priority in surplus advances will relate back to the mortgage recording date. When the parties have a relationship characterized by mutual trust such that the mortgagee need not worry about intervening liens, there may be no need to file an amendment.

86. *Id.* § 443.055.2. The mortgagor could still hold the mortgagee personally liable on the debt even though the late advance is unsecured. If the debt is to remain outstanding longer than ten years and advances will be made, the best procedure may be to search title and execute a new mortgage each time an advance is made.

87. *Id.* § 443.055.5. A second agreement is invalid only to the extent that it secures future advances. It does not invalidate the original agreement, even to the extent of the future advances clause. *See id.* The mortgagee may be able to execute a valid second future advances mortgage with a joint tenant or a tenant in common with the mortgagor who was not a party to the original future advances mortgage. The statute should also permit the mortgagor and mortgagee to enter into a second agreement after the termination of the original future advances clauses because the restriction applies only "during the life of a previous agreement concerning the same real property." *Id.*

88. *Id.* § 443.055.4. This section also prevents such agreements to act as a lien for the

Further, the mortgagee may not make any advances after the receipt of a termination statement.⁸⁹ Advances made after receipt of a termination statement, non-contractual advances, advances under a second mortgage covering the same real estate, advances made more than ten years after the mortgage are unsecured, and agreements permitting such advances are invalid and unenforceable.⁹⁰

A mortgagor may terminate the security of future advances in the mortgage by sending proper notice to the mortgagee.⁹¹ Within ten days after the receipt of such notice, the mortgagee must record a termination statement listing the total amount owing under the mortgage.⁹² Failure to properly record irrevocably binds the mortgagee to the total amount of indebtedness stated in any similar statement that the mortgagor files.⁹³ Advances made after the mortgagee's receipt of a termination notice are not secured.⁹⁴

B. *Effect of the Statute*

Section 443.055 merely restates present mortgage law insofar as it permits future advances mortgages. The similarities end there, however. The new legislation either completely reverses or else does not affect the priority rules between construction mortgagees and mechanics' lienors, creates a set of priority rules to govern line of credit and dragnet mortgages, and sets up a practical solution for advances necessary to protect security. In addition, the statute generously allows mortgagees the choice between following the statutory guidelines or ignoring those mandates, thereby being governed by the common law as it existed before the statute or as it may develop.⁹⁵ The mortgagee's

payment of any noncontractual relationship.

89. *Id.* § 443.055.7

90. *Id.* §§ 443.055.2, .3, .5, .7. These agreements are probably invalid even as between the parties, given the "invalid and unenforceable" language in these sections.

91. Section 443.055.7 provides:

At any time subsequent to the execution of an instrument, the borrower may send a notice to the lender by certified mail, return receipt requested, or by personal delivery to the lender or an authorized agent thereof . . . that the borrower elects to terminate the operation of the instrument as security for future advances or future obligations made or incurred after the date the lender receives the notice. . . .

92. Section 443.055.7 provides:

Within ten days of its receipt of such a notice, the lender shall at its own cost file of record in the public office in which the original instrument was recorded a statement referring to the original instrument, legally describing the real property therein, setting forth the fact of its receipt of the borrower's notice, stating the date of its receipt of such notice, and stating the total principal amount as of the date it received the borrower's notice of all outstanding debts and obligations secured by the instrument.

93. *Id.* If the mortgagee fails to record, the mortgagor may do so and bind the mortgagee to the amount stated, "so long as the borrower's statement is made in good faith." *Id.*

94. *Id.*

95. The mortgagee apparently makes an irrevocable election between the common law and the statute because: (1) the statute does not expressly entitle the document to be amended for any purpose other than to increase the total amount secured; (2) the mortgagee is not given the statutory right to terminate—the provision must be included in the document; and (3) the statute does not expressly permit the parties to later change the applicable law. *See id.* § 443.055.6-7.

choice depends on the purposes of the mortgage, the length of time needed for advances, and many other individual factors.

1. Construction Mortgages

The priority rules of the new statute conflict with sections 429.055 and 429.060, which grant mechanics' lienors priority as to the improvements for which they contributed labor or capital. Good arguments exist for applying either law to resolve priority disputes between construction mortgagees and mechanics' lienors. The legislature, however, neither expressly stipulated which would apply nor expressly overruled *H.B. Deal*⁹⁶ and its progeny. The mechanics' lien statute will likely still control.⁹⁷

The Missouri Supreme Court has broadly protected mechanics' lienors, relying on a strong statutorily expressed policy.⁹⁸ It seems unlikely that this judicial attitude will be reversed absent strong legislative directive, which is not present here. The new legislation, unlike the mechanics' lien statute,⁹⁹ does not differentiate between the lien on the improvements and the lien on the land. In such a situation, the general rule of construction is that the more specific statute controls.¹⁰⁰ Without the mechanics' lien statute, mechanics' lienors would be totally unprotected. A lien on the improvements is the only method for a mechanic or materialman to recover the value of his labor or materials.

If the new statute is literally interpreted, the mechanics' lienor will be left totally unprotected since the construction mortgage usually can only be satisfied by foreclosing on the land and the improvements.¹⁰¹ If the mechanics' lien statute controls, the construction mortgagee who participates in or encourages construction will be considered to have waived priority to the land under *H.B. Deal*.¹⁰² Further, if this is the resolution of the conflict, the new statute will have no impact on construction mortgage law vis-a-vis mechanics' lienors ex-

96. *H.B. Deal* and later cases granted mechanics' lienholders priority over construction mortgage advances. See notes 44-49 and accompanying text *supra*.

97. The result is that a mechanics' lien arising from the construction funded by the construction mortgage will be prior (as to the improvements) to any mortgage on the land alone and prior (as to the land and improvements) to the construction mortgage under which the advances are made.

Suppose that *X* has mortgaged vacant land to *A* and then receives a construction mortgage from *B* under which advances are to be made. An unpaid mechanic, *M*, could have a lien prior to *A* and *B* as to the improvements and prior to *B* as to the land and improvements if *B* waives priority through participating in the construction. See *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940, 952-53 (Mo. 1967).

98. See, e.g., *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 11 (Mo. 1972).

99. Mechanics' liens are superior to prior mortgages only as to the buildings, erections, or improvements for which materials or work were furnished, MO. REV. STAT. § 429.050 (1978), but they are preferred over subsequent mortgages as to the land and improvements. *Id.* § 429.060.

100. *Veal v. City of St. Louis*, 365 Mo. 836, 843, 289 S.W.2d 7, 12 (1956); *State ex rel. Chi., R.I. & Pac. R.R. v. Public Serv. Comm'n*, 441 S.W.2d 742, 746 (Mo. Ct. App. 1969).

101. See *NELSON & WHITMAN*, *supra* note 9, § 12.7, at 760-61.

102. 418 S.W.2d at 952-53.

cept insofar as it permits optional advances to allow the completion of construction.¹⁰³

On the other hand, the new statute may be considered dominant in the construction mortgage situation. First, it expressly applies to all mortgages, deeds of trust, and other real property security instruments.¹⁰⁴ No exceptions are provided for any type of competing lien. Second, the statute expressly permits mortgages to secure future advances necessary to allow the completion of construction and dates the priority of those advances as of the date the mortgage is recorded.¹⁰⁵ This indicates that construction mortgages are not exempt from the statute or its priority rules.

Given the uncertainty as to which law will apply, a construction mortgagee should utilize an escrow, construction account, or similar method to assure that mechanics are paid before their statutory liens attach and thereby protect against a holding that the mechanics' lien statute is controlling. The requirements of the new law are easily met, requiring only administrative changes in form and procedure. A construction mortgagee who complies with the new statute will probably be in a more secure position. Compliance with the statute will insure the validity of the mortgage insofar as it secures future advances; a complying mortgage and advances thereunder will be given priority over other intervening liens. Finally, the new statute may be held superior to the mechanics' lien statute, giving a complying construction mortgage and all advances priority over all mechanics' liens.

2. Line of Credit Mortgages

No Missouri court decision or prior statute sets out a technique for resolving priority disputes between advances under line of credit mortgages and intervening liens. The new legislation, which applies to line of credit mortgages,¹⁰⁶ allows a mortgagee to secure future advances under such a mortgage and locks in the priority of those advances on the date that the mortgage is recorded. Unless the mortgage secures advances for more than a ten-year period,¹⁰⁷ a line of credit mortgagee should choose to be controlled by the new legislation. A mortgagee who chooses to be governed by the common law runs the risk that the courts will reject the majority rule and subordinate all advances, whether obligatory or optional, or follow the majority rule, which assures superior priority for only obligatory advances, and subordinate the advance in question by labelling it as optional.¹⁰⁸

103. Under § 443.055.3, optional advances relate back to the original mortgage even if they exceed the face amount of the mortgage. Under prior law, such an advance would have been unsecured.

104. MO. REV. STAT. § 443.055.1 (Supp. 1983).

105. *Id.* §§ 443.055.3, .6.

106. The statute applies to all real property mortgages. *Id.* § 443.055.1.

107. Advances can be secured for a maximum of ten years. *Id.* § 443.055.2.

108. The statute implies that Missouri cases had followed the majority rule because it expressly applies to optional and obligatory advances. *See id.* §§ 443.055.2, .6.

3. Dragnet Mortgages

As with line of credit mortgages, neither statutes nor decisions previously offered an answer to the validity of dragnet clauses or the priority of advances under such clauses. The new legislation, however, provides a procedure to deal with dragnet clauses. Any instrument under the statute must state that it secures future advances and must set out the total amount secured.¹⁰⁹ Thus, prior indebtedness cannot be secured by a dragnet mortgage. Likewise, unanticipated advances will not be secured by a dragnet clause because advance consideration is required for compliance with the requirements of setting out the amount and terms of the mortgage. A mortgagee who previously complies with the technical requirements, however, can secure even unanticipated advances by filing a proper amendment increasing the total indebtedness to be secured, but those advances will take priority only from the time the amendment is recorded.¹¹⁰ A mortgagee who seriously intends to utilize a dragnet clause may be better off under the new legislation given the absence of common law and the possibility that the courts will hold that the clause does not secure the particular advance. A mortgagee who includes such a clause but does not really anticipate utilizing it may be unable to take advantage of the statute, however, if he does not follow its requirements from the outset.¹¹¹

4. Advances to Protect Security

Prior to the new statute, advances to protect security were neither approved nor disapproved. Under Missouri Revised Statutes sections 443.055.3¹¹² and 443.055.6,¹¹³ however, advances to protect security and advances to allow the completion of construction are permitted and they relate back, for priority purposes, to the date of the initial mortgage whether or not they exceed the face amount of the mortgage. Because a mortgage must indicate an intent to be governed by the statute,¹¹⁴ advances to protect security or to allow the completion of construction under non-complying mortgages will not be governed by section 443.055. Therefore, a mortgagee who must make such advances but has not executed a mortgage that complies with the statute cannot be certain that his advance will be secured, especially if the mortgage does not contain a future advances clause at all, and, if so, cannot be certain that the advance will relate back for priority.¹¹⁵ If the need arises, the non-

109. *Id.* § 443.055.2.

110. *Id.* § 443.055.6.

111. It seems that a mortgagee makes an irrevocable election when the mortgage is executed. See note 95 *supra*. The only alternative is to execute a second mortgage securing the unanticipated loan. But cf. *id.* § 443.055.5 (same realty cannot secure a subsequent future advances mortgage).

112. (Supp. 1983).

113. (Supp. 1983).

114. See note 78 *supra*.

115. Section 443.055.3 shows that the legislature intended to permit advances to protect security and allow the completion of construction and protect their priority in all mortgages,

complying mortgagee may have no choice but to make the advance and argue its validity and priority against any conflicting lien.¹¹⁶

5. UCC Security Interests

The new legislation applies only to real estate mortgages¹¹⁷ and has no application to liens arising under Article 9. Only in the fixtures area does the statute have any possible relevance, because fixtures are controlled by both the UCC and real estate law. If any conflict arises between the UCC and the statute, however, the UCC likely will control. First, the UCC specifically controls when its provisions conflict with another statute.¹¹⁸ Second, even in the fixtures area, the UCC defers to real estate law only for the purpose of ascertaining whether the goods in question are fixtures.¹¹⁹ Finally, the UCC sets out the requirements for a fixture filing¹²⁰ and devises a scheme for resolving priority disputes¹²¹ between fixture interests and other liens, which indicate that perfection and priority—the two areas of potential conflict—are to be controlled by the UCC.

V. CONCLUSION

Although the new legislation is workable and practical, it leaves a number of questions unanswered. The statute offers most mortgagees an effective technique to secure future advances and be assured of their priority. Whether a mortgagee should choose to be governed by the new statute depends on the circumstances surrounding the transaction and the length of time needed for advances. A construction mortgagee should be aware of the conflict between section 443.055 and the mechanics' lien statute, and should prepare for the possibility that mechanics' liens may take priority over his advances. Even with that possibility, a construction mortgagee likely will be in a better position under the new statute. If non-complying mortgages are executed, line of credit and dragnet mortgagees should realize that their advances may be subordinated to intervening liens.

rita carper sowards

whether or not they contain future advances clauses. A problem arose, however, when § 443.055.8 was added in 1982, excluding mortgages that do not opt-in under the statute. The problem is resolved by finding that such advances are always secured and always relate back; the only issue should be whether the advance was necessary to protect the security or to complete construction.

116. The mortgagee may be forced to make the advance to protect its security. See NELSON & WHITMAN, *supra* note 9, § 12.7, at 765-66.

117. MO. REV. STAT. § 443.055.1 (Supp. 1983).

118. See *id.* §§ 400.1-103, -104 (1978).

119. See *id.* § 400.9-313(1); see also Henning, *supra* note 26, at 65.

120. MO. REV. STAT. § 400.9-408(3) (1978).

121. *Id.* § 400.9-313(3).