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Constitutionality Of Mechanics' Liens Statutes

NOTES & COMMENTS

CONSTITUTIONALITY OF MECHANICS' LIENS STATUTES

The nation's first mechanics' lien[1] statute was enacted by the Maryland General Assembly in 1791 to stimulate construction of the new capital city of Washington.[2] Since that time all fifty states have enacted mechanics' lien laws.[3] These liens are designed to secure compensation to creditors who perform labor or furnish materials for the improvement of real property.[4] Although specific provisions of

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[1] A mechanics' lien is a lien on real property "created by statute, to secure the compensation of persons who, under contract with the owner, or some person authorized in his behalf, contribute labor or materials to the improvement of the property." H. TIFFANY, THE LAW OF REAL PROPERTY § 1575 (1939) [hereinafter cited as TIFFANY].

[2] Laws of Maryland, 1791, ch. 45, § 10. The statute granted to "master builders" a lien as security for payment for their work. The lien extended only to those builders having a direct contract with the property owner and was geographically limited to the situs of the new capital city.

The general growth of city construction throughout the nineteenth century fostered the passage of mechanics' liens statutes in many states, 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 483, at 728 (1949) [hereinafter cited as POWELL], and gradually extended the class of persons entitled to their benefit beyond those having an immediate contractual relationship with the property owner. The variety among the statutes of the several states led to the proposal of a uniform act in 1932. The Commissioners on Uniform State Laws, stating that the "varied conditions made uniformity impossible," withdrew the proposed statute in 1943. POWELL, *supra*, at 229-30. Hence, the variances among the state statutes continue today. In 1975, the Commissioners approved and recommended for adoption the Uniform Land Transactions Act. Article 5 of that act dealt with construction (mechanics' and materialmen's) liens and was designed to unify the various state mechanics' lien statutes. However, the Commissioners did not approve Article 5 and gave no explanation for the deletion, thereby excluding that article from their recommendation for nationwide adoption of the uniform law. In the Commissioner's annual meeting in August, 1976, they included in their recommendation for the adoption of a Uniform Simplification of Land Transfers Act, a proposal for construction liens. The American Bar Association's section of Real Property, Probate & Trust Law has not yet reviewed that proposal.

[3] For a compilation of some of the more significant aspects of the various states' mechanics' liens statutes, see [1977] SECURED TRANS. GUIDE (CCH) ¶¶ 8301-8580.

[4] TIFFANY, *supra* note 1, at § 1575. Mechanics' liens are purely statutory in origin with no basis in common law or equity. II GLENN, MORTGAGES § 351 (1943) [hereinafter cited as GLENN]. *See* Note, *The Proposed Uniform Mechanics' Lien Act*, 19 VA. L. REV. 406 (1933). As such, few general rules regarding judicial construction of mechanics' lien statutes exist. The generally accepted approach, however, is to construe strictly whether a person is within the group sought to be protected by the statute, while viewing the remedial and procedural provisions of the statutes more liberally. *See, e.g.*,

such statutes vary widely among the several states,[5] mechanics' liens generally secure payment to contractors, sub-contractors, materialmen and laborers by granting them a specific interest in the real property improved by their efforts, enforceable through foreclosure.[6]

Sikkema v. Packard, 79 N.J. Super. 599, 192 A.2d 334 (1963); Martin v. Baird Hardware Co., 147 So. 2d 142 (Fla. App. 1962); *see* POWELL, *supra* note 2, at ¶ 484; TIFFANY, *supra* note 1, at §§ 1575-76. *Compare* Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963)(right to lien is purely statutory and claimant must in first instance bring himself clearly within terms of statute under strict construction) *with* Fisher v. Reamer, 146 W. Va. 83, 118 S.E.2d 76 (1961) (court should apply liberal construction where there is clear right to the lien and controversy is whether claimant proceeded properly to establish lien). The more relaxed analysis of procedural provisions has been written into several statutes which require only substantial compliance with procedural provisions. *See, e.g.*, VA. CODE § 43-5 (1976). However, given the recent due process constitutional attack on prejudgment creditors' remedies, this liberal construction may no longer be valid. *See* text accompanying notes 90-125 *infra*.

[5] *See* notes 13-19 *infra*.

[6] Persons entitled to a lien and questions as to whether the lien attaches only to the property on which the improved structure stands or includes adjacent properties are determined only by reference to the particular statute. *Compare* WIS. STAT. ANN. § 289.01(3)(West Cum. Supp. 1976-77)(lien extends to all contiguous land, but if improvement located wholly on one platted lot, lien limited to that lot) *with* ILL. ANN. STAT. ch. 82, § 1 (Smith-Hurd Cum. Supp. 1977)(lien is on whole of tract or lot and extends to adjoining lots or tracts).

In granting liens to subcontractors and others with no direct contract with the property owner, two different theories have developed. Under the "New York" system, the subcontractor is given a lien by way of subrogation or derivation from the general contractor's rights against the property owner. *See, e.g.*, N.Y. [LIEN] LAW (Consol.) § 4 (1966). The New York system subcontractor's claim is limited to the amount due the general contractor at such time as the subcontractor gives notice of his claim to the owner. The owner may thus withhold payment to the general contractor in sums sufficient to satisfy the subcontractor's lien. Moreover, the total of all mechanics' liens which can be recovered is thereby limited to the unpaid balance at the time of filing.

Under the other theory, frequently termed the "Pennsylvania" system, the subcontractor is given a direct lien without regard to the rights of the general contractor. *See, e.g.*, WIS. STAT. ANN. § 289.01(3) (West Cum. Supp. 1976-77). The lien claimant under the Pennsylvania system, however, is not restricted to satisfaction of his claim by payments not yet made by the owner to the general contractor. Under the latter system, the total amount of liens claimed possibly will exceed both the contract price and the market value of the property. *See* Indianapolis Power & Light Co. v. Southeastern Supply Co., 146 Ind. App. 554, 257 N.E.2d 722 (1970). *Compare* N.Y. [LIEN] LAW (Consol.) § 4 (1966)(owner liability for individual lien shall not be greater than sum unpaid on contract at time notice of subcontractor lien is filed; total liability for all liens limited to value of price remaining unpaid at time of notice of lien) *and* VA. CODE § 43-7 (1976)(subcontractor's lien shall not exceed amount owner is indebted to general contractor) *with* IND. CODE ANN. § 32-8-3-2 (Burns 1971)(subcontractor has lien on property to extent of value of labor and materials furnished). *See also* GLENN, *supra* note 4, at § 351; POWELL, *supra* note 2, at ¶ 484; TIFFANY, *supra* note 1, at § 1576; Note, *Mechanics Liens in Virginia*, 29 VA. L. REV. 121 (1942); text accompanying note 14 *infra*.

However, mechanics' liens statutes have recently come under attack,[7] and 185 years after the first such statute was enacted, the Maryland Supreme Court declared that state's law unconstitutional.[8]

In *Barry Properties, Inc. v. Fick Brothers Roofing Co.*,[9] the Supreme Court of Maryland held that the Maryland mechanics' lien statute permits a property owner to be deprived of a significant property interest without due process of law in violation of both the fourteenth amendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights.[10] That holding was spawned by a line of United States Supreme Court decisions regarding the requirements of procedural due process in prejudgment creditors' remedies.[11] The Maryland decision and the constitutional analysis of debtor-creditor relationships by the United States Supreme Court suggest that a review of state mechanics' lien laws be undertaken. Illustrative of the various state statutes, the statutory schemes of the states within the Fourth Circuit will serve as the focal point for analysis.[12]

Under Maryland's law,[13] the mechanics' lien statute grants a lien on structures and the immediate adjacent land to those who supply labor or materials for the creation, erection, improvement or repair of such property.[14] The lien arises as soon as work commences or

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[7] *See* cases cited in notes 41 & 118 *infra*. The impetus of the recent constitutional challenges to mechanics' liens statutes is a line of Supreme Court decisions involving other prejudgment creditors' remedies. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Financing Corp., 395 U.S. 337 (1969). *See generally* Newton, *Procedural Due Process and Prejudgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 WASH. & LEE L. REV. 65 (1977); Steinheimer, *Address—Summary Prejudgment Creditors' Remedies and Due Process of Law: Continuing Uncertainty After* Mitchell v. W. T. Grant Company, 32 WASH. & LEE L. REV. 79 (1975) [hereinafter cited as Steinheimer].

[8] Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976).

[9] *Id.*

[10] *Id.* at 33, 353 A.2d at 233. *See* notes 26 & 91 *infra*. Following the decision in *Barry Properties*, the Maryland legislature acted quickly to revise its mechanics' lien statute to comply with the court's reasoning. *See* note 125 *supra*. For purposes of this comment, all references, unless otherwise noted, to the Maryland statute will be to the legislation in force at the time of the *Barry Properties* decision.

[11] *See* cases cited in note 7 *supra* and text accompanying notes 71-78, 90-118 *infra*.

[12] *See* [1977] SECURED TRANS. GUIDE (CCH) ¶¶ 8301-8580.

[13] MD. [REAL PROP.] CODE ANN. §§ 9-101 to 111 (1974 & Cum. Supp. 1975)(repealed and replaced by 1976 Md. Laws ch. 349 (Advance Sheets, 938)) (codified at MD. [REAL PROP.] CODE ANN. §§ 9-101 to 113 (Cum. Supp. 1976)). *See* note 10 *supra*. The Maryland statute in effect at the time of the *Barry Properties* decision is not atypical of many such statutes. *See* [1977] SECURED TRANS. GUIDE (CCH) ¶¶ 8301-8580.

[14] MD. [REAL PROP.] CODE ANN. § 9-102 (1974 & Cum. Supp. 1975)(work on

materials are supplied[15] and lasts until 180 days after work is completed or materials furnished even though no claim is filed.[16] If the work or materials are supplied by a subcontractor, materialman, or laborer without a contract with the owner, the lien claimant must give written notice to the owner of intent to claim a lien within 90 days of completing work.[17] To perfect his lien, a claimant, regardless of whether he has a contract with the owner, must file a claim with the clerk of the circuit court of the county in which the property is located within the 180 day period.[18] Upon filing with the county clerk, the lien subsists for one year, and expires if foreclosure proceedings are not brought.[19] During the one-year period, however, the property owner or any interested party may bring proceedings in equity to compel the claimant to prove the validity of the lien or have the lien declared void.[20] In addition, the property owner may release his prop-

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buildings, wharves, machines, swimming pools covered by lien statute; landscaping and drilling of wells included; lien extends to land covered by the building and so much of adjacent land as may be necessary for ordinary and useful purposes of the building). Other statutes vary as to the work encompassed and as to the extent of the lien. *See, e.g.*, S.C. CODE § 45-251 (Cum. Supp. 1975)(work on buildings, wells, grading and filling land, paving curbs and sidewalks, constructing ditches and drainage facilities, and laying pipes for water, gas and electric purposes included); OHIO REV. CODE ANN. § 1311.021 (Page Supp. 1976)(work on houses, mills, manufactories, furnaces, bridges, gas pipelines included); MO. ANN. STAT. § 429.010 (Vernon Cum. Supp. 1977)(lien on land to extent of three acres if outside city or town); statutes cited in note 6 *supra*.

[15] MD. [REAL PROP.] CODE ANN. § 9-105 (1974 & Cum. Supp. 1975). In Maryland and in many other states the liens are said to "relate back" to the time when the work first began. In addition, many states provide that all lien creditors of the same class participate without priority. *See, e.g.*, N.Y. [LIEN] LAW (Consol.) § 13 (1966)(subcontractors and materialmen shall have no priority on account of the time of filing their respective notices of liens, but all liens shall be on parity); MD. [REAL PROP.] CODE ANN. § 9-107 (1974 & Cum. Supp. 1975)(lien claimants shall be paid in proportion to their respective amounts). The effect of such provisions is that lien claimants, who perfect their liens within applicable time limits after completing work, will have liens relating back to the first work performed by any similar lien claimant.

[16] MD. [REAL PROP.] CODE ANN. § 9-105(e)(1974 & Cum. Supp. 1975). *See* W. VA. CODE §§ 38-2-8 to 13 (1966)(90 days); N.C. GEN. STAT. § 44A-12(b)(1976)(120 days).

[17] MD. [REAL PROP.] CODE ANN. § 9-103(a)(1974 & Cum. Supp. 1975). *See* W. VA. CODE § 38-2-9, 11, 13 (1966)(notice to owner within 60 days). *But see* S.C. CODE § 45-259 (1962)(no requirement of notice to owner).

[18] *See* text accompanying note 16 *supra*. The clerk will then record the lien in a Mechanics' Lien Docket. MD. [REAL PROP.] CODE ANN. § 9-105 (1974 & Cum. Supp. 1975). *See* N.C. GEN. STAT. § 44-A12(a)(1976)(claims of liens must be filed in office of clerk in *each* county wherein real property improved by claimant's efforts is located).

[19] MD. [REAL PROP.] CODE ANN. § 9-106 (1974 & Cum. Supp. 1975); OHIO REV. CODE § 1311.13 (Page 1962)(six years); VA. CODE § 43-17 (1976)(six months).

[20] MD. [REAL PROP.] CODE ANN. § 9-106 (1974 & Cum. Supp. 1975); *see* Continental Steel Corp. v. Sugarman, 266 Md. 541, 295 A.2d 493 (1972).

erty from the lien by substituting a bond.[21] If in either a foreclosure suit or proceeding brought by the owner, the claimant establishes a valid claim, the court will order payment of the claim within a specified time or order sale of the property to satisfy the lien.[22]

The constitutional challenge to the Maryland statute arose in a foreclosure suit brought by a subcontractor, Fick Brothers Roofing Company, to enforce a mechanics' lien against Barry Properties, Inc., the property owner.[23] Conceding that the subcontractor had complied with all applicable statutes and procedures,[24] Barry Properties moved for summary judgment on the ground that the lien statute unconstitutionally deprived it of property without due process of law.[25] The

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[21] MD. R.P. BG75 (amended by BG76, Cum. Supp. 1976)(owner of property against which mechanics' lien has been recorded may petition court to have property released from lien together with bond sufficient in amount to pay sum claimed, with interest and costs). An owner might want to release his property from a lien by substituting a bond for several reasons. Often, lien claims arise following a dispute and the discharge of a contractor by the owner. At that point, an owner unexpectedly would need additional funds to hire a new contractor at an increased cost to finish the project. *See* Ominsky, *The Mechanics' Lien Filed Despite a No-Lien Stipulation: Methods of Prevention and Removal,* 72 DICK. L. REV. 223, 238-39 (1967) [hereinafter cited as Ominsky]. An owner, however, would have difficulty in financing a secondary construction loan on property encumbered by a lien. *See* text accompanying notes 65-68 *infra.* Further, an owner would not have a clear title and might not be able to close a pending mortgage on property subject to outstanding claims on liens. *See* text accompanying note 67 *infra.* Moreover, the terms of many construction loans provide that if a lien is filed, the lender has the right to stop making construction advances thereby causing work stoppages pending release of the property or resolution of the lien claim. *See* Ominsky, *supra,* at 238-39.

[22] MD. [REAL PROP.] CODE ANN. § 9-106 (1974 & Cum. Supp. 1975).

[23] 277 Md. at 21, 353 A.2d at 226-27. The property owner, Barry Properties, had contracted with Associated Engineers, Inc., as general contractor, to construct a building on Barry Properties' land. Associated contracted wiih Fick Brothers, which, as a subcontractor, was to construct the building's roof. Fick Brothers fully satisfied its obligation and was owed $11,610 by Associated Engineers. Subsequently, Fick Brothers filed a mechanics' lien on the property and brought suit to foreclose. *Id.*

[24] *Id.* Barry Properties conceded that Fick Brothers' notice to claim a lien, filing of the lien, and bill of complaint to enforce the lien were procedurally adequate. *See* text accompanying notes 17-22 *supra.*

[25] 277 Md. at 21, 353 A.2d at 226-27. For purposes of the motion for summary judgment, the parties stipulated that the mechanics' lien prevented the property owner from being paid the balance of its construction loan since the lender withheld payment pending the outcome of all mechanics' liens claims. The parties further stipulated that the lien prevented Barry Properties from closing a permanent mortgage or from obtaining a second mortgage on its equity in the property. Barry Properties asserted that the operation of the lien statute thus deprived it of a significant property interest. *Id.* at 21, 353 A.2d at 227-28.

Barry Properties further contended that the statute contravened the require-

lower court concluded that the lien was valid and that there was no denial of due process,[26] and Barry Properties appealed to the Maryland Supreme Court.[27]

To establish a due process cause of action[28] a plaintiff must prove that he was deprived of a significant property interest[29] through some state action.[30] In *Barry Properties,* the Maryland court appropriately

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ments of procedural due process mandated by the fourteenth amendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights. Article 23 provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST., DECLAR. OF RTS. art. 23. The Maryland court noted that article 23 and the due process clause of the fourteenth amendment have the same meaning and effect with regard to alleged deprivations of property. 277 Md. at 22, 353 A.2d at 227. *See* Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, 156, 321 A.2d 748, 755 (1974); Allied Am. Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles, 219 Md. 607, 150 A.2d 421, 426-27 (1959); Baltimore Belt R.R. v. Baltzell, 75 Md. 94, 23 A. 74, 74 (1891) ("law of land" is equivalent to "due process of law" as used in federal constitution); note 85 *infra.*

[26] 277 Md. at 21, 353 A.2d at 227. The trial court also appointed a trustee to sell the property to satisfy the lien unless it was paid within 30 days. *Id.*

[27] *Id.* The Maryland Supreme Court granted certiorari while the case was pending in the Court of Special Appeals.

[28] The due process clause of the fourteenth amendment provides: "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[29] *See* text accompanying notes 36-38 *infra.*

[30] The state action doctrine first found expression in The Civil Rights Cases, 109 U.S. 3 (1883). The Supreme Court, in striking down an act of Congress prohibiting discrimination by private individuals providing public accommodations, stated:

> until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States . . . nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.

109 U.S. at 13.

Since 1883, the courts have upheld a distinction between deprivations by the states subject to due process restrictions and private conduct immune from fourteenth amendment scrutiny. The state action test has been espoused in many forms. Courts have found state action where private citizens perform a "public function," *e.g.,* Marsh v. Alabama, 326 U.S. 501, 505-06 (1946), where private individuals are "clothed" with state authority, *e.g.,* Terry v. Adams, 345 U.S. 461, 473 (1953)(Frankfurter, J., concurring), and where state action might "encourage" private activity violative of due process, *e.g.,* Reitman v. Mulkey, 387 U.S. 369, 376 (1967). *See* Catz & Robinson, *Due Process and Creditor's Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond,* 28 RUTGERS L. REV. 541, 572-79 (1975)[hereinafter cited as Catz]. *See generally* Black, *Foreword: "State Action," Equal Protection, and Califor-*

looked first to determine whether state action was present.[31] While the distinction between private and state action often has proved difficult in application,[32] the issue in the field of mechanics' liens is straightforward.[33] Mechanics' liens are created, regulated, and enforced by the states,[34] and consequently the Maryland court found sufficient state action to satisfy the initial due process requirement.[35]

The court then considered the second preliminary question of whether the state action operated to deprive plaintiff-property owners of a significant property interest. Although the fourteenth amendments shields persons from deprivations of life, liberty, and property without due process, not all property interests are constitutionally cognizable.[36] Unless significant property interests are affected, the

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nia's Proposition 14, 81 HARV. L. REV. 69 (1967)[hereinafter cited as Black]; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974). The Supreme Court most recently affirmed the state action-private conduct dichotomy in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), holding that there was no state action which would invoke fourteenth amendment safeguards in the termination of electric service by a state regulated private utility. *Id.* at 358-59.

[31] 277 Md. at 22-23, 353 A.2d at 227.

[32] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974). *Compare* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). State action has been characterized as a "conceptual disaster area." *See* Black, *supra* note 30, at 95.

[33] The readily apparent presence of state action in creating, regulating, and enforcing mechanics' liens statutes has led many courts reviewing the constitutionality of such legislation to ignore this preliminary issue. *See, e.g.*, Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974); Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974). The few courts which have examined the state action requirement have had no difficulty in finding sufficient state involvement. *See* Caesar v. Kiser, 387 F. Supp. 645, 647-48 (M.D.N.C. 1975); Connolly Dev., Inc. v. Superior Court, 17 Cal. 3d 803, 553 P.2d 637, 645, 132 Cal. Rptr. 477 (1976). Indeed, no court has held to the contrary.

The state action requirement has been much more important in challenges to other prejudgment creditors' remedies. *See, e.g.*, Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975)(no state action in nonjudicial mortgage foreclosure); Phillips v. Money, 503 F.2d 990 (7th Cir. 1974)(no state action in garageman's lien); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974)(no state action in automobile repossession statute); Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976)(no state action on self-help repossession under UCC). *Contra* Brooks v. Flagg Bros., Inc., 45 L.W. 2499 (2d Cir. April 4, 1977). Many of these statutes involve merely a codification of common law remedies and courts have declined to find state action on that basis. *See, e.g.*, Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974). *See generally* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1 (1973); Catz, *supra* note 30, at 572-84.

[34] *See* text accompanying notes 4, 13-22 *supra*.

[35] 277 Md. at 22-23, 353 A.2d at 227.

[36] *Compare* Perry v. Sinderman, 408 U.S. 593 (1972)(nontenured college teacher

full panoply of due process procedural safeguards are not required.[37] The *Barry Properties* court reasoned that a lien which arises as soon as work is performed or materials are supplied constitutes a cloud on the owner's title.[38] As such, the lien not only makes alienation or further encumbrance of the property extremely difficult, but also diminishes the owner's equity to the extent of the lien.[39] Thus, the court determined that the Maryland mechanics' lien statutory scheme constituted a deprivation of a significant property interest demanding the protection of due process of law.[40]

In contrast with the Maryland court's decision in *Barry Properties,* however, several other courts have held that the interests of a property owner affected by a mechanics' lien are not significant and hence not cognizable under the fourteenth amendment.[41] In *Spielman-Fond, Inc. v. Hanson's, Inc.,*[42] a three-judge district court upheld Arizona's mechanics' and materialmen's liens statute against attack by property owners who alleged that the statutes violated due process for failing to provide notice and a hearing prior to the filing of the lien.[43] Holding that the difficulty in freely alienating the prop-

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had actionable property interest in continued employment cognizable under fourteenth amendment) *with* Board of Regents v. Roth, 408 U.S. 564 (1972)(nontenured college teacher had no cognizable property interest in continued employment where hired for one year with no promise of reemployment). *See* Arnett v. Kennedy, 416 U.S. 134, 151-53, 155 (1974); *Id.* at 164-67 (Powell, J., concurring); Goldberg v. Kelly, 397 U.S. 254, 260-64 (1970); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 894-98 (1961); Greene v. McElroy, 360 U.S. 474, 491-92, 507-08 (1959); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157-58, *cert. denied,* 368 U.S. 930 (1961); Rendleman, *The New Due Process: Rights and Remedies,* 63 Ky. L.J. 531, 532-39 (1975).

[37] *See* cases cited in note 36 *supra.*

[38] 277 Md. at 23, 353 A.2d at 227-28. *See* text accompanying note 16 *supra.* The court noted that the lien also becomes an encumbrance on record when timely filed. 277 Md. at 23 n.6, 353 A.2d at 228 n.6.

[39] 277 Md. at 24, 353 A.2d at 228. *See* text accompanying notes 58-68 *infra.*

[40] 277 Md. at 24, 353 A.2d at 228.

[41] *See, e.g.,* Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.,* 417 U.S. 901 (1974); Cook v. Carlson, 364 F. Supp. 24, 27 (D.S.D. 1973); *cf.* Ruocco v. Brinker, 380 F. Supp. 432, 436 (S.D. Fla. 1974)(dictum).

[42] 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.,* 417 U.S. 901 (1974). *But see* text accompanying note 84 *infra.*

[43] 379 F. Supp. at 997-98. The Arizona mechanics' lien statute, Ariz. Rev. Stat. §§ 33-981 to 1006 (1956), provided that to perfect a lien, a claimant must file within 90 days, a claim with the county reporter of the county in which the improved property is located, if the claimant had a direct contract with the owner, or 60 days for all other claimants. *Id.* at § 33-993. The claim of lien must include names of the owner and person by whom the claimant was employed or to whom he furnished materials, a description of the land and improvements, a statement of the terms and conditions of

erty impressed with a lien was not a significant property interest,[44] the court distinguished a host of prior Supreme Court decisions.[45] The *Spielman-Fond* court reasoned that previous cases involving total deprivations of property interests which demanded procedural safeguards were inapposite, in that mechanics' and materialmen's leins do not dispossess owners of their property.[46] The court noted that owners are not totally deprived of their property or its use until a court reaches an adverse result in a foreclosure suit.[47] Since the owner remains in possession, retains the use of the land,[48] and assuming he can find a willing purchaser, is not prohibited from alienating his property, the court concluded that there was no deprivation of a significant property interest.[49] More specifically, *Spielman-Fond* held that the filing of a mechanics' or materialmen's lien does not amount to a taking of a significant property interest and a violation of due

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the contract, a statement of the lienor's demand and the date of completion of the building. *Id.* In addition, the claimant must serve the property owner with a copy of the claim of lien within a "reasonable time" after filing with the county reporter. *Id.* In *Spielman-Fond,* the defendants had furnished labor and materials in the development of plaintiff's mobile home park. The defendants alleged they were not paid for this work and filed a lien on the plaintiff's property. Claiming that the lien statute deprived it of the property interest in free alienation without due process of law, the owner-plaintiff sued under 42 U.S.C. § 1983 (1970) for redress of a deprivation of constitutional rights, to have the lien statute declared unconstitutional, and to enjoin the defendant from its enforcement. *Id.*

[44] 379 F. Supp. at 999. *But see* text accompanying notes 58-68 *infra.*

[45] 379 F. Supp. at 998-99. The district court distinguished the following decisions which invalidated a variety of statutes and procedures on due process grounds: Fuentes v. Shevin, 407 U.S. 67 (1972)(writ of replevin); Goldberg v. Kelly, 397 U.S. 254 (1970)(termination of welfare benefits); and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)(garnishment of wages). The court held that by contrast to those decisions, the filing of a mechanics' lien involved no actual physical taking of property. 379 F. Supp. at 997-98. In addition, the *Spielman-Fond* court distinguished previous decisions which had held that the right to alienate one's property freely was entitled to constitutional protection by reasoning that those cases involved direct and total deprivations of the right to alienate the property. 379 F. Supp. at 999. *See* Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).

[46] *But see* note 59 *infra.*

[47] 379 F. Supp. at 997-99. *See* text accompanying note 59 *infra.*

[48] The *Spielman-Fond* court was technically correct in noting that the prior decisions did not involve total deprivation of the owners' property. *But see* note 59 *infra.*

[49] 379 F. Supp. at 999-1000. *Accord, In re* Northwest Homes of Chehalis, Inc., 526 F.2d 505 (9th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976); *In re* Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. 1976); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); Bustell v. Bustell, 555 P.2d 722 (Sup. Ct. Mont. 1976). *Cf.* Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974)(dictum; if compelled to determine whether attachment of mechanics' lien constitutes deprivation of significant property interest of owner, court would hold it does not).

process under the fourteenth amendment for failing to provide for notice and a hearing prior to the filing of the lien.[50]

Similarly, in *Cook v. Carlson,*[51] a federal district court upheld from constitutional attack the South Dakota mechanics' and materialmen's liens statute.[52] The court's reasoning in *Cook* paralleled the *Spielman-Fond* analysis[53] and concluded that the owner's difficulty in selling or borrowing on the property was slight and not constitutionally cognizable.[54] In addition, the court emphasized two factors which tended to mitigate the amount the property value was diminished due to the lien.[55] First, the improvement wrought by the lienor's

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[50] 379 F. Supp. at 999-1000.

[51] 364 F. Supp. 24 (D.S.D. 1973).

[52] *Id.* at 26-27. *See* S.D. COMPILED LAWS ANN. §§ 44-9-1 to 49 (1967). In *Cook,* the defendant performed work and improved real estate owned by the plaintiff. A dispute arose as to whether the work was authorized and the defendant filed a mechanics' and materialmen's lien against the property. The property owner sued, claiming that the lien procedure provided no notice or opportunity to be heard prior to the attachment of the lien, thereby depriving her of property without due process of law. The plaintiff sought to have the lien, and the lien statute declared unconstitutional. *Id.* at 24-25.

[53] *See* text accompanying notes 42-50 *supra.*

[54] 364 F. Supp. at 26-27. As in *Spielman-Fond, see* text accompanying note 50 *supra,* the precise holding of the court was that the deprivation to the property owner was "insignificant" so as not to require notice and an opportunity to be heard prior to attachment of the lien. 364 F. Supp. at 28.

In addition, the *Cook* court held that circumstances within the construction industry and the need to protect subcontractors and materialmen are such to constitute an "extraordinary situation" that justifies postponement of a hearing until after the lien attaches. *Id. See* Terranova v. Avco Financial Svc., Inc., 396 F. Supp. 1402 (D. Vt. 1975). The Supreme Court has held that where appropriate "extraordinary situations" do exist, owners can be deprived of significant property interests without notice and prior opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67, 90 (1972). The Court, however, has set out strict guidelines as to what constitutes an extraordinary situation. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court stated that such requirements are met only if: (1) the seizure is directly necessary to secure an important governmental or general public interest; (2) there is a special need for prompt action; and (3) the state has kept strict control of such seizures and where they are conducted by a public official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in a particular instance. *Id.* at 91.

A review of the Supreme Court decisions in which the extraordinary situations exception has been applied, however, reveals that mechanics' liens statutes do not fall within that realm. *See, e.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)(seizure of yacht transporting marijuana); Ewing v. Myfinger & Casselberry, Inc., 339 U.S. 594 (1950)(misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947)(bank failure). *See also* Hutchinson v. Bank of North Carolina, 392 F. Supp. 888 (M.D.N.C. 1975); Catz, *supra* note 30, at 555-56; Pearson, *Due Process and the Debtor: The Impact of* Mitchell v. W. T. Grant, 29 OKLA. L. REV. 277, 309-11 (1976) [hereinafter cited as Pearson]; Steinheimer, *supra* note 7, at 89-96.

[55] 364 F. Supp. at 27.

efforts would increase the property's value, thereby minimizing any harm to the owner.[56] Second, the court stressed the availability of an expeditious hearing on the merits after the lien filing which would decrease the time period during which the lien remained an encumbrance of record.[57]

Those courts adopting the insignificant deprivation of interest analysis[58] arguably either have ignored the practical realities of the construction and finance industries or have made a forced choice between upholding the mechanics' liens statutes or construing due process as mandating unattractive procedural requirements. First, mechanics' liens do not prevent the owner from using or alienating his property in an absolute sense since mechanics' liens are nonpos-

[56] *Id.* The reasoning that the increased property value due to the lien claimant's services offsets the owner's deprivation is tenuous. First, that analysis assumes an equality between the increased property value and the decrease in the owner's equity due to the perfected lien. That assumption is in no way axiomatic, particularly in states where lien claims can exceed the market value of the improved property. *See* text accompanying note 6 *supra.* Second, the theory assumes that eventually statutory procedural prerequisites such as timeliness of filing and foreclosure actions have or will be met. Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. at 24, 353 A.2d at 228. Finally, that analysis assumes the underlying validity of the lien: the very issue precipitating the dispute. *Id.* In granting mechanics' liens to those who improve real property through their materials and services, statutory schemes must allow liens to attach without prior notice to the owner and a hearing. *See* text accompanying notes 126-137 *infra.* In this sense, the process does assume the validity of lien claims. However, legislatures did not give presumptive validity to claims of liens on a factual basis. Legislatures, in effect, granted a cause of action to insure sufficient funds are available to satisfy claims which later prove valid in a specific amount. However, to argue that an owner is not deprived of a significant interest because the deprivation to the owner is offset by the increase in property value assumes not only the validity of the lien in the manner necessary to protect lien claimants but additionally the substantive validity of the lien on a factual level. Under normal circumstances, an owner does not challenge the mechanics' lien claimant's statutory right to file a claim of lien but disputes the merits of the claim, such as the claimant's factual right to a lien on the owner's property for work or materials purportedly furnished or the claimant's factual allegation that he is owed a particular amount. *See* Comment, *The Constitutional Validity of Mechanics' Liens Under the Due Process Clause—A Reexamination After* Mitchell *and* North Georgia, 55 B.U.L. REV. 263, 274 (1975) [hereinafter cited as *Constitutional Validity*].

[57] 364 F. Supp. at 27-28. The availability of an immediate post-seizure hearing concerning the substantive validity of the mechanics' lien is a proper factor in analyzing what due process requires. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 610 (1974). Consideration of what procedures due process requires, however, is premature in assessing whether any due process protection must be accorded in view of the owner's property interest.

[58] *See* cases cited in note 49 *supra.*

sessory.[59] Nevertheless, the existence of a perfected mechanics' lien as an encumbrance of record[60] will reduce the value for which the property can be sold.[61] In states which do not limit the owner's liability for mechanics' liens, lien claims may exceed the full market value of the property,[62] rendering the property unmarketable.[63] While the property owner ultimately may prevail on the merits against the lien claimant, the owner would be denied the use of his potential sale funds pending that event.[64]

Furthermore, perfected mechanics' liens also deprive property owners of the right to encumber their property.[65] Often, financing

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[59] Since mechanics' liens are non-possessory claims against the owner's property, the property remains in the owner's possession until a lien is judicially foreclosed. An appealing argument has been made, however, that mechanics' liens do totally deprive the property owner of the use of his property in the same manner as does a garnishment of wages. In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), possibly the paramount deprivation was not the actual garnishment of wages but the deprivation of the ability to *dispose* of the wages to satisfy the wage earner's wants and needs. Similarly, the deprivation of the ability freely to dispose of the property may be the only significant incident of real property ownership. Comment, *Sniadach, Overmyer, and Fuentes: Problems for the Mechanics' Lien and Protection for Real Property Developers,* 1973 LAW AND SOC. ORD. 497, 504-05 [hereinafter cited as LAW AND SOC. ORD.]. *See* Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring); text accompanying notes 71-74 *infra.*

[60] *See* LAW AND SOC. ORD., *supra* note 59, at 504.

[61] Presumably, purchasers would be unwilling to pay the full unencumbered market value for property which is subject to outstanding mechanics' liens, but rather would deduct the amount of liens claimed from the purchase price. *See* Hutchinson v. Bank of North Carolina, 392 F. Supp. 888, 898 (M.D.N.C. 1975); Cook v. Carlson, 364 F. Supp. 24, 27 (D.S.D. 1973); Roundhouse Constr. Co. v. Telesco Masons Supp. Co., 168 Conn. 371, 362 A.2d 778, *vacated,* 423 U.S. 809 (1975); *reinstated,* ____ Conn. ____, 365 A.2d 393 (1976); Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 24, 353 A.2d 228, 228 (1976); Constitutional Validity, *supra* note 56, at 269; LAW AND SOC. ORD., *supra* note 59, at 503-04.

[62] *See* text accompanying note 6 *supra*; Comment, *Mechanics' Liens—Potential Pitfall for the Homeowner,* 62 KY. L.J. 278, 279-80 & n.20 (1973).

[63] *See Constitutional Validity, supra* note 56, at 274-75.

[64] *Id.* In addition to the decreased market value, the time, effort, and money which a property owner may have to spend to have the lien dissolved might, in themselves, be a property interest requiring due process protections. *See* Pearson, *supra* note 54, at 310.

[65] *See* Buchanan v. Warley, 245 U.S. 60 (1917), in which the Court stated that property is more than the physical thing which a person owns. Property includes "the right to acquire, use, and dispose of it [and] [t]he Constitution protects all these essential attributes of property." *Id.* at 74. *Accord,* Shelley v. Kraemer, 334 U.S. 1, 10 (1948). *See* Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., Inc., 365 F. Supp. 1299, 1304-05 (D. Mass. 1973)(prejudgment real estate attachment which restricts owner's ability to sell or mortgage property at full value is deprivation of constitutionally significant interest); Gunter v. Merchants Warren Nat'l Bank, 360 F.

conditions require that property be free of all liens and encumbrances.[66] The presence of a lien in that situation would prevent the closing of a permanent mortgage.[67] More importantly, as in *Barry Properties,* perfected liens may prevent the owner from refinancing a project through a secondary mortgage to continue construction.[68] Thus, the *Spielman-Fond* and *Cook* courts' conclusion that mechanics' liens deprive property owners of no significant interest seems to ignore economic practicalities.

An alternative explanation of the *Spielman-Fond* insignificant interest theory is that the analysis reflects a forced choice between invalidating mechanics' liens statutes on due process grounds and the cumbersome procedure of requiring notice to the owner and a hearing before liens could attach.[69] At the time of the *Spielman-Fond* and *Cook* decisions, Supreme Court precedent apparently mandated such an either-or choice, since they were decided after the Supreme Court rendered decisions in *Sniadach v. Family Finance Corp.* and *Fuentes v. Shevin,* but before the decision in *Mitchell v. W. T. Grant Co.*[70] In *Sniadach,* the Supreme Court invalidated a

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Supp. 1085, 1090 (D. Me. 1973)(prejudgment real estate attachment which deprives owner's ability to convey clear title is deprivation of constitutionally significant interest); Roundhouse Constr. Corp. v. Telesco Masons Supp. Co., 168 Conn. 371, 362 A.2d 778, 784-85 (recording of mechanics' lien which restricts owner's opportunity to alienate property is deprivation of constitutionally significant interest), *vacated on other grounds,* 423 U.S. 809 (1975), *reinstated,* ___ Conn. ___, 365 A.2d 393 (1976); *cf.* Griggs v. Allegheny County, 369 U.S. 84, 88-90 (1962)(noise from aircraft at nearby airport was a "taking" of homeowner's property in constitutional sense).

[66] *Cf.* 12 C.F.R. § 7.2040(d)(1)(1976)(liens which do not affect value or use of real estate include construction liens *not yet filed*).

[67] *See, e.g.,* Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 21, 353 A.2d 222 (1976); Gauntlett Equip. Co. v. Hollander, Mechanics' Lien Docket No. 1204 (C.P. No. 6, Philadelphia County, Sept. 27, 1966), *discussed in* Ominsky, *supra* note 21, at 234-36.

[68] 277 Md. at 15, 353 A.2d at 222. The secondary mortgage would be junior in priority to all perfected mechanics' liens and to any first mortgages. *See, e.g.,* W. VA. CODE § 38-2-17 (Cum. Supp. 1976)(lien shall have priority over any other lien secured by deed of trust or otherwise created subsequent to date labor or materials furnished). Most lenders apparently would be unwilling to accept such an encumbered debtor. *See* Ominsky, *supra* note 21, at 238. Thus, if the owner faces continued work stoppages for lack of financing and a foreclosure suit by lien claimants, the pressures for settlement could well outweigh the owner's honest belief that the liens are invalid. *See generally* Ominsky, *supra* note 21, at 238-40; LAW AND SOC. ORD., *supra* note 59, at 511-13.

[69] *Compare* Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973) *and* Cook v. Carlson, 364 F. Supp. 24 (D.S.D. 1973) *with* Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974) *and* Roundhouse Constr. Corp. v. Telesco Masons Supp. Co., 168 Conn. 371, 362 A.2d 778 (1975).

[70] The chronological order of these decisions is: Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Cook v. Carlson, 364 F.

Wisconsin garnishment statute which permitted prejudgment garnishment of wages.[71] Emphasizing the flexible nature of due process[72] and the potential hardship to wage earners in such a garnishment system,[73] the Court held the statute unconstitutional for failing to provide wage earners with notice and a hearing prior to the garnishment.[74] *Fuentes*, which struck down the Florida and Pennsylvania replevin statutes,[75] seemingly extended the absolute requirement of notice and prior hearing to property interests other than wages.[76] The *Fuentes* Court strongly emphasized that the central meaning of procedural due process is the right to notice and opportunity to be heard prior to a property deprivation.[77] Thus, at the time of the *Spielman-Fond* and *Cook* decisions, the law seemed to mandate that notice and a prior hearing must be afforded a property owner if a significant property interest were involved.[78]

The disadvantages of the notice and hearing requirement were apparent. First, upon a judicial declaration of a lien statute's unconstitutionality for lack or procedural requirements, contractors, subcontractors, materialmen, and laborers would be unprotected until

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Supp. 24 (D.S.D. 1973); Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

[71] 395 U.S. at 338-39, 342. The Wisconsin garnishment statute provided a summary prejudgment garnishment procedure whereby, without notice and a prior hearing, a worker's wages could be frozen in the interim between garnishment and culmination of the main suit. 395 U.S. at 338-39.

[72] *Id.* at 340.

[73] *Id.* at 341-42.

[74] *Id.*

[75] 407 U.S. at 96. In the eponymic case the *Fuentes* Court noted that in conformance with Florida procedure, a vendor selling goods under an installment sales contract had only to file summary allegations with the clerk of the small-claims court and a writ of replevin would issue without notice to the vendee or an opportunity to be heard. Similarly, in a case combined for appeal, the Pennsylvania replevin in statute provided for summary writs of replevin without notice or a prior hearing. The Pennsylvania statute did require the party seeking the writ to post a bond in double the value of the property to be seized. The statute, however, did not require that there *ever* be an opportunity for a hearing on the merits of the claim. *Id.* at 70-71, 77.

[76] Following the decision in *Sniadach* there was a split of authority as to whether that case was limited to deprivations of wages as a specialized form of property or applied to other types of property as well. *See* Fuentes v. Shevin, 407 U.S. 67, 72-73 n.5 (1972), and cases cited therein.

[77] 407 U.S. at 80-82.

[78] The Court in *Fuentes* reiterated that where extraordinary circumstances exist, there may be deprivations of property without notice or prior hearing, but that such cases must be "truly unusual." 407 U.S. at 90-92 and n.22. *See* text accompanying note 54 *supra*.

the legislature could enact new statutes.[79] Second, the legislative purpose of mechanics' liens statutes was to afford protection or security to artisans improving another's property by their efforts.[80] Prior notice of an intent to claim a lien would enable property owners to alienate or encumber their property so as to defeat or diminish that protection.[81] Thus, while the Supreme Court's subsequent decision in *Mitchell v. W. T. Grant Co.*,[82] which held that alternative procedural safeguards in lieu of a prior hearing could satisfy due process, made this forced choice unnecessary,[83] the *Spielman-Fond* and *Cook* decisions may represent merely the lower courts' practical solution to the temporary dilemma.[84] Whatever the underlying bases of those deci-

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[79] While some group or individual is often left unprotected when a statute is declared unconstitutional, those persons in the construction industry have traditionally been afforded special protection. Indeed, the court in *Cook* detailed the "particularly vulnerable position" of labor and material contractors and emphasized their importance to the stability of the economy. 364 F. Supp. at 29 (credit risks are greater as labor and materials contractors extend bigger blocks of credit, have more riding on one transaction, have more people vitally dependent upon eventual payment, and have more to lose in the event of default). Of course, contract remedies still would be available, as evidenced by the mechanics' liens statutes themselves which typically provide that the statutory mechanics' liens provisions in no way impair the rights of the lienor to bring any civil action to which he may be entitled. *See, e.g.*, S.C. CODE § 45-292 (1962); VA. CODE § 43-23.2 (1976). However, if legislators had deemed such contract remedies adequate, there would be no need for mechanics' liens statutes whatsoever.

[80] *See* text accompanying notes 4-6 *supra*.

[81] *See* 416 U.S. at 605, 609; *Constitutional Validity*, *supra* note 56, at 280; LAW AND SOC. ORD., *supra* note 59, at 507.

[82] 416 U.S. 600 (1974).

[83] *See* text accompanying notes 91-102 *infra*.

[84] This rationale, of course, does not explain those decisions handed down by lower courts after *Mitchell*, to the effect that deprivations caused by mechanics' liens and similar real estate attachments are not significant interests protected by the fourteenth amendment. *See In re* Northwest Homes of Chehalis, Inc., 526 F.2d 505, 506 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *In re* Thomas A. Cary, Inc., 412 F. Supp. 667, 670-71 (E.D. Va. 1976); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); Brook Hollow Assocs. v. J. E. Greene, Inc., 389 F. Supp. 1322, 1326-27 (D. Conn. 1975). All those decisions, however, placed great weight upon or felt bound by the Supreme Court's summary affirmance of Spielman-Fond, Inc. v. Hanson's, Inc., 417 U.S. 901 (1974). *See, e.g., In re* Thomas A. Cary, Inc., 412 F. Supp. 667, 670-71 (E.D. Va. 1976); *In re* Northwest Homes of Chehalis, Inc., 526 F.2d 505, 506 (9th Cir. 1975).

While the Supreme Court's summary affirmance is a decision on the merits, Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959), such a decision is not of the same precedential value as a Court opinion treating the question on the merits. Edelman v. Jordan, 415 U.S. 651, 671 (1974). *See* Fusari v. Steinberg, 419 U.S. 379, 388-89 n.15 (1975)(district court in interpreting Supreme Court's summary affirmance "should not have felt precluded from undertaking a more precise analysis of the issue"); *Id.* at 391-

sions, the Maryland Supreme Court in *Barry Properties,* on what seems sounder analysis, determined that they were incorrect.[85]

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92 (Burger, C. J., concurring)(summary affirmance, without opinion, of judgment of three-judge district court, affirms the judgment but not necessarily the reasoning by which it was reached; upon fuller consideration of issue under plenary review, Court has not hesitated to discard rule which a line of summary affirmances may appear to have established). This is especially applicable when the Court is dealing directly with questions of constitutional law. Edelman v. Jordan, 415 U.S. 651, 670-71 & n.14 (1974). Thus, in an area of due process requiring a balancing of several complex factors and a variety of interests, the summary affirmance of *Spielman-Fond* should be accorded limited precedential authority. *See* Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 33-35, 353 A.2d 222, 233 (1976); *Constitutional Validity, supra* note 56, at 272 n.67. Moreover, given the variety among state mechanics' lien statutes, the summary affirmance of *Spielman-Fond* may be limited to the particular statutory scheme in question. If so, other states are free to interpret different statutes without regard to *Spielman-Fond. Cf.* Roundhouse Constr. Corp. v. Telesco Masons Supp. Co., 168 Conn. 371, 362 A.2d 778, 783 (1975)(attempting to distinguish *Spielman-Fond* on its facts). *See also* Pearson, *supra* note 54, at 304-09 (*Spielman-Fond* was wrong).

[85] 277 Md. at 23-24, 353 A.2d at 228. By basing its decision on the due process provisions of both the federal and state constitutions, *see* text accompanying note 25 *supra,* the Maryland court effectively insulated *Barry Properties* from appeal. The Supreme Court has held that it will not review judgments of state courts which rest on adequate and independent state grounds. *See* Herb v. Pitcairn, 324 U.S. 117, 125-36 (1945); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871). *See generally* Note, *The Untenable Nonfederal Ground in the Supreme Court,* 74 HARV. L. REV. 1375 (1961). Even where a state court has decided both a federal and a state question, the Court is said to lack jurisdiction to review the case where the decision was supportable on the basis of the state question alone. *See* Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965); Herb v. Pitcairn, 324 U.S. 117 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 107, at 543 (3d ed. 1976). Moreover, as long as the minimal safeguards guaranteed by the federal constitution are satisfied, a state may require a higher standard of constitutional protection. *See* Falk, *Forward—The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 CAL. L. REV. 273, 275-82 (1973); Note, *The Untenable Nonfederal Ground in the Supreme Court,* 74 HARV. L. REV. 1375 (1961). *Cf.* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977)(noting and encouraging recent practice of state courts construing state constitutions as guaranteeing citizens more protection than required by federal constitution). Since *Barry Properties* arguably was based on the Maryland Declaration of Rights, the decision can be read as holding that the mechanics' lien statutory scheme provides insufficient procedural safeguards as required by the state constitution. 277 Md. at 33, 353 A.2d at 233. Because the Maryland court speaks with final authority on questions of state law, Mullaney v. Wilbur, 421 U.S. 684, 689 (1975), the holding was based on independent state grounds and Supreme Court review is consequently precluded. *See* Roundhouse Constr. Co. v. Telesco Masons Supp. Co., 168 Conn. 371, 362 A.2d 778 (Connecticut mechanics' lien statute unconstitutional), *vacated,* 423 U.S. 809 (1975)(remanded for clarification of whether judgment based upon federal or state constitutional grounds, or both), *reinstated,* ___ Conn. ___, 365 A.2d 393 (1976)(based on both constitutions); Note, *Due Process in Pre-Judgment*

Having determined that the existence of a perfected mechanics' lien constitutes a deprivation of a significant property interest[86] through state action[87] demanding due process protection, the court in *Barry Properties* turned to the question of what procedures would satisfy the requirements of due process. The Maryland court looked primarily to four Supreme Court decisions involving prejudgment creditors' remedies—*Sniadach, Fuentes, Mitchell v. W. T. Grant Co.*,[88] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[89]

Following the *Sniadach* and *Fuentes* decisions, fourteenth amendment due process apparently required that once a significant property interest potentially was affected, notice and a hearing were necessary prior to any deprivation.[90] In 1974, however, the Supreme Court decided *Mitchell v. W. T. Grant Co.*[91] which emphasized the dual interests in the property of the vendee-debtor and the vendor-creditor.[92] In *Mitchell,* the Court examined a Louisiana statute which

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Remedies—Invalidation of the Connecticut Mechanics' Lien Statute: Roundhouse Construction Corporation v. Telesco Masons Supplies Co., 8 CONN. L. REV. 744, 744-45 (1976).

Arguably, a state mechanics' lien statute which includes procedural protections to the property owner and not to the lien claimant would not satisfy federal due process guidelines. Following Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), prejudgment creditors' remedies apparently must provide procedural safeguards for the creditor as well as the debtor to meet federal due process requirements. *See* text accompanying note 92 *infra*. However, any state procedural requirements which go beyond federally mandated due process protections and which reflect a constitutional accommodation of the dual interests of the debtor and creditor would constitute an adequate independent state basis for a decision, thereby insulating the state court decision from appeal to the United States Supreme Court.

The precedential value of such a decision based on state procedural requirements, however, would be limited. A federal court construing a different state's statute or a court from another state could distinguish such a holding as confined to the other state's stricter requirements. Nevertheless, the Maryland court's reliance solely on Supreme Court precedent and the express holding that *Barry Properties* rested on the requirements of both the federal and state constitutions which were deemed synonymous, should render the case persuasive in other jurisdictions.

[86] *See* text accompanying notes 36-40 *supra*.

[87] *See* text accompanying notes 31-35 *supra*.

[88] *See* text accompanying notes 91-102 *infra*.

[89] 419 U.S. 601 (1975).

[90] *See* text accompanying notes 69-79 *supra*.

[91] 416 U.S. 600 (1974).

[92] *Id.* at 604. The vendee-debtor's interest in the goods was obviously the right not to be wrongfully deprived of the use or possession of the property. *Id.* The vendor-creditor's interest in the property was characterized as the protection of his security interest against deterioration due to time or against wrongful destruction or alienation of the property by the vendee in possession. *Id.* at 608. *See* Catz, *supra* note 30, at 556-

permitted the sequestration of personalty to enforce a vendor's lien of a creditor who sold goods under an installment contract.[93] Although there were no provisions for notice or a hearing prior to seizure of the property, the Court sustained the constitutional validity of the statute.[94]

Retreating from the earlier holdings that notice and a hearing were absolute prerequisites, the Court stressed several alternative procedural safeguards designed to prevent wrongful deprivations of debtors' property.[95] First, the Louisiana statute provided that the writ of sequestration could not issue on the bare conclusory allegations of the claimant. Rather, the complaint must include an affidavit specifying the facts supporting the claim.[96] Second, the clear showing of entitlement evinced in the complaint and affidavit must be made to a judge and not to a mere court functionary.[97] Third, the statute provided for an immediate post-seizure hearing in which the creditor must prove the validity of his claim or have it dissolved.[98] The *Mitchell* Court also noted that the validity of the claim under the Louisiana statute was easily susceptible to documentary proof, thus reducing the chances of a wrongful deprivation.[99] Moreover, in order for the writ to issue, the creditor was required to file a bond to compensate the debtor for any harm suffered from unjustified seizure.[100] The debtor, too, could post a bond and thereby release his property from the writ.[101] By means of these alternative procedural safeguards, the Court found that the statute reflected a "constitutional accommodation" of competing interests of the debtor and creditor and, therefore, satisfied the requirements of due process.[102]

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59. *See generally* Rendleman, *Analyzing the Debtor's Due Process Interest*, 17 WM. & MARY L. REV. 35 (1975) [hereinafter cited as Rendleman]; Steinheimer, *supra* note 7, at 85-88.

[93] 416 U.S. at 601.

[94] *Id.* at 619-20.

[95] *Id.* at 605-18.

[96] The statute provided that the writ of sequestration would issue only when " 'the nature of the claim and the amount thereof . . . and the grounds relied upon for the issuance of the writ clearly appear from specific facts' shown by a verified petition or affidavit." *Id.* at 605, *quoting* LA. CODE CIV. PRO. ANN., art. 3501 (West 1961).

[97] 416 U.S. at 605-06.

[98] *Id.* at 606.

[99] *Id.* at 617-18. The Court noted that the facts relevant to obtaining a writ of sequestration are narrowly confined to the uncomplicated matters of establishing the existence of a debt, a vendor's lien and the default and are particularly suited to a preliminary ex parte determination. *Id.* at 609, 617-18.

[100] *Id.* at 606.

[101] *Id.* at 607 & n.9.

[102] *Id.* at 607.

Two years later, the Court handed down a fourth decision relating to prejudgment creditors' remedies.[103] Following *Mitchell*, there was considerable question as to the constitutional validity of providing alternative safeguards in lieu of a pre-seizure hearing in areas where there was no dual debtor-creditor interest in the property to be seized.[104] To a large extent, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[105] resolved that issue. *North Georgia* involved a constitutional challenge to a Georgia garnishment statute. The Georgia statute authorized prejudgment garnishment of wages upon the execution by the creditor or his attorney of an affidavit before a court clerk. The application had to state only the amount claimed to be owed and the applicant's reason for fearing the loss of the debt unless the writ issued.[106] The only other prerequisite to issuance was that the creditor file a bond, equal to twice the amount of the claim to protect the debtor.[107] *North Georgia* dispelled any notion that the *Mitchell* analysis applied only to secured transactions and that *Fuentes* would unequivocably[108] require a prior hearing when the creditor had no prior interest in the property to be seized.[109] In *North Georgia,* the Court took the clear language of *Fuentes,* which stated that notice and prior hearing would be required, and added the alternative procedural safeguards analysis of *Mitchell.*[110] Indeed, the Court in *North Georgia* did not even discuss the absence of a pre-seizure hearing.[111] Instead, the decision examined the Georgia garnishment statute for alternative safeguards to protect debtor-property owners from wrongful dispossession.

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[103] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

[104] *See* Ruocco v. Brinker, 380 F. Supp. 432, 436 n.21 (S.D. Fla. 1974); 63 GEO. L.J. 1337, 1340 n.30 (1975), and materials cited therein.

[105] 419 U.S. 601 (1975).

[106] *Id.* at 602-03. *See* note 96 *supra.*

[107] 419 U.S. at 603.

[108] The Court in *Fuentes* did provide for postponement of notice and hearing where the requirements of the extraordinary situations exception are met. 407 U.S. at 91. *See* note 54 *supra.*

[109] If the Court had intended that the alternative safeguard analysis undertaken in *Mitchell* would apply only in cases of secured transactions, the *North Georgia* decision could have distinguished *Mitchell* on that basis alone. *See* Catz, *supra* note 30, at 563-64; Note, 14 DUQ. L. REV. 494, 505 (1976). *But see* Rendleman, *supra* note 92, at 43-45.

[110] *Compare* Fuentes v. Shevin, 407 U.S. 67, 83-84 (1972)(existence of other safeguards may affect form of hearing but do not "obviate the right to a prior hearing of some kind") *with* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975)(statute invalid for permitting deprivations "without opportunity for hearing or other safeguard[s]").

[111] *See* 419 U.S. 601.

On that basis, the Court found the Georgia statute unconstitutional, having none of the "saving characteristics" of the Louisiana statute upheld in *Mitchell.*[112] The *North Georgia* Court, however, then discussed the Georgia statute with regard to only three of the several procedural safeguards noted in *Mitchell.*[113] First, the Georgia writ of garnishment was issuable upon the affidavit of a creditor's attorney, who need not have personal knowledge of the facts supporting the claim, containing only conclusory allegations.[114] Second, the writ was issuable by a court clerk, without participation by a judge.[115] Third, the statute contained no provision for an early post-garnishment hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.[116] Moreover, the availability of bonding procedures by which a debtor could release his property from the writ, without the other safeguards, was held not to be a sufficient safeguard to satisfy due process standards.[117]

A combined reading of *Sniadach, Fuentes, Mitchell,* and *North Georgia* suggests that procedural due process requires notice and a hearing prior to any significant deprivation of property, unless adequate procedural safeguards are present.[118] Until the Supreme Court hears challenges to creditors' remedies statutes in which one or another of the *Mitchell* and *North Georgia* alternative procedural safeguards is absent, how many or which procedures are necessary remains uncertain.[119] Various combinations of alternative safeguards

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[112] *Id.* at 607.

[113] *See* text accompanying notes 95-102 *supra.*

[114] 419 U.S. at 607. The writ, however, also could issue on the affidavit of the creditor who would have personal knowledge of the factual basis of the claim. *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 607-08. *Cf.* Hutchinson v. Bank of North Carolina, 392 F. Supp. 888, 898 (M.D.N.C. 1975)(bonding procedures will not save an otherwise invalid statute from constitutional challenge). The *North Georgia* Court's discussion of the Georgia statute's bonding procedures was segregated from its analysis of the "saving characteristics" in *Mitchell.* 419 U.S. 606, 607. Such a treatment casts doubt upon whether the Court would consider the opportunity to substitute surety bonds or cash for seized property as a redeeming procedural safeguard under any circumstances. Moreover, *North Georgia* did not discuss the susceptibility of the claim to documentary proof. 419 U.S. 601. Whether that omission was meant to remove that factor from the list of minimal alternative safeguards is unclear.

[118] *See* Ruocco v. Brinker, 380 F. Supp. 432, 437 (S.D. Fla. 1974); Connolly Dev., Inc. v. Superior Ct. of Calif., 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976); Roundhouse Constr. Corp. v. Telesco Masons Supp. Co., 168 Conn. 371, 362 A.2d 778, 783-84 (1975); Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 30, 353 A.2d 222, 231 (1976).

[119] *See* Hutchinson v. Bank of North Carolina, 392 F. Supp. 888 (M.D.N.C.

seemingly would suffice for different prejudgment creditors' remedies. The particular combination which would afford adequate due process protection in any specific substantive area wherein an owner is deprived of his property, however, must reflect an analysis of and an accommodation among the interests involved.[120]

Assessing the Maryland mechanics' lien statute in view of the *Mitchell* and *North Georgia* decisions, the court in *Barry Properties* found the Maryland statutory procedures lacking in adequate alternative safeguards.[121] The court noted that the lien attached as soon as work commenced, with no requirement that the claimant provide an affidavit on personal knowledge setting forth the facts underlying his claim, file a bond to protect the property owner, submit the lien to judicial scrutiny, or prove the validity of his claim in a prompt post-attachment hearing.[122] Even when the lien is perfected by filing within the 180 day period,[123] the statute provided that the subcontractor need only present the claim to a court clerk for recordation without any requirement that the filing be accompanied by an affidavit or bond or be subjected to prior judicial examination.[124] Thus, since the statutory scheme required no prior hearing and lacked alternative safeguards, the Maryland court declared the statute unconstitutional under both the federal and state constitutions.[125]

1975)(lack of prior notice and hearing and issuance of writ of attachment by court clerk, in light of other safeguards, did not render statute unconstitutional); Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 647-48 (S.D.N.Y. 1974)(all five *Mitchell* safeguards necessary).

[120] 416 U.S. at 607-10.

[121] 277 Md. at 32-33; 353 A.2d at 232-33.

[122] *Id.* at 31-32, 353 A.2d at 232.

[123] *See* text accompanying note 16 *supra.*

[124] 277 Md. at 32, 353 A.2d at 232.

[125] *Id.* at 32, 353 A.2d at 233. Having declared the statute unconstitutional, however, the Maryland court concluded that the property owner, Barry Properties, Inc., was not unconstitutionally deprived of his property without due process of law. *Id.* at 35-37, 353 A.2d at 235. The majority reasoned that only the unconstitutional portions of the statute which provided for the taking of property without sufficient procedural safeguards need be severed from the statutory scheme. The court held that the excising of the unconstitutional aspects could be accomplished in such a way as to retain the primary legislative intent of giving additional protection to contractors, materialmen, and laborers. *Id.* at 35-37, 353 A.2d at 234-35. The court concluded that the remaining portions of the mechanics' lien statute gave lien claimants a chose in action rather than an existing lien on the improved property. *Id.* at 37, 353 A.2d at 236. In the final paragraph of the opinion, which the dissent termed the majority's "own brand of wizardry," *id.* at 40, 353 A.2d at 237 (Levine, J., dissenting), the court noted that Barry Properties knew of Fick Brothers' claim of a lien before the initiation of the enforcement suit. Thus, since Barry Properties did not challenge the constitutionality

The Maryland court correctly assessed the due process protections of that state's statute as inadequate. Given the variety of state mechanics' liens provisions, however, the precedential value of such state court decisions construing particular state statutes is limited. Nevertheless, a review of the *Mitchell-North Georgia* procedures does provide helpful guidelines.

Initially, due process requires that some hearing must occur at a meaningful time in a meaningful manner given the particular creditor remedy.[126] Upon initial analysis, a hearing prior to any deprivation seemingly would suffice in all cases. Mechanics' liens, however, closely resemble secured transactions in which the dual interests of the property owner and the lien claimant must be accommodated.[127]

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of the lien statute until the enforcement suit began, the court reasoned that Barry Properties was not deprived of any property interest prior to the lower court's determination that the lien was valid. 277 Md. at 38, 353 A.2d at 235-36. The dissent agreed that the statute was unconstitutional but argued that the property owner was either deprived of due process or not. The dissent would have applied the rule of judicial restraint and refrained from deciding constitutional issues if the same result could have been achieved on other grounds. If constitutional protection was present, the dissent argued that the decision should have been dispositive and there should have been no holding that the statute was unconstitutional. *Id.* at 40-41, 353 A.2d at 237 (Levine, J., dissenting).

The disagreement between the majority and dissenting opinion seems to center on how much of the statutory scheme was deemed unconstitutional. The dissent argued that the entire statute should fall for lack of procedural due process while the majority viewed only those provisions which provided for attachment and perfection of a lien prior to a judicial hearing as void. While their reasoning is somewhat circuitous, the majority may well have been attempting to provide an equitable result for the parties before it in the face of a statute that was unconstitutional in its procedural protections. *See* text accompanying notes 69-84 *supra.*

The Maryland legislature acted quickly to insure protection for persons providing labor and materials for the improvement of real property. Within three months of the decision in *Barry Properties,* the legislature passed a revised mechanics' lien law remedying the defects noted by the state supreme court. *See* MD. [REAL PROP.] CODE ANN. §§ 9-101 to 112 (Cum. Supp. 1976). Among the more pertinent changes were greater factual specificity required in the notice to the property owner of an intent to claim a lien and in the filing of a lien, *id.* at §§ 9-104 to 105, filing by a lien claimant of an affidavit setting forth facts supporting his claim, *id.* at § 9-105, and including an automatic post-filing judicial review of the documents on file and a hearing in which the owner can contest the claim if the initial review indicates a potentially valid claim. *Id.* at § 9-106.

[126] *See* 419 U.S. 606; Bell v. Burson, 402 U.S. 535, 542 (1971); Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[127] In both secured agreements and mechanics' liens the creditor and the debtor each have a present interest in specific property so that chances of a wrongful or mistaken seizure are reduced. *See* Pearson, *supra* note 54, at 297, 300-01, 309; Rendleman, *supra* note 92, at 40-44. Furthermore, a creditor's right in the collateral is usually

Notice and a prior hearing would certainly protect the property owner from wrongful deprivation. To be effective, however, the lien claimant's interest created by the statute apparently requires a hearing only after a claim of lien has been filed. Otherwise, upon advance notice, property owners could alienate or encumber their property so as to destroy the protection sought for contractors and laborers.[128] Indeed, this possibility was the apparent motive behind the *Spielman-Fond* and *Cook* decisions.[129] Statutory provisions preventing this ocurrence by giving mechanics' liens priority over all creditors subsequent to the commencement of work[130] do not solve the problem. States also have an interest in the integrity of their recording systems and an obligation to protect subsequent purchasers and creditors from unrecorded encumbrances.[131] Mechanics' liens which relate back to the time when the first work was performed or materials supplied[132] need not be recorded until after the work is completed and a hearing held to determine the validity of the lien.[133]

A hearing immediately following the perfection of a lien would better accommodate the various interests surrounding mechanics' liens.[134] Contractors, subcontractors, materialmen, and laborers would enjoy the statutory protection of receiving a specific lien on property improved through their efforts. Although property owners would find it difficult to dispose of, or encumber, their property with the lien on record,[135] an immediate post-filing hearing in which the

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detailed in the security agreement while a lien claimant's rights are set out in statutory form and in filing requirements, making them both readily susceptible to documentary proof. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 609 (1974); Catz, *supra* note 30, at 565.

[128] *See* 416 U.S. at 605, 609; text accompanying note 81 *supra*.

[129] *See* text accompanying notes 69-85 *supra*. The potential effect of alienation or encumbrance in eliminating statutory protection for creditors also was a major factor in the *Mitchell* decision. *See* 416 U.S. at 605, 609.

[130] *E.g.*, W. VA. CODE § 38-2-17 (Cum. Supp. 1976); FLA. STAT. ANN. § 713.07 (West 1969).

[131] *See* Cook v. Carlson, 364 F. Supp. 24, 27 (D.S.D. 1973).

[132] *See* text accompanying note 16 *supra*.

[133] Any prior recordation would result in the same problem faced in *Barry Properties*, in that a lien on record would deprive the owner of the ability to alienate his property freely. *See* text accompanying notes 36-40 *supra*. *See generally Constitutional Validity*, *supra* note 56, at 279-84.

[134] *See* MD. [REAL PROP.] CODE ANN. § 9-106 (Cum. Supp. 1976).

[135] Under the revised Maryland statute, there must be a judicial review of a petition to establish a mechanics' lien. As under the prior statute, this petition must be filed with the county clerk within 180 days of completing work. *Id.* at § 9-105. If the court determines that the lien should attach, it shall order the owner to show cause within 15 days why the lien should not attach. *Id.* at § 9-106(a).

claimant must prove the validity of the claim or have it dissolved[136] would remove the extended deprivation of the owner's ability freely to alienate or encumber his property by a potentially invalid lien. Finally, subsequent purchasers and potential lenders would need only await the outcome of the prompt post-perfection hearing to determine the validity of lien claims.[137]

Although the importance of requiring more than conclusory allegations in order for the lien to attach[138] is diminished by a prompt post-perfection hearing, requiring a sworn affidavit containing detailed factual bases of a claim would serve several purposes. First, if required to be served on the property owner as well as recorded in public property records, the affidavit could function as proper notice to the owner, not only of the substance of the claim,[139] but also of the time of the appropriate hearing. The factual information also would allow potential purchasers and lenders to evaluate independently the merits of the claim,[140] thus further lessening the period in which alienability or encumbrance would be restricted by patently invalid claims of liens. Second, requiring more than conclusory allegations would tend to discourage frivolous claims aimed at pressuring property owners into settling unjustified liens.[141] Reducing the potential for frivo-

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[136] The revised statutory scheme recently established in Maryland results in a shifting burden of proof between the lien claimant and the property owner. The lien claimant initially must prove the validity of his claim of lien in the court's review of the pleadings and documents which the claimant must file. MD. [REAL PROP.] CODE ANN. § 9-106(a) (Cum. Supp. 1976). In the initial review, the court may require the claimant to supplement or explain any matters contained in the pleadings. *Id.* The court then determines whether the lien shall attach, and, if so, the burden of going forward shifts to the property owner to show cause why a lien for the specified amount should not attach. *Id. See* note 125 *supra.* The owner may present evidence in his behalf and controvert any statement of fact in the claimant's documents. MD. [REAL PROP.] CODE ANN. § 9-106(a)(2)(Cum. Supp. 1976). If the owner's answer shows cause why a lien should not attach, the court will set the matter for hearing on the merits of the claim in which the burden of proving the validity of the claim returns to the lien claimant. *Id.* at §§ 9-106(a)(2), (3); 9-106(b). At the hearing the court determines whether the lien should attach as a matter of law and enters an order establishing or denying the lien. *Id.* at § 9-106(b)(1), (2). If the court determines that the lien should not attach as a matter of law but concludes that there is probable cause to believe that the claimant is entitled to a lien, the court will enter an order of its findings of fact and set the case for trial within six months. *Id.* at § 9-106(b)(3). *See* text accompanying note 19 *supra.*

[137] *See* text accompanying note 133 *supra.*

[138] *See* 416 U.S. at 605.

[139] *See, e.g.,* S.C. CODE § 45-259 (1962)(notice to be served on owner).

[140] *See* Ominsky, *supra* note 21, at 240.

[141] *See generally* LAW AND SOC. ORD., *supra* note 59, at 511-13.

lous claims would also serve to offset the increase in judicial workload occasioned by the prompt post-filing hearing.[142] Thus, the various procedural safeguards which the Supreme Court found sufficient in *Mitchell* and wanting in *North Georgia* can be applied to statutory mechanics' liens so as to reflect an adequate accommodation of the competing interests. With this analytical background, a brief assessment of the constitutional validity of mechanics' lien statutes in the remaining states in the Fourth Circuit[143] can be undertaken.

Initially, not one of the mechanics' lien statutes of North Carolina,[144] South Carolina,[145] Virginia,[146] and West Virginia[147] require notice and a hearing prior to attachment and perfection of the lien. Of the four states, only Virginia's statute contains provisions for a prompt post-filing hearing in which the lienor must show the validity of his lien or have it dissolved.[148] On this basis alone, the North Carolina, South Carolina, and West Virginia statutes probably could not withstand a constitutional challenge based on due process.[149]

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[142] With regard to other procedural safeguards noted in *Mitchell,* judicial participation in the form of an initial assessment of the lien's validity prior to perfection would be inefficient. When there is an immediate post-filing hearing and recordation of a lien only on a sworn statement by the claimant including the factual bases of the claim, judicial involvement probably would not be beneficial. *See Constitutional Validity, supra* note 56, at 284-85. Similarly, bonding procedures whereby owners could release their property from the lien would bring few increased benefits given the protection of a prompt hearing. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Supreme Court noted that when one piece of property is seized and the owner can recover it only if he surrenders another piece of property, the owner is deprived of his property whether or not he has the time, the funds, and the knowledge to take advantage of the recovery procedure. *Id.* at 85. Thus, an owner whose property is seized subject to a perfected lien and who then substitutes a bond in its place is still deprived of his property. Indeed, this deprivation is much more direct than the practical restrictions on his property occasioned by the mechanics' lien.

Where the post-filing hearing results in a finding of probable validity of a lien claim, however, an owner's bond could restore the unfettered use of his property pending a formal foreclosure suit on the merits. A bond requirement after such a hearing would not be an unconstitutional deprivation of property since the owner had notice and a hearing on the probable validity of the lien before the bond was required, thus satisfying due process. *See* MD. [REAL PROP.] CODE ANN. § 9-106(3)(iv)(Cum. Supp. 1976).

[143] Excluding Maryland, *see* note 125 *supra,* the remaining Fourth Circuit states are North Carolina, South Carolina, Virginia, and West Virginia.

[144] N.C. GEN. STAT. §§ 44A-7 to 23 (1976).

[145] S.C. CODE §§ 45-251 to 293 (1962 & Cum. Supp. 1975).

[146] VA. CODE §§ 43-1 to 23.2 (1976).

[147] W. VA. CODE §§ 38-2-1 to 39 (1966 & Cum. Supp. 1976).

[148] VA. CODE § 43-17.1 (1976). *See* text accompanying notes 172-179 *supra.*

[149] The mechanics' lien statutory schemes of North Carolina, South Carolina, and

The North Carolina mechanics' lien statute provides that a lien[150] attaches from the time the labor or materials are first furnished.[151] In order to preserve and enforce the lien, the claimant must file a claim of lien within 120 days and bring suit to enforce the lien within 180 days after the last furnishing of labor or materials.[152] While the absence of any requirement of a prior or post-filing hearing may be fatal, the allegations required in the claim of lien appear adequate, since the statute requires that specific and detailed information be included in the lien claim.[153] There is, however, no judicial participation in the process, and given the lack of an immediate hearing, this is especially harmful in terms of protecting property owners from wrongful deprivation. The statute does provide that an owner may release his property from the lien by depositing cash or a surety bond

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West Virginia would probably not satisfy the due process requirements of either the federal or state constitutions. The due process provisions of the South Carolina and West Virginia constitutions are nearly identical to the fourteenth amendment. *See* S.C. CONST. art. I § 3 (Cum. Supp. 1975); W. VA. CONST. art. III § 10. The due process provision of the constitution of North Carolina, N. C. CONST. art. I § 19, is similar to the "Law of the land" provision of the Maryland constitution. *See* note 25 *supra.* Moreover, although the North Carolina Supreme Court has held that although United States Supreme Court decisions construing the fourteenth amendment are not binding interpretations of its state constitutional provisions, such decisions would be persuasive. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

In any event, property owners and lien claimants must be afforded at least the protections of the fourteenth amendment and the individual state statutes probably could not satisfy those requirements. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976); Roundhouse Constr. Corp. v. Telesco Masons Supp. Co., 168 Conn. 371, 362 A.2d 778 (1975); text accompanying notes 25, 85 & 126-143 *supra.*

[150] The North Carolina statute grants to "[a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials . . . for the making of any improvement [to real property] . . . a lien on such real property to secure payment of all debts owing for" such services. N.C. GEN. STAT. §§ 44A-8, 23 (1976). *See generally* Urban & Miles, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Priority,* 12 WAKE FOREST L. REV. 283 (1976).

[151] N.C. GEN. STAT. § 44A-10 (1976).

[152] *Id.* at §§ 44A-12 to 13. *Cf.* MD. [REAL PROP.] CODE ANN. § 9-105, 106 (1974 & Cum. Supp. 1975)(180 days to file claim; one year to bring suit). *See also* text accompanying notes 139-140 *supra.*

[153] *See* N.C. GEN. STAT. § 44A-12 (1976). In addition to the names and addresses of the record property owner and lien claimant, the claim of lien must include a description of the property, the name and address of the person with whom the claimant contracted, a description of the labor or materials, the dates on which they were supplied, and the amount claimed.

in its stead.[154] Nevertheless, this procedure in no way protects property owners from invalid claims or assures a prompt hearing on the merits of the claim.[155] Consequently, this combination of procedural devices would not seem to meet due process standards for protecting the interests of both owners and lien claimants.[156]

Under the South Carolina statute[157] the lien arises on commencement of work or the furnishing of materials.[158] A lienor must file a claim of lien, termed a certificate, within 90 days of the date on which he last furnished labor or materials and must bring suit to enforce the lien within six months of completing work.[159] Perfection of the lien occurs upon filing of the certificate prior to any judicial participation.[160] The information required in the claim of lien amounts only to conclusory allegations[161] and would probably not be adequate under *Mitchell* and *North Georgia.* While an owner can release his property from a lien by substituting cash or a bond with the clerk of court,[162] this procedure suffers the same deficiencies as the North Carolina bonding provisions.[163] The lack of any prompt hearing, the conclusory allegations permitted in the filing of a claim of lien, and the absence of any judicial involvement in the perfection of the lien would likely render the South Carolina statute constitutionally defective.

Procedural provisions of the West Virginia mechanics' lien statute[164] differ between those who have direct contracts with the property owner and those who provide services or materials with no direct contractual relationship. In general, every lien claimant must file a claim of lien within 90 days and bring suit to enforce the lien within

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[154] *Id.* at §§ 44A-16(5),(6). *See* note 142 *supra.*

[155] *See* note 142 *supra.*

[156] *But cf.* Hutchinson v. Bank of North Carolina, 392 F. Supp. 888 (M.D.N.C. 1975)(upholding constitutional validity of North Carolina prejudgment real estate attachment statute similar to mechanics' lien statute where absence of prejudgment attachment would allow debtor to remove, assign, or dispose of property and defraud creditors; attachment to secure jurisdiction is an extraordinary situation justifying postponement of notice and hearing). *See* note 54 *supra.*

[157] S.C. CODE §§ 45-251 to 293 (1962 & Cum. Supp. 1975).

[158] Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959); Williamson v. Hotel Melrose, 110 S.C. 1, 30, 96 S.E. 407, 414 (1918).

[159] S.C. CODE §§ 45-259, 262 (1962).

[160] *Id.* at § 45-259.

[161] In addition to the name of the owner and a description of the property to be attached, the statute only requires the claim of lien to include a statement of a "just and true account of the amount due . . . ." *Id. See* text accompanying notes 139-142 *supra.*

[162] S.C. CODE § 45-261 (1962).

[163] *See* text accompanying notes 142 & 154-155 *supra.*

[164] W. VA. CODE §§ 38-2-1 to 39 (1966 & Cum. Supp. 1976).

six months after completing his portion of the work.[165] In addition, lien claimants having no direct contract with the owner must first have served on the owner a notice of lien within 60 days of the final furnishing of labor or materials.[166] Again, there is no judicial participation in the filing of the lien and no provision for an immediate post-perfection hearing. Moreover, no bonding procedures exist whereby an owner can release his property from a perfected lien.

The information to be contained in the claim of lien, however, appears adequate for due process purposes. While little is required in a claim of lien filed by a party with a contract with a property owner,[167] subcontractors, materialmen, and laborers without such a contract must include significantly more detail.[168] Furthermore, the statute provides that an owner can require such claimants to file more detailed itemized accounts of work done or materials furnished, including the dates those services were performed and the price.[169] Failure to file such an account within 10 days after receiving notice of the owner's demand for clarification will dissolve the lien.[170] This procedure, however, does not suffice as an adequate substitute for a prompt hearing on the merits of the claim and the West Virginia statute probably could not withstand a procedural due process challenge.

The Virginia mechanics' lien statute[171] appears to reflect an adequate constitutional accommodation of competing interests. In Virgnina, liens attach when the first work is done or materials furnished.[172] A claim of lien must be filed with the clerk of court within 90 days and an enforcement suit brought within six months of com-

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[165] *Id.* at §§ 8 to 13 (1966).

[166] *Id.* at §§ 9, 11, 13.

[167] *Id.* at §§ 8, 10, 12. Persons supplying labor and materials under a direct contract with the property owner must include in their claim the name of the owner, a description of the property and structures involved, and the amount due. Although this information is scant, it should be deemed adequate since the two parties have a direct contract, the provisions of which supply necessary details. *See* note 168 *infra.*

[168] W. VA. CODE §§ 38-2-9, 11, 13 (1966). Those persons without a direct contractual relationship with the owner must provide the information required in § 38-2-8, *see* note 167 *supra*, and a description of the nature of the subcontract together with an itemized account of the nature and quantity of any materials or services supplied and the dates on which such materials or services were delivered or performed.

[169] W. VA. CODE § 38-2-19 (1966).

[170] *Id.*

[171] VA. CODE §§ 43-1 to 23.2 (1976).

[172] W. T. Jones & Co. v. Foodco Realty, Inc., 318 F.2d 881 (4th Cir. 1963)(applying Virginia law); Hadrup v. Sale, 201 Va. 421, 111 S.E.2d 405 (1959).

pleting work.[173] Within the 90 day period, those providing labor or materials without a contract with the owner also must give written notice to the owner of the claim of lien,[174] and this notice must be accompanied by a memorandum and sworn affidavit detailing the facts and bases of the claim.[175] While there are no provisions for judicial participation in the perfection of the lien or substitution of a bond for the property, the Virginia statute does provide for a post-perfection hearing.[176] After reasonable notice to the lien claimant, the court will hold a hearing and determine the validity of the lien.[177] Added in 1975, this provision for a post-perfection hearing in conjunction with the additional safeguards, would probably satisfy due process requirements in accommodating the several interests involved.[178]

While the Supreme Court has not definitively examined the constitutional validity of mechanics' liens statutes, recent decisions involving other prejudgment creditors' remedies offer sufficient guidelines for such an assessment. Undoubtedly, the Court has moved decisively away from earlier decisions which appeared to mandate notice and a hearing prior to any significant property deprivation. Currently, the focus of procedural due process under the fourteenth amendment is aimed at an accommodation of the competing interests of the creditor as well as the debtor. The Court has not, however, invoked a case-by-case analysis of the affected interests. Still maintaining the flexibility of due process, the trend appears to be to pre-

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[173] VA. CODE §§ 43-4, 7, 9 (1976).

[174] *Id.* at §§ 7, 9.

[175] *Id.* at §§ 4, 5, 8, 10. The statute requires lien claimants to attach a memorandum specifying the names and addresses of the property owner, the general contractor, and the claimant, and detailing the amount of the lien, the time when the amount is due, a description of the property, the type of materials or services furnished, and the type of structure for which the work or materials were furnished. While this information may not be as detailed as that required under the West Virginia statute, *see* text accompanying notes 167-168 *supra,* it apparently satisfies the *Mitchell* requirement of providing the facts supporting the claim. *See* text accompanying notes 96, 114, & 138-142 *supra.*

[176] VA. CODE § 43-17.1 (1976). The statute provides that "[a]ny party, having an interest in real property against which a lien has been filed may . . . petition the court of equity having jurisdiction . . . to hold a hearing to determine the validity of any perfected lien."

[177] *Id.* The statute provides that after "reasonable notice" to the lien claimants and other interested parties, the court shall hold a hearing to determine the validity of the lien. *Id.* at § 17.1 (1976). Moreover, the statute provides that upon a finding that the lien is invalid, the court shall order the lien be dissolved. *Id.*

[178] Davey Tree Expert Co. v. Jeffrey Sneider & Co., Chancery No. 45660 (Cir. Ct. Fairfax Cty., Nov. 18, 1975), upheld the constitutionality of Virginia mechanics' lien statute.

scribe minimal procedures applicable to a particular substantive area of the law. Applying this approach to the conflicting interests in the area of mechanics' liens, many long-standing statutes are vulnerable to due process challenges.

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