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Alabama Supreme Court Clarifies Construction Lien Priority

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The Alabama Supreme Court recently reinforced its policy of giving priority to construction lenders over materialmen in its holding in *GHB Construction and Development Co., Inc. v. West Alabama Bank and Trust*, 2019 WL 1416893 (Ala. 2019). GHB, a contractor, challenged the priority of its materialman's lien against a future-advance mortgage under which no funds had been extended to the borrower at the time work commenced. The Court held that because the future-advance mortgage was recorded prior to GHB's commencement of work, the future-advance mortgage is given priority over GHB's lien regardless of whether proceeds had been disbursed prior to the commencement of work.

The Court explained that the equitable validity of a future-advance mortgage cannot be attacked by a non-party to the transaction. Because GHB could not challenge the validity of the mortgage, the Court relied on the language of Ala. Code § 35-11-211 (a), which instructs that a materialman's lien will take priority over all other liens, mortgages, or encumbrances created *subsequent to the commencement of work*. Because GHB commenced work after the future-advance mortgage was recorded, its lien did not take priority over the future-advance mortgage.

This holding emphasizes Alabama's policy of ensuring that construction projects continue to be funded. This case tells contractors that: 1) contractors should not assume their work will take priority over future-advance mortgages even when the work is performed before the loan proceeds are extended; and 2) a contractor's commencement date is crucial and will control priority against other lenders, and therefore, it is imperative that contractors memorialize that date and that they know whether any mortgages have been entered into and recorded before that date. In Alabama, it does not seem to matter whether that mortgage is a future advance or traditional mortgage.