Chapter 19

MECHANICS' LIENS

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SYNOPSIS

§ 19.1 • INTRODUCTION

For a more complete treatment of Colorado mechanics' liens, see Greenwald, *Colorado Liens and Claims*, Fourth Ed. (CLE in Colo., Inc. 2002).

Mechanics' liens are a rather recent invention of the law. They are not part of the "common law" of England of 1607, which became the foundation of the American judicial system, and mechanics' liens are still not part of British law today.

Mechanics' liens were first adopted in the United States in 1791 in the State of Maryland. Two famous patriots, Thomas Jefferson and James Monroe, introduced mechanics' lien legislation.

The Colorado mechanics' lien statute is based upon California's statute. In *Boise-Payette Lumber Co. v. Longwedel*,[1] the Colorado Supreme Court stated, "The quoted portions of our Mechanics' Lien Law were adopted in this state in 1893, apparently from California, where they had been in force at least six years prior thereto."[2]

The theory supporting the concept of mechanics' liens in Colorado (and most other states) is that the increased value of the property resulting from the labor and/or material that is put into the property with the consent of the owner (either directly or through the contractor who is his or her agent under Colorado law) is the underlying foundation allowing recovery through a mechanics' lien. This concept was well stated by the Colorado Court of Appeals in *Bishop v. Moore*.[3]

Thus, "the right to a mechanics' lien given by the statute is based upon consideration of natural justice, namely that one who has enhanced the value of property by attaching thereto his materials or labor shall have a lien therefor."[4] The mechanics' lien laws operate in favor of all contractors, subcontractors, laborers, and materialmen on private construction. Also included in this protective shield are sub-subcontractors to subcontractors, as well as material suppliers to subcontractors, as well as subsubs, etc. The purpose is to provide protection for everyone down the line.

Public construction laws are covered in another chapter. But the reader is cautioned that there are many projects that may appear to be "government" construction but are actually private and governed by the rules for private construction. Examples are certain Federal Housing Authority housing projects that may appear to be public, but are actually private. Also, in some instances, there may be a joint private-public project.

On the other hand, Denver International Airport was a project of and is owned by a local governmental entity, the City and County of Denver. Therefore, no mechanics' liens would have been permitted on that job.

For more general information on this subject, the reader is directed to § 1.1 of Greenwald, *Colorado Liens and Claims*.

The reader will find a selection of forms in the Exhibits to this Chapter.

§ 19.2 • CONCEPTS

There are many important concepts or doctrines in the mechanics' lien field. Some of them are "liberal construction vs. strict construction," "unjust enrichment," "*quantum meruit*," "lack of privity," "priority of liens-doctrine of relation back," and "blanket liens," among others. These are some of the most common, but this is not an exhaustive list.

These concepts will be discussed in the following sections.

§ 19.2.1—Liberal Construction Versus Strict Construction

The key to Colorado's lien law can be found in *Lindemann v. Belden Consolidated Mining & Milling Co. 1*, wherein the court said:

> A mechanic's lien statute should be liberally construed as to the remedial portion of it, but it must be strictly construed in determining the question as to whether the right to a lien exists. Where the inquiry is whether a person asserting a lien or the work for which he claims it comes within the statutes, or whether the statutory requirements necessary to initiate the lien have been complied with, the statute must be strictly complied with.[5]

The case of *A-1 Plumbing & Heating Co. v. Thirteenth Street Corp.* restated the general Colorado policy of "construing mechanics' liens laws in favor of claimants."[6]

Seracuse Lawler & Partners, Inc. v. Copper Mountain[7] was a case in which the court of appeals held that under certain conditions, even though there were no improvements that would enhance the value of the property, a lien could be upheld. In this case, an architect's plans were never utilized because the developer didn't go ahead with the project.

Another example is *James H. Stewart & Assoc., Inc. v. Naradel of Colorado, Inc*.[8] In this case, the court of appeals held that an architect can have a lien against the real estate, even if his plans were never used and the building was never erected.

Additional information on this subject is found in Greenwald, *Colorado Liens and Claims*, § 1.4.

§ 19.2.2—Unjust Enrichment

Generally, a party who brings a mechanics' lien foreclosure lawsuit in the district court will also include a claim for relief based upon "unjust enrichment." This is because if the judge throws out the lien claim on some technicality, the judge might award recovery to the plaintiff on the unjust enrichment theory.

Prior to 1987, the Colorado appellate courts consistently rejected the doctrine of unjust enrichment. However, in that year, the Colorado Court of Appeals ruled that the doctrine of unjust enrichment was alive and well in the State of Colorado.[9] The appellate court held that to succeed on this theory, a plaintiff must meet the burden by proving that (1) the party conferred a benefit on the defendant, (2) the benefit was appreciated by the defendant, and (3) the benefit was accepted under such circumstances that it would be inequitable for the defendant to retain it without payment of its reasonable value.[10] Two subsequent appellate cases followed this doctrine.[11]

The development of the unjust enrichment theory in lieu of a mechanics' lien came to a crashing halt in the 1996 case of *DCB Construction Co. Inc. v. Central City Development Co.*[12] Since the publication of *DCB Construction*, the doctrine of unjust enrichment in mechanics' lien cases had been unclear and on hold, so to speak, until September 14, 1998, with the issuing of the opinion by the supreme court that considered the *DCB Construction* case on appeal.[13]

The matter of unjust enrichment generally arises when a tenant of a landlord contracts with a party to do tenant finish work, or any kind of construction work where the contractor deals with the tenant, rather than with the building owner.

The Colorado Supreme Court in *DCB Construction* considered the matter very carefully and, in a 5-to-2 vote,[14] rejected the doctrine in *Frank M. Hall*,[15] and defined a new (and much stricter) standard upon which to grant relief to a party based upon unjust enrichment. Now, in order to prevail, the claimant ". . . must be able to show that the landlord has engaged in some form of improper, deceitful or misleading conduct . . . ." Short of being able to show such impropriety, the claimant will fail in his or her attempt to establish unjust enrichment against the building owner.[16]

It has been suggested that the doctrine enunciated in *DCB Construction* applies only to situations where a tenant has ordered improvements. Thus, where the owner himself or herself contracts for the improvements, the theory of unjust enrichment may still apply. The thinking behind this is that the *DCB Construction* case dealt only with a landlord/tenant situation and therefore did not address any other relationship.

The reader who is interested in an historical review of this doctrine is invited to peruse § 1.5 of *Colorado Liens and Claims*.

§ 19.2.3—*Quantum Meruit*

Quantum meruit is simply another term for unjust enrichment.

§ 19.2.4—Privity

Privity is generally defined as a relationship, or contract, between two persons. One of the key principles of mechanics' lien law is that one claiming a lien does *not* need privity with the owner of the property to assert a mechanics' lien claim, so long as the claimant adds "value" to a parcel of real estate.

For example, A is a lumber dealer, B is the framer, C is the general contractor, and D is the owner-developer. A contracts to sell lumber to B. A has no idea as to the identity of the general contractor or of the owner-developer. So long as A, at the time of the sale, knows the ultimate destination of the lumber,[17] and if A complies with all of the statutory requirements, A can assert a mechanics' lien, even with this lack of privity with the owner. But in order to have lien rights, the claimant must have performed work or supplied materials at the instance of the owner or person having charge of the construction.

Section 38-22-101(1) provides that the one claiming a lien must have provided services or materials "at the instance of the owner, or of any other person acting by the owner's authority or under the owner, as agent, contractor, or otherwise . . . ." An "agent" includes the principal contractor and can include subcontractors, subsubcontractors, etc. But this line of succession does not include every party to a construction project.

In *Schneider v. J.W. Metz Lumber Co.*,[18] for example, petitioners entered into "agreements with Colorado Log Homes (CLH) to purchase prefabricated kits to construct log homes."[19] Metz, a wholesale lumber company, "provided materials for the prefabricated kits to CLH."[20] Metz claimed that it had mechanics' lien rights against the petitioners' property by virtue of supplying the materials pursuant to its contract with CLH. The Supreme Court disagreed:

> Metz Lumber, which wholesaled the materials to CLH and delivered them at CLH's arrangement, had no contractual relationship with petitioners.
>
> Metz, lacking any agreement with petitioners apart from the agreement to deliver the materials for a fee, can only claim a lien against petitioners if CLH can be classified as a "contractor, architect, engineer, subcontractor, builder, agent or other person having charge of the construction . . . .[21]

The Court held that "Metz supplied the lumber under a contract with CLH and not at the instance of the 'owner' or 'person having charge of the construction'" and therefore "cannot assert a mechanics' lien against petitioners' property."[22]

§ 19.2.5—Doctrine Of Relation Back/Priority Of Liens/Ranking Of Liens

All mechanics' liens relate back to the date when the first labor was performed or the first materials were shipped (by anyone). This date becomes very important when a dispute breaks out between a lien claimant and a financial institution that holds a deed of trust on the real estate. The lien claimant will try to show that some type of work was done on the project prior to the placement of one or more of the mortgages on the real estate. If proven, that gives priority to *all* those who have filed valid mechanics' liens, even over senior mortgagees that were recorded after "some work" was done on the project. For purposes of priority, it is important to remember that preliminary design services constitute "commencement of the work upon the structure or improvement" for purposes of priorities,[23] as addressed in § 19.3.6.

Priority of liens refers to the order in which liens will be paid, from the proceeds of the sale of the real estate, if more than one lien or deed of trust or other type of claim against the real estate is asserted. It also refers to liens that will remain on the property in a foreclosure by a mechanics' lien claimant. For example; if there was a deed of trust recorded before *any work* done on the project, it is senior to the mechanics' lien and will not be disturbed by a mechanics' lien foreclosure. So, too, if a mechanics' lien claimant has agreed to subordinate the mechanics' lien.

Ranking of liens refers to the order in which liens are satisfied. Here is the order as to how liens are ranked, in accordance with C.R.S. § 38-22-108(1):

(a) the liens of those providing labor by the day or piece, but not materials;
(b) the liens of all subcontractors or materialmen whose claims are for materials, machinery, or fixtures;
(c) the liens of all principal contractors.

It is important to consider the 1967 Colorado Supreme Court case of *3190 Corporation v. Gould*.[24] In this matter, the court apparently construed what is now C.R.S. § 38-22-109(7), the abandonment statute. Under this doctrine, if there is a cessation of work for 90 days, the project is deemed completed and the time for filing a mechanics' lien foreclosure lawsuit begins to run.

We say "apparently" because the opinion never identifies the particular statute that it is interpreting. However, the court stated: ". . . the fact that the statute permits a 30-day cessation of the work contemplates that the work might be in a sense sporadic and uninterrupted continuity is not required . . . ."[25] But the section of the "statute" to which it is referring is never identified.

In any event, at the time of the *Gould* case, the cessation time to constitute completion to commence the running of the time to file a mechanic lien foreclosure was only 30 days, but the principle is the same.

In the *Gould* case, there was conflicting evidence of whether the cessation of work was more than 30 days. The court found that the work had not ceased for the 30-day statutory period.

It is very important that we carefully examine the exact language of the statute.

C.R.S. § 38-22-109(7) contains three sentences, the last two of which discuss abandonment. Those two sentences read as follows:

> For the purposes of this section, abandonment of all labor, work, services, and furnishing of laborers or materials under any unfinished contract or upon any unfinished building, improvement, or structure, or the alteration or addition to, or repair thereof, shall be deemed equivalent to a completion thereof. For the purposes of this section, "abandonment" means discontinuance of all labor, work, services, and furnishing of laborers or materials for a three-month period.

This particular statute nowhere discusses the doctrine of "relation back." (This important doctrine is discussed in the original text in this very section.) However, in the *Gould* case, the question concerned itself with whether or not there was a cessation of work for 30 days.

The court opinion contains the following curious language:

> The only disputed evidence is on the question of whether there was cessation of labor for 30 days or more at any time between July 1960 and July 1961, when the construction was completed. This contested matter goes to the very heart of the litigation and presents the main problem involved herein because only if there was continuity [of work] without the allowable 30 day interruption would plaintiffs be able to relate their claim back to the beginning of the construction and thus assert the priority of their mechanics' claim.[26]

As we have said, there is no statutory reference to indicate what section was being construed. And the statute that does discuss "cessation of work" nowhere discusses the "relation back" doctrine. The reader should be advised that C.R.S. § 38-22-106 is the statute that governs the relation back doctrine.

If there was no cessation, then the plaintiffs had no time problem in filing a mechanics' lien. If there was cessation, however, then the plaintiffs had several problems:

First, why should the fact that there was cessation in construction of the project cause a lien claimant not to be able to relate back to the beginning of construction?

C.R.S. §§ 38-22-109(4) and (5) define when lien statements must be filed. C.R.S. § 38-22-110 defines when the lien foreclosure lawsuit must be filed. And C.R.S. § 38-11-109(7) defines abandonment. Thus, it is clear that abandonment equals "completion."

The only thing that the abandonment statute says is that construction is deemed complete at the end of the period of cessation and that is when the time period begins running for the docketing of the lien foreclosure lawsuit and the recording of the *lis pendens*. The statute says nothing about a lienor losing his or her right to relate back to the commencement of construction.

Second, suppose a lien claimant serves and records his or her lien statement even before the 90-day cessation of work commences. Under *Gould*, one could make an argument that the lienor cannot relate back to the beginning of construction.

Third, suppose a lien claimant doesn't even begin to work on the project until after the cessation of work has run for the statutory period and then resumes again until the building is finally completed. Under *Gould*, this lien claimant, who is not even involved in the project until way after the cessation period has run and work thereafter recommences as if a new project has begun, is barred from attempting to relate back to the commencement of the original construction.

The rationale for this is probably the fact that once cessation for the statutory period has taken place, the work that took place before is now deemed completed and *if* construction resumes after the statutory cessation period, it is as if a new construction project has commenced. In other words, once the statutory time for cessation has run its course, all work done before the cessation began is deemed completed for all purposes.

No one who performs labor or supplies materials after the job has resumed, be it a contractor, subcontractor, or supplier, can ever have a mechanics' lien that could ever relate back to the beginning of the original construction, in order to defeat any deed of trust that had been placed on the real estate prior to the time that the cessation period commenced.

In all of these three examples, under *Gould*, one could argue that the lien claimant is barred from relating back. Yet, nowhere in the statute does it say what *Gould* purports to stand for. Further, the *obiter dicta* statement in *Gould* seems to fly in the face of the Colorado doctrine, which provides for a liberal construction of the mechanic lien laws, once the statutory requirements have been fulfilled.[27] In fact, the supreme court reaffirmed the liberal interpretation of Colorado's mechanics' lien statutes by stating: ". . . Mechanic's lien laws are designed for the benefit and protection of mechanics and others and should be construed in favor of lien claimants."[28] Given the statutory and case law favoring mechanics' liens, it would appear that the

Gould case provides serious problems for all those who would rely on the lien law to collect monies due for their labor performed and material furnished when there is a 90-day abandonment.

Additional information on these interrelated subjects may be found in *Colorado Liens and Claims* §§ 2.8.10, 2.15.1, and 2.15.2.

§ 19.3 • THE LIEN STATEMENT

Bradford Publishing Company form number 180A, entitled "Statement of Lien with Notice of Intent to File a Lien Statement and Affidavits of Service," is the most widely used form by attorneys practicing in the mechanics' lien field. (See Exhibit 19A to this Chapter.) However, the use of that form is not mandatory.

It is critical that all required information be accurately and completely included in the Statement of Lien. Among other things, it is better practice to include the addresses of all of the named parties, although strictly speaking, the Bradford form may not actually require all of the addresses. More is better. If in doubt, list it.

The notarization on the Statement of Lien is the subject of many errors. The name of the county where the claimant is signing the affidavit must be inserted. But, sometimes, the situation arises where the county where the real estate is located is inserted in the notarization section, which is erroneous. The practitioner should not make this mistake.

For more detailed information on the lien statement, please see Chapters 1 and 2 (and the tables of contents contained therein) of Greenwald, *Colorado Liens and Claims*.

§ 19.3.1—The Lien Claimant

Anyone who has supplied equipment, material, labor, machinery, or tools to be used in the construction, alteration, or repair of any structure, or who makes an improvement upon the land itself, is eligible to claim a mechanics' lien.[29] As is found in *Colorado Liens and Claims*,[30] the following, *inter alios*, qualify to claim a mechanics' lien on real estate: architect; engineer; draftsperson; carpeting firm; appliance dealers (if the appliances are incorporated into the real estate); fixture firms; tool supplier; job superintendent; lessor or renter of equipment and machinery; supplier of curbs, gutters, and sidewalks; assignees of the above; labor union trusts; landscapers; materialmen and suppliers of all types; subsubcontractors; submaterialmen; and general contractors.

There are no reported Colorado cases as to the validity of lien claims on behalf of interior decorators, but it would be logical that their claims would be valid. On the other hand, suppliers of draperies and furniture would not be entitled to liens because their product is not "incorporated" into the real estate — they remain personalty.

Holders of options to purchase real estate are not entitled to a mechanics' lien.[31]

In a 1998 decision, the Colorado Court of Appeals held in *Skillstaff of Colorado, Inc. v. Centex Real Estate Corporation*[32] that a temporary personnel agency that supplied laborers to a subcontractor for a bona fide construction project, which work enhanced the value of the real estate, was *not* permitted to recover on its mechanics' lien statement. The court reasoned that temporary personnel agencies are not listed in the lien statute as entitled to lien protection. Certiori was denied by the Colorado Supreme Court. This is an example of the "strict construction" in determining whether the right to a lien exists, as discussed in § 19.2.1, above.

The legislative enactment of Senate Bill 00-066, portions of which went into effect on August 2, 2000, and other portion on October 1, 2000, was in reaction to this case. The state legislature recognized the rights of personnel agencies and labor pools who furnish laborers for a construction project, to be in the protected class of those who are able to file a mechanics' lien upon the real estate in a situation where the labor of their employees had enhanced the value of real estate.

§ 19.3.2—The Owner Of The Real Estate

The owner of real estate upon which a mechanics' lien statement has been recorded or has been threatened to be recorded is not in an enviable situation. Often, the owner is caught in a dispute between the materialman-supplier and the general contractor (GC), and because of this dispute the materialman-supplier can't get paid. Sometimes the dispute is between the GC and the owner, thus leaving innocent subcontractors and materialmen unpaid.

Depending upon the terms between the owner and the GC, the owner may be entitled to demand that the GC obtain a surety bond to secure the lienor in order that the lien be removed as a cloud on the real estate.[33] Similarly, the owner of leased property may be entitled under its lease to demand that its tenant clear title and obtain a surety bond in order to remove the lien. In fact, the recording of a mechanics' lien typically constitutes a breach of lease, and can be grounds for eviction if the lien is not removed. The recording of a mechanics' lien may violate the terms of the owner's mortgage and entitles the borrower to insist that the owner obtain a surety bond in order to remove the lien. If the GC won't or can't get the lien statement removed, the owner, if he or she is financially stable, can move to get the lien statement removed by substituting a surety bond. It must be remembered that the party who obtains the surety bond as principal will be responsible for any judgment for foreclosure. This procedure is defined in *Colorado Liens and Claims*, §§ 4.10 and 4.11.

§ 19.3.3—The Amount Of The Lien

If one has supplied materials or labor for a private construction project, he or she may claim a lien for the "value" of such materials or labor. This value is usually determined by the contract price. The "value of labor" may also include any payments required under the terms of the construction or labor contract for pension, profit-sharing, vacation, health and welfare, prepaid legal services, or apprentice training benefits for the employees of any contractor.[34]

One cannot file a mechanics' lien for a sum in excess of what is actually due to the claimant. This prohibition is stated both in the statute and in case law.[35] Specifically, filing a mechanics' lien for an excessive amount can result in *forfeiture* of the entire lien claim, even that

part that is genuine, and also can result in the awarding of attorney fees and costs to the aggrieved party.[36] But neither an obviously overstated mechanics' lien nor a completely improper mechanics' lien can be deemed a "spurious lien" under Colorado's Spurious Liens and Documents statute.[37] What this means is that property owners cannot obtain expedited relief if they wish to clear their property of mechanics' liens that are recorded in bad faith, other than to bond over the liens. However, recording a mechanics' lien where no such right exists can subject the party recording the improper lien to criminal action.[38]

Interest on the amount owed, based upon the rate agreed to by the claimant and the entity with whom contracted, may be recovered, and included in the lien statement. If no specific rate has been agreed to, then the statute provides for default interest at the rate of 12 percent per annum.[39]

Costs are generally awarded to the prevailing party.[40] But, recovery of attorney fees is a much more difficult matter. The statute is silent as to attorney fees. See § 19.7.7, below, for an analysis of the cases that prohibit the awarding of attorney fees in a mechanics' lien foreclosure action.

The interesting issue of awarding attorney fees against a party who filed an excessive mechanics' lien claim was thoroughly analyzed in the case of *LSV, Inc. v. Pinnacle Creek*.[41] In this case, a lienor filed a mechanics' lien claim in the sum of $75,000, when, according to the trier of facts, the claimant knew that he only had a valid claim for $50,000. In addition to voiding the *entire* lien claim, the lower court also awarded a judgment against the lienor for attorney fees incurred by the property owner, even though the lien claim was only one of several claims for relief asserted by the lienor. On appeal, the property owner asserted that it was entitled to an award of attorney fees incurred regardless of the issue for which they were incurred.

The *Pinnacle Creek* court held that the aggrieved party, where there is more than one claim for relief, is only entitled to an award for reasonable attorney fees in defending against the excessive lien claim. This is distinguished from *Heating & Plumbing Engineers, Inc. v. H. J. Wilson Co.*,[42] as all of the claims in that cases were directly attributable to the excessive lien claim.

§ 19.3.4—Mortgaged Real Estate

Filing a mechanics' lien on mortgaged land generally leads to a series of difficult questions, as to which takes priority, the lien statement or the prior recorded mortgage?

C.R.S. § 38-22-103(2) provides the following stark language:

> When the lien is for work done or material furnished for any entire structure, erection or improvement, such lien shall attach to such building, erection or improvement for or upon which the work was done, or materials furnished in preference to any prior lien or encumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or improvement sold under execution and the purchaser at any such sale may remove the same within thirty days after such sale.[43]

However, the case of *Lew Hammer, Inc. v. Dash, Inc.*[44] held that where the construction work was for the "expansion, repair and remodeling of *existing* improvements" (emphasis added), the above section did not apply, and therefore any mechanics' lien statement could not be superior to prior recorded deeds of trust. Further, the court seemed to say that the prior recorded deeds of trust were of record before any work commenced on the current project.

The following appear to be the law in Colorado:

1) A mechanics' lien will take precedence over a construction loan given to finance the very construction that gives rise to the lien.
2) A mechanics' lien will take precedence over any deed of trust *if* the lien involves work on an *entire structure* and the first work is prior to the date when the deed of trust is recorded.
3) A mechanics' lien will not take precedence over a prior recorded deed of trust *if* the lien involves work on expansion, repair, or remodeling of an existing structure and the work begins *after* the date when the prior deed of trust was recorded.
4) Conversely, a mechanics' lien will take precedence over a prior recorded deed of trust IF the lien involves work on expansion, repair, or remodeling of an existing structure and the work begins *before* the date when the prior deed of trust was recorded.

C.R.S. § 38-22-103(2) is cited and amplified in a number of Colorado appellate decisions, as follows: *Stinnett v. Modern Homes*,[45] *Atkinson v. Colorado Title & Trust Co.*,[46] *Church v. Smithea*,[47] *Plateau Supply Co. v. Bison Meadows Corp.*,[48] and *Powder Mountain Painting v. Peregrine Joint Venture.*[49]

May 11, 2000, saw the publication of a very significant opinion by the Colorado Court of Appeals, in the case of *1st Choice Bank v. Fisher Mechanical Contractors, Inc.*,[50] concerning the issue of priority between mechanic lien claimants and a mortgage holder.

In this case, one Childers secured his bank loan for the purchase of vacant property by granting a deed of trust on the property to the bank. A month later, Childers obtained a second loan from the same bank for the purpose of financing the construction of a building on that real estate. Thereafter, the bank took back a third deed of trust for another loan to finance the final construction efforts.

Thereafter, various subcontractors who supplied labor and materials for the project weren't paid and filed mechanics' liens against the real estate. All parties agreed that the liens were filed after the recording of the second deed of trust but prior to the recording of the third. Construction was not completed, and the lienors sued to foreclose their mechanics' liens.

The general rule was, and remained so after the decision in this case, that mechanics' liens have priority over prior recorded mortgages on a newly constructed building. However, the court here carved out an exception to the general rule, as follows: "The exception grants the lien of the deed of trust priority insofar as the loan was for building the structure *and the proceeds*

were actually used for that purpose." Thus, to the extent that any loan monies were actually used in the construction of the building, the secured party's deed of trust would be prior and superior to the mechanics' lien claim. The lien claimants applied for certiorari to the Colorado Supreme Court and same was denied on September 11, 2000.

In *Wells Fargo Bank v. Fisher*,[51] the district court addressed the remanded issue of whether and to what extent the construction loan proceeds had actually been used in construction. At trial on remand, the court required the plaintiff to establish that the funds from each disbursement of the construction loan were actually expended on the construction of the subject house. In applying this standard, the trial court did not consider payments made to the lienors as qualified under this standard if the lienors received payments but applied them to pre-existing debt.

Although the second deed of trust held by the bank was in the sum of $138,000, the trial court found that only $7,857.86 of the construction loan proceeds were used in the construction of the subject house; therefore, the bank's second deed of trust had priority over the lienors only to the extent of that lesser sum.

The bank appealed and contended that the trial court erred in not concluding that the entire sum of the second deed of trust had priority over the mechanics' liens. The bank contended that (1) the trial court's interpretation of the plaintiff's burden upon remand was incorrect, and (2) that the trial court misapplied the above standard by permitting some double recovery by the lienors. Both of these contentions were rejected by the court of appeals in a decision issued on October 24, 2002, in an unpublished opinion.

Additional material on this subject is found in §§ 2.3.2 through 2.3.7 in *Colorado Liens and Claims Handbook.*

§ 19.3.5—The Time Factor

The time limits for filing a lien claim are crucial and must be strictly complied with or the right to a lien will be lost. The time limit for filing a lien claim depends on what a party has supplied to a construction project (material or labor or both) and whether he or she is classified as a principal contractor, subcontractor, supplier, or laborer.

The classification and time limits are as follows:

1) Lien statements claimed for labor by the day or piece (but without furnishing any materials) must be filed after the last labor has been performed by the laborer claiming the lien but no later than two months after the completion of the building, structure, or improvement. *Exception:* All principal contractors (those dealing directly with the owner or his or her agent) fall into the next category, even if all they contribute is labor by day or piece.[52] Although the author has seen no reported decision on this point, it is fairly obvious the "labor by the day" refers to day laborers. And, in 35 years in dealing with this area of the law, the author has seen no situation involving labor by the "piece."

2) The lien statements of all other lien claimants (those providing material, or labor and materials, and all principal contractors) must be filed no later than four months after the last day on which the labor was performed or the last material furnished by such lien claimant.[53]

The question frequently arises as to what was the *last day* that labor was performed or materials shipped. The labor that was performed or the materials that were shipped cannot have been "trivial."[54] Labor performed to correct the lienor's own mistakes does not extend the date, nor do materials shipped to remedy the prior shipment of defective materials. Punch list items, go-back work, and other corrective work *to correct one's own mistakes is not lienable but labor and/or materials to correct someone else's errors and omissions extend the date to when furnished*.

The next problem is that one should not wait until the 60th or 120th day to record the lien statement. (We understand that, conceivably, one could have up to 123 days, depending upon the length of the four months, as it applied to his or her lien.) There are several reasons, as follows. First, it takes time, sometimes several days, to obtain all of the necessary information that you need to fill out the mechanics' lien statement accurately and completely. The verification of ownership, the name and address of the general contractor, and the legal description can take a lot of time to assemble, especially in the bustling home construction market where the county real estate offices can barely keep up with all of the new residential developments.

Second, as we will see in § 19.3.7, below, the notice of intent to file a lien statement must be served at least 11 days before it can be recorded.

Third, because the office of the county clerk and recorder is closed, a mechanics' lien statement cannot be recorded on Saturday, Sunday, or a legal holiday. If the legal holiday falls on a Monday, as it often does, the clerk's office is closed for three consecutive days. *Caution:* It would appear that if the four-month period ends on a Saturday, Sunday, or holiday, the time is *not* extended and therefore failure to file within the statutory time period is fatally defective. C.R.S. § 38-22-109(d)(4) provides that liens for "labor or work by the day or piece" must be filed "at any time before the expiration of two months next after the completion" of the job. C.R.S. § 38-22-(d)(5) provides that the liens for everybody else "must be filed for record before the expiration of four months after the day on which the last labor was performed or the last material furnished by such lien claimant."

Fourth, if the lien statement is mailed to the Clerk and Recorder, a number of days may elapse while the mail is being handled between your office and the office of the County Clerk and Recorder.

One cannot file the lien statement before the debt accrues. In *Sperry & Mock, Inc. v. Security Savings & Loan Assoc.*,[55] the lienor filed his lien for about $4,000 when, at the time of filing, he was only owed $1,000, his contention being that by the time the lien process was complete, the entire sum would be owed. However, the Colorado Court of Appeals did not agree with

him. C.R.S. § 38-22-128 discusses filing a lien statement for a sum greater than what is due. The operative words here are "is due." Presumably, "is due" means the sum stated in the affidavit in the lien statement. This is consistent with the ruling in the *Sperry* case and is analogous to the material set forth in § 19.3.3, above.

For the effect of a pay-when-paid clause in the contract, see § 19.3.11.

It is proper to file a mechanics' lien before the job is completed, so long as it states only the dollar amount actually owed as of the date of the affidavit on the lien statement. (It goes without saying that to file a lien statement on a job before it is completed, assuming that your client is receiving his or her periodic payments, may not be the most prudent course of action to take, as, generally speaking, it will make all of the recipients of the notice of intention to file a lien statement extremely upset.)

The question arises as to what to do if partial payments are made. Should the lienor file an amended lien statement? Or should the lienor issue a partial lien waiver, indicating what sum has been paid and what sum is still due? The answer is that prudence dictates that the lienor should do one of the two, preferably the latter. In this manner, the lienor will not rely on filing an amended lien statement that could be construed as having been filed late, *i.e.*, after the four-month time frame, and also, the claimant will protect himself or herself by having the original lien statement in place and will record a partial lien waiver indicating the lower sum now due.

Additional material in this area is found in § 2.8 and in the "checklist" in the Appendix B of *Colorado Liens and Claims Handbook*.

§ 19.3.6—Effective Date Of The Lien

We are frequently asked, on what date does the lien become effective? Here are five possible answers:

1) the date that the lien statement is served (mailed);
2) the date that the lien statement is recorded;
3) the date that the claimant began his or her first work;
4) the date that the claimant shipped his or her first materials;
5) the date that the claimant performed his or her first work.

The correct answer is, "none of the above," because all liens "relate back" to the date when the first person (whether contractor, subcontractor, or materialman) on the project did any non-trivial work. This means that if the first work, such as drafting or architectural plans or engineering plans, took place before the first deed of trust was placed of record, and lien statements are eventually placed of record, all the lien statements will take priority over that deed of trust.

The question arises, what constitutes "first work"? The answer is that *generally* the first work is what is done done by a surveyer, an engineer, a draftsperson, or an architect. And, generally speaking, some work almost always takes place before a deed of trust is recorded.

This important principle has been reaffirmed by the Colorado Supreme Court in the case of *Weather Engineering & Manufacturing Inc. v. Pinion Springs Condominiums, Inc.*[56]

The reader is directed to § 19.2.5, the doctrine of relation back, in order to consider the 1967 case of *3190 Corp. v. Gould*.[57]

§ 19.3.7—The Notice Of Intent To File A Lien Statement

The Notice of Intent to File a Lien Statement is on the reverse side of the Bradford Publishing form number 180A, Statement of Lien, a copy of which appears as Exhibit 19A to this Chapter.

The Intent form is usually completed in three stages. The first one is the top paragraph on the page, wherein the attorney's name and address are typed on the left side and the client's name and address are typed on the right side. In addition, the client has to sign on the line indicated.

It is better practice not to complete the two affidavits in the middle of the page until the lien statements have been served by mailing them either certified mail or registered mail or having them served by a process server. Most practitioners simply serve by certified mail. This is because (1) it is much less expensive than using private process servers, and (2) it is less cumbersome because all that is needed is the Postal Service green card and the certified notice slip and a fast trip to the Post Office by a trained office employee — and the Postal Service does the rest.

Once copies of the lien statement have been so served (*one never mails the original; it is kept to be mailed to the Clerk and Recorder, if necessary*), the two affidavits are completely filled out and notarized, one for service on the owner and one for service on the contractor. *Note: if the claimant is a general contractor OR if the claimant has contracted directly with the owner, then it is not necessary to fill in the second affidavit.*

In dealing with owners who may be husband and wife, it is not considered good practice to prepare one envelope addressed, for example, to Mr. and Mrs. John Smith. It is much preferred to send one envelope to Mr. John Smith and a separate one to Ms. John Smith. If one envelope is sent to Mr. and Mrs. John Smith, suppose the Smiths are engaged in a bitter divorce. Mr. Smith receives the letter, doesn't tell Mrs. Smith, she loses the house, and she sues Mr. Attorney for not sending her a separate letter. There is no appellate decision on this subject, but in an era of spousal rights, the prudent course of action is to send each party his or her own letter.

The author recently testified as an expert witness in the District Court of Adams County. One of the key issues was whether or not, in a situation where the owner and the general contractor were two interrelated corporations, with similar officers and directors and operating out of one office, one notice was sent to one corporation and none was sent to the other. Under *Lindemann*[58] and the strict construction doctrine, such service was invalid and thus the lien statement void. See § 19.2.1.

The lien claimant appealed the trial court's decision to the court of appeals. In an opinion not selected for publication, on December 30, 1999, our intermediate court reversed the trial court's decision. In *Mark Brenneman v. Devonshire Square LLC*,[59] the appellate court disagreed with the conclusions of the trial court.

The trial court found that the lien statements to the owner and the general contractor were placed in one envelope, as both the owners and the contractor were at the same address. The trial court concluded that the service was defective, since the owners and the general contractor did not receive their individual envelopes.

The court of appeals reversed:

> The statute requires the notice of intent to be served upon the owner and the contractor "by personal service or by registered mail or by certified mail, return receipt requested, addressed to the last known address of such persons." Sending the notice by certified mail to the owner's address complies with those requirements, regardless of whether the person who receives and opens the mail at that address is acting as the owner's agent.

Notwithstanding this unpublished opinion, the conservative practice is still to use separate envelopes to each owner and to the general contractor.

It is important to stress that names and *addresses* should always be used in these affidavits (even if it means typing a separate schedule because of lack of room in the affidavit). Trial judges frequently reject liens because addresses were not used in the affidavits. It is important to remember that the lien statute is to be strictly construed in determining whether the right to a lien exists.

Concerning the service by certified mail, the letters are to be taken to the U.S. Postal Service in order that proper receipts be obtained. It has turned out that sometimes these letters, with the certified mail emblem on the envelope, are simply dropped in a mail drop box. *This is probably not good service.*

After 11 days have passed and if full payment has not been made, then the third and final affidavit, entitled "Affidavit of Service or Mailing Prior to Filing Lien Statement," should be completed and notarized. Then, the original of the document should be mailed to the Clerk and Recorder of the county where the real estate is located, together with the recording fee (currently $6 for the first page and $5 for each subsequent page). It is important to confirm the recording fees with the Clerk's office, as they are raised periodically.

On occasion, the parcel of real estate against which the mechanics' lien is asserted is owned by more than one owner. Some condominiums have common areas owned by 10, 20, or more persons. Although the statute[60] is not absolutely clear on this point, in order to reduce the attacks that are always mounted against the lien claimant, it is wise for the lienor to send notice to

each and *every* such owner. Since there is not sufficient room in the affidavit, one must simply type in the affidavit words such as "See schedule A attached." On that schedule A, each owner and his or her address should be typed.

Whenever there is a question of whether something should be included or not, 99 percent of the time, the attorney is well-served to include it.

On occasion, the addressee-owner or contractor will refuse the letter or will simply say that he or she never received it. Such person will then argue that since 10 days did not elapse from the date that he or she received the "notice" (because he or she never got it) and the day of recording the lien statement and "intent," the claimant's lien statement is defective. Not to worry. In 1982, the court of appeals in the case of *6S Corporation v. Martinez*[61] ruled that it makes no difference when the addressee receives the letter, or if he or she ever receives it, *so long as the lienor served the notices properly.*

Similarly, and under the same rationale, if the letter is returned "undelivered," service is nevertheless complete, so long as the lienor effected service in accordance with the statute. As we said earlier, simply dropping the lien statement and "intent" in the mailbox, rather than making a trip to the Postal Service, is *not proper service.*

Much more material on this subject can be found in §§ 2.7 and 2.8 of *Colorado Liens and Claims Handbook.*

§ 19.3.8—Abandonment

Discontinuance of all labor, work, services, and furnishing of materials on a structure for a three-month period constitutes abandonment. Once there has been abandonment, the building will be considered completed, and the time limits for foreclosure of a lien will commence.[62] And, as stated previously, trivial work or trivial supplies of materials will not be counted.

Abandonment has no effect whatsoever as to the time frames for serving and recording a mechanics' lien statement and the notice of intent to file a lien statement. The procedures are set forth in C.R.S. §§ 38-22-109(d)(3), (4), and (5).

Kehn v. Spring Creek Village[63] was a Colorado Court of Appeals case that considered trivial imperfections and the timely recording of a lien statement. *Kehn* upheld the legal premise that trivial imperfections do not delay the commencement of the abandonment period. The court also ruled that the "abandonment" doctrine is applicable to all potential lien claimants, laborers, contractors, and suppliers alike. Finally, the court of appeals held that where a subcontractor could not complete his contractual obligations because of the action of the contractor, such failure did not constitute "abandonment."[64]

Additional material on this subject is found in § 2.11 of *Colorado Liens and Claims Handbook*. The reader is directed to § 19.2.5, the doctrine of relation back, in order to consider the 1967 case of *3190 Corp. v. Gould*.[65]

§ 19.3.9—Leased Real Estate (Leasehold Interest)

On many occasions, construction takes place on real estate where the lessee, and not the lessor-owner of the parcel, is engaged either in the building of some structure or the remodeling of an existing structure or portion of a structure. The question arises as to whether different rules apply in these situations, and the answer is yes.

The difference is that the owner-lessor has the right to post a "notice of non-liability" on the premises in accordance with the statute.[66] The owner must file this notice within five days after the owner or his or her agent has learned that construction or remodeling has *commenced* on the property. This notice must state that the owner's property interest shall not be subject to a lien. This notice must either be personally served on all those parties engaged in the construction (an almost impossible task) *or* must be posted in some conspicuous place upon the premises where the construction is taking place, so that all those supplying labor or materials on the project will be put on notice that the interest of the property owner will not be subject to a lien.

If a lien were filed, in order for the owner to prevail, he or she would have the burden of proof to show that this notice remained on the property during the entire period of construction and was conspicuous.

Practice Pointer

Here are some suggestions for the owner to do during construction to assist him or her in having the proper proof, should litigation ensue:

1) The owner or his or her agent (both of whom should be available to testify) should personally verify, every few days, that the notice is posted. They should keep a notebook attesting to the time, locations observed (if multiple), and the date of each visit, and which of the two made the inspection.
2) If the property is large, there should be several notices. A separate written record should be maintained for each location where the notice is posted.
3) The notices must be large, readable, and conspicuous.
4) Extra copies of the notice should be made so that in the event that a notice disappears or is defaced (and both do happen with some degree of frequency), the notice or notices may be replaced.
5) Pictures of the notices should be taken periodically, taking care to note the date taken and location of the notice being photographed.
6) If the building being remodeled has more than one entrance, every entrance should be posted.

The concept of posting of the notice was upheld in *Uni-Build Corp. v. Colorado Seminary.*[67]

In the important case of *Thirteenth Street Corp. v. A-1 Plumbing & Heating*,[68] the lease authorized the tenant to make improvements to the property; the owner-lessor had knowledge of the ongoing construction, but failed to post the notice of non-liability. Thus, the Colorado Supreme Court upheld the validity of the mechanics' lien after the tenant failed to pay the costs of the improvements.

The question arises as to what happens in a situation where the lease does not authorize the tenant to make alterations or is simply silent on the subject. Initially, we must state that we are not aware of such a situation. Having said that, the point must be made that if the lease were not recorded, a potential lien claimant would not be bound by the terms of a now "secret" lease.

Additional material on this subject may be found in § 2.13 of *Colorado Liens and Claims Handbook*.

§ 19.3.10—Blanket Liens And Apportionment

When the lien claimant has furnished labor and/or materials for two or more buildings for the same person and under the same contract (and some say "series of contracts," although we have found no Colorado statute or case authority either allowing same or disallowing same), C.R.S. § 38-22-103(4) provides that "it is lawful" to apportion the labor and materials supplied to each project. However, if the labor and materials cannot be readily and definitely divided, "then one lien claim can be made," *i.e.*, a blanket lien may be filed.[69] The buildings or parcels of real estate need not be contiguous, but they must be in the same county.

The Colorado Supreme Court considered this statute in the 1925 case of *Buerger Investment Co. v. B. F. Salzer Lumber Co. 2.* The court said:

> The statute is to be liberally construed. If that means anything, it means that it is to be construed according to equitable principles. The reasonable, liberal, and equitable construction of these terms is that the claimant may apportion when possible; if impossible, he may spread his blanket, but if apportionment is possible, yet cannot readily be made, he may choose whether he will apportion or file a blanket lien.[70]

Considering the court's use of the word "equitable," it would be well to restate the proposition that the entire concept of mechanics' liens is equitable in nature. That brings up two important points. The first is that county courts have no equitable jurisdiction and do not adjudicate issues of title to real estate (which is what a lien foreclosure lawsuit is all about). C.R.S. § 13-4-104, as amended, provides the types of matters over which the county courts have jurisdiction. Neither equity matters nor mechanics' lien foreclosures are listed. (Interestingly enough, county courts have jurisdiction over the liens of agisters and landlords, as is shown in that same C.R.S. § 13-4-104(2)). This matter of "equity" is very important when it comes to trials of mechanics' lien foreclosures and is discussed in § 19.7.4, below.

In 2005, the Colorado Supreme Court reaffirmed a lien claimant's right to file a blanket lien, and held that a blanket lien is still valid even if the claimant chooses to not include some of the improved properties within the blanket lien.[71] Although the Court held that the lack of total inclusion of all benefited properties does not render a lien invalid, the Court also held that the debt can be recovered against the included properties only to the extent that each actually benefited from the work performed under the contract.[72]

There is additional material in this area in § 2.9 of *Colorado Liens and Claims Handbook*.

§ 19.3.11—Pay-When-Paid Clauses

Many construction clauses between a prime contractor and a subcontractor contain either one of the following two provisions:

1) "Monthly and final payments will be made to the subcontractor by the contractor within five days after receipt by the contractor from the owner." (This is a "pay-when-paid" clause.)
2) "It is agreed that payment to a subcontractor is fully dependent upon the contractor receiving payment from the owner." (This is a "pay-if-paid" clause.)

It is clear that in the second provision, the contractor does not have to pay the sub unless, and until, the contractor gets paid by the owner.

The more difficult problem is the first provision, the pay-when-paid clause. This provision was considered by the Colorado Court of Appeals in the case of *Printz Services Corp. v. Main Electric, Ltd.*[73]

Citing the 1897 Colorado Supreme Court case of *Orman v. Ryan*,[74] the court of appeals held on April 17, 1997, that such a pay-when-paid clause was valid and that if the contractor did not get paid by the owner, the owner did not have to pay the sub.[75]

Those unpaid subs, citing the facts that most jurisdictions have come to the opposite conclusion and that *Orman* was an "old" case, on August 4, 1997, filed a petition for writ of certiorari with the Colorado Supreme Court, which was granted. Thereafter, all parties filed their respective briefs in 97 SC 601, and oral arguments were heard in mid-September of 1998.

The Colorado Supreme Court in *Main Electric, Ltd. v. Printz Services Corp.*[76] reversed the court of appeals and reinstated the ruling of the Teller County District Court.

The supreme court stated that if the contracting parties want to shift the risk of the owner's non-payment, ". . . the relevant contract terms must unequivocally state that the subcontractor will be paid only if the general contractor is first paid by the owner and (also) set forth the fact that the subcontractor bears the risk of the owner's non-payment."[77]

Thus, the second *Main Electric* case marks an important change in what had been the law and represents a victory for the subcontractor.

As far as the question of when the monies are due, see § 19.3.5, above.

§ 19.4 • NOTICES

The mechanics' lien statute provides three special type of notices of which the lien practitioner should be aware. They are found in C.R.S. §§ 38-22-102(4), (5), and -126(2).

The Notice by Claimant is found in 102(4) of Article 22; the Notice by the Disburser is found in 126(2) of Article 22, and the Notice to Disburser is found in 126(4) through (7) of Article 22.

The Notice by Claimant is a document given to the owner and/or the disbursing agent that gives these parties notice that a party has or is performing labor and/or has or is supplying materials to a certain project. The recipient is now on notice about a potential claim and may be obligated to hold sufficient funds to pay the claimant.

The Notice by the Disburser is a document that Colorado law requires every party responsible for disbursing funds for a project to record with the County Clerk and Recorder detailing certain pertinent information.

The Notice to Disburser, although similar to the Notice by Claimant, is separate and distinct. A claimant, therefore, could avail himself or herself of both the Notice to Claimant and the Notice to Disburser. Any person or entity entitled to a mechanics' lien may serve notice on a "disburser," identifying itself by name, address, and telephone number, describing the property, the person with whom it has contracted, and a general statement of the contract.[78] If such notice is received, the disburser, prior to disbursing any contract funds, must ascertain the amount due the claimant on any disbursement date, and "pay such amount directly to the claimant out of any undisbursed funds available for and due to said person designated in said notice on such date. . . ."[79]

Detailed explanations of these three procedures can be found in Chapter 5 of *Colorado Liens and Claims Handbook*.

Suffice it to say that the utilization of these forms can be very helpful to a lien claimant.

§ 19.5 • TRUST FUNDS

C.R.S. § 38-22-127(10) provides: "All funds disbursed to any contractor or subcontractor under any building, construction or remodeling contract, or on any construction project shall be held in trust for the payment of the subcontractors, material suppliers or laborers who have furnished materials, services or labor. . . ."

This means that a contractor or subcontractor cannot use money paid to him or her for one project to pay laborers and materialmen from some other job or for any other purpose, such as

regular office overhead. The contractor or subcontractor cannot use that money for any purpose that would leave laborers or materialmen on the present construction project unpaid. Using the money held "in trust" for any purpose other than the payment of subcontractors, laborers, and materialmen constitutes "theft" under this law. A lien claimant who is "cheated" in such a situation can file a criminal complaint in the county where the theft occurs.[80] It does not matter if the violator later pays off the claimant. Later reconciling does not change the fact that the violator used money that it was required to hold in trust for other purposes in violation of the trust fund statute.[81]

Historically, the local county prosecutors had been very reluctant to file charges in this type of situation. As a result of *People v. Collie*[82] and *People v. Mendro*,[83] the local district attorneys adopted a more aggressive posture with violators of the "trust fund" statute, and this policy has been approved by Colorado's appellate courts.

In addition to criminal liability, the trust fund statute, coupled with the criminal code, also provides a civil remedy for the theft, thus providing a vehicle for the possible recovery of treble damages, costs, and attorney fees. Because violation of the trust fund statute constitutes theft under C.R.S. § 18-4-401,[84] the victim can seek to enforce the civil remedies available under C.R.S. § 18-4-405.

Applicability of the trust fund statute also opens up alternative avenues of payment. For instance, any corporate officer who controls the finances of a corporation that violates the trust fund statute can be held personally liable for violating the statute.[85] And it's not just the unpaid subcontractor or subcontractors to benefit. Property owners and general contractors can also have standing to sue under the statute if the facts warrant.[86]

Additionally, a violation of the trust fund statute may render a claimant's claim nondischargeable in bankruptcy.[87]

Suing for violation of the trust fund statute is in addition to the remedy of perfecting and foreclosing a mechanics' lien. In 2007, on a certified question from the Tenth Circuit, the Colorado Supreme Court in *In re Regan* held that a party does not need to have perfected a mechanics' lien, or even still be within the time limits to perfect such a lien, in order to have a claim for moneys held in trust under Colorado's trust fund statute.[88] Although the ruling seems simple enough, the case has a lengthy three-justice dissenting opinion.

Aside from disagreeing with the majority's statutory interpretation, the dissent argues that "[n]o subcontractor, laborer, or supplier would undertake all the steps of the Mechanics' Lien Statute to gain the protection of a mechanics' lien when they could simply sit on their rights and rely on the Trust Fund Statute to protect them indefinitely."[89] The dissent also expresses great concern for general contractors who, the dissent believes, will be unfairly subject to possible trust fund claims indefinitely. But the arguments and concerns in the dissenting opinion in *Regan* ignore several points.

First, a mechanics' lien provides security for a subcontractor's claim, whereas a trust fund claim does not. Having a trust fund claim against the general contractor who may be judgment proof due to lack of assets does not make payment any more likely. Also, perfecting a mechanics' lien results in increased pressure from the property owner, lessee, and lenders to pay the claim quickly in order to clear title and avoid foreclosure. Given the added benefits of recording mechanics' liens, don't expect a drop in mechanics' lien filings after *Regan*.

Second, the dissent in *Regan* ignores the fact that the trust fund statute was enacted to protect against and punish theft. Whether or not a contractor, for example, is criminally liable for stealing a subcontractor's money should not depend on the subcontractor's remembering to record its mechanics' lien within four months of its last work on the project.

Third, although subcontractors obviously know when they haven't been paid on time, they don't always know that a trust fund violation has occurred. Subcontractors generally communicate only with the general contractor, and not directly with the owner, so a lack of payment can sometimes be attributed to, or blamed on, a lack of payment from the owner. It may not be until discovery in a pending lawsuit has taken place that a subcontractor learns that a trust-fund violation has occurred.

Fourth, subcontractors who are the victims of a trust-fund violation sometimes do not have lien rights. For example, a subcontractor may contractually waive its lien rights. Also, as discussed in § 19.8, if a homeowner has paid its general contractor in full, the subcontractors' mechanics' lien claims will fail.

Finally, the dissenting opinion forgets that parties that do not have mechanics' lien rights can have standing to bring a trust-fund claim.[90] For example, an owner who has paid a subcontractor directly in order to avoid or satisfy a mechanics' lien after already paying its general contractor in full for the subcontractor's work has standing to bring a trust-fund claim.

Additional material and case law in this area can be found in § 2.14 of *Colorado Liens and Claims Handbook*.

§ 19.6 • HOW DOES BANKRUPTCY AFFECT A MECHANICS' LIEN CLAIM?

The owner of the subject real estate could file a petition in bankruptcy at any one of several stages in the life of a mechanics' lien claim. In addition, the general contractor or a subcontractor could be the party filing bankruptcy.

The first stage could be after the labor was performed and/or the materials were supplied but prior to the lien being served. The second could be after the lien was served but before it was mailed in for recording. The third could be after it was mailed in for recording but before the document was actually recorded in the office of the County Clerk and Recorder. The fourth could be

prior to a mechanics' lien foreclosure action being instituted. The fifth could be after the suit was filed but prior to actual trial. And the sixth and final possibility could be after the trial court issued a decree in foreclosure through a sheriff's sale but prior to the sale itself.

For a person seeking to assert a mechanics' lien claim at any of the above stages, the important thing to remember is that once a petition in bankruptcy is docketed, there is an automatic stay of execution that is supposed to bar any effort to collect a debt.

Because the lien claim is an *in rem* action, rather than an *in personam* proceeding, lien claimants argue that proceeding with the lien claim is not really a violation of the bankruptcy stay order. The best way to proceed is to file a motion in the bankruptcy court for relief from the stay order.

One impact of a bankruptcy filing is that certain payments made within a certain time before the bankruptcy are sometimes deemed a preference and subject to return. But payments made within the time by which a creditor could have perfected a mechanics' lien might not be deemed an avoidable preference, assuming the creditor would have had statutory lien rights if it had not been paid and if the value of the collateral would have covered the creditor's claim.[91]

The reader is directed to three provisions of the Bankruptcy Code: 11 U.S.C. § 108, Extension of Time; § 362, Automatic Stay; and § 546(b), Limitations on Avoiding Powers. In the case of *In re Cantrup*,[92] the U.S. Bankruptcy Court had occasion to deal with this exact issue.

In the *Cantrup* case, the materials were delivered to Cantrup's property prior to Christmas 1982. Cantrup filed a petition in bankruptcy on March 22, 1983, and the supplier recorded his mechanics' lien statement on April 15, 1983, a date within four months from the delivery of the materials. Cantrup argued that the April 15 recordation violated Rule 362(a)(4) and (5) (the automatic stay provision). Cantrup also argued that since the lienor did not proceed to file his mechanics' lien foreclosure lawsuit within six months after the final work was completed, the lien also failed to conform with C.R.S. § 38-22-110.

Judge Brumbaugh, sitting in Denver, held that the recording did not violate the automatic stay rule and that 11 U.S.C. § 108 tolls the running of the six-month period until 30 days after relief from the stay is granted.[93] Judge Brumbaugh, in a well-reasoned opinion, gives further direction to a lienor caught in this dilemma.

The reader is cautioned that this ruling is not binding upon the other divisions of the U.S. Bankruptcy Court.

The *Cantrup* case is a situation where the bankrupt is the party who actually owned the real estate that is the subject of the mechanics' lien statement. More often, the bankrupt is not the owner of the real estate, but rather is either the general contractor where a subcontractor is the lienor, or is the subcontractor where his or her supplier is the lienor. Using the *Cantrup* case as a major argument, if the lienor could win where his or her goal was to take the actual property of the

bankrupt, it would appear to be an easier task to prevail in the latter two situations, where the only reason the bankrupt is being named is because he or she is a necessary party to the proceedings.

The reader is also directed to § 8.2 of *Colorado Liens and Claims Handbook* for a further analysis of the various problems that can be encountered and solutions that can be utilized to protect the mechanics' lien claim. A number of cases are also cited therein.

Practice Pointer
This is another reason for attorneys (and their clients) to avoid the last-minute rush to get the lien statement filed just before the end of the 120 days, and instead to file it as quickly as possible. Delay never helps the innocent!

§ 19.7 • LIEN FORECLOSURE LAWSUIT

The first matter to consider is whether to file in the state court or in the federal court. Mechanics' lien foreclosures are rarely, if ever, brought in the federal court, even if there is diversity of citizenship and the statutory minimum dollar amount in controversy. Lien foreclosures have ended up in the federal bankruptcy courts because someone, either the owner, the developer, or the general contractor, filed a petition in bankruptcy.

Mechanics' liens, unknown in common law, are strictly creatures of statute, and thus are equitable in nature. There is never a jury trial in a mechanics' lien case because there is never a jury trial in a case in equity.

If the lienor fails to docket the lawsuit in the proper county within the time limits set by the statute, as stated above, OR if the lienor fails to record the *lis pendens* within the time frame as stated above, the lien claim will be forever lost. Of course, the lienor still has his or her *in personam* claim, but generally speaking, *in personam* claims are not too successful. This is because the contracting party is either insolvent, not available, or both; consequently, it is necessary to go to the trouble and expense of proceeding with the mechanics' lien claim.

Generally speaking, the lien claimant always includes in his or her mechanics' lien foreclosure lawsuit an *in personam* claim for relief for a monetary judgment. In fact, the principal contractor and all other persons personally liable for the debt for which the lien is claimed are necessary parties to the mechanics' lien foreclosure lawsuit anyway.[94] But the *in personam* claim is not limited by the amount of the mechanics' lien.[95]

If the *in personam* claim is pursued separately, it is still possible to maintain a mechanics' lien foreclosure claim in a different action, assuming the deadline to do so discussed in § 19.7.1 has not yet expired. In *Dave Peterson Electric v. Beach Mountain Builders*, for example, the court of appeals held that claim preclusion does not preclude a subcontractor's mechanics' lien foreclosure claim, although the subcontractor had already sued on its *in personam* claim in a separate

action and received a default judgment against the owner.[96] Section "38-22-124 is the rare exception to the doctrine of claim preclusion and permits a subsequent action based upon the same claim for relief involving the same parties."[97] Pursuing the claims contemporaneously is more efficient than pursuing them in piecemeal fashion.

For more information on the complaint, legal description, pleadings, disclaimer, intervention, and consolidation, see Chapter 6 of *Colorado Liens and Claims Handbook*. There are also materials, definitions, and case law concerning *in personam* and *in rem* actions in § 6.2.9 of that *Handbook*.

§ 19.7.1—Time Requirements

C.R.S. § 38-22-110 provides that no lien:

> shall hold the property longer than six months after the last work or labor is performed, or materials furnished, or after the completion of the building, structure or other improvement, or the completion of the alteration, addition to, or repair thereof, as prescribed in section 38-22-109, unless an action has been commenced within that time to enforce the same, and also unless a notice stating that such action has been commenced is filed for record within that time in the office of the county clerk and recorder in the county in which such property is situate.

The lien claimant's attorney cannot wait until the last minute to begin preparation of the lawsuit. The attorney will need to obtain a "foreclosure certificate" or a "litigation guaranty certificate" from the title company (the name of the document varies from company to company). This certificate, for which a substantial charge is made, will contain copies of all of the recorded documents of all parties claiming an interest in the subject real estate. If the title company misses an entry, they are liable, so long as they are paid their premium.

Sometimes, if the amount is relatively small, the attorney, particularly an inexperienced one, will try to "save" the expense of the certificate by doing his or her own examination of the title records. The attorney may even obtain a signed "waiver" from the client for this money-saving tactic. It is NOT recommended, and if an attorney does skip this important step, he or she should make sure that there is sufficient malpractice insurance coverage. As far as obtaining this "waiver" from the client, a court would probably hold that either the client didn't give "informed consent" or it is against public policy for the attorney to attempt this entire procedure.

(As to whether it is financially worthwhile to initiate a lien foreclosure lawsuit, please see § 19.7.7, below.)

In any event, the attorney will need to order supplemental update certificates from the title company during the pendency of the litigation. Further, should the trial judge enter a decree of foreclosure and a sheriff's sale, it is necessary to obtain a final update supplement before the sale. These supplements are necessary to monitor the possible recordings of other documents that would affect the title to the subject property.

The attorney will also need time to investigate the nature of the parties that need to be named in the lawsuit and, obviously, prepare the proper pleadings. If the attorney practices in an area not near the county where the real estate is situate, the attorney will need to allow time to mail the *lis pendens* to the clerk and recorder of the county where the real estate is located.

Furthermore, generally speaking, the *lis pendens* bears the docket number of the complaint in the district court. Since the attorney cannot know the docket number until the time that the complaint is docketed in the district court, the attorney can't even send in the *lis pendens* to the clerk and recorder until that docket number becomes available. The bottom line is that the attorney needs sufficient time to gather up all of the necessary information and then to make sure that all the time constraints are complied with. If the attorney is dealing with a county far from his or her own, extra time must be allowed for the filings to be carried out in a timely manner.

Additional information on this subject is to be found in § 6.1.1 of *Colorado Liens and Claims Handbook*.

§ 19.7.2—*Lis Pendens*

In the preceding section, a portion of C.R.S. § 38-22-110 was quoted that, in essence, provides that in order to preserve a mechanics' lien claim, a lawsuit to enforce the lien must be filed and "a notice stating that such action has been commenced. . . ." must be recorded with the county clerk and recorder where the real estate is located, within six months after the last work or labor is performed, or the last materials are supplied by anyone. (We suggest that the reader examine § 19.7.1, above, to peruse the exact words of C.R.S. § 38-22-110.) In any event, the above-referred-to "notice" is the *lis pendens*, which is simply Latin for "litigation is pending."

An example of a *lis pendens* is found in Exhibit 19G to this Chapter.

Although the statute only speaks about one *lis pendens*, the fact is that if more than one party is pursuing a mechanics' lien claim in the same lawsuit, the second party should not necessarily rely on the plaintiff's *lis pendens.* The plaintiff could have made an error in the legal description or some other equally significant point, which could void the entire *lis pendens.* If that document is rejected by the court, then the entire lien foreclosure lawsuit could fail for everyone. However, if the second lien claimant took the precaution of filing his or her own accurate *lis pendens*, the latter has saved the day, at least for himself or herself.

The case of *Fasso v. Straten*[98] considered the problem of the incorrect designation of the lien claimant as a corporation, whereas the claimant was actually a sole proprietor. The caption in the *lis pendens* and in all of the court pleadings bore the incorrect designation of the corporation. At the trial, when the error was discovered, Fasso requested and was granted permission to amend all of the captions to show that he was indeed a sole proprietorship. The property owners contended that the error in the *lis pendens* rendered the entire procedure null and void. However, the trial judge and the court of appeals disagreed, ruling that Fasso's name did appear correctly in both the lien statement and in the body of the *lis pendens*, as opposed to the caption, and since the required "notice" was given, the *lis pendens* was ruled valid.

In *Abrams v. Colorado Seal & Stripe, Inc.*,[99] the court of appeals found that a *lis pendens* filed by one subcontractor was adequate to allow another subcontractor's lien to be perfected, even though the *lis pendens* did not disclose the existence and nature of the second subcontractor's lien.

There is some additional material on this subject in § 6.2.5 of *Colorado Liens and Claims Handbook*.

§ 19.7.3—Venue, Where To File

A mechanics' lien foreclosure action may be filed only in the district court of the county where the real estate is located. C.R.S. § 13-6-105(1)(d) provides that the county courts do not have jurisdiction in matters affecting title to real estate. Since mechanics' lien lawsuits affect title to real estate, the foreclosure cannot be initiated in the county courts. Furthermore, by statute, county courts are not given jurisdiction over equity matters. Since mechanics' lien cases are inherently equitable in nature, the county courts do not enjoy jurisdiction over mechanics' lien cases.

In the event of a sheriff's sale, the judge of the district court orders a foreclosure sale by the sheriff of the county where the real estate is located, which is the same county where the *lis pendens* has been recorded and is also the same county where the litigation should be brought.

§ 19.7.4—Trial To The Court

As stated in § 19.1, above, mechanics' lien cases are equitable in nature. Thus, there is never a jury trial in a mechanics' lien case.

Federal Lumber Co. v. Wheeler[100] was a Colorado Supreme Court case that simply restated the cardinal rule that since mechanics' lien foreclosure lawsuits are equitable in nature, one can never have a jury trial with any equitable case in general and in a lien foreclosure lawsuit in particular.

§ 19.7.5—Bifurcation

There are occasions when a party to a mechanics' lien foreclosure lawsuit has one or more claims pending, aside from the lien aspects themselves. A party may have a claim for damages, for loss of profits, for personal injuries, for breach of contract, or any other legitimate claim. Let us further assume that under those circumstances, as to these non-lien claims, one or more parties desire a trial by jury.

It is very simple. A party desiring a jury trial (or parties seeking a jury trial) may file a motion for bifurcation (dividing the trial in two parts) and file a demand for a jury trial pursuant to C.R.C.P. 38. There will then be two separate trials, the mechanics' lien case, tried by the court, and the non-lien issues, tried by the jury.

It has been suggested that there could be just one trial, with the court trying the equitable issues and the jury deciding the legal issues. Although this is an interesting concept, we are not aware of any case that has been handled in this manner.

§ 19.7.6—The Parties To The Lawsuit

The foreclosing party must determine whom to make defendants in the lawsuit. The best rule to follow is to sue any party who claims any interest in the real estate on which the lienor is seeking to foreclose. If in doubt, list!

Section 19.7.1, above, discusses obtaining a certificate from a title company that will disclose the identity of every party claiming such an interest.

Then, there are those parties who claim no ownership in the real estate but nevertheless should be listed. They are the lienor's contracting party, who may be the owner, the owner's agent, the general contractor, a subcontractor, or a supplier. This list is not meant to be exclusive. For example, there could be the contractor, the subcontractor, the subsubcontractor, and so on. If the lienor is involved with anyone, they should all be listed, as each is a sub of the next person up the line.

Examples of persons to list as defendants are the owners; the general contractor; the lienor's contracting party; all mortgage holders; the public trustee; the private trustee, if any; all mortgage holders; homeowner associations; and all other lienors.[101]

There is abundant additional material on this subject found in § 6.2.2 of *Colorado Liens and Claims Handbook*.

§ 19.7.7—The Expense Of Litigation/Attorney Fees

Filing a mechanic lien foreclosure lawsuit can be a very expensive proposition. If one has a claim for $25,000 or more the action is generally worth pursuing. If it is for $10,000 or less it is certainly not worthwhile, unless the client is very wealthy and wishes to proceed because "of the principle involved." If the lien is between $10,000 and $25,000, the practitioner and the client have much soul searching to do.

The first issue is the matter of costs. There is the foreclosure certificate or litigation certificate described in § 19.7.1. That will run several hundred dollars. There is the court docket fee, presently $91. There is the cost of service of process, $20 to $50 for each defendant, if in your local area. If a defendant is in a different area and you have to hire a private process server or an out-of-state sheriff, there can be fees ranging from $40 to $100 for each defendant . Then there is the relatively small expense of recording the *lis pendens*, $6 for the first page and $5 for each additional page. Therefore, depending upon the number of entries in the certificate, the number of defendants, the out-of-pocket expenses, *ab initio*, could run as much as $1,000. However, should the lien claimant prevail, these costs are generally recoverable.

Second, we must deal with the attorney fees to handle the foreclosure action. The lawyer should attempt to estimate what it will cost to draft the complaint with its various claims for relief, the summons, and the *lis pendens*. Then the attorney should contemplate the possible counterclaims that would require replies. Motions may be filed by any of the parties that would require responses and possible court hearings. There may be depositions, which would not only require

the actual time for attendance, but also preparation time and the expense of the court reporter. One would also have to compute the time for the mandatory disclosure and discovery rules under C.R.C.P. 26. We haven't even mentioned the legal research, conferring with witnesses and the client, etc. Nor have we discussed the matter of the trial and the preparation therefor.

Although it may be true that nine out of 10 lawsuits get settled before trial,[102] we never know whether our case is the one that goes to trial or is one of the nine that gets settled,[103] and we never know just how long before the trial the case may settle (possibly at the courthouse steps on the morning of the trial?). The bottom line is that the attorney could have literally thousands and thousands of dollars invested in the case. Therefore, as one can see, if the claim is for less than $25,000, one must carefully weigh the merits of even filing the lawsuit. Also, in this situation, the attorney would have a heavy obligation of reviewing in writing all of these expenses with the client well before the preparation of the lawsuit would begin. And he or she should then obtain the authorization of the client to proceed as part of the written fee agreement. These preparations don't even consider the expense of a possible appeal.

Here follows a short caveat about attorney fees. Unless the plaintiff can prove that the defendant's defenses are frivolous, Colorado case law, in a series of older cases, has consistently ruled against the awarding of attorney fees to a lienor. These cases are *Los Angeles Gold-Mine Co. v. Campbell*,[104] *Burleigh Building Co. v. Merchant Brick and Building Co.*,[105] *Davidson v. Jennings*,[106] *Campbell v. Los Angeles Gold-Mine Co.*,[107] *Perkins v. Boyd*,[108] *Antlers Park Regent Mining Co. v. Cunningham*,[109] and *Sickman v. Wollett*.[110] (The most recent of this series of cases was the *Sickman* case in 1903.) The rationale in all of these cases is that it is unconstitutional to award attorney fees to a mechanic lien claimant.

The one case where attorney fees were allowed was where a property owner took out a surety bond in connection with his contract with the general contractor. Mechanics' liens were filed against the real estate and the property owner contended that the surety company did not properly defend the property owner. Since the bond provided that the surety had to provide indemnity for "all costs, damage and expense," the Colorado Supreme Court ruled that the surety had to pay the attorney fees that were incurred by the property owner. The case was *National Union Fire Insurance Company of Pittsburgh, Pa. v. Denver Brick and Pipe Company.*[111]

§ 19.7.8—Avoiding Lien Foreclosure

If one has a lien claim for at least $25,000, it is extremely difficult not to foreclose the mechanics' lien, given the fact that the lien has been served and other collection attempts were undertaken and failed.

But there are some things that a lienor can do, short of foreclosing the lien.

1) If the party with whom the lienor contracted is solvent, the lienor can file a money judgment lawsuit in the county court for up to $15,000 plus interest, attorney fees (if the contract provides for same), and costs.[112]

2) The potential lienor, who obtains a contract to provide labor and/or materials, is well served to utilize a provision that provides that the contracting party will be liable for interest at the rate of 18 percent or 24 percent per annum and all reasonable attorney fees. That potential lienor should also attempt to obtain one or two personal guarantors, but only if they are *solvent*.
3) When a solvent party is faced with the prospect of having to pay a high rate of interest and substantial attorney fees, he or she might think twice about refusing to pay the actual invoice balance due to the lienor. Likewise, if solvent, the contracting party is not interested in having the personal guarantors, presumably friends of the actual debtor, be sued by the lienor in the district court.
4) The lienor may tighten up his or her credit policy, deal only with bona fide customers, run a better credit check, and investigate the construction project itself. Do the principals enjoy a proper reputation? Are any of them shady characters? etc.

But remember, if there's no privity, there's no lawsuit, except if one files a lien foreclosure lawsuit.[113]

In each of the situations, the lienor has abandoned pursuing the *in rem* action of an actual lien foreclosure lawsuit.

For additional material in this area, see §§ 6.1.2 and 6.1.3 in *Colorado Liens and Claims Handbook.*

§ 19.7.9—After A Favorable Judgment, The Sheriff's Sale

Now the lienor has obtained a judgment and decree in foreclosure, but the lienor needs to satisfy his or her judgment. The court has ordered a sheriff's sale and the lienor is anxious to handle it in a proper fashion in order to avoid possible complaints that he or she didn't handle the sale in a proper manner.

The reader is directed to Chapter 7 in *Colorado Liens and Claims Handbook*. This one chapter contains 30 separate sections dealing with every aspect of the foreclosure sale. In addition, all of the necessary forms are identified in § 7.10.

§ 19.8 • HOMEOWNER DEFENSE

Colorado has a specific statutory exception to mechanics' liens applicable to single-family dwelling units. Under this exception, it is a complete defense to the enforcement of any mechanics' lien if the owner has paid its principal contractor in full.[114]

In *Crissey Fowler Lumber Co. v. First Community Industrial Bank*,[115] a division of the Colorado Court of Appeals interpreted this statute to require the full payment to be made before any liens are recorded. In *Crissey*, the first general contractor walked off the project, and liens were filed before the homeowner paid the full contract price. According to the Court:

> Here, as noted, defendants' original contractor abandoned the project midway without paying plaintiffs either in part or in full. At that point, defendants had paid the contractor $130,000 of the $146,500 purchase price. Thus, because they had to hire a second general contractor and new subcontractors, eventually defendants paid the original purchase price, and more, for their home. Accordingly, defendants contend, they satisfied the statutory requirement of paying "the initial purchase price or contract amount plus any additions or change orders."
>
> Rejecting this argument, however, the trial court concluded that, because they knew of plaintiffs' liens prior to completing payment, the Taylors were in a different position from that of a homeowner who does not learn of any mechanics' liens until after full payment. The court reasoned that under the plain language of § 38-22-102(3.5), defendants could not assert the homeowner's defense because they had not paid "the initial purchase price" prior to plaintiffs' liens being recorded. We agree with that interpretation.[116]

§ 19.9 • BONDING LIENS

Often, it is imperative to clear title to a mechanics' lien while preserving the right to dispute the lien claim. For example, a general contractor may wish to dispute a claim filed by a subcontractor but might be contractually obligated to keep the property free and clear of liens by subcontractors. The lien statute provides a mechanism for doing so. A mechanics' lien may be substituted by a corporate surety bond or similar security or undertaking.[117]

The bond or undertaking must be for at least one-and-a-half times the amount of the lien.[118] And because it serves as substituted security for the mechanics' lien, if the lien claimant proves entitlement to a lien, then the bond principal and surety are bound to pay under the terms of the surety bond.[119] Any action to enforce or foreclose on the bond must be commenced within the same time allowed for the commencement of an action upon foreclosure of the lien.[120]

One misconception is that simply acquiring the bond itself, or recording the bond with the clerk and recorder's office, results in the lien's being cleared. This is not true. Instead, the bond or undertaking must be filed with the district court of the county where the lien is recorded.[121] Once the court approves the bond, the court clerk then can issue a certificate of release, which should be recorded with the clerk and recorder where the property is located.[122] The recorded certificate of release is what serves as notice to the public that the referenced mechanics' lien has been discharged.

It is best to present the court with a complete and easy-to-use package that includes a petition to approve the bond and clear the lien, a draft order approving the bond and directing the issuance of a Certificate of Release, and a draft Certificate of Release. If a mechanics' lien foreclosure lawsuit is already pending, then it is also possible to file a motion in the pending case seeking the approval of the bond and issuance of the certificate of release.

With the advent of mandatory electronic filing in many districts, receiving fast relief on a petition to release a lien has become increasingly difficult. In some districts, gone are the days of filing a proceeding for approval of a substitution bond in person and waiting at the duty judge's chambers for an immediate order. Finding out the specific court's preferred protocol for obtaining a quick order is more important these days. Additionally, despite mandatory electronic filing rules, many courts still want the original bond before granting requested relief.

For the lien claimant, it is important to note that a mechanics' lien substitution bond does not act as security for the potential *in personam* claims of the lien claimant. Instead, the bond serves as substituted security for the *in rem* claim that would otherwise be against the property. And in order to enforce the bond, the lien claimant must timely plead a claim specifically to foreclose the bond.

In *Mountain Ranch Corp. v. Amalgam Enterprises, Inc.*,[123] for example, Amalgam, a subcontractor, recorded a mechanics' lien on Mountain Ranch's (MR's) property, and the lien was later discharged when MR obtained and filed a substitution bond.[124]

MR brought a slander of title action against Amalgam, and Amalgam filed a counterclaim against MR and a third-party complaint against the general contractor. Unfortunately for Amalgam, it "asserted counterclaims and cross-claims for breach of contract, fraud, and racketeering activity, but it did not assert a counterclaim or cross-claim for foreclosure on the bond."[125] After a bench trial, the trial court found in favor of Amalgam on its breach-of-contract claim against the general contractor. But the trial court entered judgment against MR and the bond surety in addition to the general contractor.[126]

The court of appeals vacated the judgment as against the surety because Amalgam had failed to bring a claim to foreclose against the substitution bond.[127] The court noted that a claim for foreclosure is essentially the same whether the claim is against property or the bond that has been substituted for the property.[128] Thus, to be a claim upon which the lien is based, the claim must be one for foreclosure, and the claim must be set forth in a complaint, counterclaim, or cross-claim.[129]

The court did not address whether or not the bond surety must be named as a party to the foreclosure lawsuit. The Colorado Rules of Civil Procedure may provide means of enforcing a judgment against a substitution bond surety,[130] but naming the surety in the foreclosure action initially is the safer practice.

Additional material on substitution and other surety bonds is found in Chapter 4 of the *Colorado Liens and Claims Handbook*.[131]

NOTES

1. *Boise-Payette Lumber Co. v. Longwedel*, 295 P. 791 (Colo. 1931).
2. *Id*. at 792.
3. *Bishop v. Moore*, 323 P.2d 897 (Colo. 1958).
4. *Id*. at 899.
5. *Lindemann v. Belden Consol. Mining & Milling Co*., 65 P. 403, 404 (Colo. App. 1901).
6. *A-1 Plumbing & Heating Co. v. Thirteenth St. Corp*., 616 P.2d 141, 145 (Colo. App. 1980), *citing 3190 Corp. v. Gould*, 431 P.2d 466 (Colo. 1967), *aff'd in part, rev'd in part*, 640 P.2d 1130 (Colo. 1982).
7. *Seracuse Lawler & Partners, Inc. v. Copper Mountain*, 654 P.2d 1328 (Colo. App. 1982).
8. *James H. Stewart & Assocs., Inc. v. Naredel of Colo., Inc*., 571 P.2d 738 (Colo. App. 1977).
9. *Frank M. Hall & Co. v. Southwest Properties Venture*, 747 P.2d 688, 690 (Colo. App. 1987), *disapproved in part in DCB Constr. Co. v. Central City Dev*., 965 P.2d 115, 122 (Colo. 1998).
10. *Id*.
11. *Elliott Elec. Supply Co. v. Adolfson & Peterson, Inc*., 765 P.2d 1079, 1081 (Colo. App. 1988); *Denver Ventures, Inc. v. Arlington Lane Corp*., 754 P.2d 785, 787 (Colo. App. 1988).
12. *DCB Constr. Co. v. Central City Dev. Co*., 940 P.2d 958 (Colo. App. 1996).
13. *DCB Constr. Co. v. Central City Dev. Co*., 965 P.2d 115 (Colo. 1998), *affirming* lower court decision.
14. *Id.*
15. *Frank M. Hall & Co.*, 747 P.2d at 690.
16. *DCB Constr. Co*., 965 P.2d at 115.
17. *Milwaukee Gold Mining Co. v. Tomkins-Cristy Hardware*, *Co.*, 141 P. 527, 528 (Colo. App. 1914).
18. *Schneider v. J.W. Metz Lumber Co.*, 715 P.2d 329 (Colo. 1986).
19. *Id.* at 330
20. *Id.*
21. *Id.* at 332
22. *Id.*
23. *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 560 P.2d 457, 461 (Colo. 1977); *see also Weather Engineering & Mfg., Inc. v. Pinion Springs Condominiums, Inc.*, 563 P.2d 346, 349 (Colo. 1977) (addressing preliminary survey services).
24. *3190 Corporation v. Gould*, 431 P.2d 466 (Colo. 1967)
25. *Id*. at 469.
26. *Id*. at 468.
27. See *Lindenmann* in § 19.2, above.
28. *Gould*, 431 P.2d at 469, *citing with approval Darrien v. Hudson*, 302 P.2d 519 (Colo. 1956).
29. C.R.S. § 38-22-101.
30. Greenwald, *Colorado Liens and Claims*, Fourth Ed. (CLE in Colo., Inc. 2002).
31. *Columbia Sav. and Loan Ass'n v. Counce*, 447 P.2d 977, 978 (Colo. 1968).
32. *Skillstaff of Colo., Inc. v. Centex Real Estate Corp.*, 973 P.2d 674 (Colo. App. 1998).
33. *See* C.R.S. § 38-22-131.
34. C.R.S. § 38-22-101(4).
35. C.R.S. §§ 38-22-123 and -128. *Pope Heating & Air-Conditioning Co. v. Garrett-Bromfield Mortgage Co*., 480 P.2d 602, 604 (Colo. App. 1971); *Heating and Plumbing Eng'rs, Inc. v. H. J. Wilson Co., Inc*., 698 P.2d 1364, 1367 (Colo. App. 1984).
36. *Pope Heating & Air-Conditioning Co.*, 480 P.2d at 602.
37. *Tuscany, LLC v. Western States Excavating Pipe & Boring, LLC*, 128 P.3d 274 (Colo. App. 2005), *cert. denied* (2006).

38. *People v. Cohn*, 160 P.3d 336 (Colo. App. 2007) (affirming conviction of first-degree offering a false instrument for recording where defendant improperly recorded mechanics' liens against six properties to retaliate against the property owners).

39. C.R.S. § 38-22-101(5).

40. C.R.C.P. 54(d).

41. *LSV, Inc. v. Pinnacle Creek*, 996 P.2d 188 (Colo. App. 1999).

42. *Heating & Plumbing Engineers, Inc. v. H. J. Wilson Co.* , 698 P.2d 1364 (Colo. App. 1984).

43. C.R.S. § 38-22-103(2).

44. *Lew Hammer, Inc. v. Dash, Inc*., 599 P.2d 948, 949-50 (Colo. App. 1979).

45. *Stinnett v. Modern Homes*, 350 P.2d 197 (Colo. 1960).

46. *Atkinson v. Colorado Title & Trust Co*., 151 P. 457, 460 (Colo. 1915).

47. *Church v. Smithea*, 35 P. 267, 268 (Colo. App. 1893).

48. *Plateau Supply Co. v. Bison Meadows Corp*., 500 P.2d 162, 166 (Colo. App. 1972).

49. *Powder Mountain Painting v. Peregrine Joint Venture*, 899 P.2d 279, 282 (Colo. App. 1994).

50. *1st Choice Bank v. Fisher Mechanical Contractors, Inc*., 15 P.3d 1100 (Colo. App. 2000).

51. *Wells Fargo Bank v. Fisher*, 2002 Colo. App. LEXIS 1819 (Oct. 24, 2002) (not selected for official publication).

52. C.R.S. § 38-22-109(4).

53. C.R.S. § 38-22-109(5).

54. *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co*., 59 P. 83, 86 (Colo. App. 1899); *Boise-Payette Lumber Co. v. Longwedel*, 295 P. 791 (Colo. 1931).

55. *Sperry & Mock, Inc. v. Security Sav. & Loan Ass'n*, 549 P.2d 412 (Colo. App. 1976).

56. *Weather Eng'g & Mfg., Inc. v. Pinion Springs Condominiums, Inc*., 563 P.2d 346, 348 (Colo. 1977).

57. *3190 Corp. v. Gould*, 431 P.2d 466 (Colo. 1967).

58. *Lindemann*, 65 P. at 404.

59. *Brenneman v. Devonshire Square L.L.C.*, 2000 Colo. App. LEXIS 75 (Feb. 10, 2000).

60. C.R.S. § 38-22-109(d)(3).

61. *6S Corp. v. Martinez*, 831 P.2d 509, 510-11 (Colo. App. 1992).

62. C.R.S. § 38-22-109(7).

63. *Kehn v. Spring Creek Village*, 563 P.2d 969 (Colo. App. 1977).

64. *Id*. at 971-72.

65. *3190 Corp. v. Gould*, 431 P.2d 466 (Colo. 1967).

66. C.R.S. § 38-22-105(2).

67. *Uni-Build Corp. v. Colorado Seminary*, 650 P.2d 1300, 1301 (Colo. App. 1982).

68. *Thirteenth St. Corp. v. A-1 Plumbing and Heating Co.*, 640 P.2d 1130, 1136 (Colo. 1982).

69. C.R.S. § 38-22-103(4).

70. *Buerger Inv. Co. v. B.F. Salzer Lumber Co. 2*, 237 P. 162, 165 (Colo. 1925).

71. *Compass Bank v. The Brickman Group, LTD*, 107 P.3d 955 (Colo. 2005) (Bender, J., dissenting).

72. *Id.*

73. *Printz Servs. Corp. v. Main Elec., Ltd*., 949 P.2d 77 (Colo. App. 1997), *aff'd in part, rev'd in part*, 980 P.2d 522 (Colo. 1999).

74. *Orman v. Ryan*, 55 P. 168 (Colo. 1897).

75. *Printz Services*, 949 P.2d at 81.

76. *Main Electric, Ltd. v. Printz Services Corp.*, 980 P.2d 522 (Colo. 1999).

77. *Id*. at 528.

78. C.R.S. § 38-22-126(4).

79. *Id.*

80. *People v. Piskula*, 595 P.2d 219 (Colo. 1979), *overruled by People v. Mendro*, 731 P.2d 704 (Colo. 1987); *People v. Brand*, 608 P.2d 817 (Colo. App. 1979).

81. *In re Regan*, 151 P.3d 1281, 1289 (Colo. 2007).

82. *People v. Collie*, 682 P.2d 1208 (Colo. App. 1983).

83. *People v. Mendro*, 731 P.2d 704 (Colo. 1987).
84. C.R.S. § 38-22-127(5).
85. *In re Walker*, 325 B.R. 598, 601 (D. Colo. 2005); *Flooring Design Associates, Inc. v. Novick*, 923 P.2d 216, 221 (Colo. App. 1995), *cert. denied* (Colo. 1996).
86. *In re Walker*, 325 B.R. at 604.
87. *Id.*
88. *In re Regan*, 151 P.3d 1281, 1289 (Colo. 2007).
89. *Id.* at 1292.
90. *See In re Walker*, 325 B.R. at 604.
91. *The Electron Corp. v. JCOR Mechanical, Inc.*, 336 B.R. 809 (10th Cir. 2006).
92. *In re Cantrup (Schiffer v. Arvada Steel Fabricating Co.)*, 38 B.R. 148 (Bankr. Colo. 1984).
93. *Id*. at 150.
94. C.R.S. § 38-22-115.
95. *See, e.g.*, *Belfor USA Group, Inc. v. Rocky Mountain Caulking and Waterproofing, LLC*, 159 P.3d 672 (Colo. App. 2006), *cert. denied* (Colo. 2006) (affirming subcontractor's $106,868.10 judgment against the general contractor, even though subcontractor's mechanics' lien was only for $12,582.90).
96. *Dave Peterson Electric v. Beach Mtn. Builders*, 2007 Colo. App. LEXIS 1298 (Colo. App. July 12, 2007).
97. *Id.*
98. *Fasso v. Straten*, 640 P.2d 272, 274 (Colo. App. 1982).
99. *Abrams v. Colorado Seal & Stripe, Inc*., 702 P.2d 765, 767 (Colo. App. 1985).
100. *Federal Lumber Co. v. Wheeler*, 643 P.2d 31, 33 (Colo. 1981) (not selected for official publication).
101. *See* C.R.S. §§ 38-22-111(3) and -115.
102. *Fasso*, 640 P.2d at 272.
103. *Abrams*, 702 P.2d at 765.
104. *Los Angeles Gold-Mine Co. v. Campbell*, 56 P. 246 (Colo. App. 1899).
105. *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 59 P. 83 (Colo. App. 1899).
106. *Davidson v. Jennings*, 60 P. 354 (Colo. 1900).
107. *Campbell v. Los Angeles Gold-Mine Co.*, 64 P. 194 (Colo. 1901).
108. *Perkins v. Boyd*, 65 P. 350 (Colo. App. 1901).
109. *Antlers Park Regent Mining Co. v. Cunningham*, 68 P. 226 (Colo. 1902).
110. *Sickman v. Wollett*, 71 P. 1107 (Colo. 1903).
111. *National Union Fire Ins. Co. v. Denver Brick and Pipe Co.*, 427 P.2d 861, 867 (Colo. 1967).
112. C.R.S. § 13-6-104(1).
113. *See H.T.C. Corp. v. Olds*, 486 P.2d 463 (Colo. App. 1971) (not selected for official publication.).
114. C.R.S. §§ 38-22-102(3.5) and -113(4); *see Koch Plumbing and Heating, Inc. v. Brown*, 835 P.2d 610, 612-13 (Colo. App. 1992).
115. *Crissey Fowler Lumber Co. v. First Community Industrial Bank*, 8 P.3d 536, 538-39 (Colo. App. 2000).
116. *Id*. at 538.
117. C.R.S. § 38-22-131.
118. C.R.S. § 38-22-131(2).
119. C.R.S. § 38-22-131(3).
120. C.R.S. § 38-22-133.
121. C.R.S. § 38-22-131(1).
122. C.R.S. § 38-22-132.
123. *Mountain Ranch Corp. v. Amalgam Enterprises, Inc.*, 143 P.3d 1065 (Colo. App. 2005), *cert. denied* (Colo. 2006).
124. *Id.* at 1067.
125. *Id.* at 1068.
126. *Id.* at 1067.

127. *Id.* at 1069.
128. *Id.* at 1068.
129. *Id.*
130. C.R.C.P. 65.1 and 106(a)(5).
131. Greenwald, *Colorado Liens & Claims Handbook*, Fourth Ed. (CLE in Colo., Inc. Supp. 2007).

EXHIBIT 19A • STATEMENT OF LIEN WITH NOTICE OF INTENT TO FILE A LIEN STATEMENT

STATEMENT OF LIEN

In accordance with Article 22 of Title 38 of the Colorado Revised Statutes,

makes the following statement of lien.

FIRST. That the name of the owner or reputed owner of such property to be charged with the lien is

SECOND. That the name and mailing address of the person claiming the lien is

☐ a subcontractor
☐ Principal Contractor.

That the name of the person who furnished the laborers or material, or performed the labor or services, or supplied the machinery, tools or equipment for which said lien is claimed is

That the name of the principal contractor is

THIRD. That the property to be charged with such lien is described as follows:

also known by street number as

situate in the County of State of Colorado. That the said lien is held for and on account of

FOURTH. That the amount of indebtedness due or owing the claimant for which said lien is claimed, for laborers or material furnished, labor and services performed, machinery, tools and equipment supplied is $, together with interest thereon at the legal rate.

Claimant

By

STATE OF COLORADO
County of } ss.

I, , being of lawful age and being first duly sworn upon oath, do say that I am the claimant herein named; that I have read the within statement of lien and abstract of indebtedness and know the contents thereof; and that the same is true and correct, to the best of my knowledge, information and belief, and is made on behalf of the claimant.

Subscribed and sworn to before me in the County of , State of this day of , 20 .

My Commission expires . Witness my hand and official seal.

Notary Public

Name and Address of Person Creating Newly Created Legal Description (§ 38-35-106.5, C.R.S.)

No. 180A. Rev. 7-00. **STATEMENT OF LIEN WITH NOTICE OF INTENT TO FILE A LIEN STATEMENT AND AFFIDAVITS OF SERVICE ©**
Bradford Publishing, 1743 Wazee St., Denver, CO 80202 —303-292-2500 —www.bradfordpublishing.com—8-02

NOTICE OF INTENT TO FILE A LIEN STATEMENT

TO THE OWNER AND TO THE PRINCIPAL CONTRACTOR:

Take Notice that the Lien Claimant set forth on the Statement of Lien contained on the reverse of this Notice claims a Mechanic's Lien for laborers or material or equipment supplied to or labor performed on the project situate upon the real property described on said Statement of Lien, for the amount stated. If payment is not made within ten (10) days, the Claimant intends to record said Statement of Lien in the County where the real property is located. This notice is given pursuant to Section 38-22-109(3) C.R.S.***

_____
Signature

_____ _____
_____ _____
_____ _____
Attorney's Name and Address — Type Name and Address of Claimant Above

AFFIDAVIT OF SERVICE OR MAILING — OWNER

STATE OF COLORADO
_____ County of _____ } ss.

The undersigned, being of lawful age and being first duly sworn upon oath, deposes and says that this Notice of Intent to File a Lien Statement was (personally served upon)* (mailed by fully prepaid registered* or certified* mail, return receipt requested, to the last known address of)* the owner or reputed owner or his agent, as follows: _____
_____
on the _____ day of _____, 20_____.

_____

Subscribed and sworn to before me in the _____ County of _____,
State of _____, this _____ day of _____, 20_____.

My commission expires: _____
Witness my hand and official seal.

_____
Notary Public

AFFIDAVIT OF SERVICE OR MAILING — CONTRACTOR

STATE OF COLORADO
_____ County of _____ } ss.

The undersigned, being of lawful age and being first duly sworn upon oath, deposes and says that this Notice of Intent to File a Lien Statement was (personally served upon)* (mailed by fully prepaid registered* or certified* mail, return receipt requested, to the last known address of)* the principal or prime contractor or his agent, as follows:_____
_____
on the _____ day of _____, 20_____.

_____

Subscribed and sworn to before me in the _____ County of _____,
State of _____, this _____ day of _____, 20_____.
My commission expires: _____
Witness my hand and official seal.

_____
Notary Public

AFFIDAVIT OF SERVICE OR MAILING PRIOR TO FILING LIEN STATEMENT**

STATE OF COLORADO
_____ County of _____ } ss.

The undersigned, being of lawful age and being first duly sworn, deposes and says that this Notice of Intent to File a Lien Statement was served pursuant to Section 38-22-109(3) C.R.S.***, as evidenced by the Affidavits of Service or Mailing, at least ten (10) days before the time of filing the Lien Statement with the County Clerk and Recorder.

_____

Subscribed and sworn to before me in the _____ County of _____,
State of _____, this _____ day of _____, 20_____.
My commission expires: _____
Witness my hand and official seal.

_____
Notary Public

*Strike according to fact.
**To be completed 10 or more days after mailing or service of Notice of Intent to File a Lien Statement, but prior to filing lien statement.
***38-22-109. **Lien Statement.** (3) In order to preserve any lien for work performed or laborers or materials furnished, there must be a notice of intent to file a lien statement served upon the owner or reputed owner of the property or the owner's agent and the principal or prime contractor or his or her agent at least ten days before the time of filing the lien statement with the county clerk and recorder. Such notice of intent shall be served by personal service or by registered or certified mail, return receipt requested, addressed to the last known address of such persons, and an affidavit of such service or mailing at least ten days before filing of the lien statement with the county clerk and recorder shall be filed for record with said statement and shall constitute proof of such service.

No. 180A. Rev. 7-00. (Page 2 of 2)

EXHIBIT 19B • LIEN WAIVER

LIEN WAIVER

_____, Colorado Date: _____

FOR A VALUABLE CONSIDERATION *the undersigned hereby releases unto the owner or owners of the hereinafter described property, and to the heirs, personal representatives or assigns of such owner or owners all right of the undersigned to claim a mechanic's lien for labor, services, machinery, tools, equipment, laborers or materials heretofore furnished for the construction, alteration, improvement, addition to or repair of the structure or improvement on Lot numbered* _____ *Block numbered* _____ *in* _____ *Addition, also known as No.* _____ (Street Address) *in the City of* _____ *and County of* _____ *and State of Colorado.*

_____ _____

No. 1030. Rev. 7-00. LIEN WAIVER © Bradford Publishing, 1743 Wazee St., Denver, CO 80202 — (303) 292-2500 — www.bradfordpublishing.com — 8-00

LIEN WAIVER

_____, Colorado Date: _____

FOR A VALUABLE CONSIDERATION the undersigned waives all right to claim a mechanic's lien for labor, services, machinery, tools, equipment, laborers or materials furnished to _____, ☐ Owner ☐ Contractor, prior to _____, 20 _____, for the improvements to Lot number _____, Block number _____, Addition _____ also known as _____.
(Street Address, City, County, State)

This release valid on condition that Check No. _____ drawn by _____, on the _____ Bank for $ _____, and dated _____, is paid when presented.

_____

By _____

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EXHIBIT 19C • RELEASE OF MECHANICS' LIEN

RELEASE OF LIEN

KNOW ALL BY THESE PRESENTS, That _____

_____

_____, the undersigned lien claimant, filed a statement of lien on the _____ day of _____, _____, which was recorded in Book _____, Page _____ (Film No. _____, Reception No. _____ of the records in the office of the County Clerk and Recorder of the County of _____, State of _____, for the purpose of claiming a lien upon the property described in said lien statement.

The undersigned claimant and _____, the present owner of the property, have agreed that this property is to be released from the claim of lien.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby releases the claim of lien, and forever discharges the following described property from said claim, to wit:

Executed this _____ day of _____, _____.

_____

_____

STATE OF COLORADO
_____ COUNTY OF _____ } ss.

The foregoing instrument was acknowledged before me this _____ day of _____, _____, by _____.

Witness my hand and official seal.

My commission expires: _____

_____
Notary Public

EXHIBIT 19D • NOTICE OF NON-LIABILITY

NOTICE OF NON-LIABILITY

TO WHOM IT MAY CONCERN:

1. Notice is given that the undersigned, RICHARD ROE, of 21234 East Broad Street, Colorado Springs, Colorado 80906, the legal owners of real property at 9876 Champa Court, Denver, Colorado, more particularly described as follows:

Lots 1, 2, and 3, Block 11
of West Denver
City and County of Denver, State Of Colorado.

2. Other persons having an interest in such property, and the interest of such persons therein, are as follows: WELTON ENTERPRISES, INC., a Colorado corporation, Tenant.
3. On August 5, 2002, the undersigned first learned of remodeling of the premises.
4. Five (5) days have not elapsed since the date that the undersigned first obtained such knowledge.
5. The undersigned will not be responsible for such remodeling, nor will the undersigned be responsible for any labor or materials that have been, are being, or may, in the future, be furnished or supplied to the premises with respect to such re-modeling of the premises.

THIS NOTICE IS GIVEN PURSUANT TO COLORADO REVISED STATUTES, SECTION 38-22-105.

DATED AND POSTED August 8, 2002.

_____
Richard Roe

WELTON ENTERPRISES, INC.

By: _____

EXHIBIT 19E • MECHANICS' LIEN CLAIMANTS NOTICE TO DISBURSER

MECHANIC'S LIEN CLAIMANT'S
NOTICE TO DISBURSER
Section 38-22-126(4)(5), C.R.S.

To: Disburser's Name:
Address:

Pursuant to Section 126, Article 22 of Title 38, Colorado Revised Statutes, notice is hereby given that the undersigned claims and will be entitled to a mechanic's lien for labor, services, machinery, tools, equipment, laborers or materials furnished for improvements on real estate.

1. The land to be improved is situate in the County of , State of Colorado, and is described:
Legal description *Address*

2. The name, address and telephone number of the lien claimant are:
Name *Address* *Telephone*

3. The name, address and telephone number of the person with whom the lien claimant has contracted are:
Name *Address* *Telephone*

4. A general statement of the contract of the lien claimant is:

5. The amount requested by the lien claimant is: $

Lien Claimant

By:

No. 87A. Rev. 8-00. MECHANIC'S LIEN CLAIMANT'S NOTICE TO DISBURSER ©
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Disburser hereby acknowledges due service of this notice this day of , 20 .

_____
Disburser

By: _____

STATE OF COLORADO
_____ County of _____

_____, of lawful age, being first duly sworn upon oath, deposes and says, that he/she made due service of this notice on the disburser by

- ☐ mailing by certified mail a copy of this notice addressed to the disburser at the address stated in the notice.
- ☐ delivering a copy of this notice to the disburser in person.
- ☐ leaving a copy of this notice at the (residence) (place of business)* of the disburser with the person in charge, to wit: _____

_____

Subscribed and sworn to before me this _____ day of _____, 20_____.

My Commission Expires _____

Witness my hand and official seal.

_____
Notary Public

*Strike according to fact.

38-22-126. Disburser - notice - duty of owner and disburser. (4) Any lien claimant who is entitled to a lien under this article may give notice to the disburser stating the property by address or legal description, or by such other description as will identify the real property; the claimant's name, address, and telephone number; the person with whom he was contracted; and a general statement of his contract.

(5) Such notice shall be in writing and shall be served upon the disburser by certified mail or by delivering the same personally to such disburser, or by leaving a copy at his residence or at his place of business with some person in charge.

EXHIBIT 19F • NOTICE EXTENDING TIME TO FILE LIEN STATEMENT

NOTICE EXTENDING TIME TO FILE LIEN STATEMENT

Pursuant to Section 109(10), Article 22, Title 38, Colorado Revised Statutes, notice is hereby given that the undersigned may hereafter file a lien statement or claim a mechanic's lien for labor, services, machinery, tools, equipment, laborers or materials furnished for improvement on real estate.

1. The land to be improved is situate in the County of , State of Colorado, and is described as follows:

Legal description *Address*

2. The name, address and telephone number of the lien claimant are:

Name *Address* *Telephone*

3. The name, address and telephone number of the person with whom the lien claimant has contracted are:

Name *Address* *Telephone*

Lien Claimant

By: _____

Name and Address of Person Creating Newly Created Legal Description (§ 38-35-106.5, C.R.S.)

38-22-109. Lien statement. (10) Within the applicable time period provided in subsections (4) and (5) of this section and subject to the provisions of section 38-22-125, any lien claimant granted a lien pursuant to section 38-22-101 may file with the county clerk and recorder of the county in which the real property is situated a notice stating the legal description or address or such other description as will identify the real property; the name of the person with whom he has contracted; and the claimant's name, address, and telephone number. One such notice may be filed upon more than one property, and, in the case of a subdivision, one notice may describe only the part thereof upon which the claimant has or will obtain a lien pursuant to section 38-22-101. The filing of said notice shall serve as notice that said person may thereafter file a lien statement and shall extend the time for filing of the mechanic's lien statement to four months after completion of the structure or other improvement or six months after the date of filing of said notice, whichever occurs first. Unless sooner terminated as provided in subsection (11) of this section, the notice provided for in this subsection (10) shall automatically terminate six months after the date said notice is filed. In the event that said structure or other improvements have not been completed prior to the termination of said notice, a claimant, prior to said termination date, may file a new or amended notice which shall remain effective for an additional period of six months after the date of filing or four months after the date of completion of said structure or other improvements, whichever occurs first.

No. 87B. Rev. 7-00. NOTICE EXTENDING TIME TO FILE LIEN STATEMENT ©

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EXHIBIT 19G • NOTICE OF *LIS PENDENS*

[DISTRICT COURT, MESA COUNTY, COLORADO Mesa County Justice Center 125 N. Spruce Grand Junction, Colorado 81501]	**▲COURT USE ONLY▲**
Plaintiff: ABC CORPORATION, a Colorado corporation v. **Defendants:** JOE BLOW; RICHARD ROE CORPORATION, a Colorado corporation; XYZ COMPANY, a Michigan corporation; RUSSIAN INSURANCE COMPANY, a Colorado corporation; and THE PUBLIC TRUSTEE OF MESA COUNTY, STATE OF COLORADO [Attorney for Plaintiff: Name Jack Greenwald, # 3503 Address: 3773 Cherry Creek Drive North, #575 Denver, CO 80209 Phone Number: (303) 331-3406 Fax Number: (303) 377-7262 E-Mail: JackGreenwald@aol.com]	Case No. CV Div: # Ctrm:
NOTICE OF LIS PENDENS	

The undersigned hereby gives notice that an action is pending in the within matter which affects the interest of the following real property and improvements thereon, situated in the [County of Mesa], State of Colorado, to wit:

[Lots 1 and 2, Block 5, Apache Subdivision,
County of Mesa, State of Colorado]

also known and numbered as [1 North Main Street, Chicago Creek, Colorado.]

_____
Honorable Attorney