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Kentucky Employees' Wage Liens: A Sneak Attack on Creditors, but Beware of the Bankruptcy Trustee

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INTRODUCTION

In Kentucky, employees who have not been paid by a business have been granted a statutory lien on the business' property from the earliest statutory codifications of Kentucky law.¹ Examining the cases wherein a party claimed the lien shows that most of the legal activity involving the lien occurred in the early to mid 1900s. In fact, there does not appear to be a published case involving the employees' lien since the 1940s. Due to the steady number of businesses closing their doors,² it may be time to dust off the lien and put it to work.

One may protest that with businesses mortgaging their real property and granting security interests in their personal property there is little left for the lien to encumber. Businesses often secure borrowings with their assets³ which is the precise reason why employees need to arm themselves with the lien. Why? Because the reasonable and logical interpretation of the lien statute should be that the lien has priority over such encumbrances, even when the encumbrances antedate the lien.

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¹ The Kentucky legislature enacted the lien statute on March 20, 1876. The earliest codification of the statute occurred in 1887. KY. GEN. STAT. ch. 70, art. III (Bullitt & Feland 1887).

² David N. Ravin, *Getting the "Professionals" to Chip In*, N.J. L.J., Jan. 17, 1994, at 5 (discussing the increase in bankruptcy filings).

³ See *Aim for the Right Environment*, NATION'S BUS., Mar. 1995, at 52 (discussing an example in which a business borrowed against its assets to create liquidity).

Part I of this Article explores the lien and cases interpreting it.⁴ Next, part II presents an analysis of the priority of the lien against the priority of a Uniform Commercial Code Article Nine security interest in the personal property of the business.⁵ Finally, part III examines the lien as it enters the period where the business has filed a petition in bankruptcy.⁶ This Article concludes that the Kentucky employees' lien is a powerful tool, superior to an Article Nine security interest, and unavoidable by a bankruptcy trustee in most situations.⁷

I. SCOPE OF THE LIEN

Section 376.150 of the Kentucky Revised Statutes grants employees a lien upon their employer's property and effects, which are involved in the business, whether or not the business is incorporated, when the property or effects are assigned for the benefit of or distributed among creditors.⁸ Should the company suspend, sell, or transfer its business, or if business is stopped or suspended as a result of its property being attached or levied upon, the employees' lien also attaches.⁹ Many events activate the employees' lien: the assignment of business property for the benefit of creditors; the voluntary or involuntary distribution of business property; suspension, sale, or transfer of the business; and attachment or execution upon business property so that the business is stopped or

⁴ See *infra* notes 8-52 and accompanying text.

⁵ See *infra* notes 53-127 and accompanying text.

⁶ See *infra* notes 128-227 and accompanying text.

⁷ See *infra* p. 348.

⁸ Section 376.150 states:

(1) When the property or effects of any mine, railroad or canal, or other public improvement company, or of any rolling mill, foundry or other manufacturing establishment, or of any other business, whether incorporated or not, are assigned for the benefit of, or are to be distributed among creditors, whether by operation of law or by its own act, the employes of the owner or operator of the business shall have a lien upon the property and effects which have been involved in the business and upon the accessories connected therewith, including any interest in real property used in carrying on the business.

KY. REV. STAT. ANN. § 376.150(1) (Baldwin 1994).

⁹ When any company or establishment referred to in [Kentucky Revised Statutes §] 376.150 suspends, sells or transfers its business, or when the property or effects engaged in the business are taken in attachment or execution so that the business is stopped or suspended, a lien shall attach as provided in [Kentucky Revised Statutes Annotated §] 376.150 and may be enforced by proceedings in equity.

Id. § 376.180.

suspended.¹⁰ While some of these events involve legal action, others have no connection with the law. For instance, filing a federal bankruptcy petition falls within the event "property . . . assigned for the benefit of . . . creditors" and activates the legal process of the federal bankruptcy code.¹¹ Simply closing the doors and walking away from the business comes within the event "suspension of a business" and also triggers the lien without any legal action.¹²

Given the breadth of events that activate the lien, it is no surprise that Kentucky courts have taken an expansive view of the situations that will trigger the lien. In *Gugenheim v. Watkins*,¹³ the judgment by the circuit court ordered sale of all the company's property to satisfy the company's debts.¹⁴ The court of appeals agreed with the conclusion of the chancellor that the order had caused the "company's affairs . . . to be distributed among its creditors . . .," thus activating the lien.¹⁵

The lien is given to the "employees of the owner or operator of the business"¹⁶ However, neither the "president or other chief officer, nor any director or stockholder of any such company shall be deemed an employe within the meaning of [section] 376.150 [of the Kentucky Revised Statutes]."¹⁷ Courts have refused to extend the lien to independent contractors doing business with the owner or operator of the business.¹⁸

The employees' entitlement under the lien is designated by section 376.160 of Kentucky Revised Statutes as "for the whole amount due the employes"¹⁹ That section also addresses the priority of the lien and speaks in terms of "wages."²⁰ However, limiting the lien to wages does not seem to include "the whole amount due"²¹ unless the term wages is

¹⁰ *Id.* §§ 376.150, .180.

¹¹ *Id.* § 376.150.

¹² *Id.* § 376.180.

¹³ 181 S.W. 357 (Ky. 1916).

¹⁴ *Id.* at 358-59.

¹⁵ *Id.* at 359.

¹⁶ KY. REV. STAT. ANN. § 376.150(1) (Baldwin 1994).

¹⁷ *Id.* § 376.160; *Trust Co. of Am. v. Casey*, 115 S.W. 780, 782 (Ky. 1909) (holding a director of a company not entitled to a superior lien on property of an insolvent corporation).

¹⁸ *Southern Coal Co. v. Martin's Fork Coal Co.*, 151 S.W.2d 394, 398 (Ky. 1940) (holding that an independent contractor is not entitled to a labor lien); *Katz v. Scott*, 17 S.W.2d 1024, 1027 (Ky. 1929) (stating that where statute does not clearly include independent contractors, they cannot take advantage of the lien).

¹⁹ KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

²⁰ *Id.*

²¹ *Id.*

given an expansive reading. For example, under the employee's contract with the business, the employee might be due vacation pay or medical reimbursement. Such amounts should be included in "the whole amount due the employes" ²² Chapter 337 of the Kentucky Revised Statutes, entitled "Wages and Hours," defines wages, for the purposes of that chapter, as follows:

"Wages" include any compensation due to an employee by reason of his employment, such compensation to include salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy ²³

Adoption of that definition as a statement of the employees' lien entitlement comports with the statute's words: "the whole amount due the employes" ²⁴

The statute defines the broad boundaries of the property encumbered by the lien. Employees are given a lien "upon the property and effects which have been involved in the business and upon the accessories connected therewith" ²⁵ The phrase "property and effects" ²⁶ should encompass such items as equipment, supplies, raw materials, work in progress, and inventory. ²⁷ A court has even held that intangible property is property "involved in the business." In *Fels v. George Lueders & Co.*, the lienholders asserted their liens against certain accounts receivable of the business which had been assigned before the business' bankruptcy. ²⁸ The assignee argued that, due to the assignment, the accounts were not "involved in the business" when the lien was

²² *Id.*

²³ *Id.* § 337.010(1)(c).

²⁴ *Id.* § 376.160.

²⁵ *Id.* § 376.150(1).

²⁶ *Id.*

²⁷ Of course, the term "property" permits the lien to attach to any interest in real property used in carrying on the business. This Article is concerned only with personal property.

²⁸ *Fels v. George Lueders & Co.*, 246 F. 436, 437 (6th Cir. 1917). At the time of the *Fels* case, the statute, KY. GEN. STAT. § 2487, creating the lien extended the lien to persons who furnished materials to the business. Lueders and Co. was such an entity. *Fels*, 246 F. at 437.

activated.²⁹ Noting that the accounts were surely "so involved" before they were pledged, the court found that because the assignment was "merely a security," the accounts were never withdrawn from the business.³⁰ Accordingly, the court thought "it clear . . . that all the assigned accounts were . . . 'involved in the business' within the meaning of the statute."³¹

Courts addressing the employees' lien have not interpreted the phrase "accessories connected therewith."³² However, it should be given its general meaning as something incidental to the main purpose. The word accessories does not seem to enlarge to any great extent the property which the lien encumbers because an accessory connected to the business property would seem to be included as part of the "property involved in the business." For example, suppose a coal mining company owns a computer system for use by its clerical employees. The computer system would be incidental to the main purpose of the business (mining coal), but, besides being an accessory, it would also seem to be property involved in the business. This interpretation of accessory comports with the Uniform Commercial Code's ("U.C.C.") Article Nine definition of "accessory," as an article of personalty connected to an existing article of personalty,³³ i.e., a part of "property involved in the business."

An interesting aspect of the lien is its perfection requirements, or more accurately, its lack of such requirements.³⁴ Unlike other statutory liens created by Chapter 376 of the Kentucky Revised Statutes, the employees' lien requires no public filing and no possession of the lien property for perfection.³⁵ The statutes creating the employees' lien are silent regarding such requirements. This silence has resulted in the courts consistently construing the statutes as requiring no filing of a notice of lien to perfect it.³⁶

²⁹ *Fels*, 246 F. at 438.

³⁰ *Id.* at 437.

³¹ *Id.*

³² KY. REV. STAT. ANN. § 376.150(1) (Baldwin 1994).

³³ *Id.* § 355.9-314(1).

³⁴ Perfection denotes the steps required to make the lien effective against persons other than the debtor and the steps required to insure that the lien attains the highest possible priority against other interests in the encumbered property; see BLACK'S LAW DICTIONARY 1137 (6th ed. 1990).

³⁵ See KY. REV. STAT. ANN. §§ 376.010-.120 (Baldwin 1994), for a lien requiring public filing for perfection and § 376.290 for a lien requiring possession for perfection.

³⁶ *Leslie's Adm'x v. Branham*, 158 S.W.2d 949, 951 (Ky. 1942) (stating that "[c]laimants of liens under [§] 2487 [Kentucky Revised Statutes § 376.150] of our Statutes are relieved of filing the notices required in any other section . . ."); *Rockcastle*

Both possession and filing provide a public notice function so that the lack of either is a significant omission. The rationale for the lack of a possession requirement may stem from the fact that an employee typically does not have the authority to take possession of the property of the business. Omitting any filing requirement implies a legislative intent to insure existence of the lien in favor of the employee. The purpose of the statute was eloquently stated by the Kentucky Court of Appeals.

The statute is based upon a well-recognized policy, which is written into the statutes of many states and of the federal government, and that is to protect the wage earner in many forms of public endeavor who is necessarily dependent upon his daily labor for the sustenance and the support of himself and family, and particularly in such forms as are recognized to be primarily for the benefit of the public good.³⁷

However, there is a limitation of action provision that affects enforcement of the lien. Section 376.190 of the Kentucky Revised Statutes provides a statute of limitations for enforcing the lien. "Action to enforce the lien shall be filed within sixty days from the date of the assignment, or from the date when the property goes into the hands of a receiver or trustee, or from the date when the business is stopped, suspended or sold"³⁸

Thus, to enforce the lien an employee need only file an action in court within the proper time. The Kentucky cases have consistently held that enforcement of the lien depends upon the filing of an action within the sixty-day period.³⁹

Lumber Co. v. Burns, 194 S.W. 95, 100 (Ky. 1917) ("It is true that in order to perfect this character of lien no notice need be filed with the county court clerk"); *Gugenheim v. Watkins*, 181 S.W. 357, 359 (Ky. 1916) ("It was therefore not necessary for appellees to have filed statements with the county clerk to protect their liens").

³⁷ *Turner v. Randolph*, 280 S.W. 462, 463 (Ky. 1926) (holding that employees' liens for wages due within six months before a corporation's property is distributed to creditors are superior to vendor's lien).

³⁸ KY. REV. STAT. ANN. § 376.190 (Baldwin 1994).

³⁹ *International Harvester Co. v. Dyer's Adm'r*, 178 S.W.2d 966, 968 (Ky. 1944) (holding that mine workers have a lien for wages since they filed their claims within 60 days); *McClone v. Smith*, 168 S.W.2d 566, 568 (Ky. 1943) (holding that no superior lien was acquired when claim was filed four months after business was suspended); *Freeman v. Craft*, 294 S.W. 822, 826-28 (Ky. 1927) (holding that when a wage claim is filed one day late it is error to give it priority over a mortgage lien). *But see In re Falls City Shirt Mfg. Co.*, 98 F. 592, 595-96 (D. Ky. 1899) (applying the bankruptcy law period for filing claims to the wage lien). *Contra Rockcastle Lumber Co.*, 194 S.W. at 100 (holding that appointment of creditor's committee does not excuse lien claimant from taking necessary

When the lien is activated by certain events, there is an alternate method of enforcing it. Section 376.190 allows a party to file the action in the sixty-day period, or timely file the "claims for which a lien is asserted. . . . with the person authorized to receive and report claims."⁴⁰ When the event activating the employees' lien is an assignment for benefit of creditors,⁴¹ the appointment of a receiver,⁴² or a federal bankruptcy, a person to receive claims against the debtor will exist. In such cases a party may enforce the lien by filing the claim with the proper person, or by instituting an action.⁴³ An employee need not do both.⁴⁴

Because the priority given the lien is dependent upon compliance with the statute's time requisites, claimants of the lien must take care to comply. The Kentucky courts agree that failure to conform to the statute's time limitations results in loss of priority.⁴⁵

Two distinct priorities are awarded the employees' lien. Section 376.160 of the Kentucky Revised Statutes makes the lien superior to the lien of any mortgage or encumbrance "thereafter created."⁴⁶ This priority comports with the typical "first in time, first in right" priority. Under the statute's grant, the employees' lien which arises, for instance, upon suspension of the business, is superior to any mortgage or encumbrance arising after the suspension of the business.⁴⁷

The second grant of priority provided by section 376.160 is more like a super priority; pursuant to it the employees' lien is awarded priority over any mortgage or encumbrance, "*theretofore* or thereafter created."⁴⁸ However, this priority, unlike the aforementioned priority, is not given for the "whole amount due the employees."⁴⁹ It is limited to a lien for

steps to perfect his lien).

⁴⁰ KY. REV. STAT. ANN. § 376.190 (Baldwin 1994).

⁴¹ *Id.* §§ 379.010-.170.

⁴² *Id.* § 425.600.

⁴³ In the situation of a federal bankruptcy proceeding, the ability to take action to enforce the lien after commencement of the bankruptcy proceeding depends upon obtaining relief from the automatic stay. 11 U.S.C. § 362(1) (1993).

⁴⁴ KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

⁴⁵ *Freeman v. Craft*, 294 S.W. 822, 826-28 (Ky. 1927); *Rockcastle Lumber Co. v. Burns*, 194 S.W. 95, 100 (Ky. 1917); *Gugenheim v. Watkins*, 181 S.W. 357, 359 (Ky. 1916).

⁴⁶ KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

⁴⁷ *Id.*

⁴⁸ *Id.* (emphasis added).

⁴⁹ *Id.*

wages owed the employee within the six months preceding the event which activates the lien.⁵⁰

To illustrate these priorities, consider the following example. Suppose a sales associate of a manufacturing company is paid a salary plus a monthly commission. For each of the past seven months the associate earned \$600 in commission. However, the associate has not been paid any commission for the last seven months. One year ago, the company granted the bank a security interest in its inventory. A labor strike now forces the company to suspend its operations. After the business suspension, the company grants a security interest in its inventory to a supplier of raw materials used in manufacturing its goods. Pursuant to the statutory scheme of priority, the sales associate would have a lien superior to both secured creditors for the sales commission earned in the previous six months. Regarding the commission earned in the preceding seventh month, the lien is superior only to the subsequent security interest — the security interest of the supplier of raw materials. The lien for the seventh month's commission is subordinate to the bank, a secured creditor whose interest antedates the employees' lien. Kentucky cases considering the priority of the employees' lien have consistently upheld the statutory grant of superiority⁵¹ and super priority against an attack that it resulted in an unconstitutional impairment of a contractual obligation.⁵²

II. PRIORITY BETWEEN THE LIEN AND AN ARTICLE NINE SECURITY INTEREST

The preceding example raises the next issue for discussion: Is the statutory priority scheme of the employees' lien operative against a security interest created pursuant to Article Nine of the U.C.C.? The Kentucky General Assembly originally passed the employee lien statute on March 20, 1876.⁵³ From its earliest adoption, the lien was awarded superiority over mortgages and other encumbrances whether they were created before or after the lien arose.⁵⁴ Although the lien statute has

⁵⁰ *Id.*

⁵¹ *International Harvester Co. v. Dyer's Adm'r*, 178 S.W.2d 966, 969 (Ky. 1944); *Leslie's Adm'x v. Branham*, 158 S.W.2d 949, 951 (Ky. 1942); *Gugenheim v. Watkins*, 181 S.W. 357, 360 (Ky. 1916).

⁵² *Turner v. Randolph*, 280 S.W. 462, 463 (Ky. 1926).

⁵³ JOURNAL OF THE REGULAR SESSION OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF KENTUCKY 1393 (1875-76).

⁵⁴ "The said lien shall be superior to the lien of any mortgage or other encumbrance

been amended over the years, the lien's superiority over antecedent encumbrances has remained intact.⁵⁵ Furthermore, the legislature has not amended the statutory priority scheme since the adoption of the U.C.C. Two arguments can be made regarding priority between the lien and the security interest: One can argue that the priority scheme of the lien statute should be followed; or one can argue that the priority scheme of Article Nine of the U.C.C. should be followed.

This article previously discussed the priority awarded the lien by section 376.160 of the Kentucky Revised Statutes.⁵⁶ Pursuant to that statute, the employees' lien is "superior to the lien of any mortgage or other encumbrance"⁵⁷ If the priority accorded to the lien by that section is to operate against an Article Nine security interest, a security interest must be considered to be a "lien of any mortgage or other encumbrance."⁵⁸ No Kentucky cases have considered the question, so the answer must be found by examining the definitions of "lien" and "security interest."

The U.C.C. defines a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation."⁵⁹ The essence of the security interest is that it gives the secured creditor a property-like interest in the debtor's personal property which the secured creditor can use to satisfy the debtor's obligation.⁶⁰ The secured creditor does not obtain title to the property,⁶¹ but only the right to dispose of the property to satisfy the obligation.⁶²

Neither the employees' lien statute, the U.C.C., nor any other Kentucky statute defines "lien." Kentucky case law has defined lien as "a charge upon [property]. It is a right which the law gives to have a debt satisfied out of the property"⁶³ Surely a security interest fulfills that definition. A security interest is an interest in property, which can be deemed a "charge" upon property, and its function is to satisfy a debt out

heretofore or hereafter created, and shall be for the whole amount due such employes as such, or due for such materials or supplies" KY. GEN. STAT. ch. 70, § 2, at 983 (Bullitt & Feland 1881).

⁵⁵ See KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

⁵⁶ See *supra* notes 46-52 and accompanying text.

⁵⁷ KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

⁵⁸ *Id.*

⁵⁹ *Id.* § 355.1-201(37).

⁶⁰ *Id.* § 355.9-504.

⁶¹ *Id.* § 355.1-201(37).

⁶² U.C.C. § 9-504(1) (1994).

⁶³ *Bruner v. Home for the Aged of the Little Sisters of the Poor*, 429 S.W.2d 381, 382-83 (Ky. 1968) (defining "lien").

of the property so charged.⁶⁴ Therefore, one can conclude that the concept of lien includes a security interest.

Building upon that conclusion, the security interest is seemingly subordinate to the employees' lien whenever the statutory basis for superiority is satisfied. When the lien antedates the security interest, section 376.160 awards the lien priority over the security interest "for the whole amount due the employes . . ."⁶⁵ When the security interest antedates the employees' lien, section 376.160 awards the lien priority "for wages coming due to them within six months before"⁶⁶ the occurrence of the event that activates the lien. A literal application of the statutory priority scheme results in the superiority of the lien over the U.C.C. Article Nine security interest in the designated factual situations.

The manifest intent of the statute also supports the superiority of the lien over the security interest. The legislature clearly awarded the lien priority over mortgages and other encumbrances.⁶⁷ Although the precise meaning of "other encumbrances" is not definite, the concept of "mortgages" is more certain. A mortgage conventionally is considered to be a contractual relationship in a consensual transaction where a debtor grants a creditor an interest in property to secure a debt.⁶⁸ Of course, the legislature did not enact the priority provisions of the employees' lien with the Article Nine security interest in mind. However, a security interest arises in a transaction highly similar to that of a mortgage. It also arises in a consensual transaction in which an interest in property (personal property or fixtures) is granted to secure a debt.⁶⁹ Since a security interest is virtually identical to a mortgage, application of the statutory priority scheme against a security interest comports with the intent of the legislature to subordinate other encumbrances to the lien.

⁶⁴ KY. REV. STAT. ANN. § 355.1-201(37) (Baldwin 1994).

⁶⁵ *Id.* § 376.160.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *Watt's Adm'r v. Smith*, 63 S.W.2d 796, 800 (Ky. 1933) ("[A] mortgage creates only a lien on real estate in favor of the mortgagee, the legal title being left in the mortgagor . . . [A] mortgage is a mere security for debt."); *Smith v. Berry*, 181 S.W. 379, 382 (Ky. 1916) (holding that a mortgage is a mere lien or security for the payment of money and does not convey any title to the mortgagee); *Cumber & Pearce v. Chandler*, 5 Ky. L. Rptr. 185, 185 (Ky. 1883) ("[M]ortgage conveys the legal title simply as a pledge for the mortgage debt, but confers on the mortgagee none of the rights of ownership."); BLACK'S LAW DICTIONARY 1009 (6th ed. 1990) ("A mortgage is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt.").

⁶⁹ U.C.C. § 9-102(1)(a) & cmts. (1994).

Although there have been no reported Kentucky decisions addressing the priority between an employees' lien and a security interest, several cases have addressed the priority of the lien against a chattel mortgage. *Leslie's Administratrix v. Branham*,⁷⁰ *McGlone v. Smith*,⁷¹ and *International Harvester Co. v. Dyer's Administrator*,⁷² all involved a conflict where the debtor had granted a "mortgage" in items of personal property, i.e., a chattel mortgage, to the creditor. In each of those cases the court applied the statutory priority scheme of the employees' lien without discussing whether the scheme was applicable against chattel mortgages.⁷³ Thus, it appears that courts have routinely applied the statute to other encumbrances, as if they too were "liens".

Although construction of employees' lien statutes leads to the conclusion that the lien is superior to the security interest, the U.C.C. must be examined to determine whether its provisions affect such a conclusion. Thus, the inquiry becomes whether the U.C.C. displaces the priority scheme of the employees' lien statutes.

Article One, the General Provisions article of the U.C.C., provides general interpretation provisions to be used in construction of the other articles.⁷⁴ Section 1-103 provides that the principles of law and equity shall supplement the provisions of the U.C.C., "[u]nless displaced by the particular provisions of this Chapter [of the U.C.C.] . . ."⁷⁵ In this initial pronouncement, the U.C.C. is receptive to the application of the employees' lien and its priority scheme against a security interest.

The next inquiry is into the provisions of Article Nine, the Secured Transactions article. Three sections of Article Nine impact this issue: 9-102, 9-104 and 9-310. Section 9-102 is entitled "Policy and Subject Matter of Article." Subsection (2) of 9-102 provides that Article Nine "does not apply to statutory liens except as provided in Section 9-310."⁷⁶ That exclusion is not surprising given that the purpose of the section is "to bring all consensual security interests in personal property and fixtures under this Article . . ."⁷⁷ Statutory liens, including the employees' lien, are not consensual, and thus they are not within Article

⁷⁰ 158 S.W.2d 949 (Ky. 1942).

⁷¹ 168 S.W.2d 566 (Ky. 1943).

⁷² 178 S.W.2d 966 (Ky. 1944).

⁷³ *International Harvester Co.*, 178 S.W.2d at 968; *McGlone v. Smith*, 168 S.W.2d 566, 568 (Ky. 1943); *Leslie's Adm'x*, 158 S.W.2d at 950-51.

⁷⁴ U.C.C. § 1-102 (1994).

⁷⁵ KY. REV. STAT. ANN. § 355.1-103 (Baldwin 1994).

⁷⁶ U.C.C. § 9-102(2) (1994).

⁷⁷ *Id.* § 9-102 cmt. 1.

Nine.⁷⁸ Section 9-104 is entitled "Transactions Excluded From Article." It includes a list of transactions to which Article Nine does not apply.⁷⁹ Subsection (c) of 9-104 excludes from Article Nine "a lien given by statute or other rule of law for services or materials except as provided in section 9-310 on priority of such liens."⁸⁰ According to this provision, a lien given for services or materials created either by statute or case law is excluded from Article Nine. According to the Official Comment, the drafters of Article Nine believed it was unnecessary and inappropriate for Article Nine to encompass those liens because of their connection to local conditions and their distance from commercial financing.⁸¹ One could argue that the employees' lien is a lien awarded for "services," and thus it is excluded from Article Nine. If application of these U.C.C. sections results in exclusion of the lien from Article Nine, then the priority scheme of the wage lien should operate to award the lien priority over a security interest. However, both sections 9-102 and 9-104 exclude liens except as provided in section 9-310.⁸² Moreover, the comment to section 9-104 provides that although section 9-104(c) excludes statutory liens from the article, "[s]ection 9-310 states a rule for determining priorities between such liens and the consensual security interests covered by this Article."⁸³ That statement indicates that although Article Nine does not govern the creation of statutory liens, it may govern their priority. Thus, one must explore the meaning of section 9-310.

Section 9-310, entitled "Priority of Certain Liens Arising by Operation of Law," provides as follows:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.⁸⁴

It is clear that the scope of the section is over liens awarded for services or materials. Its function is to resolve priority conflicts between

⁷⁸ *Id.* § 9-102(2).

⁷⁹ *Id.* § 9-104.

⁸⁰ *Id.* § 9-104(c).

⁸¹ *Id.* § 9-104 cmt. 3.

⁸² *Id.* §§ 9-102(2), 9-104(c).

⁸³ *Id.* § 9-104 cmt. 3.

⁸⁴ *Id.* § 9-310.

a lien and a security interest, and it does so only when the security interest antedates the lien.⁸⁵ Furnishing services or materials to "goods subject to a security interest"⁸⁶ indicates the presence of a security interest at the time the services are furnished. Beyond that, several questions are raised regarding the application of section 9-310's priority rule to the employees' lien. Does an employee who claims a lien pursuant to section 376.150 furnish "services" to goods? In a broad sense, one can argue that every employee furthers the business of the company, and when that business involves goods, every employee furnishes services to goods. An employee who works in the manufacturing phase of a business is arguably within the scope of section 9-310. But does, for instance, a clerical worker, a personnel manager, or a custodian furnish services to goods? The comment to section 9-310 indicates that the section's purpose is to award priority to liens arising from work "intended to enhance or preserve the value of the collateral"⁸⁷ Whether such employees' work enhances or preserves the value of the collateral is questionable. Furthermore, even a manufacturing employee does not actually "enhance or preserve" the collateral; such an employee produces the collateral. The lien is also available to employees who work in nonmanufacturing businesses.⁸⁸ It is illogical to conclude that such employees furnish services to goods. The priority conflict resolved by section 9-310 involves liens of persons who preserve or enhance the value of the collateral.⁸⁹ The employees' lien covers all employees of a business.⁹⁰ Accordingly, it does not seem to be a lien within the scope of section 9-310.

If, however, an employee is deemed to furnish services or materials to the collateral so that its lien is within the scope of section 9-310, the secured creditor now plays its trump card. Section 9-310 awards priority to a lien given "upon goods in the possession of such person"⁹¹ The secured creditor would argue that unless the employee is in possession of the goods, the lien does not have priority over the security interest.

Whether that contention is accurate depends upon how the possession requirement of section 9-310 is construed.⁹² Is the lienholder's posses-

⁸⁵ *Id.* § 9-310 cmt. 1.

⁸⁶ *Id.* § 9-310.

⁸⁷ *Id.* § 9-310 cmt. 1.

⁸⁸ See 9 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-310:02 (1993).

⁸⁹ *Id.*

⁹⁰ See KY. REV. STAT. ANN. §§ 376.150-.160 (Baldwin 1994).

⁹¹ U.C.C. § 9-310 (1994).

⁹² See 9 HAWKLAND ET AL., *supra* note 88, at § 9-310:02.

sion of the goods a requirement for priority, or is it a requirement for activation of section 9-310? If possession is required for priority over the security interest, it is likely that the employees' lien will be subordinate because it is unlikely that the employees will have possession of the goods subject to the security interest. If the possession requirement is viewed as a condition to the activation of section 9-310, then the section does not apply to liens which are deemed nonpossessory liens — liens which do not require possession of the encumbered property to be effective.⁹³ If section 9-310 is not applicable, then resolution of the priority conflict between the lien and the security interest is governed by the Kentucky employees' lien statutes.⁹⁴ As discussed above, that law awards the lien superiority.⁹⁵

Some cases addressing the issue have concluded that possession of the liened goods is required for priority, but others have concluded that nonpossessory liens are not within the scope of section 9-310. *Forrest Cate Ford, Inc. v. Fryar* represents the view that possession is required.⁹⁶ In *Forrest*, the lienholder repaired several vehicles owned by Fryar, but it did not retain possession of the vehicles.⁹⁷ Pursuant to the Tennessee statutes, possession was not a requirement for effectiveness of the lien.⁹⁸ Without discussing whether section 9-310 was applicable to a lien not requiring possession, the court decided that the priority between the lien and a security interest "must be decided based upon an interpretation of [section 9-310]."⁹⁹ An examination of the statute led the court to find that:

[t]he wordage of the statute, given its clear meaning and full import, limited this priority to those liens upon "goods in the possession of" the artisan or repairman We conclude that the plain import of [section 9-310] is the repairman must retain possession of the vehicle repaired in order to maintain the priority of his statutory lien . . . over that of a previously perfected security interest in the same vehicle.¹⁰⁰

⁹³ *Id.*

⁹⁴ KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

⁹⁵ See *supra* notes 63-69 and accompanying text.

⁹⁶ 465 S.W.2d 882 (Tenn. Ct. App. 1970).

⁹⁷ *Id.* at 882.

⁹⁸ *Id.* at 883.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 884.

However, the majority of cases considering the issue have disagreed with the conclusion that section 9-310 is applicable to nonpossessory liens.¹⁰¹ *Brazier Forest Industries, Inc. v. Northern Transport, Inc.*¹⁰² typifies such opinions. *Brazier* involved a conflict between a security interest and statutory loggers and stumpage liens.¹⁰³ The effectiveness of the liens was not dependent upon possession of the encumbered goods by the lienholders.¹⁰⁴ Accordingly, the lienholders argued that pursuant to sections 9-102(2), 9-104(c) and 9-310, Article Nine did not govern the conflict.¹⁰⁵ However, the secured party argued that pursuant to section 9-310 only a lienholder in possession of the goods is superior to the security interest.¹⁰⁶ Relying on the Washington Bar Association desk-book statement that a nonpossessory lien is not affected by section 9-310, and decisions in other jurisdictions, the court held that "nonpossessory liens are outside the scope of section 9-310"¹⁰⁷ The court's interpretation was based on the belief that such construction "is more reasonable than inferring from the provision [section 9-310] that all nonpossessory liens are subordinate to perfected security interests."¹⁰⁸

Secured creditors have argued that the negative implication of section 9-310 is that if a lien is not within the scope of section 9-310, then it is subordinate to the security interest.¹⁰⁹ Their contention is based on a

¹⁰¹ *First Md. Leasecorp v. M/V Golden Egret*, 764 F.2d 749, 754 (11th Cir. 1985) (holding that Article Nine does not establish a system of priorities for nonpossessory statutory liens); *Ameritrust Nat'l Bank v. Domore Corp.*, 147 B.R. 473, 477 (Bankr. N.D. Ind. 1992) (holding that Article Nine only covers priority of possessory nonconsensual liens); *Smith v. Atlantic Boat Builder Co.*, 356 So. 2d 359, 364 (Fla. Dist. Ct. App. 1978) (holding that Article Nine does not apply to nonpossessory liens); *Church Bros. Body Serv., Inc. v. Merchants Nat'l Bank & Trust Co.*, 559 N.E.2d 328, 330 (Ind. Ct. App. 1990) (quoting *In re Brazier Forest Prods., Inc.*, 724 P.2d 970, 976-78 (Wash. 1986) (holding that nonpossessory liens are outside the scope of Article Nine)); *Leger Mill Co., Inc. v. Kleen-Leen, Inc.*, 563 P.2d 132, 136 (Okla. 1977) (holding the Uniform Commercial Code totally inapplicable to nonpossessory liens); *Brazier Forest Indus., Inc. v. Northern Transp., Inc.*, 724 P.2d 970, 978 (Wash. 1986) (holding that nonpossessory liens are outside scope of Article Nine). Several commentators agree that § 9-310 is not applicable to nonpossessory liens. See, e.g., 8 HAWKLAND ET AL., *supra* note 88, § 9-104:04; Gerald F. Hess, *Priority Conflicts Between Security Interest and Washington Statutory Liens for Services or Materials*, 25 GONZ. L. REV. 453 (1990).

¹⁰² 724 P.2d 970 (Wash. 1986).

¹⁰³ *Id.* at 973.

¹⁰⁴ *Id.* at 977.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 978.

¹⁰⁸ *Id.*

¹⁰⁹ In *First Maryland Leasecorp*, several creditors argued that, because nonpossessory

construction of Article Nine that a statutory lien is superior to a security interest only if the lien is within the scope of section 9-310 and satisfies the section's requirements.¹¹⁰ Pursuant to that construction, if nonpossessory liens are not within the scope of section 9-310, they will be inferior to security interests.¹¹¹ This argument fails to consider sections 9-102(2) and 9-104(c). If section 9-310 was the only Article Nine provision addressing the issue, one might concede that a failure to fulfill its criteria results in subordination of the lien. However, sections 9-102 and 9-104 indicate the drafters' intent to exclude statutory liens from the coverage of Article Nine, except to the extent that section 9-310 provides for liens for services and materials.¹¹² Thus, to conclude that a lien either is within the scope of section 9-310 or is inferior to a security interest does not consider all the relevant provisions of Article Nine.

Admittedly, there is nothing in the text of section 9-310 that prohibits a construction that the lien given priority in section 9-310 is a lien for services or materials on goods "in the possession" of the person who furnished the same. In fact, that is exactly what the words of section 9-310 provide.¹¹³ Moreover, there is no section in Article Nine which provides that the priority of nonpossessory liens is governed by other law. However, construing section 9-310 as requiring possession for priority in the cases of both possessory and nonpossessory liens also ignores other construction tools and the policy behind many statutory liens. Section 9-310's title indicates that not all liens come within its scope. Section 9-310 is entitled "Priority of *Certain Liens* Arising by Operation of Law."¹¹⁴ The drafter's use of "Certain Liens" allows for an interpretation that the scope of the section is not over all statutory liens. As noted above, sections 9-102 and 9-104 also indicate that some liens are not within the scope of Article Nine. Subordinating all nonpossessory liens may also contravene the policy behind statutory liens. It is entirely possible that state legislatures, in creating statutory liens, intended that the liens would be superior to all other encumbrances. Many such liens are explicitly

liens are excluded, the intent of the Code is to make them inferior to a secured interest. 764 F.2d 749, 755 (11th Cir. 1985); In *Leger Mill Co., Inc.*, the creditor also argued that the intent of the Code was to make nonpossessory liens inferior to a secured interest. 563 P.2d 132, 135 (Okla. 1977).

¹¹⁰ *First Md. Leasecorp*, 764 F.2d at 755.

¹¹¹ *Id.* at 755-56.

¹¹² See *supra* note 76 and accompanying text.

¹¹³ "[A] lien upon goods in the possession of such person . . . takes priority over a perfected security interest . . ." U.C.C. § 9-310 (1994).

¹¹⁴ *Id.* (emphasis added).

superior to other interests.¹¹⁵ As the court in *Brazier Forest Industries* noted, interpreting section 9-310 as inapplicable to nonpossessory liens "is more reasonable than inferring from the provision [section 9-310] that all nonpossessory liens are subordinate to perfected security interests."¹¹⁶ This interpretation is more reasonable because of Article Nine's policy of excluding statutory liens and because of the massive subordination of liens that would occur if nonpossessory liens were governed by section 9-310.

The foregoing analysis indicates that holders of Kentucky's employees' liens have two grounds upon which to base an argument that it is not subject to the priority scheme of section 9-310. First, an employee can argue that he or she does not furnish services and materials to goods. Section 9-310 covers only liens given to providers of services or materials; thus, such employees are not within the scope of the section. Second, a holder of the lien can argue that nonpossessory liens are not within the section's scope. The priority scheme of the section is activated when a statutory lien, whose requirements include possession, conflicts with a security interest. The employees' lien does not require possession for effectiveness against the property, and thus it is not within section 9-310's scope.

A Kentucky decision arguably supports the construction that section 9-310 creates a priority scheme that determines priority of nonpossessory as well as possessory liens. Of course, under such a construction, the Kentucky employees' lien would be subordinate to the security interest. In *ITT Commercial Finance Corp. v. Madisonville Recapping Co.*, a repair company performed repairs and supplied tires to equipment subject to a purchase money security interest.¹¹⁷ When the owner failed to pay for the services and goods, Madisonville Recapping claimed a lien on the equipment pursuant to section 376.440 of the Kentucky Revised Statutes.¹¹⁸ The effectiveness of that statutory lien is not dependent upon the lienholder's retention of possession of the goods, and Madisonville Recapping did not have possession.¹¹⁹ In fact, due to the nature of

¹¹⁵ See, e.g., ALA. CODE § 35-11-60 (1991) (giving watercraft lien priority over other liens); COLO. REV. STAT. ANN. § 38-20-102(1)(a) (West 1987) (agistor's lien is superior to all other liens); IND. CODE ANN. § 32-8-24-2 (Burns 1980) (employees' lien superior to all liens except those filed of record 60 days before employees' lien); WASH. REV. CODE ANN. § 60.24.038 (West 1990) (giving logger's lien priority over other liens).

¹¹⁶ *Brazier Forest Indus., Inc. v. Northern Transp., Inc.*, 724 P.2d 970, 978 (Wash. 1986).

¹¹⁷ 793 S.W.2d 849, 850 (Ky. Ct. App. 1990).

¹¹⁸ *Id.* at 850.

¹¹⁹ *Id.*

the goods, mining equipment, the services were performed on the debtor's premises.¹²⁰ Among the issues addressed by the court were whether the lien was superior to the security interest pursuant to section 9-310.¹²¹ Employing the words of section 9-310, the secured creditor argued that a lien is superior only as to goods in possession of a lienholder, and accordingly, the lien is subordinate.¹²² The court noted that "courts have a duty to construe a statute literally unless to do so would lead to an absurd or wholly unreasonable conclusion."¹²³ It then found that "[r]equiring possession for [section] 355.9-310 [of the Kentucky Revised Statutes] to be effective would not lead to an absurd or wholly unreasonable result."¹²⁴ The lienholder argued that possession should not be required in cases, such as this, where the machinery was so large that repair on the owner's premises was necessary.¹²⁵ The court rejected that argument by noting "that the plain meaning of a statute cannot be ignored by the courts simply because another interpretation might be considered to state a better policy . . . [section] 355.9-310 [of the Kentucky Revised Statutes] is clear and unambiguous in its requirement of possession by the lienholder."¹²⁶

Although the court's decision supports the interpretation of section 9-310 that the lienholders' possession of the goods is required for superiority over security interests, it cannot be said that the issue is decided conclusively. There is no indication in the opinion that the lienholders argued that section 9-310 is not activated when the lien is not dependent upon possession. Consequently, the court did not consider such an argument. When that argument has been made, the majority of courts have held section 9-310 inapplicable.¹²⁷ It therefore seems reasonable that the Kentucky courts might reach the same result and award the non-possessory lien priority over the security interest. That is the proper construction.

III. BANKRUPTCY AND THE EMPLOYEES' LIEN

It takes little imagination to foresee that the employees' lien may attach when the company has filed a bankruptcy petition. Filing a

¹²⁰ *Id.*

¹²¹ *Id.* at 851.

¹²² *Id.*

¹²³ *Id.* at 852.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See *supra* note 101 and accompanying text.

bankruptcy petition is likely encompassed by section 376.150 in the words "assigned for the benefit of, or are to be distributed among creditors, whether by operation of law or by its own act . . . ,"¹²⁸ or the words "company . . . suspends . . . its business."¹²⁹ In these cases the issue of superiority over a secured creditor gives way to a more important issue: is the employees' lien effective in bankruptcy?

Employees of a business which has filed a bankruptcy petition would find the employees' lien attractive for several reasons. First, a claim against the debtor secured by a lien on property of the estate is a secured claim pursuant to § 506(a) of Title 11 of the United States Code ("Bankruptcy Code").¹³⁰ Secured claimholders are favored in the bankruptcy distribution process.¹³¹ Second, although wage claims are generally a priority claim under § 507(a)(3) of the Bankruptcy Code, that priority is limited to \$4000 per claimant and to claims for compensation earned within ninety days before the date of filing the petition in bankruptcy.¹³² The Kentucky employees' lien has no such limitations. Thus, assuming that the value of the business property equals or exceeds the amount of the lien, the lienholder fares better than a priority claim holder. Finally, when the value of the lien property exceeds the employees' claims, the employees, as holders of secured claims, are entitled to interest on their claims pursuant to § 506(b) of the Bankruptcy Code.¹³³

The validity of the lien in bankruptcy will depend upon whether it survives the trustee's power to avoid statutory liens.¹³⁴ Without question the employees' lien is a statutory lien.¹³⁵ Section 545 of the Bankruptcy

¹²⁸ KY. REV. STAT. ANN. § 376.150 (Baldwin 1994).

¹²⁹ *Id.* § 376.180.

¹³⁰ 11 U.S.C. § 506(a) (1988).

¹³¹ Generally, holders of secured claims in a Chapter Seven bankruptcy receive either the collateral or payment of the claim, or the security interest is unaffected by the bankruptcy. 11 U.S.C. §§ 363, 506, 524, 554, 722, 725 (1993). In Chapter 11 or 13 bankruptcies, the debtor generally must either propose full payment of the secured claim, obtain the secured claimholder's consent to the plan, provide the creditor with the equivalent of its secured claim, or sell the collateral and grant a security interest in the sale proceeds. *Id.* §§ 1123, 1124, 1129, 1325.

¹³² *Id.* § 507(a)(3).

¹³³ See *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (stating that the Bankruptcy Code authorizes the payment of interest on an oversecured claim).

¹³⁴ See *In re County Club Mkt.*, 162 B.R. 226, 231-32 (Bankr. D. Minn. 1993), *rev'd on other grounds*, 175 B.R. 1005 (D. Minn. 1994).

¹³⁵ "[S]tatutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such

Code authorizes the trustee to “avoid the fixing of a statutory lien on property of the debtor” in certain situations. A trustee may avoid a lien that:

- (1) first becomes effective against the debtor —
 - (A) when a case under this title concerning the debtor is commenced;
 - (B) when an insolvency proceeding other than under this title concerning the debtor is commenced;
 - (C) when a custodian is appointed or authorized to take or takes possession;
 - (D) when the debtor becomes insolvent;
 - (E) when the debtor’s financial condition fails to meet a specified standard; or
 - (F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;¹³⁶

Examining the statutory provisions of the Kentucky employees’ lien against the situations allowing avoidance by a trustee reveals that several of the events that activate the lien may also trigger the trustee’s avoidance power. Pursuant to section 376.150 of the Kentucky Revised Statutes, the lien arises when the property or effects of a business “are assigned for the benefit of, or are to be distributed among creditors, whether by operation of law or by its own act.”¹³⁷ An assignment for the benefit of creditors involves transferring property to a third person to liquidate it and distribute its proceeds, much like a Chapter Seven bankruptcy.¹³⁸ Consequently, a court is likely to find that those events come within the § 545(1) situations of “custodian . . . appointed or authorized to take . . . possession,”¹³⁹ or commencement of “an insolvency proceeding other than under this title”¹⁴⁰ The Kentucky employees’ lien also arises pursuant to section 376.180 of Kentucky Revised Statutes when the property of a company is taken in attachment or execution so that the

interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute

11 U.S.C. § 101(47) (1993).

¹³⁶ *Id.* § 545(1).

¹³⁷ KY. REV. STAT. ANN. § 376.150 (Baldwin 1994).

¹³⁸ *Id.* § 379.010.

¹³⁹ 11 U.S.C. § 545(1)(C) (1993).

¹⁴⁰ *Id.* § 545(1)(B).

business is stopped or suspended.¹⁴¹ A court could find that such an event is indistinguishable from § 545(1)(F)'s situation where a lien becomes effective upon "execution against property of the debtor"¹⁴² If a court concludes that the event activating the employees' lien comes within the situations enumerated in § 545(1), the trustee is able to avoid the lien. If the lien is avoided, the employees would have only the § 507 priority claim against the company.

However, there are events which activate the statutory lien that are not included in the § 545(1) situations. Pursuant to section 376.180 of the Kentucky Revised Statutes, the lien attaches when the company "suspends, sells or transfers its business."¹⁴³ Those events alone do not trigger the operation of § 545(1).¹⁴⁴ If the employees' lien is effective in bankruptcy, the employees' claim would be classified as a secured claim.¹⁴⁵ As holders of secured claims, employees would achieve the preferred status discussed previously.¹⁴⁶

The nonapplicability of § 545(1) does not end the bankruptcy trustee's scrutiny; the employee's lien might yet be avoided under § 545(2). Pursuant to § 545(2), the trustee may avoid the fixing of a statutory lien to the extent that the lien "is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists"¹⁴⁷ Section 545(2) equips the trustee, as of the commencement of the case, with the rights of a hypothetical bona fide purchaser of property.¹⁴⁸ The trustee's exercise of those rights may allow it to avoid the employees' lien. For purposes of this Article, the operative words of § 545(2)'s test of whether the trustee can avoid the statutory lien are, "the trustee may avoid . . . a statutory lien . . . to the extent that such lien . . . is not perfected or enforceable . . . against a bona fide purchaser"¹⁴⁹ These words create a test that allows a trustee to nullify a statutory lien if it is not perfected or enforceable against a bona fide purchaser. However, if the

¹⁴¹ KY. REV. STAT. ANN. § 376.180 (Baldwin 1994).

¹⁴² 11 U.S.C. § 545(1)(F) (1993).

¹⁴³ KY. REV. STAT. ANN. § 376.180 (Baldwin 1994).

¹⁴⁴ See 11 U.S.C. § 545(1) (1993).

¹⁴⁵ S. REP. NO. 989, 95th Cong., 2d Sess. 85 (1978).

¹⁴⁶ See *supra* note 131 and accompanying text.

¹⁴⁷ 11 U.S.C. § 545(2) (1993).

¹⁴⁸ "Hypothetical" because the right is given "whether or not such a purchaser exists."

Id.

¹⁴⁹ *Id.* § 545.

statutory lien is perfected or enforceable against a bona fide purchaser, the trustee cannot avoid it.¹⁵⁰

Because "perfected" has a generally accepted meaning to be discussed,¹⁵¹ this discussion initially focus on the function of the phrase "or enforceable . . . against a bona fide purchaser." Does it 1) qualify or explain "perfected"; 2) create a separate method of preventing avoidance; or 3) merely give an example of the effect of "perfected?" If the phrase qualifies or explains perfected, then perfected can be defined as the state of being enforceable against a bona fide purchaser. Accordingly, if the lien is so enforceable, it is perfected and cannot be avoided.¹⁵² If the phrase creates a separate test of preventing avoidance by the trustee, then the statutory lien survives in bankruptcy if it is perfected or if it is enforceable against a bona fide purchaser. If the phrase merely gives an example of the effect of perfected, then to prevent avoidance the lien must be perfected.

The history of § 545 of the Bankruptcy Code may aid in the construction of the "enforceable" phrase. Unfortunately, scant congressional history regarding § 545 of the Bankruptcy Code exists. What does exist indicates that § 545 was derived from § 67b and 67c of the Bankruptcy Act of 1898.¹⁵³ The words of § 545(2) are virtually identical to the words of § 67c(1)(B) of the Bankruptcy Act.¹⁵⁴ Moreover, there are no congressional statements that indicate any intent to change the law from the construction given § 67b and 67c.¹⁵⁵ Consequently, it

¹⁵⁰ *Id.* § 545(2).

¹⁵¹ See *infra* notes 156-77 and accompanying text.

¹⁵² See *In re Allgeier & Dyer, Inc.*, 18 B.R. 82, 86-87 (Bankr. W.D. Ky. 1992) (stating that a statutory lien is only valid as against a bankruptcy trustee if it is perfected or enforceable against a bona fide purchaser).

¹⁵³ "It [§ 545] is derived from subsections 67b and 67c of present law." S. REP. NO. 989, 95th Cong., 2d Sess. 85 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5871; *accord* H.R. REP. NO. 595, 95th Cong., 1st Sess., 371 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6327.

¹⁵⁴ The following liens shall be invalid against the trustee:

[E]very statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists

11 U.S.C. § 107(c)(1)(B) (1976) (formerly § 67c(1)(B) of the Bankruptcy Act of 1898).

¹⁵⁵ The Commission on the Bankruptcy Laws of the United States intended to substantially alter the Bankruptcy Act's treatment of statutory liens. It recommended a section that voided a statutory lien unless it was "perfected as a matter of public record . . . or . . . notice of the lien is given to the trustee within 30 days of actual knowledge by the lien claimant of the filing of the petition." REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 2, at 165 (1973). Obviously, Congress did not adopt the Commission's recommenda-

is logical to give § 545 of the Bankruptcy Code the same construction given § 67b and 67c of the Bankruptcy Act.

Commentators have construed the enforceability phrase of § 67c(1)(B) as qualifying "perfected."

It is clear . . . that the enforceability of the statutory lien depends upon its state of perfection as of the date the petition is filed. *Have the necessary steps been taken, by that date, to make the lien enforceable against a bona fide purchaser?* That is the question to determine its validity.¹⁵⁶

Courts have applied a bona fide purchaser test to determine whether the lien is effective in bankruptcy.¹⁵⁷ If a statutory lien is enforceable against a bona fide purchaser, then, in essence, it is perfected and is not avoidable by the trustee.¹⁵⁸ Accordingly, the "enforceable" phrase of § 545(2) of the Bankruptcy Code could be construed as qualifying the meaning of "perfected."

Notwithstanding the apparent congressional intent and the prior construction of § 67c(1)(B), courts construing § 545(2) of the Bankruptcy Code generally have viewed the phrase as creating either a separate test of preventing avoidance or as an example of the effect of a perfected lien. *In re Loretto Winery Ltd.*, is illustrative of cases which view the phrase as a separate test of preventing avoidance.¹⁵⁹ In that case the

tion.

¹⁵⁶ 4 JAMES W. MOORE ET AL., COLLIER ON BANKRUPTCY 422-23 (14th ed. 1978) (emphasis added).

¹⁵⁷ *In re Mission Marine Assoc., Inc.*, 633 F.2d 678, 680-81 (3d Cir. 1980) ("[A]ppellants rely on [§] 67(c)(1)(B) of the Bankruptcy Act, which invalidates, against a trustee in bankruptcy, statutory liens which would on the date of bankruptcy be invalid against a bona fide purchaser from the debtor."); *Limperis v. First Nat'l Bank (In re Phillips Constr. Co.)*, 579 F.2d 431, 432 (7th Cir. 1978) ("Under the Federal Bankruptcy Act, whether a statutory lien is valid against the trustee depends upon whether the lien is enforceable against a bona fide purchaser, according to state law, on the date the bankruptcy petition is filed."); *In re Trahan*, 283 F. Supp. 620, 624 (W.D. La.) ("A statutory lien will [not be recognized] . . . when . . . it would not be enforceable against a bona fide purchaser . . . on the date of bankruptcy."), *aff'd*, 402 F.2d 796 (5th Cir. 1968), *cert. denied sub nom. Bernard v. Beneficial Finance Co.*, 394 U.S. 930 (1969).

¹⁵⁸ See *In re Mission Marine Assoc., Inc.*, 633 F.2d at 682.

¹⁵⁹ 898 F.2d 715 (9th Cir. 1990). Other courts employing a separate enforceable test include *Borg-Warner Acceptance Corp. v. Tape City, U.S.A., Inc. (In re Tape City U.S.A., Inc.)*, 677 F.2d 401, 403 (5th Cir. 1982) ("For the purposes of testing statutory liens under this provision (§ 545(2)), the trustee is thus given the status of a hypothetical bona fide purchaser . . ." (quoting 4 MOORE ET AL., *supra* note 156, at 545)); *Stern v. Munroe (In re Stern)*, 44 B.R. 15, 19 (Bankr. D.C. Mass. 1984) ("[I]t is my conclusion

Ninth Circuit considered the avoidance under § 545(2) of a producer's lien created by California statute.¹⁶⁰ Like the Kentucky employees' lien, the California lien attached upon the occurrence of a particular event and contained no perfection requirements.¹⁶¹ Although the lien was not perfected in the sense of "notice to the public," the court nevertheless chose to analyze the avoidance question by determining the lien's validity against a bona fide purchaser according to the laws of California.¹⁶² The court found such an inquiry to be in accord with the scheme of the Bankruptcy Code.

Because, under the scheme of the Bankruptcy Code, a statutory lien's validity against a bona fide purchaser is determined under state law, we conclude that the proper inquiry is whether the particular lien is good against a bona fide purchaser under the laws of the state, California in this case.¹⁶³

Examining the lien statute and its policy, the court found that the lien would be valid against a bona fide purchaser.¹⁶⁴ Consequently, avoidance of the lien was not permitted.¹⁶⁵ This case evidences a construction of § 545(2) wherein a statutory lien escapes avoidance, whether or not it is perfected, if it is enforceable against a bona fide purchaser. Such a construction recognizes the "enforceable" phrase as a separate test for preserving a statutory lien.

Other cases seem to have applied the § 545(2) phrase in a manner that makes it merely an example of the effect of a perfected statutory lien. Such cases, in essence, require perfection of the lien to prevent avoidance.¹⁶⁶ To these courts, if the lien is perfected it also will be

that the lien . . . would be enforceable against a hypothetical bona fide purchaser as of the date of the filing of the bankruptcy petition, and, therefore, is not voidable under [§] 545(2)"); *Leach v. Connecticut (In re Leach)*, 15 B.R. 1005, 1009-10 (Bankr. D.C. Conn. 1981) ("If the legislature . . . had intended to make the State's lien . . . enforceable against a bona fide purchaser, it could have done so").

¹⁶⁰ *In re Loretto Winery Ltd.*, 898 F.2d at 717.

¹⁶¹ *Id.* at 720, 722.

¹⁶² *Id.* at 720.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 720-24.

¹⁶⁵ *Id.* at 725.

¹⁶⁶ *Dairy Fresh Foods, Inc. v. Ramette (In re County Club Mkt., Inc.)*, 162 B.R. 226, 232 (Bankr. D. Minn. 1993) ("Therefore, the enforceability of a statutory lien depends on whether it was perfected as of the date of the filing of the bankruptcy petition."), *rev'd on other grounds*, 175 B.R. 1005 (D. Minn. 1994); *Wisconsin Dep't of Indus., Labor and*

enforceable against a bona fide purchaser.¹⁶⁷ The focus of inquiry in these cases is whether the lien is perfected.¹⁶⁸ Such courts usually first quote § 545(2).¹⁶⁹ Some even note that § 545(2) grants the trustee the status of a bona fide purchaser.¹⁷⁰ However, when the avoidance issue is considered, the court first determines the perfected status of the lien, and, if it is perfected, the lien is not avoidable.¹⁷¹

A bankruptcy court for the Western District of Kentucky has adopted such a construction of § 545(2).¹⁷² That court was considering the avoidance of a Kentucky statutory public improvement lien.¹⁷³ The court followed the usual pattern of quoting § 545(2).¹⁷⁴ It even created a role for a bona fide purchaser: "Section 545(2) requires perfection of the lien and establishes, essentially, a bona fide purchaser of property subject to the lien, test to determine perfection."¹⁷⁵ One could argue this quotation indicates that the Bankruptcy Court recognizes the separate "enforceable against a bona fide purchaser" test. However, the court's analysis deflects such an argument: "It is clear, therefore, that the enforceability of the statutory lien depends upon its state of perfection as of the date the petition is filed."¹⁷⁶ That pronouncement indicates that avoidance of the lien depends upon its perfection, with enforceability relegated to an example of the effect of perfection.¹⁷⁷

Is one of these constructions of the "enforceable" phrase the correct construction? The divergence of opinions indicates that the courts have

Human Relations v. Ludwig (*In re* Napcographic Arts, Inc.), 83 B.R. 558, 563 (Bankr. E.D. Wis. (1988)) ("In short, the trustee can avoid all statutory liens unless they are perfected on the date of the petition."); *Allgeier & Dyer, Inc. v. City of Bowling Green* (*In re* *Allgeier & Dyer, Inc.*), 18 B.R. 82, 86-87 (Bankr. W.D. Ky. 1982) ("It is clear, therefore, that the enforceability of the statutory lien depends upon its state of perfection as of the date the petition is filed.").

¹⁶⁷ *Dairy Fresh Foods*, 162 B.R. at 232; *Ludwig*, 83 B.R. at 563; *Allgeier & Dyer*, 18 B.R. at 86.

¹⁶⁸ *Dairy Fresh Foods*, 162 B.R. at 232; *Ludwig*, 83 B.R. at 563; *Allgeier & Dyer*, 18 B.R. at 86-87.

¹⁶⁹ *Ludwig*, 83 B.R. at 563.

¹⁷⁰ *Dairy Fresh Foods*, 162 B.R. at 232.

¹⁷¹ *Allgeier & Dyer*, 18 B.R. at 88.

¹⁷² *Id.* at 86-87.

¹⁷³ *Id.* at 83.

¹⁷⁴ *Id.* at 86.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 86-87.

¹⁷⁷ However, a subsequent statement by the court exhibits its vacillation between the possible constructions of § 545(2): "[I]t is clear that the trustee has the power to avoid liens that are not so *perfected nor enforceable* against him as of the date of the petition" *Id.* at 88 (emphasis added).

not thought so. However, construing the clause as creating a separate test of avoidance seems to be the appropriate construction. This construction properly gives a disjunctive effect to the word "or" in the phrase "perfected *or* enforceable . . . against a bona fide purchaser" in § 545(2).¹⁷⁸ This construction comports with the legislative history of § 545 and the construction of § 67c(1)(B), the predecessor to § 545.¹⁷⁹ This construction also creates a test of avoidance that comports with the logic of avoidance.¹⁸⁰ The reasoning of the Bankruptcy Act, carried forward into the Bankruptcy Code, was to avoid state created priorities; its purpose was not to avoid true liens.¹⁸¹ If a statutory lien is found to be enforceable against a bona fide purchaser, then a true lien, rather than a priority claim, was intended.¹⁸² For these reasons, the "enforceable" phrase should be construed as creating a separate test, the satisfaction of which prevents avoidance of the statutory lien.¹⁸³

Notwithstanding the above choice of construction for the § 545(2) "enforceable" phrase, since the courts have viewed it as both a separate test and as a mere example of "perfected," the Kentucky employees' lien must be examined to determine whether it is both perfected and enforceable. The first inquiry is whether the employees' lien is "perfected" and thus not avoidable by the trustee.

The concept of perfection has its roots in bankruptcy law and is generally involved with preventing the trustee's exercise of the avoidance power. Perfection is a "status" which a lien or other transfer can attain. Unfortunately, "perfected" is not defined in the definitions section of the Bankruptcy Code. However, it is defined in § 547 — the Bankruptcy Code section pertaining to avoidance of preferences. In that section, perfection occurs, in real property transfers, when a bona fide purchaser

¹⁷⁸ 11 U.S.C. § 545 (1988) (emphasis added).

¹⁷⁹ See *supra* note 153 and accompanying text.

¹⁸⁰ See *supra* notes 149-50 and accompanying text.

¹⁸¹ MOORE, *supra* note 156, at 229-30 (quoting H.R. REP. NO. 686, 89th Cong., 1st Sess. (1965)).

¹⁸² *Id.* at 230-34.

¹⁸³ There is a fourth possible construction of § 545(2). Such construction views the subsection as creating *only* an enforceable lien against a bona fide purchaser. Under that construction, the lien is avoidable, whether perfected under applicable nonbankruptcy law, if it is not enforceable (superior) to such a purchaser. This construction relegates "perfected" to a synonym for "enforceable against a bona fide purchaser." This interpretation is not discussed because no courts have clearly adopted it, and its application would be no different than construing the enforceable clause as a separate test of avoidance.

cannot acquire an interest superior to the transferee's interest.¹⁸⁴ In personal property and fixture transfers, perfection occurs when a simple contract creditor cannot acquire a judicial lien that is superior to the interest of the transferee.¹⁸⁵ Although the definition of perfection contained in the preference section literally applies only to that section, it is the standard for perfection throughout both the Bankruptcy Code and U.C.C. Article Nine.

The Kentucky statutes creating the employees' lien impose no perfection requirements.¹⁸⁶ The courts interpreting those statutes have uniformly held that no such requirements exist.¹⁸⁷ Therefore, to assert that the employees' lien is perfected, one must argue that it is perfected without any action on the part of the holder of the lien: an instance of automatic perfection.¹⁸⁸ Does the Kentucky employee's lien reach the status of perfection? Heeding the definition of perfection,¹⁸⁹ that question produces two further questions. Is the employees' lien superior to the interest of a judicial lien creditor? Is it superior to a bona fide purchaser of real property? If the employees' lien is superior to each such entity, it is perfected.¹⁹⁰ For now, the question of the superiority of the employee's lien to a bona fide purchaser of real property shall be postponed.¹⁹¹ Instead, the superiority of the lien against a judicial lien shall be discussed.

An employees' lien is superior to the holder of a judicial lien.¹⁹² Section 376.160 of the Kentucky Revised Statutes provides that the employees' lien is "superior to the lien of any mortgage or *other encumbrance* created."¹⁹³ A judicial lien is acquired through a prejudgment attachment, a postjudgment seizure, or, in the case of real estate, by obtaining a final judgment for the recovery of money.¹⁹⁴ In these instances, the lien created is an "encumbrance" on the property of the

¹⁸⁴ 11 U.S.C. § 547(e)(1)(A) (1993).

¹⁸⁵ *Id.* § 547(e)(1)(B).

¹⁸⁶ KY. REV. STAT. ANN. §§ 376.150, .180 (Baldwin 1994).

¹⁸⁷ *See supra* note 36.

¹⁸⁸ Automatic perfection is not a new concept. Under Article Nine of the U.C.C. certain security interests are perfected without the necessity of any postattachment action, ergo, automatic perfection. *See* KY. REV. STAT. ANN. § 355.9-302(1)(c)-(h) (Baldwin 1994).

¹⁸⁹ *See supra* notes 184-85 and accompanying text.

¹⁹⁰ *See supra* note 34.

¹⁹¹ *See infra* notes 203-14 and accompanying text.

¹⁹² KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

¹⁹³ *Id.* (emphasis added).

¹⁹⁴ *See id.* §§ 425.006-.316, 426.010-.715, .720.

debtor.¹⁹⁵ Pursuant to the statutory provisions, the employees' lien is superior to such encumbrances.¹⁹⁶ Because the lien is superior to the encumbrance of a judicial lien, it is "perfected," at least in relation to personal property and fixtures.¹⁹⁷

It is possible to counter the proposition that the employees' lien is perfected by focusing on the lien's lack of statutory perfection requirements. One could argue that because the statute includes no perfection requirements the lien cannot be perfected. If it is not perfected, then it is vulnerable to avoidance by the trustee under § 545(2).¹⁹⁸ Such an argument leads to the other avoidance test of § 545(2): the "enforceable" test. If the lien "is not . . . enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case," it is avoidable by the trustee.¹⁹⁹ Note that § 545(2) does not require the actual existence of such a purchaser.²⁰⁰ The trustee has the status of a bona fide purchaser "whether or not such a purchaser exists."²⁰¹ The enforceability of the lien against a hypothetical bona fide purchaser is judged as of the commencement of the case.²⁰²

The analysis of the employees' lien under the enforceable test also applies to the previously postponed issue of whether the employees' lien is "perfected" against a bona fide purchaser of real property under the "perfected" test.²⁰³ Both involve the question of the superiority of the lien against the bona fide purchaser. In analyzing this question, it is helpful to substitute "superior" for the statutory word "enforceable."²⁰⁴ If the lien is *enforceable* against a bona fide purchaser, then the lien is superior in a conflict between the two entities. Using "superior" more accurately indicates the focus of the section's test.

The provisions of the Kentucky statutes regarding the employees' lien are silent regarding the priority between the lien and a bona fide

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* § 376.160.

¹⁹⁷ The limitation of action provisions of the employees' lien, *id.* § 376.190, should have no impact on the perfection question. Those provisions pertain to the time the employee has to bring an action to enforce the lien, not whether the employee has a lien superior to a bona fide purchaser or a judicial lien.

¹⁹⁸ 11 U.S.C. § 545(2) (1993).

¹⁹⁹ *Id.*

²⁰⁰ *See supra* note 148.

²⁰¹ 11 U.S.C. § 545(2) (1993).

²⁰² *Id.*

²⁰³ *See supra* p. 342.

²⁰⁴ The statutory use of the word "enforceable" is from 11 U.S.C. § 545(2) (1993).

purchaser of the lien property. However, one can infer the outcome of such a conflict by recognizing what the statute does provide. Section 376.160 of the Kentucky Revised Statutes awards the lien superiority over "any mortgage or other encumbrance."²⁰⁵ Thus, the lien is superior to a mortgage. The Kentucky statutes regarding recording of deeds and mortgages award a properly recorded mortgage superiority over a bona fide purchaser of real property.²⁰⁶ Because the lien has priority over the mortgage, and the mortgage has priority over the bona fide purchaser,²⁰⁷ the lien should have priority over the bona fide purchaser. Although no case has directly considered the issue, a Kentucky case did adopt similar logic in dealing with the superiority of the employees' lien. In *International Harvester Co. v. Dyer's Administrator*, the court subordinated a widow's exemption to the employees' lien.²⁰⁸ "As a mortgage is inferior to a labor lien under . . . [section] 376.160 [of the Kentucky Revised Statutes], and as the widow's exemption . . . is inferior to a mortgage, it follows that her exemption is also inferior to the labor liens."²⁰⁹

Section 376.180 of the Kentucky Revised Statutes also supports an inference that the lien is superior to the bona fide purchaser. It provides that the lien attaches when the company "sell[s] or transfers its business."²¹⁰ Thus, the Kentucky legislature recognized that the employees' lien might arise in the situation in which the business property is sold. Because the lien attaches in such a case, it is likely that if the legislature intended the lien to be inferior to the rights of the purchaser of the business, then the statute would have so provided. The lack of such a provision implies that the lien is superior, not subordinate, to the purchaser.

The lack of a statutory provision subordinating the lien to a bona fide purchaser is also important. Compare the statutory provisions of the employees' lien to the provisions of the mechanics' and materialman's lien. Section 376.010(2) of the Kentucky Revised Statutes provides that, in certain situations, the mechanics' and materialman's lien "shall not take precedence over a . . . bona fide conveyance for value."²¹¹ In such

²⁰⁵ KY. REV. STAT. ANN. § 376.160 (Baldwin 1994).

²⁰⁶ *Id.* § 382.270. Case law supports the statutes. *See, e.g.,* Hays v. Adams, 294 S.W. 1039, 1041 (Ky. 1927) (holding that purchasers take subject to recorded mortgage); Morrison v. Hampton's Adm'r, 49 S.W. 781, 782 (Ky. 1899) (holding that vendees take subject to prior recorded mortgages).

²⁰⁷ KY. REV. STAT. ANN. §§ 376.160, 382.270 (Baldwin 1994).

²⁰⁸ 178 S.W.2d 966, 969 (Ky. 1944).

²⁰⁹ *Id.* at 969.

²¹⁰ KY. REV. STAT. ANN. § 376.180 (Baldwin 1994).

²¹¹ *Id.* § 376.010(2).

a case the lien would not be superior to a bona fide purchaser. This provision obviously indicates that the Kentucky legislature knows how to subordinate a statutory lien to a bona fide purchaser.²¹² Its failure to do so connotes a decision not to subordinate the employees' lien.

The lack of a definite statutory pronouncement regarding the priority of the lien against a bona fide purchaser requires a consideration of the policy implications of the issue. Because the employees' lien has no perfection or notice requirements it is vulnerable to being labeled a "secret lien." The lien is secret because it exists, but third parties are unaware of it.²¹³ Secret liens generally are not favored in the law because when such a lien is effective, the rights of an unsuspecting third party are subordinate to the rights of the lienholder.²¹⁴ The few pronouncements by the Kentucky courts regarding secret liens can be traced to an 1877 case.

In *Greer v. Church & Co.*, the court adjudicated the parties' rights to a piano.²¹⁵ Church & Co. entered into an agreement with Martin to rent Martin a piano.²¹⁶ The agreement also provided Martin with an option to purchase the piano.²¹⁷ Before all the rentals had been paid, Martin sold the piano to Greer, who had no notice of the lease.²¹⁸ When the rentals remained unpaid, Church & Co. brought suit to regain possession of the piano.²¹⁹ The court found that the lease transaction was in fact a sale, and the effect of the agreement gave Church & Co. a lien for the unpaid purchase price.²²⁰ Thus, the conflict over the piano was between a lienholder and a purchaser without notice of the lien. In holding for the purchaser, the court discussed the effect of the lien: "The well-defined policy of the law is to have as few secret liens and claims upon property as possible, that the title may be readily and safely transmitted from one to another. This is in the interest of trade as well as opposed to fraud and collusion."²²¹ Because the lien could have been registered, which would have protected both parties, the court refused to allow Church & Co. to

²¹² See *id.* §§ 376.440, .450.

²¹³ See BLACK'S LAW DICTIONARY 1352 (6th ed. 1990).

²¹⁴ See *infra* note 227.

²¹⁵ 76 Ky. 430, 431 (13 Bush 1877).

²¹⁶ *Id.* at 431-32.

²¹⁷ *Id.*

²¹⁸ *Id.* at 433.

²¹⁹ *Id.*

²²⁰ *Id.* at 434.

²²¹ *Id.* at 434-35.

obtain possession of the piano.²²² The court found no hardship in requiring compliance with the law or sufferance of its consequences.²²³

Based on the *Greer* opinion, one can argue that Kentucky courts do not tolerate secret liens. The employees' lien is a secret lien in the sense that no perfection or notice provisions are required. If the Kentucky courts would strike down the lien based on a policy against enforcement of secret liens, then the employees' lien would not be enforceable against a bona fide purchaser for value. If the lien is not so enforceable, it can be avoided by the trustee in bankruptcy.

However, judicially noted policy supports the employees' lien. In *Turner v. Randolph*, the court determined the priority between the Kentucky employees' lien and a vendor's lien which encumbered the employer's property.²²⁴ In upholding the superiority of the employees' lien, the court discussed the policy behind the statute:

The statute is based upon a well-recognized policy, which is written into the statutes of many states and of the federal government, . . . to protect the wage earner in many forms of public endeavor who is necessarily dependent upon his daily labor for the sustenance and the support of himself and family, and particularly in such forms as are recognized to be primarily for the benefit of the public good. Obviously, if the average day laborer can be deprived, by the misfortune of his employer, of his wages for the last six months prior to such misfortune, his family will almost of necessity suffer, and he himself, in many instances, deprived of the necessities of life, and thereby rendered unfit to give further service to the public.²²⁵

The policy against secret liens competes with the policy favoring employee liens. Is one stronger than the other? The secret lien pronouncement in *Greer* arises from a situation in which the lien in question could have been recorded.²²⁶ The other Kentucky opinions discussing secret liens also involve liens that could have been recorded.²²⁷ The employ-

²²² *Id.* at 435.

²²³ *Id.*

²²⁴ 280 S.W. 462 (Ky. 1926).

²²⁵ *Id.* at 463.

²²⁶ *Greer*, 76 Ky. at 435.

²²⁷ *Johnson v. Stimpson Computing Scale Co. (In re Duker Ave. Meat Mkt.)*, 2 F.2d 699, 701 (6th Cir. 1924) (construing statute as against "evil" secret liens); *In re Draughn & Steele Motor Co.*, 49 F.2d 636, 636 (E.D. Ky. 1931) (construing an unrecorded trust receipt as a mortgage within the recording statute), *aff'd sub nom.* Commercial Inv. Trust

ees' lien statutes create no perfection provisions, and no notice provisions. Accordingly, the policy statements relating to secret liens arguably are not applicable to liens without perfection procedures. It is also arguable that buyer from the employer of the unpaid employee is on notice that the employer undoubtedly has employees. Presumably, the buyer is on notice that employees provide their services for pay. It then follows that the buyer is on notice that some mechanism for payment must exist if the employer is not paying the employees their wages. Few secret liens deserve enforcement. However, the policy for enforcing the employees' lien against a bona fide purchaser outweighs the policy that invalidates secret liens.

The grounds for finding the lien superior to a bona fide purchaser outweigh the grounds for subordinating it. Extrapolation and inference from the statute, the statute's lack of subordinating words, and the policy of the statute all lead to the determination that the lien is superior to a bona fide purchaser. A lien that is superior to a bona fide purchaser is also enforceable against a bona fide purchaser. Furthermore, an enforceable lien is also a perfected lien. Accordingly, under either avoidance test of § 545(2), the trustee is unable to avoid the employees' lien.

CONCLUSION

The Kentucky employees' lien can play a significant role in insuring that unpaid employees receive the amounts due them. Pursuant to its statutory provisions, it is superior to other encumbrances. Because the priority provisions of Article Nine of the U.C.C. should not apply to a nonpossessory statutory lien, the employees' lien should also be superior to the Article Nine security interest.

The effect of the lien will be felt even when the employer has filed a petition in bankruptcy. Notwithstanding its status as a statutory lien, unless the lien arises from an event specified in § 545(1) of Title 11 of the United States Code, it should not be avoidable by the trustee under § 545. It is time to revive the employees' lien.

Corp. v. Wilson, 58 F.2d 910 (6th Cir. 1932); *In re Frost*, 9 F.2d 128, 129 (E.D. Ky. 1925) (construing an unrecorded mortgage on three automobiles).