**Who is entitled to file?**

There is more to the question of who is entitled to file a materialmen's lien in Arkansas than at first meets the eye. The most obvious examples are contractors, subcontractors and suppliers. A.C.A. § 18-44-107, which provides:

"§ 18-44-107. Definitions

            As used in this subchapter, unless the context otherwise requires:

            (1) "Contractor" means any person who contracts orally or in writing directly with a person holding an interest in real estate, or such person's agent, for the construction of any improvement to or repair of real estate;

            (2) "Subcontractor" means any person who supplies labor or services pursuant to a contract with the contractor, or to a person in direct privity of contract with such person; [1](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

            (3) "Material supplier" means any person who supplies materials, goods, fixtures, or any other tangible item to the contractor or a subcontractor, or an individual having direct contractual privity with such persons;  and

            (4) "Person" includes an individual, a partnership, a corporation, a limited liability organization, a trust, or any other business entity recognized by law. Amended by Acts of 1995, Act 1298, § 2."

**Contractors**

            The first group one thinks of in the case of liens are contractors. The obvious case occurs when a landowner signs a contract with a contractor to construct or repair an improvement. The difficult situations arise when the person who contracts for the work is not an owner. Most commonly this is done by a tenant, with or without a lease. Another is when a person seeking to purchase real property makes some improvements, and the purchase falls through. The situation regarding tenants comes up regularly, when a new business owner contracts for the completion of an interior finish of a shopping or strip center shell as an example. A direct lien against the real property may be obtained if it can be shown that the lessee was an 'agent' of the owner for the purpose of the improvement. This can be shown if the claimant can establish that the owner paid for the improvements by allowing a deduc­tion or offset from the rental payments. [2](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Otherwise, a claimant is limited to a lien against the actual improvement and the 'leasehold' under A.C.A. 18-44-103. This statute gives a claimant the right to "take over" the lease and pay back rents in order to maintain the improvement until it can be sold, or another tenant is located, willing to pay the contractor and assume the lease or buy the improvements at foreclosure sale, for use during the term of the lease. If, however, the landlord has already taken the premises back, then the claimant is given 60 days to remove the improvement for sale, the owner of the land retains from the sale pro­ceeds sufficient funds to compensate for rent. This particu­lar provision is not often used. In the case of a long term lease of land where another party owns the buildings, then the lien can extend only to the improvement and not the land. [3](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Special care must be taken when dealing with an industry operating on land leased from a city or governmental agency. No lien will attach to either property or the leasehold. [4](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

**Subcontractors and Suppliers**

            A subcontractor is one who has a contract with the contractor, or a person in direct ***privity*** of contract with such person. If one has a contract with the owner, no matter what trade or sub-specialty, then for these purposes one is a contractor. The easy part concerns a person with a contract directly with the contractor for some portion of the improvements. An example would be a drywall subcontractor. The next tier of beneficiaries are those who have a contract with one in privity with the owner. For instance a sheet rock hanger with a contract with the drywall subcontractor, where there is a contract between the drywall subcontractor and the original contractor. If the sheet rock hanger has contracted with another party to do some part of its work, that party is not a Subcontractor as defined in A.C.A. 18-44-107, and has no lien.

            Under A.C.A. 18-44-107, the new definitions section of the lien laws, a "Material Supplier" means any person who supplies materials, goods, fixtures, or any other tangible item to the contractor or a subcontractor, or an individual having direct contractual privity with such persons . . . " The distinction existed prior to the 1995 amendments. It was considered that a subcontractor must do more than simply furnish materials. [5](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) The distinction is now especially significant due to the differing notice requirements facing one deemed to be a supplier, most notably the 75-day notice. [6](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  The group that ended up with most of the burden imposed by the 1995 amendments are suppliers, who not only must deal with the traditional notices, but the notices from the prior reforms and the 75 days notice cannot be over emphasized, particularly in view of  Books-a-million V. Ark Paint and Spec. 340 Ark. 467 (2000) which has had the effect of application of this Notice to Subcontractors as well.

**Others Who May Claim a Materialmens Lien**

Assignees

            Under A.C.A. 18-44-113, a lien may be assigned [7](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) or sold [8](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx), but it may not be enforced against the owner or proprietor unless the owner has actual notice of the assignment.  However, the lien must have been perfected before it can be assigned. [9](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) The courts have ruled that actual notice also includes an implication that the notice will be reasonably contemporaneous. The length of time is left open, but the courts have held that seven months is too long. 1[0](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

Others?

            Over the years these statutes have been the subject of a number of 'add on's.' One such is represented by A.C.A. 18-44-104, concerning drainage material. This statute states:

A.C.A. 18-44-104. Drainage material

            (a) Every **manufacturer** or **contractor** who shall furnish to any landowner any soil or drain pipe or tile for drainage of his land, or who shall put in soil or drain tile for any land, shall have a lien for each tract of forty (40) acres or less of the real estate upon which the tile is placed for the payment of the lien.   The lien shall extend for a period of two (2) years.

            (b) The lien for the tile shall attach to the real estate and all improvements thereon in preference to any subsequent liens, encumbrance, or mortgage executed upon the land after the purchase of the tile.   The lien shall be enforced in the same manner as a mechanic's or contractor's liens.

There are two things that can be gleaned from this statute. The first is that this is a rural state and improvements to farm land represent an important economic reality. And second, at some point manufacturers of drain tiles had a really good lobbyist at the legislature. If one can come within this statute, the lien is substantially extended as to the amount of property covered and the length of time the lien once filed will extend.

Landscapers

            In 1995, landscapers, evidently, hired the same legislative expert but paid slightly less. Landscapers now have their own statute:

"§ 18-44-134. Landscaping services and supplies

            (a)(1) Every person who shall do or perform landscaping services or provide landscaping supplies on any land, building, erection, or improvement upon land, under or by virtue of any written agreement for performance with the owner or his agent thereof shall have a lien upon the land, building, erection, or improvement to the extent of the agreed contract price or a reasonable price for those services.

            (2) However, the lien does not attach to the land, building, erection, or improvement unless and until the lien is duly filed of record with the circuit clerk and recorder in the county in which the land, building, erection, or improvement is located.

            (b) This recorded lien will be enforced in the same manner as a mechanic's or contractor's lien."

Except for this statute one would never have supposed that a landscaper would not have been covered under the normal lien law. There are no cases yet on this statute, but the language included in section (2) may give landscapers a lower priority than other claimants on the same project.

Laborers

            A laborer would seem to have the most obvious right to the protection afforded by a lien. The legal position of laborers is, however, not completely settled.  Remember that the liens represent a reform, based on a reform of a reform.  The lien provided in A.C.A. 18-44-101, covers, "(a) Every **contractor, subcontractor, or material supplier** as defined in § 18-44-107, who supplies **labor.**" A strict reading brings the question of a single laborer into some doubt. The question is answered with a separate section dealing with the rights of laborers. The remedies are intended to be in addition to any other rights rather than 'instead of.' 1[2](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  The statute is as follows:

            " A.C.A.  18-44-203. Suppliers and laborers. **Any person**, corporation, firm, association, partnership, or *materialman* who furnishes machinery, material, or *supplies* to a contractor or subcontractor or***any person who performs labor*** under a subcontractor with a contractor, or who as an artisan or day laborer in the employ of a contractor or subcontractor performs any labor, shall have a lien on the land. . . ."

The first thing to notice is that the statute title included laborers, but the actual text deals with just about everybody else before its first actual mention of a laborer. The lien provided is to be enforced in the same manner as a Materialman' Lien. 1[3](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)."  The lien given is to be superior in the case of a common laborer to all other subsequent liens. 1[4](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

            However, as with insurance policies everywhere, what the front page giveth the back page taketh away. The limiting factor on the rights of laborers, which renders the statute a foot note, is the fact that the lien extended only to the extent of the contract price. 1[5](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) In other words if an owner has paid the contractor, then even though unpaid a laborer loses whatever rights were given. This destroys any benefit that may seem to be given. Even the owner has no reason to look behind the contractor, since payment in full to the contractor excuses any further debt. The only advantage of this lien over the Materialmen's lien is that suppliers and contractors might escape some of the notice requirements. However, the practical effect is that collection would be limited to the contract price which would be exhausted once paid to the contractor.

Engineers and Architects

The legislature has had some difficulty in dealing with design professionals.   Both A.C.A. 18-44-105 and A.C.A. 18-44-133, seem to cover the same ground. A.C.A. 18-44-133 also covers surveyors, appraisers**, abstractors, or title insurance agents**. The statutes give this class of persons a lien to be enforced in the same way as Materialman liens generally. In neither statute, does the lien attach prior to filing with the circuit clerk. The effect is that other lien claimants are very likely prior. The interesting question comes with the interpretation of the phrase, found in both statutes,    "This recorded lien will be enforced in the same manner as a mechanic's or contractor's lien." The issue being whether this covers only the remedy or relates to the conditions required to get a lien provided as a part of the lien law, to wit, the reconstruction notices and the 75-day, 10 day and 120 day filing requirements. There is only one case that touches this issue and it was a federal district court case and it seemed to accept without analysis that the notice would be required. [[1]](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

            The explanation for these two statutes that deal in the same area may be the process in which the courts have interpreted a statute in a way that the legislature cannot accept. In a narrowly decided case concerning a contractor that had removed brush and trees from land later sold, the court in  Lambert V. Newman,  245 Ark. 125, 431 S.W.2d 480 (1968), held that the statutes covered only work done to an **improvement upon** land and not an **improvement to** land.  The legislature reacted with an amendment to add in the word **'to.'** In John E. Mahaffey & Associates, Inc. v.  Brophy, 462 S.W.2d 226, 249 Ark. 884 (Ark. 1971), an engineer who had worked to lay out a subdivision was denied a lien by the court on the ground that these were not improvements, but rather planning services. The reaction to this was Act 291 of 1971, also known as A.C.A. 18-44-105. In 1987, the legislature enacted A.C.A. 18-44-133, which is very similar to the earlier section. The chief difference being that it allows coverage for architects, engineers, surveyors, appraisers, abstractors, or title insurance agents. The explanation may simply be that in the intervening years, the legislature wished to add explicitly the additional covered parties.

**Basic Mechanics of Lien Formation**

            Where practical we will avoid theory, old cases and 'Blackacre' and concentrate on the "How" leaving the "Why" for another day.  A contractor or supplier's lien is established when an improvement is made to real property or materials are delivered and incorporated into an improvement. The 'filing' as it is commonly called, is simply the means by which to 'perfect' that lien. The trick is that there are a number of deadlines that must be met in order to 'file' and preserve a Materialmen's Lien. Failure to meet any one of these deadlines IS fatal to the lien claim.

            The first time that is important is the date of commencement of the project. The date of commencement sets the priority of all of the other materialmen's liens. The statutes, old and new, make a number of other dates significant that will be discussed in the next few pages.

Preconstruction Notice

            The first deadline occurs before the work of the prime contractor starts when a pre-construction notice is required. The courts have strictly construed these rights because the enforcement of a Materialmen's Lien often means that an innocent property owner's rights will be affected. The trend of the cases now seems to be away from the older 'substantial compliance' mode toward a strict compliance standard.  A.C.A. 18-44-115 "(c) The notice set forth in this subsection may be incorporated into the contract, or affixed thereto, and shall be conspicuous, worded exactly as stated,  . . . " The notice should be placed in the contract. A prudent person should still state the statutory notice in all capitals with a separate signature.

            This provision requires that, in the case of residential construction, a notice concerning the potential for liens be given to the property owner. The exact form and wording of this notice are contained in the statute. This notice is the responsibility of the prime contractor, but it may be given by subcontractors and suppliers.

            The notice must be in capital letters and in exactly this form from the statute:

                         "IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH PERSON SUPPLYING MATERIAL OR FIXTURES IS ENTITLED TO A LIEN AGAINST PROPERTY IF NOT PAID IN FULL FOR MATERIALS USED TO IMPROVE THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY MATERIALS OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.

                                SIGNED: -\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

                                        \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

                                        ADDRESS OF PROPERTY

DATE: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER OR AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.

                                     \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

                                        CONTRACTOR"

            As with just about every legal concept, the main rule here has a number of exceptions:

**Commercial Projects.** The exception applies to commercial projects and residential real estate of four or more units.

**Bonded and Direct Sale Projects 1**[**6**](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)**.** A.C.A. 18-44-115(d) If the contractor supplies a performance and payment bond or if the transaction is a direct sale to the property owner, the notice requirement of subsection (a) of this section shall not apply and the lien rights arising under this subchapter shall not be conditioned on the delivery and execution of the notice.  A sale shall be a direct sale only if the owner orders the materials from the lien claimant.

75 Day Notice

            One of the more significant of the changes in recent times is the addition of the 75 Day Notice. The statute's wording placed this requirement only on suppliers and laborers, but the case law has broadened the requirement and reinforced the strict construction notion.

            A.C.A. 18-44-115  (2) No material supplier  . . . [SUBCONTRACTOR 1[8](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) - CASE LAW CHANGE]  . . . or laborer shall be entitled to a lien unless the material supplier or laborer notifies the owner of the commercial real estate being improved, in writing, that such material supplier or laborer is currently entitled to payment but has not been paid.  This notice shall be sent to the owner and to the contractor by registered mail, return receipt requested restricted delivery or, and this is new as of 2005, by any officer authorized by law to serve civil process 1[9](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx), before seventy-five (75) days have elapsed from the time that the labor was supplied or the material furnished.  Such notice shall contain the following information:

  (A) A general description of the labor, service, or material furnished, and the amount due and unpaid;

  (B) The name and address of the person furnishing the labor, service, or materials;

  (C) The name of the person who contracted for purchase of the labor, service, or materials;

  (D) A description of the jobsite sufficient for identification; and

  (E) The following statement set out in boldface type:

                         "NOTICE TO PROPERTY OWNER

    IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED TO

  CONSTRUCT AN IMPROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL,

  A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS

  COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF

  ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY

  OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU

  MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY

  PAYING THE ABOVE NAMED PROVIDER OF LABOR, SERVICES, OR

  MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE

  NAMED PROVIDER AND CONTRACTOR JOINTLY."

            There is an interesting question raised by this notice. You will notice that the owner in this notice is advised that a joint check may be used as a means of protection. The statute nowhere explicitly, gives such a right, but the notice required by the legislature seems to give just such a right. To a certain extent, this simply puts into words what was already a fairly common means of protection.

10 Day Notice of Intent to File Lien**.**

            A.C.A. 18-44-114 requires that ten days notice be given to the owner, and where appropriate, to the contractor prior to filing the lien. This requirement applies to all potential claimants and as of 2005, includes the original contractor 2[0](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx). The requirements for this notice are less stringent, but no less important. The Notice must state that there is a claim, the amount of the claim, and from whom the money was due; without at least this information, it is ineffective. The 2005 amendments affect not only who must give this notice, but how it is to be done.

  "   18-44-114. Notice and service generally.

(a)  Every person who may wish to avail himself or herself of the benefit of the provisions of this subchapter shall give ten (10) days' notice before the filing of the lien, as required in § 18-44-117(a), to the owner, owners, or agent, or either of them, that he or she holds a claim against the building or improvement, setting forth the amount and from whom it is due.

    (b)(1)  The notice may be served by any:

(A)  Officer authorized by law to serve process in a civil action;

(B)  Person who would be a competent witness; or

(C)  Form of mail addressed to the person to be served, with a return receipt requested and delivery restricted to the addressee or the agent of the addressee.

(2)(A)(i)  When served by an officer, his or her official return endorsed on the notice shall be proof of the service.

(ii)  When served by any other person, the fact of the service shall be verified by affidavit of the person so serving.

(B)(i)  When served by mail, the service shall be verified by a return receipt signed by the addressee or the agent of the addressee, or a returned envelope, postal document, or affidavit by a postal employee reciting or showing refusal of the notice by the addressee.

(ii)  If delivery of the mailed notice is refused by the addressee, then the person holding the claim shall immediately mail to the owner, owners, or agent a copy of the notice by first class mail and may proceed to file his or her lien.  "

Statement of Account A.C.A. 18-44-117.

            The actual lien filing is known as a Statement of Ac­count and is filed with the circuit clerk for the county wherein the improvement is located within 120 days of the last work or material delivery. 2[1](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) The Statement of Account is what most people refer to when they discuss the filing of a lien on a piece of proper­ty.  This filing gives one the right to foreclose the lien. As with the preconstruction notice, and 10-day notice, a claimant must comply with this requirement in order to preserve a lien right. 2[2](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  The only exception is if suit is filed prior to the expiration of 120 days. 2[3](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  There is a requirement under a separate statute that the Statement of Account must also contain the name of the person authorized to release it on the record. 2[4](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  (e)  The validity or priority of any attachment, claim, encumbrance, financing statement, lien, mortgage, or security agreement currently on file, or filed of record after the effective date of this act, shall not be affected by the failure of any person to comply with the requirements of this section.

And the Countdown Starts When?

     The most important concept is the date when the time for these deadlines starts. The 120 day period refers not to the entire construction project, but rather to the work or delivery of the specific claimant. After a claimant stops work, the time for filing a lien starts, even though others are still working. Even though the liens are all related back to the same date for priority purposes; for purposes of this sec­tion, each claimant is considered separately. The 'last work' concept needs some further explanation. Some claimants over the years have tried to extend the time for liens by repairs or adjustments to the work. The 'last work' criterion should be altered to state last "substantial work."  In one instance, a claimant attempted to get around the 120 day deadline by returning to 're-calibrate' equipment previously installed. The court ruled that the time runs from the last substantial work. 2[5](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) In cases of goods sold on open account the time for each delivery of goods for a particular improvement is inde­pendent of a second delivery for another improvement. A Statement of Account filed within 120 days of the second delivery confers no lien for the cost of the first delivery. The exception is where there is some proof of an expectation that the supplier was to supply the entire project. Therefore, care should be taken in this situation. 2[6](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

Attorney Fees

            Another important issue is the matter of attorney fees. Until the 1990's, each party in most cases paid its own attorney. Now, by statute in most commercial situations, the winner is entitled to collect its attorney's fees from the other party. This concept has been carried over into the lien arena.

Sec. A.C.A. 18-44-128.  Attorney's fee

  When any contractor, subcontractor, or material supplier, who has filed a lien, as provided for in this chapter, gives notice thereof to the debtor or owner of property which has been subjected to the lien in writing sent by registered or certified mail, and the claim has not been paid within twenty (20) days from the date of the mailing and if the contractor, subcontractor, or material supplier is required to sue for the enforcement of his claim, the court shall allow the successful party in the action a reasonable attorney's fee in addition to other relief to which he may be entitled. In this way, the right to collect attorney's fees as part of the lien is protected.

Filing of Foreclosure Complaint

            The final deadline relates to the period of time between the filing of the Statement of Account and the filing of a foreclosure complaint. We have already discussed the 120-day 2[7](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) deadline which may generally be tolled by filing suit within 120 days. 2[8](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)   Filing suit without the Statement of Account is a procedure of last resort. The problem is that the lien obtained maybe denied priority as against mortgagees, even when filed after the start of work. The filing of suit within 120 days rather than filing a Statement of Account perfects the lien as between the land owner and contractor. The Arkansas Supreme Court has held that with regard to a mortgagee, whose mortgage was filed after the start of construction, but before the foreclosure was filed, that the contractor was not superior to the lien of the mortgagee. 2[9](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)   Once the Statement of Account has been filed, the contractor has 15 months to foreclose the lien. 3[0](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  After the fifteenth month, the lien is no longer effective. A recent amendment has made the expiration of the lien more explicit. 3[1](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Furthermore the suit must include a Lis Pendens in order to beat the deadline.

Priorities and other Conundrums

            Now, that we have established who can obtain a lien, and how one perfects the lien. The next questions, what is the effect of this lien on the owner, prior mortgage holders, current and future mortgage holders. The basic rule of priorities in Arkansas is first in time, first in line. But there are exceptions, and a materialmen's lien is one of those exceptions.

Commencement of Project

            A.C.A. 18-44-110  (2) states that construction or repair commences when there is a visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair of an improvement to the real estate***has begun or will soon begin***, including but not limited to the following:

 '(A) Delivery of a significant amount of lumber, bricks, pipe, tile, or other building material to the site; or

  (B) Grading or excavating the site; or

  (C) Laying out lines or grade stakes; or

  (D) Demolition in an existing structure. 'This statute is very different from the prior law [case law and statute] which required that work must be actually started on the building. In fact, this standard directly contradicts several of the old cases regarding site work, grade staking and demolition of existing structures all of which were held not to constitute 'commencement' under the old law and which are now specific examples under the current statute. 3[2](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

            The concept of the priority of a lien relates to what happens when persons with claims of more than $100,000.00 file claims against property valued at $50,000.00. After the property is sold at foreclosure, who is entitled to the proceeds as between prior mortgages, other lien claimants, and the owner.

A.C.A. 18-44-110.  Preference over prior liens--Exception

  (a)(1) The liens for labor performed or material or fixtures furnished, as provided for in this subchapter, **shall have equal priority toward each other** without regard to the date of filing the account or lien or the date when the particular labor or material was performed or furnished.  All such liens shall date from the time that the construction or repair first commences.

  (3) In all cases where a sale shall be ordered and the property sold, and the proceeds arising from the sale are not sufficient to discharge in full all the liens against the property without reference to the date of filing the account or lien, **the proceeds shall be paid pro rata on the respective liens.**

  (b)(1) The liens for labor performed or materials or fixtures furnished, as provided for in this subchapter, **shall attach to the improvement** on which the labor was performed or the materials or fixtures were furnished in preference to any encumbrance existing on the real estate prior to the commencement of construction or repair of the improvement.  In all cases where the prior encumbrance was given**for the purpose of funding construction** or repair of the improvement, that lien**shall have priority** over all liens given by this subchapter.

 (2) The liens, as provided for in this subchapter, shall be enforced by foreclosure, as further provided for in this subchapter, and **the property ordered sold subject to the lien of the prior encumbrance on the real estate**.

(c) The lien for labor performed and materials or fixtures furnished, as provided for in this subchapter, **shall have priority over all other encumbrances that attach to the real estate or improvements thereon subsequent to commencement of construction or repair."**

            The 'even' priority means that at least with regard to other lien claimants on the same project, there is no race to the courthouse.

            The law prior to the 1995 statutes also contained language that stated that a materialmens lien was given priority over pre-existing liens. However, the courts, based on the ancient law of fixtures, drew a distinction between removable and irremovable fixtures. The effect of this distinction was that the apparent plain wording of the legislature was rendered ineffective. The courts limited lien claimants in priority over other liens only with regard to the improvement and not the real property. Since the claimant was not allowed to remove the improvement, the effect was to render the statute ineffective. In 2000, based on changes in the wording of the statute in 1995, the Arkansas Supreme Court, altered this situation, in its decision in  Simmons First Bank Vs. Bob Callahan Services, 340 Ark. 692, 13 S.W.3d 570 (2000)3[3](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx). The court adopted essentially a new remedy that protects both the prior lien holder and the contractor.

            The language of the opinion is instructive and lays out the prior law and the reasons for the change along with the new remedy.

"We conclude that the only way to adequately protect the competing interests is to require the chancery court to conduct a double appraisal of the property, determining the value of the property prior to construction of the improvement and the value of the property with the improvement.

         This method is best illustrated by the case law of the Supreme Court of Alabama. Similar to our section 18-44-110, the statutory law of Alabama provided that as to the building or improvement, materialmen's liens were given priority over all other liens, mortgages, or encumbrances, whether executed before or after construction began. See Empire Home Loans, Inc. v. W.C. Bradley Co., 241 So.2d 317 (Ala. 1970); Baker Sand & Gravel Co. v. Rogers Plumbing & Heating Co., 154 So. 591 (Ala. 1934). Enforcement was also by means of foreclosure sale. Id. The dilemma faced by the Alabama court was how to adjust the proceeds of the sale in a way that gave the materialmen's lien priority as to the improvement while simultaneously giving priority to the bank as to the real estate. The solution was to sell the entire property and distribute the proceeds in an equitable manner. The court held:

    On principle as well as the authority of our former

  decisions, we hold the court of equity has plenary power to

  mold its decrees in such form as to conserve the equities of

  all parties; and may, when a removal of the building would,

  in large measure, operate a destruction of the security,

  order a sale of the property as a whole, adjusting priorities

  in the proceeds on equitable principles.

Id. at 597 (citations omitted). We believe that this approach best implements our current statutory scheme.

  Section 18-44-101 provides that every contractor who supplies labor, materials, or services shall have a lien upon the improvement and up to one acre of land, or to the extent of the number of acres upon which improvement has been made. Section 18-44-110(b)(1) provides that the materialmen's lien attaches only to the improvement, and thus enjoys priority over prior encumbrances on the property only as to the value of the improvement. Subsection (b)(2) provides that the means of enforcing a materialmen's lien is foreclosure  of the entire property, subject to the prior encumbrance on the land. To give meaning to each of these provisions, the chancery court must determine the value of the improvement using the double-appraisal method.

         Accordingly, we reverse and remand this matter to the chancery court to conduct a double-appraisal of the property, determining the value of the property both with and without the improvement. Pursuant to its plenary powers in equity matters, the chancellor shall then distribute the proceeds of the sale, first to Callahan for the value of the improvement and the remainder to Simmons. See Ark. Code Ann. § 16-13-304(a) & (c) (Repl. 1999); Monette Road Imp. Dist. v. Dudley, 144 Ark. 169, 222 S.W. 59 (1920)." [340 Ark 692, 695-699]

This along with the new notice, and definition of the commencement of construction represents one the more far reaching changes from the 1995 Amendments to the Lien law.

            Another issue is when materialmen are in second place, the property may be sold, but subject to the prior lien. This was not possible before the 1995 changes. Under A.C.A. 18-44-110(b)(2), stated above, the claimant can now cause the property to be sold, but subject to the prior lien. There are no cases on this section. There is a real issue, in my opinion, regarding sale subject to the prior lien. How, can one force a bank or any creditor to accept another entity on its duly filed mortgage. This may limit the effectiveness of this provision, to a situation where the new owner can pay off the prior mortgage.

**Strategies for clearing liens on real estate**

            There are limited tools for clearing materialmen's liens in Arkansas. The tool box, such as it is, is derived from old provisions of the lien law, a new statute also passed in 1995 and standard litigation methods, now with a new twist. The question is how can these liens be avoided, and if filed how they can be removed, neutralized or voided.

The Use of Construction Proceeds

First and foremost, The owner is required to pay the contractor who is then required to pay the project subcontractors and materialmen from each construction draw. This is a matter of trust between the owner and contractor and, frankly, between the contractor and those that have been hired. In addition to the moral and contractual obligation to pay one's debts, it is a criminal offense 3[4](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) for a contractor to take any proceeds from a project and not pay the job costs as provided in A.C.A. 18-44-132.3[5](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) The statute states:

 "A.C.A. 18-44-132. Criminal offenses;  fraud

     (a) It shall be unlawful for any contractor, subcontractor, or other person who has performed work or furnished materials for the improvement of any property where the work or materials may give rise to a mechanic's, laborer's, or materialman's lien under the laws of this state, this subchapter, §§ 18-44-201 -- 18-44-210 and subchapter 3 of this chapter, or any other statute providing for a mechanic's, laborer's, or materialman's lien, or the assignee of such person, knowingly to receive payment of the contract price or any portion of it without applying the money so received toward the discharge of any liens known to the person receiving the payment, or properly record it as required by statutes, with the intent thereby to deprive the owner or person so paying the contractor or other person receiving payment of his funds without discharging the liens and thereby to defraud the owner or person so paying."

     (b) In any prosecution under this section as against the person so receiving payment, when it shall be shown in evidence that any lien for labor or materials existed in favor of any mechanic, laborer, or materialman and that the lien has been filed within the time provided by law in the office of the circuit clerk or other officer provided by law for the filing of such liens, and that the contractor, subcontractor, or other person charged has received payment without discharging the lien to the extent of the funds received by him, then the fact of acceptance of the payment without having discharged the lien within ten (10) days after receipt of the payment or the receipt of notice of the existence of the lien, whichever event shall occur last, shall be prima facie evidence of intent to defraud on the part of the person so receiving payment."

     ( c) ... deals with penalties....

Often people complain that statutes are not clear and on that count this statute, stands as the poster child of obscurity. It seems in places to refer to liens already perfected by filing. The most useful reading of this statute is that it requires each person in the materialmen's 'food chain' to pay those down the stream within ten days of receipt of the funds. The problem with this approach is that while it sounds good, the fact is that making such a purely economic action a felony renders it ineffective. There are virtually no cases filed under this statute, I have cited the only two I am aware of and they were in the 1960's. Prosecutors are simply not going to get involved. Other states have adopted a less sever sounding but far more effective set of statutes, which are called 'trust fund' statutes. Whether or not they carry criminal penalties, they are effective because they offer a private remedy that an owner, or other party can control.

**Demand for Information**

            The next item in the Arkansas Tool box is one added with 1995 Amendments. The basic gist of this statute is that it allows owners and mortgagees to demand and receive a list of subcontractors and suppliers. The practical benefits of this are rather important. Once the list is obtained, then it is possible to learn with some, but not absolute certainty, the complete list of possible claimants. The statute is:

A.C.A. 18-44-108. Refusal to list parties doing work or furnishing materials.

  (a) The **owner or proprietor, material supplier, subcontractor**, or anyone interested as **mortgagee or trustee** in the real estate upon which improvements are made under this subchapter, **may, at any time**, apply to the contractor or subcontractor for the following:

  (1) A list of all parties doing work or furnishing material for the buildings and the amount due to each of the persons;

  (2) Certification that the owner or agent has received the preliminary notice specified under § 18-44-115.

  (b) Any contractor or subcontractor who, upon request, refuses or fails within five (5) business days to give a correct list of the parties furnishing material or doing labor, and the amount due to each, on the building, or who falsely certifies that an owner or agent has received the preliminary notice specified under § 18-44-115, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500).

            The rights given here are important, not only to those claiming liens, but also to those subjected to the liens. This statute attempts to make sure that all interested parties can have access to this important information. An owner can, for instance, learn the identity of all the subcontractors and suppliers, so that it is possible to check with them all prior to making payments.

**Bonding Around**

            One of the better-known means of removing a lien is the statute that allows a party to 'bond around' the lien. This statue has been amended by Act 2287 of 2005, to allow more service options and to make it clear that a Declaratory Judge may be granted in the case of liens.

Note: .**This section has been amended by Act 2287 of 2005** - The Text appears here with the new language in place and the old language deleted just as it**may** appear in the published statutes. The changes relate to service and a clarification that a declaratory judgment may be used to clear a lien.

   18-44-118. Filing of bond in contest of lien.

(a)(1)  In the event any person claiming a lien for labor or materials upon any property shall file such a lien within the time and in the manner required by law with the circuit clerk or other officer provided by law for the filing of such a lien, and if the owner of the property, any mortgagee or other person having an interest in the property, or any contractor, subcontractor, or other person liable for the payment of such a lien shall desire to contest the lien, then the person so desiring to contest the lien may file with the circuit clerk or other officer with whom the lien is filed as required by law a bond with surety, to be approved by the officer in double the amount of the lien claimed.

    (2)  The bond shall be conditioned for the payment of the amount of the lien, or so much of the lien as may be established by suit, together with interest and the costs of the action, if upon trial it shall be found that the property was subject to the lien.

(b)(1)(A)  Upon the filing of the bond, if the circuit clerk or other officer before whom it is filed approves the surety, he or she shall give to the person claiming the lien, at his or her last known address, three (3) days' notice of the filing of the bond.

(B)  The notice shall be in writing and served by any:

(i)  Officer authorized by law to serve process in a civil action; or

(ii)  Form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee.

(2)(A)  Within the three (3) days' notice, the person claiming the lien may appear and question the sufficiency of the surety or form of the bond.

(B)  At the expiration of three (3) days, if the person claiming the lien shall not have questioned the sufficiency of the bond or surety or if the clerk finds the bond to be sufficient, the clerk shall note the filing of the bond upon the margin of the lien record and the lien shall then be discharged and the claimant shall have recourse only against the principal and surety upon the bond.

(c)(1)  If no action to enforce the lien shall be filed within the time prescribed by law for the enforcement of a lien against the surety, the bond shall be null and void.

(2)  However, if any action shall be timely commenced, the surety shall be liable in like manner as the principal.

(d)  If the clerk shall determine that the bond tendered is insufficient, the person tendering the bond shall have twenty-four (24) hours within which to tender a sufficient bond, and unless a sufficient bond shall be so tendered, the lien shall remain in full force and effect.

(e)(1)  Any party aggrieved by the acceptance or rejection of the bond may apply to any court of competent jurisdiction by an action which is appropriate.

(2)  Upon notice as required by law, the court shall have jurisdiction to enter an interlocutory order as may be necessary for the protection of the parties by:

(A)  Requiring additional security for the bond;

(B)  Reinstating the lien in default of the bond, pending trial and hearing; or

(C)  Requiring acceptance of the bond as may be necessary for the protection of the parties.

(f)  Nothing in this section shall be construed to limit the right of an owner, mortgagee, or any other person with an interest in the property to contest the lien by declaratory judgment proceedings under § 16-111-101 et seq.

History. Acts 1963, No. 66, § 2; A.S.A. 1947, § 51-641; Acts 2005, No. 2287, § 2.

The procedure as outlined in the statute is straight forward and does not in general lead too much controversy from a procedural stand point. For one thing any claimant, with a normal IQ immediately recognizes that a bond is a far better debt security than real property. The limitation of the effectiveness is a practical and economic one. Most surety companies are reluctant to write these types of bonds and when they will consider doing so, they will generally require 100% collateral and a hefty premium. For many small companies and individuals this amounts to a prohibition. The suggestion in the amendment, that a party can seek a ruling on a lien's validity via a Declaratory Action is an excellent one. The cost of legal proceedings and the time involved limit the use of this as a stratagem. The practical reality is that such an action can be used to force a claimant to either stand and defend its lien or foreclose rather than simply using a faulty or questionable lien to bluff a settlement.

**Slander of Title**

            While litigation is never a first choice, there is another statutory tool available to owners and purchasers in dealing with lien claims. The common law action was known as Slander of Title, which action has been around for many years and has seen some use against lien claims. The action requires proof of malice however a notoriously difficult element of any suit. One example is Hicks V. Early, 235 Ark. 251, 357 S.W.2d 647 (1962), the court held that "before [the] appellant could prevail in a slander of title action, it was necessary for him to prove that appellees acted with malice by filing a materialman's lien upon appellant's property." 3[6](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) In 1995 another new statute was added, that speaks to this cause of action.

A.C.A. 5-37-226. Filing instruments affecting title or interest in real property.

  (a) It shall be unlawful for any person or persons to have placed of record in the office of the recorder of any county any instrument clouding or adversely affecting the title or interest of the true owner, lessee, or assignee in real property or clouding or adversely affecting any bona fide interest in real property with the knowledge of the instrument's lack of authenticity or genuineness, and with the intent of clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property, which may prevent the true owner, lessee, or assignee from disposing of the real property, transferring or granting any interest in the real property, or with the intent of procuring money or value from the true owner, lessee, or assignee to clear the Instrument from the records of the office of the recorder.

  (b) Any person violating the provisions of subsection (a) of this section shall be guilty of a Class A misdemeanor.

  (c) Any owner, lessee, or assignee of real property located in the State of Arkansas who suffers loss or damages as a result of conduct which is prohibited under subsection (a) of this section, and who must bring civil action to remove any clouds from his title or interest in the real property, or to clear his title or interest in the real property shall be entitled to treble actual damages, punitive damages, and costs, including all reasonable attorney's fees and other costs of litigation reasonably incurred.

  (d) The provisions of this section shall not apply to bona fide filings of lis pendens, materialmen's liens, laborer's liens, and other legitimate notice and protective filings as provided by law.

History. Acts 1995, No. 1086, §§ 1-3.

            The statute, still requires a show of 'malice' in that a lien claimant whose lien is 'bona fide' is protected. But, this adds an incentive as it allows triple damages, punitive damages and attorney fees. Given the number of procedural hurdles placed in the way of lien claimants, a case can be made that a lien claimant aware that one of the many notices has not been sent, or received timely does not have a 'bona fide' lien is a significant deterrent.

            The only case that speaks on this point seems to add weight to the proposition that a lien which the claimant knowingly filed without complying with the deadlines would support a suit under this statute. A party sought damages under this statute because the contractor knowingly filed the lien more than 120 days after the last work. The jury found that the contractor had not 'knowingly' filed out of time. While the court did not extensively discuss the application of the statute, the opinion seems to accept that had the lien been filed out of time the outcome would have been different. [[ii]](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)

**Releases**

            Finally a note about lien releases in use today. A release operates and is effective because once a person has given a release that person if nothing else, has waived all rights released. While all liens relate to the date of first disturbance of the soil, each lien depends on perfection by its own claimant. A release from a general contractor that purports to release all liens, is effective only against that contractor and does not release liens that may be the result of that contractor's subcontractors and suppliers work and materials. The same would hold for an affidavit from a general contractor that "no work had commenced." 3[7](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) That contractor might be estopped, but not the unpaid subcontractors and suppliers.

**Case studies: reviewing problem liens and potential solutions**

            FACTS:

Claimant [1](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx), a heating and air-conditioning contractor, contends that its lien for labor and materials furnished for the heating and air-conditioning system of a dwelling house has priority over the lien of a recorded construction money mortgage containing the language requisite to its purpose under which Innocent Mortgage Company advanced money to a developer, Anxious Construction Company, for the construction of the house. Claimant claims priority under the lien laws. The mortgage was recorded on February 5, 2005 when the developer's purchase was closed. The only work done on the premises by Claimant prior to this date was an inspection of the premises on January 24th by George Carlin, its President and General Manager, and the preparation of the plans for heating and air conditioning and a "Manual J worksheet" delivered to the owner on January 25th. Claimant testified that his "on-site" inspection on January 24th consisted of the determination of the direction the house would face by a compass reading and the location of the center of the house on the lot. This latter was in order to determine the proper location of the unit by use of a tape measure and a wooden peg. The peg was driven into the ground to aid in the use of the tape. The whole inspection and measurement took about thirty minutes. Carlin admitted that he probably could have determined the direction the house would face from a set of plans given him by Anxious. He made mental notes of his inspection and later prepared the documents for delivery to Anxious with an estimate of cost. He says that he and Anxious entered into a verbal contract at the time of the delivery of these documents. He claims that there was an agreement that Claimant would be paid for what Carlin had done if FHA approval was not obtained. Carlin testified that Claimant did not order the equipment to be used but started making the necessary fittings. The time work was started on these fittings is not definitely stated. There is no evidence that anything else was done by Claimant or the builder before the date the mortgage was recorded, which, of course, was after FHA approval.

    An employee of Innocent Mortgage Company made a physical examination of the lot on the date the mortgage was recorded. He found no visible construction materials, no stakes or string along the ground on the lot, nor any other evidence of anything done to prepare the lot for construction. He did not walk to the back side of the lot. He took a photograph to record the appearance of the lot as to the improvement or preparation therefor. He admitted that there could have been a one-inch stake in the ground in the grass on the lot which he would not have seen.

Who has a prior interest, Innocent Mortgage Company or the Claimant?

[1](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) The distinction between Subcontractors and suppliers has been seriously eroded in the decision, Books-a-million V. Arkansas Paint. And Spec., 340 Ark. 467, 10 S.W.3d 857 (2000).

[2](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  To establish the Lessee as the owner's agent requires an agreement between the lessee and owner that the work will be done and that owner will pay for it. Payment can be by deduction of costs from rent Whitcomb Vs. Gans, 90 Ark. 676 (1909) and Langston Vs. Matthews, 117 Ark. 626, 173 S.W. 397 (1915)

[3](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  If a building is owned by party other than land owner [long term lease] then the lien goes only to the improvements and not land Arkansas Foundry Co. Vs. Farrell, 238 Ark. 757, 385 S.W.2d 26 (1964)

[4](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Dow Chemical Co. v. Bruce-Rogers Co., 501 S.W.2d 235, 255 Ark. 448 (Ark. 1973), in an appeal by private lessee and public lessor [city] from a decree enforcing statutory Materialmen's liens against leasehold interest in land owned by city, the Supreme Court held that public policy forbids attachment of liens on public buildings and land for labor and materials furnished by contractors in construction of public facilities and that leasehold interest of lessee which contracted with city that it would not permit liens to attach.

[5](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) American States Ins. Co. v. Tri Tech, Inc., 812 S.W.2d 490, 35 Ark.App. 134 (Ark.App. 1991)

[6](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) A.C.A.18-44-115."...(2)(A) No material supplier or laborer shall be entitled to a lien unless the material supplier or laborer notifies the owner of the commercial real estate being improved, in writing, that such material supplier or laborer is currently entitled to payment, but has not been paid.            (B) This notice shall be sent to the owner and to the contractor by registered mail, return receipt requested, before seventy-five (75) days have elapsed from the time that the labor was supplied or the material furnished......"

[7](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) This is an important concept when dealing with factored accounts or collateral for a bank loan.

[8](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  cf. Right is assignable to all E. O. Barnet Brothers Vs. Wright, 116 Ark. 44, 172 S.W. 254 (1914)

[9](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)   Middleton Vs. Hopkins Hardware, 196 Ark. 133, 116 S.W. 2d 1043 (1938)

[10](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Carter-Fleming Vs.. Kirby Bldg. Systems, Inc., 270 Ark. 149,  603 S.W.2d 421 (Ark. 1980)

[12](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) A.C.A.§ 18-44-201. Application of subchapter..  The provisions of this section and §§ 18-44-202 -- 18-44-210 shall not be construed to deprive or abridge materialmen, artisans, laborers, or mechanics of any rights and remedies given them by law, and the provisions of this section and §§ 18-44-202 -- 18-44-210 shall be cumulative of the lien laws of this state.

[13](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)A.C.A  18-44-208. Construction;  perfection and enforcement

            (a) Except as expressly provided in §§ 18-44-201 -- 18-44-210, the lien created under the provisions of these sections shall be construed, established, preserved, and enforced in like manner and in the same time as liens of mechanics are construed, established, preserved, and enforced.

            (b) Where the labor performed or the material, supplies, or machinery furnished was entered under an open, running account, that shall be construed as a continuous contract, and the time within which the verified statement of the claim for lien shall be filed with the clerk of the circuit court shall be computed from the time upon which the last labor was in good faith performed or the last material, machinery, or supplies were in good faith furnished.   The lien provided for, when perfected in the manner herein set out, shall be held in law and equity as security for the entire open, running account whether it has been partially closed by note or not

[14](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) A.C.A.18-44-207. Common laborers;  superiority. "(a) As between the various liens provided by §§ 18-44-202 -- 18-44-204, that given common laborers shall be superior to all other liens perfected under §§ 18-44-201 -- 18-44-210."

[15](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) A.C.A. 18-44-210. Liability;  contract limit. "Nothing in §§ 18-44-201 -- 18-44-209 shall be construed to fix a greater liability against the owner of the land or leasehold interest in the land than the price or sum stipulated to be paid in the contract under which the material is furnished or labor performed."

[[1]](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Westside Galvanizing Svcs. V. Geo. Pac., 724 F. Supp. 644  (W.D.Ark. 1989) the court stated:  "Notice must be given to a landowner before there is a delivery of materials in order for a materialman's lien to be perfected against the land. Ark. Code Ann. ' 18 44 115 (1987); Ellison v. Tubb, 295 Ark. 312, 749 S.W.2d 650 (1988). Neither Westside nor AAA Steel provided this requisite notice to Georgia Pacific."

[16](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) The direct sale provision was not addressed in Act 2287 of 2005.

[18](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) See  Books-a-million V. Ark Paint. And Spec. 340 Ark. 467 (2000) where in the court treats subcontractors as suppliers apparently unaware of this statute. And, Cannon Remodeling V. the Marketing Co., 79 Ark. App. 432, 90 S.W.3d 5 (2002), The law requires that the notice provisions in the statute are to be strictly construed, thus requiring strict compliance.***The requirements cannot be satisfied by substantial compliance***.

[19](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) This later use of civil process server is a new amendment from Act 2287 of 2005.

[20](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Act 2287 of 2005

[21](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Transportation Prop. V. Central Glass & Mirror, 38 Ark. App. 60, 827 S.W.2d 667 (1992) (page 63-64) "However, in the instant case we are concerned with the time within which a suit in a civil proceeding had to be filed in order to perfect and enforce a lien. The lien was created by a statute which required that a verified account or a suit had to be filed within 120 days after the last material or labor was furnished, but the statute did not provide that a certain method or procedure be used in computing the 120 days. Thus, Ark. R. Civ. P. 81 (a) does not exclude the use of Ark. R. Civ. P. 6 (a) in computing the statutory 120-day period within which the complaint in this civil proceeding had to be filed in order to perfect and enforce the statutory lien involved in this case.  Under Ark. R. Civ. P. 6 (a), the day of the act or event (here, the last day that material or labor was furnished) shall not be included in computing the time period involved, but the last day of the time period shall be included unless it is a Saturday, Sunday, or legal holiday. Therefore, since the 120th day fell on Saturday, the complaint filed on the next Monday was within the 120-day period when computed under the provisions of rule 6 (a)."

[22](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Rasmussen Vs. C.J. Horner Co., 255 Ark 1030, 505 S.W. 2d 225 (1974)

[23](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Burk Vs. Sims 230 Ark. 170, 321 S.W. 2d 767 (1959) This is a limited exception however.

[24](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) 18-1-101. Lien holder form (a) Any attachment, claim, encumbrance, financing statement, lien, mortgage or security agreement filed of record against any real or personal property, and any judgment filed of record against any person, firm or corporation, shall display the name, address, and telephone number of the claim holder, lien holder or the judgment creditor, together with the name and title of the person authorized to release the claim, lien or judgment, or the person's successor.

  (b)  Subsection (a) of this section shall not be applicable to any claim holder, lien holder or judgment creditor which is a financial institution insured by the Federal Deposit Insurance Corporation.

  (c)  Subsection (a) of this section shall not be applicable to motor vehicle titles.

  (d)  Clerks responsible for recording the documents enumerated in subsection (a) of this section, shall ensure the documents presented for filing display the information required by subsection (a) of this section.

[25](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Arkla Gas Co. Vs. Moffitt, 245 Ark. 992, 436 S.W. 2d 91 (1969)

[26](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Streuli Vs. Wallin-Dicky & Rich Lumber Co., 227 Ark. 885, 302 S.W. 2d 522 (1957)

[27](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  Transportation Prop. V. Central Glass & Mirror, 38 Ark. App., 827 S.W.2d 667 60 (1992)  the statute did not provide that a  certain method or procedure be used in computing the 120 days, Ark. R. Civ. P. 81(a) did not exclude the use of Ark. R. Civ. P. 6(a) in computing the statutory 120-day period  within which the complaint had to be filed in order to perfect and enforce the statutory lien involved, thus time is counted from the first day after the last day on which work is done.

[28](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Transportation Properties, Inc. v. Central Glass & Mirror of Northwest Arkansas, Inc.,  827 S.W.2d 667, 38 Ark.App. 60 (Ark.App. 1992)

[29](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  Wiggins v. Searcy Federal Sav. and Loan Ass'n, 486 S.W.2d 900, 253 Ark. 407 (Ark. 1972) There is some question because procedurally, the mortgagee was not named in the suit and no claim of superiority was alleged in the complaint.

[30](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) A.C.A.18-44-119. Statute of limitations.

[31](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Act 2287 of 2005 states: "SECTION 4. Arkansas Code § 18-44-119 is amended to read as follows: 18-44-119.  Limitation of actions.   (a) All actions under this subchapter shall be commenced within fifteen (15) months after filing the lien and prosecuted without unnecessary delay to final judgment.  (b) No lien shall continue to exist by virtue of the provisions of this subchapter for more than fifteen (15) months after the lien is filed, unless within that time:  (1~~) an~~ An action shall be instituted as described in this subchapter; and   (2)  A lis pendens is filed under § 16-59-101 et seq." Emphasis Supplied.

[32](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)These cases have been specifically overturned under the current statute. See Mark's Sheet Metal v. Republic Mtg. Co., 242 Ark. 475, 414 S.W.2d 106 (1967); this court explained that the commencement of buildings and improvements "means some visible or manifest action on the premises to be improved, making it apparent that the building is going up or other improvement is to be made . . . This must be done with the intention and purpose then formed to continue the building to completion." and See Jim Walter Homes V. Bowling Bldg. Supply, 258 Ark. 28, 521 S.W.2d 828 (1975), " Removing the foundations of old buildings on the premises, commencement of leveling operations and the establishment of cut and fill elevations are not sufficient evidence of commencement. Clark v. General Electric Company, supra. An inspection and measurement of the premises and the placing of a wooden peg to determine the location of a proposed house on the premises are not sufficient."

[33](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Simmons First Bank V. Bob Callahan Services, 340 Ark. 692, 13 S.W.3d 570 (2000) double appraisal & distribution of   proceeds ordered - case reversed & remanded.  In order to  implement  the provisions of Ark. Code Ann. § 18-44-101,(b)(1) and (2)   and to protect the competing interests of the parties, the   Supreme Court reversed and remanded the case to the chancery  court for it to conduct a double appraisal of the property,   determining the value of the property both with and without   the improvement; pursuant to its plenary powers in equity   matters, the chancery court was ordered to then distribute   the proceeds of the foreclosure sale, first to appellee for   the value of the improvement, and the remainder to the  bank.

[34](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) A.C.A.5-37-525. Defrauding a materialman another try at the use of a criminal statute that was held unconstitutional in  State V. Riggs, 305 Ark. 217, 807 S.W.2d 32 (1991)

[35](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  This statute was upheld in State v. Jacks, 418 S.W.2d 622, 243 Ark. 77 (Ark. 1967).          A person charged with failure to discharge mechanics' and materialmen's liens in violation of statute moved to quash information.  The lower court granted the motion and the state appealed.  The Arkansas Supreme Court, held that this statute meant that acceptance of payment without discharging a mechanics' lien within ten days after receipt of payment or receipt of notice of existence of lien was  prima facie evidence of intent to defraud on part of person so receiving payment. This statute was upheld as having a rational connection with the balance of statutes governing mechanics' and materialmen's liens.  But also for problems in enforcement see Reno and Stark V. State, 241 Ark. 127, 406 S.W.2d 372  (1966).

[36](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) See also Bright V. Gass, 38 Ark. App. 71, 831 S.W.2d 149 (1992)

[[ii]](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx)  Swink V. Lasiter Construction, Inc., 94 Ark. App. 262 (2006) at Page 281, "  [8] In his ninth point, Swink argues that the trial court erred in dismissing his counterclaim. The counterclaim alleged that Lasiter improperly filed its lien in violation of Ark. Code Ann. § 5-37-226(a).[fn3] In interrogatory 11, the jury found that Lasiter did not file its lien on October 20, 2003, knowing that it had not performed work within 120 days of filing the lien. Swink's argument is directed to a finding that the jury was not asked to make. He is arguing that Lasiter's lien filing was untimely, while the jury was asked whether Lasiter knew that it had not performed any work within 120 days of filing its lien. Here, Michael Lasiter testified that the last work on the project was on June 23, 2003, and unspecified days in August, within 120 days of the lien. Therefore, substantial evidence supports the jury's answer to interrogatory 11 that Lasiter did not file its lien knowing that no work had been performed within 120 days of the lien filing."

[37](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Even in the event such language were used it might not be effective against the contractor, since the actual start of work is not the deciding factor.

[1](file:///C:\Users\JBC\Documents\Documents.ws\Articles%20Seminars\Internet%20Articles\Impact%20of%20an%20Arkansas%20Materialmens%20Lien%20on%20Real%20Property%20Altered%20for%20web%202007.docx) Mark's Sheet Metal V. Republic Mtg. Co., 242 Ark. 475, 414 S.W.2d 106 (1967)

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