Mechanics' Liens Subject to Fourteenth Amendment Guarantees

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MECHANICS' LIENS SUBJECT TO FOURTEENTH AMENDMENT GUARANTEES

Since the Supreme Court's 1969 invalidation of Wisconsin's prejudgment wage garnishment statute in Sniadach v. Family Finance Corp., a number of creditors' remedies have been challenged successfully on fourteenth amendment procedural due process grounds. Although the Court has mandated differing safeguards in various transactions, it has uniformly held that where the machinery of the state is employed to deprive a debtor of a significant property interest, he must be afforded notice and an opportunity to be heard on the validity of the taking.

The concept of due process implemented by Sniadach and its progeny has been applied by the highest courts of two states to the imposition of mechanics' liens. In Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Connecticut, in 1974, became the first jurisdiction in

7. See cases cited note 3 supra.
8. 168 Conn. 371, 362 A.2d 778 (1975), vacated and remanded, 423 U.S. 809 (1975) (for determination of whether the decision was based on federal or state
which a mechanics' lien statute was struck down for failure to meet due process requirements. In February, 1976, the Maryland Court of Appeals followed Connecticut's lead in *Barry Properties, Inc. v. Fick Brothers Roofing Co.*,9 declaring portions of the state's mechanics' lien statute constitutionally infirm.

The states' development10 of the mechanics' lien was designed to encourage and protect the efforts of those engaged in the often economically uncertain construction industry.11 Simply defined, the statutes allow a person who has furnished labor or material for the improvement of real property to force a judicial sale of that property to satisfy unpaid claims.12 The lien attaches from the time labor or materials are furnished,13 and once perfected,14 provides the lienor with a security interest in the property until the claim is settled.15

Many statutes require only the subcontractors and materialmen to provide the owner with notice of their intention to claim a lien; the general contractors need only file a claim with the registry of deeds to create the lien,16

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10. All 50 states, the District of Columbia, and Puerto Rico have mechanics' lien statutes. The relevant provisions of these statutes are set forth at 4 CCH SEC. TRANS. GUIDE ¶¶ 61,201-62,226 (1969). In contrast, the federal government imposes a mandatory bonding system on its general contractors. 40 U.S.C. §§ 270(a)-(b) (1970). See Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138 (1958) for a well-documented article advocating the replacement of the mechanics' lien statutes with mandatory bonding provisions.
11. For a discussion of the varied problems encountered by building contractors, see Comment, supra note 10, at 139-40. The tenuous economic position of the construction industry and its sensitivity to market and seasonal variations largely results from the competitive bidding system employed by the industry. The general contractor and subcontractors must quote their prices in advance and then attempt to perform accordingly. Thus, additional costs generated by weather problems, labor disputes, and varying market conditions cannot be readily absorbed. Id. at 139.
12. Id. at 141.
13. 2 L. JONES, THE LAW OF LIENS § 1389 (3d ed. 1914). See also 277 Md. at 30, 353 A.2d at 231. 
15. See 2 L. JONES, supra note 13, § 1184.
giving rise to the possibility that the owner will have no notice of the lien until a subsequent foreclosure action. Once recorded, the lien's cloud on title can continue without further action by the claimant for a statutorily defined period of time—usually no longer than two years.\textsuperscript{17} Thus, although the claimant must institute judicial proceedings to foreclose the lien, the encumbrance on title created by the perfection of the claim continues until either the statutory life expires, payment is made, or the owner institutes judicial proceedings to test the validity of the lien.\textsuperscript{18} The adverse impact of disputed title on the owner's ability to alienate or otherwise encumber his property pending determination of the claims on the merits is the injury against which aggrieved property owners have sought fourteenth amendment protection.

The Connecticut and Maryland courts' imposition of due process standards on this traditionally recognized remedy of the construction industry\textsuperscript{19} broke with a long line of recent cases in which other jurisdictions have upheld mechanics' lien statutes against fourteenth amendment challenges.\textsuperscript{20} This article will examine the considerations underlying the courts' application of fourteenth amendment standards to the mechanics' lien, and will assess the potential impact of both rulings on the modification or alteration of present lien procedures.

\section{I. Due Process and Creditors' Remedies}

Prior to its holding in \emph{Sniadach}, the Supreme Court had consistently sustained the constitutionality of ex parte prejudgment property seizures, viewing the opportunity for a later decision on the merits as sufficient protection of a debtor's rights.\textsuperscript{21} In \emph{Sniadach} the Court invalidated a Wisconsin prejudgment garnishment statute which permitted a creditor, without notice or prior hearing, to freeze the wages of an alleged debtor. Under the

\begin{footnotesize}
\begin{enumerate}
\item \textit{S. Phillips, Mechanics Liens} § 6 (2d ed. 1883).
\item \textit{See} cases cited note 45 \textit{infra}.
\end{enumerate}
\end{footnotesize}
statute, the summons was issued by a court clerk upon application by the creditor's lawyer. The Court held the statute's failure to provide the debtor with notice and a hearing prior to garnishment violative of due process. The fact that Sniadach dealt with a unique form of property (wages), the deprivation of which had an obvious and devastating effect on the debtor and his family, left unclear the applicability of Sniadach's prior notice and hearing requirements to other prejudgment seizures. The ambiguities of the holding were evidenced in the subsequent split of the lower courts on the ultimate parameters of procedural due process, many courts concluding that Sniadach's holding should be confined to the facts of the case.

In Sniadach, Justice Harlan argued in a concurring opinion that a showing of great harm resulting from the taking was not a condition precedent to the imposition of due process safeguards. This view of the necessity for prior notice and hearing safeguards was largely adopted in Fuentes v. Shevin, in which the Court invalidated the prejudgment replevin statutes of Florida and Pennsylvania. The Court, in an opinion written by Justice Stewart, noted that while the form of notice and hearing mandated by the

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23. Id. at 341-42.
24. Id.

26. 395 U.S. at 342 (Harlan, J., concurring).
28. FLA. STAT. ANN. § 78.07 (Supp. 1972-1973); 12 PA. STAT. ANN. § 1821 et seq. (1967). The Court noted that while the statutes required the creditor to post a bond to protect the debtor from wrongful replevin, and provided for possible liability in damages for mistaken seizure, their failure to afford the debtor a prior hearing was constitutionally infirm, since the existing safeguards tested no more than the creditor's belief in his rights. The Court viewed this result as an insufficient substitute for a hearing on the validity of the claim. 407 U.S. at 83.
due process clause will vary with the particular property interest involved, the form of notice and hearing must be provided before the deprivation of any interest that is not de minimis. In a major expansion of the language employed in Sniadach, the Court stated that, except in certain extraordinary situations, procedural due process requires notice and an adversary hearing before a debtor can be even temporarily deprived of a possessory property interest.

The broad language of Fuentes inspired a fresh series of challenges to ex parte creditors' remedies. The Court responded to this trend when, in upholding the Louisiana sequestration statute in Mitchell v. W. T. Grant Co., it criticized a uniform application of the prior notice and hearing rule

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30. 407 U.S. at 86.


The Fuentes Court established a three-part test strictly delineating the applicability of the "extraordinary situations" exception to the imposition of fourteenth amendment guarantees:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

407 U.S. at 91.

32. 407 U.S. at 84-86.


For a state court decision which refused to consider Fuentes' 4-3 majority binding precedent, see Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1972). The Arizona Court prophetically anticipated the effect of the votes of Justices Powell and Rehnquist on the Fuentes prior hearing rule.

34. 416 U.S. 600 (1974).
as creating an impractical and inflexible constitutional standard. In distinguishing the statute from those overturned in *Fuentes*, the Court noted that under the Louisiana statute the creditor had a present interest in the subject property which could be defeated if the debtor transferred possession or allowed the property to deteriorate during the pendency of the adversary hearing. The Court found debtors sufficiently protected from wrongful deprivation by the statute’s provisions for close judicial scrutiny of the creditor’s factually based affidavit, penalties in the event of the creditor’s failure to substantiate the claim, and the debtor’s ability to force an early post-seizure hearing on the merits.

While *Mitchell*’s dissenting Justices viewed the decision as a sub silentio overruling of *Fuentes*, the Court’s recent decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, although stopping short of reinstating the prior hearing rule, reaffirmed the Court’s intention to apply due process standards to statutes affecting debtors’ interests. In striking down a Georgia statute providing for prejudgment garnishment (freezing) of a bank account, the Court found the statute constitutionally deficient in that it failed to provide the safeguards contained in the Louisiana statute upheld in *Mitchell*. Unlike the Louisiana sequestration statute, the Georgia scheme did not require judicial supervision of the applications for the writ or provide the debtor with an early post-seizure hearing.

Thus, after *Mitchell* and *North Georgia* it appears that the Court has abandoned the strict prior hearing rule in favor of a procedural due process test which examines the statute in its entirety to determine whether its provisions adequately accommodate the conflicting interests of the creditor.

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35. Id. at 607-10.
36. Id. at 609. The Court’s view is predicated on the premise that, upon being informed of a hearing on the taking, the debtor would be encouraged to transfer possession of the subject property and thereby defeat the creditor’s claim. The Court also noted that the failure of the debtor to continue payments pending the hearing further diminished the creditor’s security. Id. at 608-09.
37. Id. at 605-06.
38. Mr. Justice Stewart was joined in his dissenting opinion by Justices Douglas and Marshall.
41. Id. at 607.
42. GA. CODE ANN. § 46 et seq. (1967). Under the Georgia garnishment statute, the only prerequisites to the creditor’s obtaining the writ were that the creditor or his lawyer execute an affidavit before a court clerk stating the amount claimed to be due, and that the creditor file a bond equal to twice the amount claimed. See 419 U.S. at 602-03 n.1.
debtor, and state. As Mitchell and North Georgia indicate, however, the Court's post-Fuentes analysis of prejudgment taking of property has largely focused on statutory safeguards which lessen the debtor's interest in a prior hearing.

II. DUE PROCESS AND THE MECHANICS' LIEN—
The Pre-Roundhouse Courts

In the cases considering the application of procedural due process safeguards to mechanics' lien laws and similar real property attachment, several courts have concluded that since the liens do not affect the owner's ability to alienate or encumber the land, the lien is a de minimis taking not requiring the imposition of due process safeguards. Before the decision of the Connecticut Supreme Court in Roundhouse, the only authority holding an interference with property title cognizable under the fourteenth amendment's due process clause stemmed from two 1973 federal district court decisions concerning real property attachment statutes. In Bay State Harness Horse Racing & Breeding Association v. PPG Industries, the court found a significant property interest affected since the attachment interfered with the


44. See 416 U.S. at 610.


48. The real property attachment remedy's effect on land is identical to that of the mechanics' lien; however, unlike the mechanics' lien claimant, the applicant for attachment has no prior interest in the involved property. See Comment, The Constitutional Validity of Mechanics' Liens Under the Due Process Clause—A Re-examination After Mitchell and North Georgia, 55 B.U.L. Rev. 263, 275 (1975).

owner's ability to sell or mortgage the property at full market value.\textsuperscript{50} Similarly, in \textit{Gunter v. Merchant's Warren National Bank},\textsuperscript{61} the owner's ability to convey clear title was considered constitutionally significant.\textsuperscript{62}

In spite of these decisions, and the fact that identical interests are affected by real property attachments and mechanics' liens, courts continued to find due process inapplicable to the latter.\textsuperscript{53} It is interesting to note that these courts did not separate their consideration of the significance of the fourteenth amendment interest affected by the lien from their analysis of the statutory provisions governing its imposition. Thus, in \textit{Ruocco v. Brinker},\textsuperscript{64} a federal district court, in upholding Florida's mechanics' lien statute from constitutional attack, stated that the deprivation engendered by the lien was de minimis,\textsuperscript{65} but based its holding on the statute's constitutionally adequate accommodation of the competing interests of the claimant and owner.\textsuperscript{66}


In invalidating the Massachusetts attachment statute, the court noted that the unrestricted use of property has been recognized as a right which may be protected from even temporary deprivation. 365 F. Supp. at 1305, \textit{citing} Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).

\textsuperscript{51} 360 F. Supp. 1085 (D. Me. 1973). In the wake of \textit{Mitchell} and \textit{North Georgia}, the United States District Court for the District of Maine has abandoned \textit{Gunter}'s prior hearing rule. \textit{In Re Oronoka}, 393 F. Supp. 1311 (D. Me. 1975). The \textit{Oronoka} court did not dispute \textit{Gunter}'s ruling that the attachment statute affected a significant property interest, but merely found that the owner's ability under the Maine Rules of Civil Procedure to obtain a hearing two days after the attachment satisfied the requirements of procedural due process. The early hearing provision had not yet been enacted at the time \textit{Gunter} was decided. \textit{See} 393 F. Supp. at 1315 n.6.

\textsuperscript{52} 360 F. Supp. at 1090. \textit{See also} \textit{Clement v. Four N. State St. Corp.}, 360 F. Supp. 933 (D.N.H. 1973) (notice and hearing required before attachment). \textit{But see} Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971), where the court ruled a $4,500,000 attachment de minimis since the property was already encumbered by liens of $22,000,000.

\textsuperscript{53} \textit{See cases cited note 45 supra.} The only attempt at distinguishing either \textit{Gunter} or \textit{PPG} occurred in \textit{Connolly}, where the California court noted that unlike mechanics' lien statutes, the attachment statute considered in \textit{Gunter} absolutely prohibited alienation. The Maine attachment provision's absolute bar on transfer stemmed from the subject property's being placed in the custody of the court, upon attachment, to prevent alienation. 416 Cal. Rptr. at 197 n.4. The filing of a mechanics' lien claim, however, does not absolutely bar alienation; it merely informs prospective purchasers of the property's disputed title. \textit{See, e.g.}, Cook v. Carlson, 364 F. Supp. 24, 29 (D.S.D. 1974); Spielman-Fond, Inc. v. Hanson's Inc., 379 F. Supp. 997, 999 (D. Ariz. 1973), \textit{aff'd}, 417 U.S. 901 (1974).

\textsuperscript{54} 380 F. Supp. 432 (S.D. Fla. 1974).

\textsuperscript{55} \textit{Id.} at 436.

The dual thrust of the *Ruocco* holding is surprising since its conclusion that only a de minimis deprivation was present seemingly obviated the necessity of testing the statute's accommodation of interests. 57 The decision is understandable, however, as the court's conclusion that the interest affected by the lien was de minimis was not based on finding the owner's ability to alienate or encumber his property constitutionally insignificant; rather the court focused on the statute's effect on this interest and labeled the resulting short-term infringement de minimis. 58 In reaching this conclusion, the court noted the owner's ability to institute show cause proceedings with a return date of 20 days 59 or to force the claimant to bring foreclosure proceedings within 60 days or forfeit the lien. 60 Considering these provisions in conjunction with the fact that the lien would be discharged if not enforced within one year, the *Ruocco* court concluded that the state's failure to mandate a hearing prior to or immediately following the imposition of the lien was constitutionally permissible under *Mitchell*'s "flexible test" of procedural due process. 61

Similarly, in *Cook v. Carlson*, 62 another federal district court, in holding the mechanic's lien's effect on the owner's interest not cognizable under the fourteenth amendment, emphasized statutory provisions that protected the owner from an unfair or mistaken property seizure. 63 Unlike the *Ruocco* court, however, which after concluding that the owner's deprivation was de minimis, posited no countervailing interests of the creditor or state in avoiding the strictures of a prior hearing, the *Cook* court stated that prior notice and hearing would destroy the effectiveness of the lien remedy by creating an interim period pending the hearing during which bona fide purchasers and encumbrancers could tie into the property and hinder the claimant's

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58. The *Ruocco* court employed the term de minimis to refer to the nature of the deprivation, rather than in reference to the property interest involved. In this approach it followed the analysis of Justice Harlan in *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (Harlan, J., concurring). The Harlan approach examines the statute to determine whether the "deprivation" it exacts is significant. Under the *Fuentes* approach, on the other hand, the court first considers whether the "property interest" involved is de minimis and thus requires procedural safeguards. See 407 U.S. at 90 n.21. Although the Harlan approach focuses more closely on the statute's effect on the deprivation, the distinction between it and the *Fuentes* approach is not great, for in the final analysis both appraise the sufficiency of the statute's procedural protections. See Comment, supra note 48, at 266 n.24.
61. 380 F. Supp. at 437.
63. *Id.* at 27-28.
ability to exact compensation. Noting the legislative intent to protect the vulnerable and important construction industry, the court concluded that the statute provided adequate procedural protection for the owner's insignificant interest.

In *Spielman-Fond, Inc. v. Hanson's, Inc.*, the district court found it unnecessary to analyze the adequacy of the protections afforded the debtor under the Arizona mechanic's lien statute, concluding simply that since the lien involved no dispossession or actual taking of property, procedural due process was inapplicable. The United States Supreme Court's summary affirmance of the holding in *Spielman-Fond* raised the possibility that the case would be considered binding precedent on the fourteenth amendment issue.

The reasoning of the pre-*Roundhouse* courts is notable for its failure to assess seriously the adverse impact of the lien on the owner's ability to alienate or encumber the subject property. In focusing on statutory safeguards and other means by which the owner could ameliorate the lien's cloud on title, the courts conveniently bypassed the pre- eminent question of whether the imposition of a lien requires fourteenth amendment safeguards.

III. *Roundhouse* AND *Fick Brothers*-FACIALLY INVALID STATUTES

In *Roundhouse* and *Fick Brothers*, the owner's intercession of a fourteenth amendment defense to the imposition of the mechanics' lien occurred

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64. Id.
65. Id. at 29. The court termed the application for a lien an exceptional situation requiring special protection to a creditor interest. But cf. discussion at note 31 supra.
66. 364 F. Supp. at 29. In upholding the statute the court stated it to be narrowly drawn in that the lien was valid only against bona fide purchasers, extended only to the labor and materials furnished, and could be challenged within 30 days of the owner's notice to the creditor that the lien was contested. Id.
69. 379 F. Supp. at 999.
71. See *In re Oronoka*, 393 F. Supp. 1311 (D. Me. 1975). The *Oronoka* court cited the Supreme Court's summary affirmance in *Spielman-Fond* as widening the Court's substantial modification of the constitutional principles articulated in *Fuentes*. Id. at 1316. See also note 46 supra.
72. See *Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997, 999 (D. Ariz. 1973), aff'd, 417 U.S. 901 (1974). The court noted that any economic interests infringed by the lien could be protected by bonding or title insurance. Since these economic interests were held to be de minimis, the court did not discuss the applicability of procedural safeguards. 379 F. Supp. at 999.
74. 277 Md. 15, 353 A.2d 222 (1976).
during the claimant's action to foreclose the lien.\textsuperscript{75} In the Connecticut action, the constitutional defense was one of several defenses interposed by the owner after disputes had arisen under the contract causing the owner to cease payments and the contractor to abandon the project.\textsuperscript{76} In contrast, in the Maryland case, the claimant fully and satisfactorily performed its obligations and the only defense tendered by the owner was the fourteenth amendment claim.\textsuperscript{77}

The courts prefaced their consideration of the constitutionality of the statutory schemes by setting forth the relevant statutory provisions. In both states the lien attached from the time labor or materials were furnished\textsuperscript{78} and could be perfected without judicial participation.\textsuperscript{79} Only the subcontractors and materialmen who did not directly contract with the original owner were required to provide the owner with notice of the claim.\textsuperscript{80} Under the Maryland scheme, the lien could exist for one year without the claimant instituting foreclosure proceedings,\textsuperscript{81} unless the owner moved to dissolve the lien by filing a bond\textsuperscript{82} or by bringing proceedings in equity to compel the claimant either to prove the lien's validity or have it declared void.\textsuperscript{83} Similarly, the Roundhouse court noted the owner's ability to discharge the lien prior to the

\textsuperscript{75} 362 A.2d at 779; 277 Md. at 21, 353 A.2d at 226. In Roundhouse, there were claims by both the prime contractor and subcontractors, although only the prime contractor appealed the Superior Court's ruling that the lien statute was unconstitutional. 362 A.2d at 779.

The Fick Brothers claim was lodged by a subcontractor, and the case reached the Court of Appeals from a denial of plaintiff Barry Properties' motion for summary judgment on the ground that the lien statute deprived it of its property without procedural due process. 277 Md. at 21, 353 A.2d at 226-27.

\textsuperscript{76} 362 A.2d at 779.

\textsuperscript{77} 277 Md. at 21, 353 A.2d at 226-27.


\textsuperscript{81} 1974 Md. Laws ch. 12, § 2.

\textsuperscript{82} Md. R. P. BG75(6).

\textsuperscript{83} See Continental Steel Corp. v. Sugarman, 266 Md. 544, 548, 295 A.2d 493, 494 (1972).
termination of its two-year statutory life by posting bond\textsuperscript{84} or by demanding the lienor's discharge of the lien, thus forcing the institution of foreclosure proceedings within 30 days.\textsuperscript{85}

Unlike the \textit{Cook} and \textit{Ruocco} decisions, the Maryland and Connecticut courts did not consider the significance of the deprivation created by the lien in conjunction with the statutory provisions which allegedly rendered its impact de minimis. Rather, the courts separated their consideration of the constitutional significance of the owner's property interest from their analysis of the existing procedures afforded the debtor,\textsuperscript{86} and concluded that the mechanics' lien affected a fourteenth amendment property interest. The \textit{Roundhouse} court based its finding solely on the lien's impairment of the owner's ability freely to alienate the subject property.\textsuperscript{87} The Maryland Court of Appeals concurred in this ruling, and additionally deemed of constitutional import the lien's effect of diminishing the owner's equity, noting that the lien deprived the corporate owner of its construction mortgage and rendered it unable to close a permanent mortgage or obtain additional financing on the property's equity.\textsuperscript{88}

In concluding that due process was applicable to the mechanics' lien statutes, however, both courts were vague on the fourteenth amendment safeguards to be extended to the debtor. The \textit{Fick Brothers} court, noting the remedial nature of the statute, held the existing statute constitutional when read as if containing prior notice and hearing requirements.\textsuperscript{89} The court strongly implied that a newly enacted statute incorporating the \textit{Mitchell} and \textit{North Georgia} safeguards of judicial supervision of the application for the writ and a prompt post-seizure hearing on the merits of the taking, would be constitutional.\textsuperscript{90}

In contrast, the Connecticut court did not expressly estab-

\begin{itemize}
  \item \textsuperscript{86} The Connecticut and Maryland courts followed the fourteenth amendment analysis employed by the \textit{Fuentes} court, and thus focused on the "property interest" affected by the lien rather than the "deprivation" wrought by the statute. \textit{See} note 58 \textit{supra}.
  \item \textsuperscript{87} 362 A.2d at 784.
  \item \textsuperscript{88} 277 Md. at 24, 353 A.2d at 228.
  \item \textsuperscript{89} \textit{Id.} at 37, 353 A.2d at 235.
  \item \textsuperscript{90} \textit{Id.} at 30, 353 A.2d at 231.
\end{itemize}

What we glean from \textit{Sniadach}, \textit{Fuentes}, \textit{Mitchell}, and \textit{North Georgia Finishing} is that, lacking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior probable-cause-type hearing are, as held in \textit{Fuentes}, unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in
lish guidelines for the legislature's drafting of a constitutionally satisfactory statute, although it did note that the Arizona mechanics' lien statute, which restricted the life of a non-foreclosed lien to six months and had been summarily upheld by the Supreme Court in *Spielman-Fond, Inc. v. Hanson's, Inc.*,91 could be interpreted as offering "the bare minimum of due process protection consistent with the extent of the deprivation present."92

The Maryland court distinguished the Arizona scheme approved in *Spielman-Fond* on the basis of its short statutory life and its requirement that the lien application be made under oath on personal knowledge.93 These distinctions, however, are superficial at best, since the Supreme Court has indicated that even temporary deprivations are to be accorded the full panoply of procedural safeguards mandated by the due process clause, subject only to the caveat that the extent of the deprivation will affect the form of the hearing required.94 Since both the *Roundhouse* and *Fick Brothers* courts held procedural due process applicable to the mechanics' lien, it is reasonable to conclude that the courts chose not to consider the Supreme Court's summary affirmation in *Spielman-Fond* a binding precedent.95

The courts' refusal to reject explicitly *Spielman-Fond* is incompatible with the broad holdings set forth in the cases. By the same token, the Maryland court's application of its interpretation of the law to the facts before it in *Fick Brothers* casts doubt on the case's ultimate impact. The court concluded that since the property owner knew of the subcontractor's claim prior

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*Mitchell* and *North Georgia Finishing* are present and even then, although this is less clear, the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized.

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91. Id. at 37 n.12, 353 A.2d at 235 n.12.
93. 362 A.2d at 783.
94. Id. at 34-35, 353 A.2d at 233-34.
96. The *Fick Brothers* court quoted extensively from Chief Justice Burger's concurrence in *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975), where the Chief Justice stated:

When [the Supreme Court] summarily affirm[s], without opinion, the judgment of a three-judge District Court [the Court] affirm[s] the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmation settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may have appeared to have established (footnote omitted).

277 Md. at 34, 353 A.2d at 233.
to the foreclosure action, and did not assert a demand for a hearing, it thereby
forfeited any right it may have had to have its position determined prior to
the foreclosure hearing. The court also concluded that since the claimant
did not divest the owner of any property interest prior to the foreclosure
hearing, only a possibility of a lien existed prior to the judicial determina-
tion. As the dissenting justices noted, however, these conclusions contra-
dict the majority's earlier assertions that the statute permitted a significant
property deprivation prior to the ultimate adjudication on the merits.

The most restrictive interpretation that can be placed on the Fick Brothers
majority's resolution of the issues for the parties involved is that the court's
opinion amounts to a mere advisory opinion, in view of its holding that the
property owner suffered no denial of due process. The holding subjects
the opinion to criticism as an example of judicial legislation since the court's
failure to discharge the subcontractor's lien suggests that it was utilizing the
case as a vehicle to substantially amend the lien statute. A broader reading
of the decision, however, would view it as one made in the interests of judi-
cial economy, the lower court having determined that the subcontractor's
claim was valid in all respects. Thus, the court, while establishing prospective
due process requirements, may have concluded that their application to
the parties before it would unfairly penalize the subcontractor.

IV. THE EXTENT OF THE DEPRIVATION

In viewing the significance of the property interest affected by the lien as
a matter unrelated to the protections afforded by the particular statute, the
Roundhouse and Fick Brothers courts have broken with a long but dubious
line of cases holding the imposition of a mechanics' lien exempt from four-
teenth amendment procedural due process. By focusing solely on the statu-
tory provisions which allegedly rendered the lien's impact de minimis, the
prior case law failed to assess adequately the immediate and collateral effects
of the lien on the owner's property interests.

96. 277 Md. at 38, 353 A.2d at 235-36.
97. Id. at 38, 353 A.2d at 236.
98. Id. at 39-40, 353 A.2d at 237 (Levine and Eldridge, JJ., dissenting). The dis-
senters concurred in the court's holding that the statute was facially invalid.
99. See id. at 40, 353 A.2d at 237.
100. See id. at 40, 353 A.2d at 237 (Levine and Eldridge, JJ., dissenting).
101. The court noted that in neither North Georgia, Mitchell, Fuentes, nor Snidach
was there a determination on the merits of the creditor's claim. Instead, the debtors
attacked the prejudgment remedy involved by way of injunction, declaratory judgment,
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 603-05 (1975); Mitchell
motion to dismiss, or similar procedure. Id. at 38 n.14, 353 A.2d at 236 n.14.
The pre-Roundhouse courts felt that the mechanics’ lien did not infringe on the owner’s right to alienate the property but at most made alienation more difficult. However, in many jurisdictions the lien laws are so drafted that the claims may exceed the cost of the improvements, and often even the market value of the property. Such claims effectively negate the owner’s fourteenth amendment right to alienate the property. This impairment of alienation coupled with the lien’s effect on the owner’s ability to obtain financing on the property’s equity can have a potentially devastating impact on the property owner.

The pre-Roundhouse courts also failed to make a realistic evaluation of the existing statutes’ safeguards against wrongful deprivations. Although one court implied that the owner’s ability to substitute a bond for the lien claim protected his ability to alienate or encumber the property, it is evident that the bond is not only an insufficient substitute for a hearing, but also exacts its own independent property deprivation. Similarly, the Ruocco and Cook courts’ emphasis on the owner’s ability to compel the claimant to establish the lien’s validity does not address the fact that many statutes fail
to ensure that the owner will receive notice of the lien.\textsuperscript{110} Moreover, since such actions are subject to the delays inherent in all litigation,\textsuperscript{111} the egregious effects of the lien can subsist for a considerable period of time.

Since the statutory provisions cited by the pre-\textit{Roundhouse} courts as protective of the owner's interest are inadequate to prevent the mistaken or wrongful deprivation which procedural due process is designed to prevent,\textsuperscript{112} it is evident that once the owner demonstrates the significance of the property interests infringed upon by the lien, the existing statutes must be voided for failure to protect the debtor's constitutionally recognized property interests. The ultimate form of the safeguards to be afforded the lien-affected owner will be dictated by the competing interests of the owner, the creditor, and the state.\textsuperscript{113}

V. \textit{Roundhouse} AND \textit{Fick Brothers}—Evolving Standards?

The Connecticut court, while stating conclusively that fourteenth amendment safeguards must be applied to the imposition of a mechanics' lien, failed to establish precise due process standards. The price to be paid for bequeathing the task of implementing new lien procedures to the legislature was illustrated by the post-\textit{Roundhouse} amendments to Connecticut's lien statute. The most substantial changes occurred through introduction of a notice requirement for general contractors,\textsuperscript{114} and a reduction of the lien's statutory life to one year.\textsuperscript{115} The amended statute does not, however, require a hearing on the validity of the claim prior to the foreclosure action, unless the owner institutes proceedings to contest the lien.\textsuperscript{116} Since the burden of obtaining a hearing remains with the aggrieved owner, the amended statute fails to insure that the owner will receive the meaningful opportunity to be heard required by the fourteenth amendment.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{111} See Comment, supra note 48, at 283.
\item \textsuperscript{112} North Georgia Finishing Corp. v. Di-Chem, Inc., 419 U.S. 601, 613-14 (1975).
\item \textsuperscript{113} See Fuentes v. Shevin, 407 U.S. 67, 90-93 (1972).
\item \textsuperscript{115} Id. § 49-39.
\item \textsuperscript{116} Id. Under the amended statute the owner must provide the claimant with notice at least four days before the hearing. Previously the owner was required to order the lienor to discharge the lien and was entitled to a hearing only if the lienor failed to discharge the lien within 30 days. Conn. Gen. Stat. Ann. § 49-51 (1958).
\item \textsuperscript{117} See Fuentes v. Shevin, 407 U.S. 67, 85 (1972). The Court found the replevin statutes' provision for the debtor's recovery of the goods upon the posting of bond an inadequate substitute for a mandatory hearing on the validity of the taking, reasoning that not all debtors were possessed of the knowledge or the funds to utilize the recovery
The Fick Brothers court suggested that a newly enacted statute incorporating the Mitchell and North Georgia safeguards of judicial supervision of the application for the writ and a prompt post-seizure hearing on the merits of the taking would satisfy constitutional requirements. While allowing for legislative modification of the strict prior hearing rule established by the court, this approach effectively circumscribed the legislature's discretion in enacting a statutory scheme containing provisions less protective of the debtor's property interests than those approved in Mitchell and North Georgia. Although the court did not specifically state that any relaxation of the prior hearing rule must be justified by a corresponding interest of the creditor or state in avoiding the prior hearing, its reliance on Mitchell and North Georgia indicated that such legislation must not only be justified by a countervailing state interest in avoiding a prior hearing, but must also result in safeguards for the debtor comparable to those afforded by a prior hearing.

The significance of the Fick Brothers court's emphasis on Mitchell and North Georgia safeguards is reflected in the newly enacted Maryland mechanics' lien statute. The statute directs the court to review all lien claims prior to their attachment. If the court determines that the lien should attach, it issues the owner an order to show cause that the claim is invalid. The owner is assured an opportunity to challenge the claim within 15 days of receiving the court order.

The failure of the Connecticut statute to relieve the owner of the burden of protecting his or her constitutional rights appears constitutionally deficient under this formulation of procedural due process.

118. 277 Md. at 37 n.12, 353 A.2d at 235 n.12.

119. In suggesting the constitutionality of a statutory scheme incorporating North Georgia safeguards, the Maryland court emphasized the utility of a lienor's provision of a bond as a safeguard against wrongful takings. Although such a provision was deemed significant in Mitchell, 416 U.S. at 602-03, the strong legislative policy favoring the mechanic's lien renders unlikely the possibility that such a requirement would be imposed on the construction industry. As a practical matter, a bond provision would be largely superfluous in a statutory scheme incorporating the North Georgia safeguards of a factual inquiry by a neutral officer prior to the taking and a prompt post-seizure hearing.

120. However, in many situations the provision of a prior hearing may be the only means by which the owner can be insulated from the effects of a wrongful taking. See, e.g., Bell v. Burson, 402 U.S. 535, 541-42 (1971) (hearing required prior to suspension of driver's license); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (hearing required prior to termination of welfare benefits).


122. Id. § 9-106.

123. Id. If the court finds that the lien should not attach or should not attach in the amount claimed, it issues an interlocutory order establishing the lien, stating the amount for which probable cause exists, and specifying the amount of bond the owner must post to free the property from the lien. The court may also require the claimant
The statute adopts the Court of Appeals’ position that prior to judicial
determination of the lien’s validity the claimant possesses only a possibility
of a lien.124 The statute thus allows an owner to defeat the lien claim by
transferring the subject property to a bona fide purchaser for value.125 Although this provision of the statute imposes a prior hearing rule, it would
appear that a claimant could utilize the state’s lis pendens procedure to
protect his interest in the property.126 The lis pendens serves notice that
litigation is pending and subjects the interests of future purchasers to the
outcome of the litigation.127 The continued availability of this procedure
recognizes that a requirement of prior notice and hearing jeopardizes the
creditor’s interest in preventing the owner from alienating or encumbering
the land to defeat the outstanding claims,128 and thus preserves the state’s
interest, as evidenced by the legislative history underlying the lien statutes,129
in insuring that those who contribute labor or materials to a construction
project are compensated for their efforts and risks in that enterprise.130 Also, since the greatest property taking effected through present statutes
occurs through their failure to insure the owner an early opportunity to clear
title, a short delay in providing the owner notice and an opportunity to be
heard does not create the type of irreparable harm often cited by the courts
as necessitating a hearing prior to the taking.131 Of particular importance to the legislative reconsideration of the Maryland lien statute was the court’s perception of the function of the hearing on the
validity of the claim. While the Roundhouse court noted that notice and an
opportunity to be heard must be granted at a meaningful time and in a mean-

to post bond for damages. All disputed matters must be tried within six months of
the order, although the owner may move for modification or dissolution of the order
at any time prior to the trial. Id.

124. 277 Md. at 38, 353 A.2d at 235-36; 1976 Md. Laws ch. 349. § 9-106. The
statute reflects the court’s incongruous finding that the lien claim in Fick Brothers had
involved no dispossession. 277 Md. at 38, 353 A.2d at 236. The court failed to note
that it is the lien claim’s cloud on title and not its judicial validation per se which affects
the owner’s fourteenth amendment interest.

125. MD. REAL PROP. CODE ANN. § 9-102(c) (Supp. 1976).

126. MD. R.P. BD 1.


128. The lienor’s interest in preventing the owner from having notice of the claim
prior to perfection is similar to the interests which the Mitchell court found to militate
against providing the debtor with prior notice and hearing safeguards. See note 36
& accompanying text supra.

129. See S. PHILLIPS, MECHANICS’ LIENS § 6 (2d ed. 1883).

130. Id. See generally Comment, supra note 10.

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... it did not indicate whether the state must require a pre-foreclosure hearing on the validity of all lien claims. This formulation of the hearing question suggests that the lien is presumed to be valid until the owner assumes the burden of challenging the claim. In contrast, the Fick Brothers court, in discussing North Georgia, indicated that the burden of establishing the lien’s validity rests with the claimant. The Fick Brothers court’s formulation is incompatible with a statutory scheme which requires the owner to initiate time-consuming and costly procedures to protect himself from a wrongful taking. The Maryland legislature’s reconsideration of the lien statute reflects the court’s approach by requiring judicial supervision of the lien application and guaranteeing the owner an early opportunity to contest the court’s probable cause determination.

VI. CONCLUSION

Although Roundhouse and Fick Brothers do not delineate the precise scope of the safeguards to be applied to mechanics’ lien statutes, the decisions, in recognizing the extent of the property interests affected, provide a means by which the courts and legislatures can begin the evolutionary process of developing equitable lien procedures. The Fick Brothers court’s promulgation of general guidelines based on Mitchell and North Georgia for implementing these procedures, while inadequately assessing the competing interests affected by the lien statute, substantially insured that any legislative reassessment of the lien statutes would not jeopardize the owner’s right to an early hearing on the validity of the claim. These guidelines diminished the possibility that the Maryland legislature would follow post-Roundhouse Connecticut in enacting a statute failing to guarantee a pre-foreclosure adversary hearing. In directing the focus of any legislative reconsideration of the lien statute, the Maryland Court of Appeals provided a more solid foundation than did the Connecticut Court for the expansion of debtors’ constitutional rights to the imposition of liens, since a procedural scheme

132. 362 A.2d at 781.
133. The newly amended statute, however, has greatly simplified the procedure through which the owner can seek to discharge or reduce the lien. The hearing is limited to a determination of whether probable cause exists for sustaining the claim, and thus enables the knowledgeable owner to remove a wrongful claim with a minimum of legal preparation and expense. Conn. Gen. Stat. Ann. § 49-39 (Supp. 1976).
135. See note 117 supra.
which provides the debtor with only the possibility of a hearing imposes safeguards which are illusory at best.

The single flaw in the Maryland legislature's response to *Fick Brothers* is the possibility that the statute creates for the owner to defeat the claim by transferring title prior to the court's imposition of the lien. However, to the extent that the lis pendens remains a viable creditor's remedy, the Maryland scheme's adoption of *Fick Brothers'* call for judicial supervision of the claimant's perfection of the lien, and a prompt hearing to establish at least probable cause for the claim, preserves the remedial purpose of the mechanics' lien while protecting the owner's property interests from wrongful deprivation. So interpreted, the statute preserves the interests of all parties in an expeditious and equitable scheme, and is in the best tradition of flexible due process.

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