Can I Lien That?

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For contractors' counsel, the phone call from a client that a job has gone bad is frequently accompanied by a measure of angst. Perhaps the project went fairly smoothly, but near the end of the job the owner began to slow the pace of its payments and—after completion of the work—the owner still owes the contractor significant funds. The project may have been rough from start to finish with the end of the project flowing directly into months of negotiations. Or the owner may have terminated the contractor's contract, and the contractor claims termination was wrongful.

Whatever the situation, your mind immediately races through a litany of questions designed to understand whether mechanic's lien rights are available to the contractor. In what state was the project located? Does the applicable state statute require the contractor to serve or file a preliminary notice for its work on the project? If so, did the contractor serve and file the notice? Was the notice accurate? Did the contractor serve the notice on the correct parties? Did the owner file a notice of termination or cessation? Are there other statutory prerequisites to asserting lien rights? Has a mechanic's lien already been filed? If so, was the filing done correctly? Assuming those requirements have been met, your mind moves quickly to other potential statutory hurdles to asserting your client's lien rights.

Unfortunately, satisfying statutory criteria is not the only hurdle a construction practitioner may face in prosecuting a mechanic's lien claim. Frequently, a practitioner may run into any of a number of additional hurdles. For example, what if the owner files for protection under the bankruptcy laws before making final payment for work on the project? Does the automatic stay under the Bankruptcy Code preclude the contractor from recording a mechanic's lien? What if the client is a civil contractor that constructed improvements as part of a major mixed-use development? Frequently, in this setting, a contractor will construct the roads, sewer system, storm drain system, and other improvements. When the improvements are completed and approved by the governing municipality, the streets and other improvements are dedicated to the municipality. If the owner has not paid, the contractor may desire to assert a mechanic's lien against those improvements. Will this violate the rule that mechanic's liens may not be asserted against public property? The list of potential issues is extensive.

This article is the first of a two-part series that surveys the law concerning the ability of a contractor to assert a mechanic's lien in a variety of circumstances where there may be perceived or real barriers to asserting or enforcing a mechanic's lien.

The Bankruptcy Automatic Stay

One of the first things that an attorney learns upon embarking on the practice of law is that the automatic stay under the Bankruptcy Code is broad.[1] Therefore, an attorney might presume that the automatic stay bars recording and perfecting a mechanic's lien. Indeed, the Code expressly states that a bankruptcy filing operates to stay "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title."[2]

Lien Claim Arising Prepetition

Interestingly, a contractor is not required to seek relief from the automatic stay to file a mechanic's lien against the property of an owner/debtor that has filed bankruptcy after construction has commenced. The automatic bankruptcy stay does not prohibit an act to perfect a lien against property "to the extent that the bankruptcy trustee's rights and powers are subject to such perfection under section 546(b)."[3] Section 546(b) of the Bankruptcy Code provides that the trustee's power to void liens is subject to any applicable law that "permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection."[4] Courts have uniformly held that mechanic's lien statutes constitute "applicable laws" covered by section 546(b). As a result, contractors with valid lien claims do not need relief from the automatic stay in order to record and perfect a mechanic's lien.[5] In fact, in spite of the bankruptcy action, a lien claimant still must perfect its lien within the time required by state law or the claimant forfeits its lien rights.

In contrast, the automatic stay does bar an action to enforce a mechanic's lien.[6] Thus, within the time required to foreclose under state law, the claimant should file a notice under section 546 with the bankruptcy court informing all interested parties of the claimant's rights to foreclose on the property "but for" the pending bankruptcy action.[7] Such a notice preserves the claimant's lien against the property and tolls the statute of limitations specified by state law.

A contractor can seek relief from the automatic stay to enforce its lien as outlined in section 362(d).[8] Whether a contractor will prevail in gaining relief from the stay depends on a number of factors, including the type of bankruptcy case and the amount of equity in

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the property. Section 362(d) allows relief from stay to a lien claimant if (1) there is no equity in the property and (2) the property is not necessary for an effective reorganization.[9] The claimant has the burden to show that there is no equity in the property.[10] If the debtor or trustee opposes the motion for relief from stay, it has the burden to prove that the property is necessary for an effective reorganization.[11]

In situations where the lien claimant's interest in the property is oversecured, the bankruptcy court may deny the motion for relief from stay and allow the trustee to sell the property at issue to recover any equity in the property.[12] In such a circumstance, the lien claimant will receive payment of its claim after the sale, to the extent the sale price is sufficient to satisfy the lien. As a practical matter, many times the claimants allow the trustee a specified amount of time to sell the property, after which the trustee agrees to consent to relief from stay to allow the contractor to foreclose.

Lien Claim Arising Postpetition

Case law has interpreted section 541 to allow a claimant to file a lien against property of a bankruptcy estate for work performed postpetition.[13] This case law can catch unsuspecting counsel off guard. For example, if a contractor's counsel mistakenly assumes that the bankruptcy stay precludes recording a mechanic's lien, counsel may file a motion for relief from the automatic stay seeking authority to record the lien, assuming that the motion will toll the time to record its lien. Because relief from the stay is unnecessary, the motion for relief from the stay likely does not toll the recording period. Thus, a claimant must ensure that its lien is recorded, even when the property owner has filed bankruptcy.

Public Property

All state laws provide that a lien may not attach to public property. Public buildings, facilities, power plants, and infrastructure are not subject to sale under execution of a mechanic's lien and courts are reluctant to apply lien statutes against the state.[14] Some courts, however, have upheld liens against parties, other than a government entity, for work performed on public areas of a subdivision or other private development. These jurisdictions allow liens for work performed on public areas that are later deeded to a municipality.

In *Ladue Contracting Co. v. Land Co.*, a subcontractor sued to enforce a mechanic's lien against twelve contiguous residential lots and buildings surrounding a circular turn-around.[15] The subcontractor's lien included costs for work performed on the street and turn-around that serviced the buildings.[16] The court cited case law holding that sidewalks servicing buildings constructed "under an entire contract for the building, erections, appurtenances, and improvements" were lienable, even if not located on the property.[17] The court further noted that other "[c]ourts have ruled that liens for paving streets adjacent to residential lots are applicable against those lots, even when the streets are public."[18] The court found that the improvements on the street and turn-around were part of one general contract for, and appurtenant to, the work completed on the lots and buildings, and therefore held they were lienable.[19]

Similarly, work on sewer and water lines "where a portion of the work is done on land owned by the developer and a portion is outside of the subdivision or under streets within the subdivision which are dedicated to the city" may entitle a contractor to a lien against an entire subdivision.[20]

Although subterranean work may be performed exclusively in public areas, a lien right exists against the adjoining property because the work is essential to the ultimate completion and habitation of the subdivision. As one court stated, "dwellings without streets for ingress and egress . . . or without efficient sewer systems are just no longer constructed in urban areas."[21] Another court upheld lien rights for off-site work deemed necessary to make residences habitable.[22]

Dismantling or Demolition Work

Contractors' counsel frequently point to the purpose of mechanic's lien laws—avoiding unjust enrichment of the owner—when seeking to enforce liens that are called into question. Following this fundamental premise would seem to dictate that improvements arising from dismantling or demolition work would give rise to a mechanic's lien. However, the opposite appears to be true. Under many mechanic's lien statutes, a contractor can only file a mechanic's lien against property on which the contractor performed services used in the "improvement" of the property. Absent statutory language expressly including demolition or dismantling work as lienable, these services are likely not an "improvement" that gives a contractor a right to a mechanic's lien. In *Dean v. McFarland*, a subcontractor filed a lien against a property after demolishing a building on the property.[23] The state mechanic's lien statute allowed liens where a contractor supplied equipment "for clearing, grading, filling in, or Otherwise improving any real property."[24] The Washington Supreme Court noted that the demolition benefited and increased the value of the property, but strictly construed the statute and refused to extend its reach to cover demolition.[25] In another case, a court held that neither furnishing materials nor performing work to demolish or remove structures was lienable unless the contract provided specifically that such a lien could be filed.[26]

One court appeared apologetic in ruling that demolition work did not constitute lienable work. In *John F. Bushelman Co. v. Troxell*, the court acknowledged that the underlying legal premise for mechanic's liens dictates that demolition and dismantling constitute lienable work.[27] The court noted that a subcontractor's work demolishing structures could well entitle it to a mechanic's lien within the intent and underlying purpose of a mechanic's lien statute. The omission of demolition per se from the work categories expressly entitled to a lien under the statutes, however, caused the court to decline to extend the statute to allow a lien for demolition work.[28] The court reasoned that even if the omission of dismantling or demolition services was a legislative oversight, the court was required to apply the law as written.[29]

Following this same logic, another court held that the removal of hazardous waste was not deemed an improvement to real property under the state mechanic's lien law.[30] The court found that the contractor was not entitled to a mechanic's lien unless it provided evidence showing that the removal of the waste was part of an overall plan to improve the property or that the removal would necessarily enhance the value of the real property.[31] Similarly, language of a mechanic's lien statute providing a lien right to "raise or lower any house thereon or remove any house thereto" did not give rise to a lien right when a contractor moved a house from a piece of land, even though the contractor would have a lien right for moving a

house onto land.[32]

Courts have applied an exception to this rule when labor is expended or materials are furnished for the demolition or removal of a structure pursuant to a general plan by the owner to erect a new structure or to restore or repair the old one.[33]

Work Not Completed

An equally thorny issue arises when the owner breaches the contract before the contractor's work is incorporated into the project. A contractor may be entitled to a mechanic's lien for work performed under a contract even if the work was not completed. For example, when the owner breaches the contract, courts may allow a subcontractor to lien the project for the value of specially fabricated materials, even though the materials were not delivered to the project.[34] In *Surf Properties, Inc. v. Markowitz Bros.*, the court reasoned the property owner should "stand good" for "materials which would not have been 'fabricated' were it not for the unusual characteristics of the improvement proposed."[35] The Ninth Circuit upheld a lien right for the supplier of undelivered, specially fabricated windows, stating "where the materialman contracts directly with the owner . . . and material is manufactured and especially designed for the building—the material is furnished in contemplation of . . . delivery and the owner should not be permitted to defeat the lien by a wrongful refusal to receive or accept the material."[36]

Courts have likewise upheld the lien rights of a contractor that supplied and delivered standard materials that were not yet incorporated into the structure when work was stopped. Courts uniformly presume that the delivered materials were actually incorporated into the structure. For example, a lumber company was entitled to lien for building supplies furnished directly to the property owner.[37] Similarly, an air-conditioning unit that had been delivered but not installed when the general contractor halted work could be included in a mechanic's lien.[38]

Some jurisdictions, however, have denied a mechanic's lien for delivered materials if construction never actually commenced and the contractor's notice of claim does not specify which portion of the site was to benefit from the abandoned project. For example, a supplier was denied a lien against farmland when no structure was ever erected on the land.[39]

Courts have held that for a contractor to obtain a lien, there must be substantial performance of the contract.[40] In some jurisdictions, "[s]ubstantial performance allows only the omissions or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to other portions of the building, and may be compensated for through deductions from the contract price."[41] When a contractor seeks a lien based on substantial performance, a factual issue arises as to whether the performance of the contract is so nearly equivalent to what was bargained for, or whether any deviation from completion is inadvertent or unintentional.

Courts employ a rule of thumb that a contractor is entitled to lien for value bestowed on the property, less damages caused by its failure to render full and complete performance.[42] For example, a court held that if work deemed by the architect to be substantially complete were also found by the trial court to be substantially complete, then a tile subcontractor would be entitled to a lien for tile work completed less damages.[43] In contrast, a contractor was not entitled to a lien when repair and remodel work to a home had to be replaced at a greater expense than the value of the work.[44]

Fixtures

A contractor's counsel encounters other thorny issues when its work straddles the line between personal property and real property. A contractor may be entitled to a lien for installing fixtures. Under the Uniform Commercial Code, "fixtures" are "goods that have become so related to particular real property that an interest in them arises under real property law."[45] Accordingly, the definition may vary by jurisdiction. One state supreme court noted there is a "wilderness of authority" on the law of fixtures and that cases "are so conflicting that it would be profitless to undertake to review or harmonize them."[46] Nevertheless, general principles have evolved over time that offer some measure of guidance. To decide whether materials have become a fixture or an "improvement upon land" for lien purposes, courts consider three main factors: (1) the intent of the parties to make the materials a permanent part of the land, (2) the manner in which the item is integrated into the real property, and (3) whether the equipment is adapted to and necessary for the purpose of the premises.[47]

Courts usually consider intent to make the materials or equipment a permanent part of the real property the most significant factor.[48] For example, in *Christensen Group, Inc. v. Puget Sound Power & Light Co.*, a subcontractor asserted a lien against real property for furnishing and installing a large bank vault.[49] The owners argued that the bank vault was not a fixture but personal property and asserted that the vault design was specifically chosen because it could later be removed. The court stated the property owner's subjective declaration of intent was not dispositive. Rather, the court would look for "proof of [the owner's declared intent in] facts bearing on 'the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made.' "[50]

In defining annexation, or physical attachment, most jurisdictions require that the materials or equipment actually be permanently incorporated into the real property.[51] For example, whey drying equipment bolted to the floor was not considered a fixture when ducts and wiring could be easily disconnected.[52] Yet, a supplier could lien a greenhouse for the value of a boiler because the boiler was considered a permanent improvement.[53] Similarly, restaurant booths, a wine cabinet, and kitchen appliances were considered fixtures for lien purposes.[54]

"Adaptation" occurs when personal property is installed for the specific purpose the real property is constructed. In one case, the court concluded a contractor was not entitled to a lien against real property for tanks and other equipment installed for drying whey.[55] The building that housed the equipment did not have any characteristics that limited its use exclusively to drying whey, nor did it exist as a whey drying "plant" before the arrival of the machinery. Furthermore, the hoses and support structures used on the equipment were easily disconnected, suggesting the owners intended the machinery be transportable.[56] Similarly, an engineer could not lien for planning installation of gas machinery that never became part of the existing building.[57]

Trucking Services

What if a portion of the charges for which the contractor wants to lien include trucking services? May those also be included in the lien? Depending on the mechanic's lien statute, a claimant may be entitled to a lien for trucking services provided to haul equipment or materials to a project.

Some courts have identified specific circumstances where transportation costs may be lienable. In *Ivy Trucking, Inc. v. Creston Brandon Corp.*, the court identified three exceptions to what the court considered a general rule that a hauler cannot assert a mechanic's lien: "(1) the one performing the hauling owns the materials and the cost of hauling is part of the cost of materials, (2) the hauler participates in the work of improvement, and (3) the hauler is hired by the agent of the owner."[58] In *Ivy Trucking*, the transporter was hired by the subcontractor. Although the transporter was not the direct material supplier, the court allowed its lien claim under a broad interpretation of the subcontractor's "agent" under the statute to encompass persons hired by the subcontractor.[59]

Other courts focus on whether the transportation charges are reasonable and the type of charges typically incurred in providing construction services. For example, when a company included a separate, unusually large transportation charge for a drilling rig shipped to the project, rather than including transport in the overall cost of services, a court held that a hauler could not lien for the services, in part because of how unusually large they were.[60] Another court held that reasonable transportation charges are a standard portion of services provided to an owner and upheld a lien for customary transportation charges to prevent "a windfall to property owners at the expense of . . . suppliers."[61]

Some jurisdictions only allow a lien claim when the material supplier transports the material itself, and do not allow independent haulers lien rights.[62] However, there are jurisdictions where any person who transports the materials can assert a valid lien claim.[63] If included in the work contract, some courts allow liens for board and lodging in addition to transportation costs.[64]

Despite the cases cited above, liens for transportation costs are not universally awarded. One court did not allow liens for transportation costs on public works, although it recognized exceptions to this rule in other cases, when the costs were included in the contract amount.[65] Another court denied a lien for transportation costs because they were not included in the original contract.[66]

Lost Rental Equipment

Another quirky issue arises when a portion of a contractor's lien arises from charges assessed by a rental company for stolen rental equipment. Three divergent lines of reasoning address the issue.[67]

The first, and most liberal, line of reasoning allows a contractor to lien for both rental equipment fees and the lost rental equipment.[68] An owner of rental equipment was entitled to claim against a payment bond for both the rental charges and the value of the missing rental equipment because rental equipment fell within the meaning of "materials furnished."[69]

The second line of cases is more restrictive and requires that the rental equipment price must be included in the contract price for the lessee to have lien rights.[70] For example, a scaffolding supplier was entitled to lien for the rental value of lost scaffolding but not the purchase price of lost scaffolding where only the rental price was specified in the contract.[71]

The third, and most restrictive, line of cases allows liens for recovery of lost rental equipment only if it was the type of equipment that would be used up or if it was part of normal wear and tear. For example, when a general contractor leased a barge to transport equipment and other materials and the barge was lost at sea,[72] the subcontractor was not entitled to lien for the lost rental equipment because the incident was not expected. The court, however, stated that the subcontractor was entitled to claim for ordinary wear and tear on the equipment and the rental fee.[73] Similarly, a construction crane lessor could not recover for replacement parts because they were not incidental and comparatively inexpensive in character, "representing only ordinary wear and tear."[74]

Architects and Engineers

Finally, liens for professional design services raise a whole new set of issues. Architects and engineers generally can obtain a lien for services rendered for a project. The ability of an architect to obtain a lien varies greatly across jurisdictions. Therefore, whether or not an architect can recover must be analyzed "within the context of [the] mechanic's lien statute" in that jurisdiction.[75] The mechanic's lien statutes in many jurisdictions expressly provide for the assertion of mechanic's liens by architects and engineers.[76]

Even if no work has occurred on the project, an architect, engineer, or designer can still assert a valid lien claim if he or she can show that the project's failure was caused by someone else.[77] For example, an engineer provided services to a project that was abandoned. Although the lien statute required the plans to be used in the actual construction for the architect or engineer to assert a lien, the engineer had a lien right when the owner abandoned the property without fault of the engineer.[78] However, if the architect's plans were one of many potential plans being shown to a client, then only the plans that were finalized for the project would likely be lienable.[79]

The court in *Nolte v. Smith* reached a similar conclusion. There, the property owners hired an engineer to subdivide property into residential lots.[80] The engineer completed the terms of the contract, which included surveying, planning, mapping the property, preparing a subdivision map, and constructing and erecting permanent markers. The court rejected the argument that the engineer's work did not constitute a "work of improvement" or "improvement" necessary to give rise to a lien right because the work provided "constructive improvement" to the project, even though the project was not constructed.[81]

Significant Hurdles

Even when appropriate procedures have been followed to perfect a mechanic's lien under state law, there may be significant hurdles to perfection and enforcement of that lien. Perhaps the two most accurate conclusions that can be reached are that (1) the law is less intuitive than a practitioner may first anticipate and (2) the proper analysis may vary greatly depending on the jurisdiction. A practitioner is wise to delve into the applicable case law whenever such circumstances arise.

Endnotes

1. *See* 11 U.S.C. § 362(a) (2006) (automatic stay precludes the commencement or continuation of judicial proceedings against a debtor,

enforcement of a judgment against the debtor, any act to obtain property of debtor, any act to perfect or enforce a lien against property of debtor, and other similar actions against a debtor).

2. *Id*. § 362(a)(5) (2006).

3. *See id*. § 362(b)(3).

4. *See id*. § 546(b)(1)(A) (2006); *id*. § 544 (1998) (stating trustee's authority to void transfers).

5. Miner Corp. v. Hunters Run Ltd. P'ship (*In re* Hunters Run Ltd. P'ship), 875 F.2d 1425, 1428 (9th Cir. 1989) (section 546 "allows creditors with certain types of liens to avoid the potential prejudice of section 362's automatic stay by allowing for post-bankruptcy-petition perfection of these liens"); *e.g*., Levin v. Potts Welding & Boiler Repair Co. (*In re* Oxford Royal Mushroom Prod., Inc.), 40 B.R. 930, 931 (Bankr. E.D. Pa. 1984).

6. 11 U.S.C. § 362(a)(3)–(5).

7. *Id.* § 546(b)(2)(B).

8. *See generally id.* § 362(d).

9. *Id.* § 362(d)(2).

10. *Id.* § 362(g)(1).

11. *Id.* § 362(g)(2).

12. *Id.* § 362(d)(2), (g).

13. *Id*. § 541 (2006); *see*, *e.g*., Boggan v. Hoff Ford, Inc. (*In re* Boggan), 251 B.R. 95, 100 (B.A.P. 9th Cir. 2000) (holding that a mechanic did not violate the automatic stay by retaining possession of the debtor's car when the debtor failed to pay postpetition repair costs because the mechanic's lien statute expressly authorized a mechanic to retain possession of an automobile and the statute was excepted from the automatic stay under section 546(b)).

14. *See* City of Westminster v. Brenna Sand & Gravel Co., 940 P.2d 393, 395 (Colo. 1997) ("Nothing in the mechanics' lien statutes indicates that the General Assembly sought to eliminate the common law rule which prohibits the filing of mechanics' liens against public property.").

15. 337 S.W.2d 578, 579–80 (Mo. Ct. App. 1960).

16. *Id.* at 580.

17. *Id.* at 582–84.

18. *Id.* at 585.

19. *Id.*

20. Woodcrest Homes, Inc. v. First Nat'l Bank of Pueblo, 15 B.R. 886, 888–90 (D. Colo. 1981).

21. *Id*. at 889 (quoting W.L. Dev. Corp. v. Trifort Realty, Inc., 377 N.E.2d 969, 973 (N.Y. App. 1978) (quoting Ladue Contracting Co. v. Land Dev. Co., 337 S.W. 2d 578, 585 (Mo. Ct. App. 1960)).

22. *See also* First of Denver Mortgage Investors v. C.N. Zundel & Assocs., 600 P.2d 521, 525 (Utah 1979).

23. 500 P.2d 1244 (Wash. 1972).

24. *Id.* at 1248 (citing WASH. REV. CODE § 60.04.040 (1972)). Repealed June 1991. *See* WASH. REV. CODE § 60.04.21 (lien placed on improvements and not on entire property).

25. *Id.* at 1246–48.

26. J & J Equip., Inc. v. Plinkinton, 850 S.W. 2d 804, 805–06 (Tex App. 1993).

27. 338 N.E.2d 780 (Ohio Ct. App. 1975).

28. *Id.* at 783.

29. *Id.*

30. Haz-Mat Response Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839, 846 (Kan. 1996) (finding the removal of hazardous waste was not an improvement to the property "because it was part of a maintenance program that was necessary in the normal course of . . . business").

31. *Id*.

32. *See* Robinette v. Servite Fathers, 364 N.E.2d 679, 681 (Ill. App. Ct. 1977).

33. *See*, *e.g*., Pratt v. Nakdinen, 138 S.W. 974, 978 (Ark. 1911) (upholding a lien for costs of demolition because "it was impossible to build the new building without removal of the old"); Janoe & Bushnell Constr., Inc. v. Jordan, 310 P.2d 310, 312 (Or. 1957) (upholding a lien where a house was moved from one location to another "pursuant to a plan which contemplated not only the moving but also the structure's transformation into a residence at its new location").

34. *See* Lehigh Structural Steel Co. v. Langner, 43 So. 2d 335, 338 (Fla. 1949) ("[I]n our opinion the better view is that the real property proposed to be improved by specially fabricated materials is subject to a lien for such materials when their use or delivery is prevented by the act or direction of the owner of such real property and without the fault of the materialman.").

35. Surf Props., Inc. v. Markowitz Bros., 75 So. 2d 298, 302 (Fla. 1954).

36. Haskell v. McClintic-Marshall Co., 289 F. 405, 412–13 (9th Cir. 1923).

37. *See* Van Wells v. Stanray Corp., 341 N.E.2d 198, 202 (Ind. Ct. App. 1976) (noting "materials actually delivered are presumed to have been used in the building").

38. Luczak Bros., Inc. v. Generes, 451 N.E.2d 1267 (Ill. Ct. App. 1983).

39. *See* Chief Indus., Inc. v. Schwendiman, 587 P.2d 823 (Idaho 1978).

40. Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293, 295 (Iowa Ct. App. 1995).

41. *Id.*

42. *See id.* at 293.

43. *See* Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd., 642 So. 2d 766, 769 (Fla. Dist. Ct. App. 1994).

44. Bishop v. Moore, 323 P.2d 897, 898 (Colo. 1958) ("A prime requisite to the establishment of a valid mechanic's lien is that an indebtedness exist in favor of the claimant for labor or materials.").

45. U.C.C. § 9-102(41) (2006).

46. Strain v. Green, 172 P.2d 216, 218 (Wash. 1946) (quoting Phila. Mortgage & Trust Co. v. Miller, 56 P. 382 (Wash. 1899). The court further stated: "Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take." *Id.*

47. Cornell v. Sennes, 95 Cal. Rptr. 728, 731 (Cal. Ct. App. 1971); Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1283 (Utah 1982). Other factors the court may consider are "the relationship of the parties, the relative difficulty of removal, the nature of the article annexed, and whether the fact of annexation is open and apparent. *Cornell*, 95 Cal. Rptr. at 731 (citing 35 AM. JUR. 2D Fixtures § 4 (1971)).

48. *See Cornell*, 95 Cal Rptr. at 731 (noting that of three factors used to determine whether something is a fixture, "intention is the most significant"); *Paul Mueller Co.*, 657 P.2d at 1284 ("The parties agree that of the three elements to be considered in determining whether the whey dryer is real or personal property, the most important is intention.").

49. 723 P.2d 504, 505 (Wash. Ct. App. 1986).

50. *Id.* at 507 (citing Westinghouse Elec. Supply Co. v. Hawthorne, 150 P.2d 55 (Wash. 1944)).

51. Pfeifle v. Tananbe, 620 N.W.2d 167, 173 (N.D. 2000) (quoting N.D. CENT. CODE § 47-01-05 (2005)) (fixtures statutorily defined as "permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts or screws").

52. *See Paul Mueller Co.*, 657 P.2d at 1283.

53. *See* Willcox Boiler Co. v. Messier, 1 N.W.2d 130, 132 (Minn. 1941).

54. Fondren v. K/L Complex, Ltd., 800 P.2d 719, 722–23 (Nev. 1990).

55. Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1284 (Utah 1982).

56. *Id*.

57. *See also* Girdler Corp. v. Del. Compressed Gas Co., 183 A. 480, 481–82 (Del. 1936).

58. These factors have only specifically been applied in California, but other jurisdictional rules often fall within these three categories. 100 Cal. Rptr. 2d 582, 584 (Cal. Ct. App. 2000) (citations omitted).

59. *Id.* at 583, 585.

60. Stanton Transp. Co. v. Davis, 341 P.2d 207, 210–11 (Utah 1959).

61. Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1077 (Utah 1988).

62. *See* Hayward Lumber & Inv. Co. v. Ross, 90 P.2d 135, 138 (Cal. Ct. App. 1939).

63. *See* Chesebro-Whitman Co. v. Edenboro Apartments, Inc., 207 A.2d 186, 191 (N.J. Super. Ct. App. Div. 1965) (citing West Jersey & S.S.R. Co. v. County of Cape May, 135 A. 74 (N.J. Ch. 1926)) (stating that carriers may recover even if not materialman); Indem. Ins. Co. of N. Am. v. Portsmouth Ice, Coal & Building Material Co., 172 N.E. 152 (Ohio 1930) (finding "the party who thus gives the material this added value [of transporting the mate-

rials to the site] has the right to secure and recover such enhanced value under and pursuant to the mechanic's lien laws").

64. Crane Co. v. Westerman, 8 N.W.2d 412, 413 (Iowa 1943).

65. *In re* Kent Refining Co., 20 F. Supp. 662 (W.D. Mich. 1937).

66. Schneider v. Menaquale, 49 A.2d 330 (Md. 1946).

67. Some of the cases cited below arise out of claims against payment bonds. To the extent payment bonds provide substitute security for work on public projects, these cases are likely helpful to determine the scope of mechanic's lien rights. Transamerica Premier Ins. Co. v. Ober, 894 F. Supp. 471, 484 (D. Me. 1995).

68. R.C. Stanhope Inc. v. Roanoke Constr. Co., 539 F.2d 992 (4th Cir. 1976).

69. The dissent vehemently opposes this outcome and argues that capital equipment was never meant to be protected. *Id.* at 995 (Haynsworth concurring and dissenting).

70. Harsco Corp., Patent Scaffolding Co. Div. v. NYC City Dep't of Gen. Servs., No. 92-CV-2314, 1993 WL 138829, at *1, 3 (S.D.N.Y Apr. 23, 1993).

71. *Id.*

72. Although this case does not directly deal with mechanic's liens, it deals with the Miller Act, which "was to serve as 'a substitute for liens which might otherwise have been claimed against the government construction.' " *Transamerica Premier Ins. Co.*, 894 F. Supp. at 484 (quoting Moran Towing Corp. v. M.A. Gammino Constr. Co., 363 F.2d 108, 115–16 (1st Cir. 1966)).

73. *Id.* at 483.

74. *See also* Morrow Crane Co. v. T.R. Tucker Constr. Co., 373 S.E.2d 701, 703 (S.C. Ct. App. 1988).

75. *See* Kimberly C. Simmons, Annotation, *Architect's Services as Within Mechanics' Lien Statute*, 31 A.L.R.5th 664, § 2[a] (2005).

76. Courts do not usually distinguish between architects and engineers, *see* Dunham Assocs. v Group Invs. Inc., 223 N.W.2d 376, 378 (Minn. 1974), so the rest of the article will use "architects" to represent engineers, designers, and architects. *See* Frank Pisano & Assocs. v. Taggart, 105 Cal. Rptr. 414, 427 (Cal. Ct. App. 1972); Cubit Corp. v. Haulser, 845 P.2d 125, 126 (N.M. 1992); UTAH CODE ANN. § 38-1-3 (1953).

77. *Cubit Corp.*, 845 P.2d at 125.

78. *Id.* at 127. Several other jurisdictions follow this reasoning. *See* Lamoreaux v. Andersch, 150 N.W. 908 (Minn. 1915) (holding "an architect's lien for services in preparing plans and specifications when the land was not benefited due to the owner's repudiation of the construction agreement . . ." was valid, "emphasizing the fact that the property owner and not the lien claimant, was at fault for abandoning the project"; *Cubit*, 845 P.2d at 128); Seracuse Lawler & Partners, Inc. v. Copper Mountain, 654 P.2d 1328 (Colo. Ct. App. 1982) (reasoning that if an owner can avoid claims by abandonment or only allowing partial completion, then many who worked on a project could be left without remedy); Zions First Nat'l Bank v. Carlson, 464 P.2d 387, 388 (Utah 1970) ("although [a property owner's] plans may not be brought to fruition by erection of a building," the architect still may assert a lien against the property); CAL. CIV. CODE § 3081.2 (West 1993) ("A design professional shall . . . have a lien upon the real property for which the work of improvement is planned to be constructed, notwithstanding the absence of commencement of actual construction of the planned work of improvement"); *see also* McDonald v. Filice, 60 Cal. Rptr. 832, 837 (Cal. Ct. App. 1967) (holding no lien attached because both the property owner and the lien claimant abandoned the project).

79. *McDonald*, 60 Cal. Rptr. at 836.

80. 11 Cal. Rptr. 261, 262 (Cal. Ct. App. 1961).

81. *Id.* at 264.