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MECHANIC’S LIENS IN MISSOURI AND KANSAS: WHY BUILDING IN KANSAS IS BETTER FOR BUSINESS THAN BUILDING IN MISSOURI

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I. INTRODUCTION

Imagine the following hypothetical: Dan¹ wants to build a large commercial property in the Kansas City area that he projects will be one of the area's largest shopping and entertainment districts by the time the work on the property is finished. The project is a complicated one that will take at least five years to build and will cost well over \$100 million to complete.

Dan is the CEO of XYZ commercial development company (XYZ) in Kansas City and the first thing he does is consult with his team of developers² to get each person's thoughts on the project. His team likes Dan's initial idea. The company decides to move forward with the research phase of the development. During this phase, the development company looks at a range of different factors³ that could affect the building of this development. As the team looks at these different factors, one factor keeps coming up in the discussion - location. Location, the team decides, will be critical to the success of the project.

Unlike XYZ's previous projects,⁴ this time, the company has the option to either build in Missouri or Kansas within a 25 - 30 mile radius of the Plaza in Kansas City, Missouri. The development team has decided that this radius offers the greatest accessibility to potential patrons. In addition, XYZ knows that the

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¹ A fictional person

² This note references developers, development companies, and owners interchangeably due to the structure of this hypothetical and the nature of many new commercial development properties. However, readers should be aware that the terms “owner” and “developer” are not always interchangeable depending on the type, size, and structure of a construction project.

³ These factors included, but were not limited to, cost considerations, tax incentives, and legal issues.

⁴ These were commercial development projects in mid-Missouri that did not touch two state borders.

greater Kansas City area is currently engaged in an economic border war.⁵ The economic border dispute is advantageous to businesses, such as XYZ, because the states of Missouri and Kansas are engaged in a “bidding war”⁶ to encourage businesses to either move across the state line or to build in that state.⁷ Missouri and Kansas use these tactics to push cash and jobs back into their state's economy.⁸

Dan and XYZ are not concerned about the economic development war. The company expects that both states will offer similar, but significant, financial and tax incentives because the large shopping and entertainment district will provide cash flow and jobs. Instead, Dan and the team's main concern focuses on the amount of people that will be necessary to complete this project. A large project similar to XYZ's entertainment and shopping district often calls for multiple contractors, subcontractors, and suppliers to work on various pieces of the project.

Dan knows that one of the most effective tools a contractor or supplier has against an owner or developer is the mechanic's lien.⁹ He also knows that mechanic's liens can tie up title to the property making it more difficult to sell in the future.¹⁰ Unfortunately, while no developer wants to deal with this situation, every developer *should* plan for this situation. Therefore, Dan and XYZ consult Lawyer A who specializes in Missouri and Kansas construction law. Lawyer A is asked to advise XYZ whether Missouri or Kansas provides better legal protection for XYZ as the developer.

This Note will address one facet of XYZ's question through an analysis of the law pertaining to mechanic's liens in both Missouri and Kansas. Part II of this Note provides some general background on construction terminology and mechanic's liens. Part III discusses a few of the requirements related to mechanic's liens in each state and lays out the advantages of those requirements in relation to the owner or developer. Part IV discusses the significant advantages in mechanic's lien laws for the owner or developer when building in Kansas. Part V ultimately concludes that choosing a location in Kansas as a construction project site makes better business sense from a legal standpoint than building in Missouri.

⁵ Chris Oberholtz & Dave Jordan, *Group Wants to Stop Missouri-Kansas Border War*, KCTV5 (Sept. 5, 2013 7:49 AM), <http://www.kctv5.com/story/23346953/missouri-kansas-border-war>.

⁶ The states generally “bid” by offering tax incentives or breaks. *See id.*; *See also* Mike Maciag, *Report Identifies Top Job-Poaching States*, GOVERNING (January 31, 2013), <http://www.governing.com/blogs/by-the-numbers/state-tax-incentive-delas-job-bidding-wars.html>.

⁷ *See, e.g.*, Steve Vockrodt, *Kansas-Missouri, Eco-Devo Border War Brings Only Losses*, *Study Says*, KANSAS CITY BUS. J. (Mar. 1, 2013 5:00 AM), <http://www.bizjournals.com/kansascity/print-edition/2013/03/01/kansas-missouri-eco-devo-border-war.html>. For example, Applebee's in the past few years moved its corporate headquarters from Kansas right across the state line into Missouri off Ward Parkway Boulevard. Jason Hancock, *Economic 'Border War' spurs Missouri Lawmakers to Action*, KANSAS CITY STAR (February 18, 2012), <http://www.kansascity.com/2012/02/18/3436557/economic-border-war-spurs-missouri.html>.

⁸ *See* Mike Maciag, *Report Identifies Top Job-Poaching States*, GOVERNING (January 31, 2013), <http://www.governing.com/blogs/by-the-numbers/state-tax-incentive-delas-job-bidding-wars.html>.

⁹ Sarah M. Canberg & Eric L. Probst, *Mechanic's and Construction Liens: Strict Requirements for Cost Effective Protection*, THE EDGE, at 66 (Feb. 1, 2010), available at <http://www.pbnlaw.com/data/articles/eric%20copy1.pdf>.

¹⁰ *See id.* at 68.

II. GENERAL INFORMATION

A. Terminology

This Note frequently references the following individuals or groups that contribute to a large construction project: the owner(s), the developer or development company, general contractor, and subcontractor. The terms owner and developer are used interchangeably in this paper; however, the two words are not always interchangeable. An owner is the person, agency, or company for whom the construction work is provided.¹¹ The owner may be hands-off, preferring to delegate tasks to someone else, or the owner may be very hands-on and oversee every aspect of the project completely.¹² A developer is similar to a hands-on owner. The developer takes a construction project from the idea stage to the completion stage and is involved in every stage of the process from securing the financing on the building to managing the contractors on the construction site.¹³

The contractors on a construction site supervise and work on the project.¹⁴ A general contractor is the contractor responsible for coordinating and ensuring that all work gets completed on the project.¹⁵ Technically, the general contractor is the only contractor "that has a direct contractual relationship with the owner,"¹⁶ and therefore, is the person or entity responsible for performing the work.¹⁷ On a typical construction project, the general contractor hires out most of the physical work to subcontractors.¹⁸ The subcontractor's contractual relationship is with the general contractor and not the owner or developer.¹⁹ However, the general contractor – subcontractor relationship does not mean that the owner or developer is immune from the reaches of a subcontractor regarding mechanic's liens.²⁰

B. Mechanic's Liens

A creation of statute,²¹ the mechanic's lien is used to protect the private interests of those entities that provide labor or materials to a property.²² A

¹¹ Judah Lifschitz & Diane A. Grossi, *Construction Supervision*, CONSTRUCTION BRIEFINGS, No. 93-10, p. 2 (Sept. 1993).

¹² *Id.*

¹³ See BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/developer.html> (last visited Jan. 14, 2014) (searching for the definition of the term "developer").

¹⁴ See CHRIS HENDRICKSON, PROJECT MANAGEMENT FOR CONSTRUCTION 1.1 (1998), available at http://pmbook.ce.cmu.edu/01_The_Owners'_Perspective.html.

¹⁵ See *Id.*; Lifschitz, *supra* note 11, at 7.

¹⁶ Lifschitz, *supra* note 11, at 7.

¹⁷ *Id.* at 8.

¹⁸ *Id.* Note that the general contractor is the party responsible for ensuring that the work gets completed. The general contractor, not the subcontractor, answers to the owner or developer.

¹⁹ See *id.*

²⁰ See *infra* Part III.

²¹ See MO. REV. STAT. § 429.010 (2013); see also KAN. STAT. ANN. § 60-1101 (2013).

mechanic's lien attaches to the property as a security interest in real estate.²³ The lien, if properly prepared, does not release from the land until the claimant is paid.²⁴ An effective mechanic's lien can encumber title to the property adding an extra layer of uncertainty and potential difficulty to any future property transactions.²⁵ Thus, property owners and developers should maximize the tools available to them through state mechanic's lien laws to better protect the future outcome of the construction project.

III. REQUIREMENTS

Kansas and Missouri have strict requirements for mechanic's liens. In both states, to the advantage of the owner or developer, the lien claimant²⁶ has the responsibility of bringing him or herself within the statutory requirements.²⁷ The owner or developer, on the other hand, just needs to be aware of the requirements to defend against the mechanic's lien if necessary. This section describes the requirements in each state that work to the advantage of the owner or developer.

A. Missouri

The following requirements²⁸ in Missouri favor the owner or developer more than the contractor when compared to similar Kansas requirements: notice and time period to file an action to foreclose. In Missouri, a lien claimant must file a mechanic's lien within "six months after the indebtedness shall have accrued."²⁹ Typically, the indebtedness accrues when the job has been completed.³⁰ A recent Missouri case, *Manning Construction Co. v. MCI Partners, LLC* suggests that extension of the six month window is difficult.³¹ The six month filing period in Missouri works in favor of the owner because it

²² *Via Christi Reg'l Med. Ctr., Inc. v. Reed*, 247 P.3d 1064, 1068 (Kan. App. 2011) (citing *Mutual Savings Ass'n v. Res/Com Properties*, 32 Kan. App. 2d 48, 52, 79 (2003), *rev. denied* 277 Kan. 924 (2004)).

²³ MARK A. ANDERSEN ET AL., KANSAS REAL ESTATE PRACTICE AND PROCEDURE HANDBOOK § 9.2.1 (2009).

²⁴ *Mechanic's Lien*, LII, http://www.law.cornell.edu/wex/mechanics_lien.

²⁵ ROBERT J. GUINNESS, MISSOURI CONSTRUCTION LAW § 9.1 (MoBar 2nd ed. 2004).

²⁶ The lien claimant is the person or entity that claims the mechanic's lien against the land. In Missouri, the lien claimant can be "any person who shall do or perform any work or labor . . . by virtue of contract." MO. REV. STAT. § 429.010 (2013). That is not the case with lien claimants in Kansas. In Kansas, the lien claimant can *only* be the contractor, subcontractor, 2nd tier subcontractor and certain suppliers. *See* KAN. STAT. ANN. § 60-1101 (2013). *See also* Kan. STAT. ANN. § 60-1103(a) (2013).

²⁷ *Creme de la Creme (Kansas), Inc. v. R&R Int'l, Inc.*, 85 P.3d 205, 208 (2004) (stating that those who claim the lien bear the burden of bringing themselves within the statute). *See* MO. REV. STAT. §§ 429.005 – 429.630 (2013).

²⁸ This list is a starting point for the requirements that may be to the owner's advantage – it should not be taken as an expansive list of every requirement that may favor the owner in anyway shape or form.

²⁹ MO. REV. STAT. § 429.080 (2013).

³⁰ *See Channing v. Brindley-Sullivan, Inc.*, 855 S.W.2d 463 (Mo. Ct. App. 1993).

³¹ *Manning Constr. Co. v. MCI Partners, LLC*, 2013 Mo. App. LEXIS 1319 (Nov. 5, 2013).

affords the owner more notice that an action to foreclose may be filed than the time period for filing mechanic's liens in Kansas.³² Another owner advantage in Missouri is that a general contractor must give notice to the owner or developer that a lien will be filed³³ and a subcontractor must get a "consent of owner" to be able to file a mechanic's lien.³⁴ If there is no notice or consent, the lien will fail.³⁵ This is not the case in Kansas. In Kansas, only the subcontractor, not the general contractor, is required to give notice.³⁶ Clearly, in Kansas, there is less notice generally given to the owner or developer than in Missouri which may be detrimental if the owner does not have enough time to react and strategize after receiving notice that a lien has or will be filed.

Notice is one of the requirements that favors the owner or developer in Missouri. Another requirement that favors a Missouri owner is the time period to foreclose on the lien. After the lien is filed, the lien claimant only has six months to file an action to foreclose on the lien.³⁷ The short turn-around time could be easily missed by the contractor and then, to the owner's relief, the action could not take place. Kansas, on the other hand, gives lien claimants a year to file an action to foreclose on the lien.³⁸ Many businesses cannot afford to wait for a year to see whether or not an action might be filed if it could affect the future of the business (or project). Fortunately, Kansas has protections that allow the owner not to wait on the claimant for a year, and those will be discussed in Part IV.

B. Kansas

The following requirements work to the advantage of the owner or developer in Kansas compared to Missouri: filing time and service requirements. Kansas has shorter filing times for mechanic's liens than Missouri. A general contractor has four months to file a mechanic's lien³⁹ and a subcontractor has three months to file a mechanic's lien.⁴⁰ With extensions, however, both a general contractor and subcontractor have five months to file.⁴¹ That time frame is still a shorter time period than Missouri and is therefore possibly easier for a contractor to miss the filing deadline. In addition to a shorter filing time, Kansas also requires that mechanic's liens be served on the owner or developer⁴² whereas Missouri does not require service.⁴³ The Kansas owner, therefore, will know exactly when the mechanic's lien is filed as soon as it is filed. The

³² See KAN. STAT. ANN. §§ 60-1102(a), 60-1102(c), 60-1103(a)(1), 60-1103(e) (2013).

³³ MO. REV. STAT. § 429.012 (2013).

³⁴ MO. REV. STAT. § 429.013 (2013).

³⁵ MO. REV. STAT. §§ 429.012, 429.013 (2013).

³⁶ KAN. STAT. ANN. § 60-1103(a) (2013).

³⁷ MO. REV. STAT. § 429.170 (2013).

³⁸ KAN. STAT. ANN. § 60-1105 (2013).

³⁹ KAN. STAT. ANN. § 60-1102(a) (2013).

⁴⁰ KAN. STAT. ANN. § 60-1103(a)(1) (2013).

⁴¹ KAN. STAT. ANN. §§ 60-1102(c), 60-1103(e) (2013).

⁴² KAN. STAT. ANN. § 60-1103(c)(1) (2013).

⁴³ Note that while Missouri does not require service of mechanic's liens, the state does require notice from a general contractor and consent of owner from a subcontractor – so the owner has knowledge that a mechanic's lien may be filed against the property. See *supra* Part III(A).

Missouri owner, on the other hand, may have to do some research to find out if a lien has been filed.

The requirements described in this section are requirements that may factor into an owner's decision, but do not necessarily tip the scale in favor of building in Missouri or Kansas in the same way other factors play into this important decision. The next section describes the unique features in Kansas' mechanic's lien laws that should tip the scale in favor of building in Kansas.

IV. OWNER ADVANTAGES IN KANSAS

The state of Kansas is considerably more business friendly for owners and developers in regards to mechanic's lien law because of the following factors: there are limits on who can file a mechanic's lien, there is a lien removal statute in Kansas, Kansas allows owners to bond around the lien, and the priority law is more beneficial to the owner (or lender) than any lien claimant. These four areas are discussed in detail below.

A. Limits on Who Can File

In Kansas, only a contractor, subcontractor, second tier subcontractor, or a supplier with an agreement with the [owner, contractor, subcontractor] can file a lien against the property.⁴⁴ The Kansas statute is narrower than the equivalent Missouri statute. Missouri allows "any person who shall do or perform work upon the land" under contract to file a mechanic's lien.⁴⁵ On a large commercial project with many contractors and suppliers, the Kansas statute greatly limits potential claimants and encumbrances on the property. The Missouri statute essentially opens the floodgates for claims.

B. Lien Removal

Kansas law allows an owner to file an action to remove a lien off of property.⁴⁶ If the owner files the action for adjudication, he can take charge of the legal process by forcing the contractor to respond to the first lawsuit.⁴⁷ Missouri does not have anything like the Kansas process initiating lien removal—once a lien is filed in Missouri it remains on the property until there is an action by the contractor or until the lien is paid.⁴⁸ Therefore, in Kansas, the owner has more certainty and control over the legal process.

C. Bond Law

⁴⁴ See KAN. STAT. ANN. § 60-1101 (2013). See also Kan. STAT. ANN. § 60-1103(a) (2013).

⁴⁵ MO. REV. STAT. § 429.010 (2013).

⁴⁶ KAN. STAT. ANN. § 60-1108 (2013).

⁴⁷ *Id.*

⁴⁸ See MO. REV. STAT. §§ 429.005 - 429.630 (2013).

Kansas Statutes section 60-1110 is the state's "bonding-over" law.⁴⁹ Bonding-over is the process by which an owner can secure a bond that acts as insurance if the owner does not pay those working or providing materials on a construction project.⁵⁰ If an owner secures this type of bond, a mechanic's lien cannot be filed against the property and any mechanic's lien on the property is removed.⁵¹ This bond is useful to a business owner because it gives other creditors and potential future property buyers a greater sense of security in the property because that encumbrance is removed. In addition, for the bank or loan company that provides a mortgage, an owner's agreement to secure bond for payment of claims may be beneficial because the agreement ensures the removal of future creditors that have priority rights above those of a general creditor and rights that often compete with the mortgage company.⁵² Missouri *does not* have a "bonding-over" statute or anything similar to that option.⁵³ Therefore, the Missouri owner must either pay the lien claimant, wait for the foreclosure action process, or wait for the lien to expire.⁵⁴

The Kansas bonding-over statute can be a useful tool for owners. Unfortunately, for some owners or developers, obtaining this type of bond may not be feasible due to expense – especially if the owner does not have an existing relationship with a surety company.⁵⁵ In Kansas, this type of bond must have "good and sufficient sureties," and be for a sum "not less than the contract price."⁵⁶ Kansas law is unclear on the point of what amount of sureties would be sufficient if the lien claims equaled the contract price. However, the amount other states require for bonding around a lien (if there is already a lien on the property) is anywhere from the amount of the lien to double the amount of the lien.⁵⁷

Although potentially an expensive option for the owner, the bonding-over statute provides great benefit to the owner that can obtain the bond and is probably one of the most important advantages in Kansas lien law. The other important advantage in Kansas is priority law.

D. Priority Law

Priority law in both Missouri and Kansas defines who has first priority to a property - a bank (mortgage lender) or a lien claimant. Although it may not be as involved in the development as an owner or developer as defined above, a bank/lender is essentially one of the "owners" of the property in the sense that the

⁴⁹ See KAN. STAT. ANN. § 60-1110 (2013).

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *supra* Part IV.D.

⁵³ See Leonard R. Ruzicka, Jr. & Ellen C. Nangle, *2010 Revisions to Missouri's Mechanics Lien Law*, STINSON MORRISON HECKER LLP (Apr. 28, 2011).

⁵⁴ See *supra* Part III.

⁵⁵ Guest Blogger, *Primer on Mechanic Lien Bonds and Bonding off a Mechanics Lien*, LIEN & CREDIT JOURNAL (Oct. 24, 2011), <http://www.zlien.com/blog/primer-on-mechanic-lien-bonds-and-bonding-off-a-mechanics-lien/>.

⁵⁶ KAN. STAT. ANN. § 60-1110 (2013).

⁵⁷ See, e.g., Kelly M. Davis, *How to Bond Around a Mechanic's Lien*, KMDA (Apr. 16, 2012), <http://www.kmdalegal.com/construction-law/how-to-bond-around-a-mechanics-lien/>. See also WASH. REV. CODE § 60.04.161 (2013).

entity often has a high financial stake in the property to the point of sometimes having a say in the direction and cost of the project.⁵⁸

Missouri priority law allows a bank to actually waive—either directly or, as is often the case, indirectly—priority to the property, allowing lien claimants to have first priority to the property.⁵⁹ For example, the case *In re Exec Tech Partners* (“Exec Tech”), shows an example of a priority battle between a mechanic’s lien claimant (held in this case by Ward Construction (“Ward”)), and a deed of trust (held in this case by the RTC Mortgage Trust (RTC)).⁶⁰ The priority battle arose after Ward submitted a change order to Exec Tech.⁶¹ RTC did not approve the change order and Ward did not sign a lien waiver.⁶² In Missouri, generally, the deed holder has priority over mechanic’s liens unless waived.⁶³ Waiver occurs generally when there is inducement⁶⁴ by the mortgagee to get labor or material from the “materialmen.”⁶⁵ The court held that RTC had waived its priority right through both active participation and knowledge because it provided funding that induced Ward to provide labor and materials.⁶⁶ This case demonstrates how Missouri law is construed significantly in favor of the contractor: the simple knowledge that construction occurred may waive a lender’s priority rights to the property.⁶⁷

Another example of Missouri law favoring contractors is the “first spade” rule. The first spade rule says that mechanic’s lien claimants have equal rights to the property based on the first date that *any* contractor, subcontractor or supplier started work on the property.⁶⁸ That means any person who may qualify as a lien claimant has equal rights to the property based on the first date that someone started working on the project.⁶⁹

Fortunately for the owner of a construction project, Kansas does not have the first spade rule as of 2005.⁷⁰ Instead, Kansas law allows a mechanic lien claim to date back only to the “date upon which the earliest unpaid contractor or subcontractor began work.”⁷¹ This law is very beneficial for the owner because it allows the owner to pay off contractors who started work earlier and shift the

⁵⁸ See *In re Exec. Tech. Partners*, 107 F.3d 677, 679-80 (8th Cir. 1997).

⁵⁹ *Id.* at 680-81.

⁶⁰ *Id.* at 679.

⁶¹ *Id.* at 680.

⁶² *Id.*

⁶³ *Id.* (citing *In re Gateway Ctr. Bldg. Investor, Ltd.*, 95 Bankr. 647, 650 (Bankr. E.D. Mo. 1989)).

⁶⁴ *Id.* Inducement can either be knowledge of construction giving rise to a mechanic’s lien (citing *Gateway*, 95 B.R. at 654-55) or it may be both knowledge and active participation in the project (internal citations omitted).

⁶⁵ *Id.* (citing *Trout Invs., Inc. v. Davis*, 482 S.W. 2d 510, 517 (Mo. Ct. App. 1972)).

⁶⁶ *Id.* at 681-82.

⁶⁷ See *supra* note 64 and accompanying text. It is very easy for the lender to unknowingly waive these rights if the lender is not aware of the Missouri priority law described in the text.

⁶⁸ Rob Pitkin, *Dealing with Mechanic’s Lien Priorities*, CONSTRUCTION LAW MUSINGS (Dec. 9, 2011), <http://constructionlawva.com/dealing-mechanic’s-lien-priorities/>.

⁶⁹ *Id.*

⁷⁰ Don Dagenais, *Amendment to Kansas Statute Changes Mechanic’s Lien Rules*, LATHROP & GAGE: LEGAL ALERT (May 2005), http://www.martindale.com/members/Article_Atachment.aspx?od=301738&id=151194&filename=asr-151196.pdf.

⁷¹ *Id.*

date any mechanic's lien attaches to a later date.⁷² The lender also benefits from Kansas case law that allows for a lender to ensure priority over any other claimant.⁷³ The lender can do so by paying off any outstanding mechanic's liens and by getting lien waivers from all possible lien claimants.⁷⁴ If the lender does not ensure his priority right outright by paying off lien claims, then whichever document is recorded first – the mortgage or the lien – has priority.⁷⁵ The Kansas owner can use these priority laws to leverage the playing field – paying off the liens of contractors who may pose a serious threat to the property and working with the lender to ensure that the lender knows his priority rights.

V. CONCLUSION

The answer to XYZ's original question in the hypothetical is that building in Kansas is better for business, at least with respect to mechanic's liens. Kansas offers significantly more advantages to the owner – both in quantity and in quality.⁷⁶ Two of the most powerful tools for an owner against mechanics liens include bonding around the lien and priority law that favors the owner.⁷⁷ Kansas has both of these tools available to owners and Missouri does not. Even though Missouri does have a few factors that favor the owner over Kansas law,⁷⁸ those factors are of lesser value than the advantages available to the owner in Kansas. Therefore, owners or developers seeking to build in the Greater Kansas City Area should consider selecting a location in Kansas because Kansas offers better protections for the business owner against mechanic's liens than does Missouri.

⁷² *Id.*

⁷³ *Mutual Sav. Ass'n v. Res/Com Properties, L.L.C.*, 79 P.3d 184, 196 (2003).

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *See supra* Part III, IV.

⁷⁷ *See supra* Part IV.

⁷⁸ *See supra* Part III.