

# Deciding Whether to Include “Claims” in Your Lien

By Timothy W. Gordon



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Mechanic’s lien laws are meant to provide protection and security for those who supply labor, materials, and equipment to improve real property for private construction projects. The theory behind the right to a mechanic’s lien is that one who has increased the value of property as a result of labor or materials put into the property should have security in the form of a lien

against the property. But there sometimes is a disconnect between what a contractor is entitled to contractually and what it can include in a mechanic’s lien claim. And when these two numbers are not the same, there can be competing motivations influencing the lien claimant.

On the one hand, the lien claimant wants the amount of its mechanic’s lien to be as large as allowable in order to have ample security for the full amount of its contractual claim. A larger lien amount also can put more pressure on the responsible party to settle. Moreover, recording a lien for less than what is allegedly owed contractually can sometimes set an artificially low starting point for settlement negotiations. On the other hand, a lien claimant risks forfeiting its lien rights entirely, having to pay attorneys’ fees, or worse if its lien is determined to be overstated or excessive. Faced with these competing motivations, the lien claimant must carefully consider what amounts to include in its lien claim, especially when deciding whether and to what extent to include claims for additional compensation and unapproved change orders in a mechanic’s lien. This article addresses the pitfalls of recording an excessive lien and how courts have addressed the inclusion of common claims-related costs in a mechanic’s lien claim.

## I. The Risk of Recording an Excessive Lien

While mechanic’s lien statutes seek to provide security to those whose labor, materials, and equipment have improved the value of real property, they also often seek to protect property owners from frivolous or excessive liens. One should not file a mechanic’s lien for a sum in excess of what is actually due, and many states penalize parties who do so. Such penalties can range from losing

lien rights entirely to monetary penalties and worse.

In Colorado, for example, filing a mechanic’s lien for an excessive amount can result in forfeiture of the entire lien claim, even that part of the claim that is genuine.<sup>1</sup> Additionally, one who files an exaggerated mechanic’s lien can be made to pay attorneys’ fees and costs to the aggrieved party.<sup>2</sup> Similarly, in New York, if a claimant “willfully exaggerates” its lien amount, then the entire lien is forfeited,<sup>3</sup> and the aggrieved party is entitled to an award of damages (such as the premium paid for a discharge bond) and attorneys’ fees.<sup>4</sup> In Tennessee, if a court finds that the amount of a lien has been willfully and grossly exaggerated, then it can disallow any recovery on the lien and the lien claimant can be liable for actual expenses and attorneys’ fees incurred as a result of the exaggeration.<sup>5</sup> And in Georgia, filing an excessive lien will result in its invalidation.<sup>6</sup>

In some states, an excessive lien merely results in a reduction of the lien amount and not a total loss of the lien, although fees also can be awarded. In Nevada, for example, filing an excessive lien can result in a reduction of the lien amount and an award of attorneys’ fees against the lien claimant.<sup>7</sup> Similarly, in Washington, if a lien is found to be clearly excessive, then the court shall reduce the lien amount and award reasonable attorneys’ fees and costs to the party challenging the lien.<sup>8</sup> In Alaska, the bad-faith inclusion of nonlienable items can be grounds for invalidating a lien,<sup>9</sup> and a party injured by a violation of the state’s mechanic’s lien law may recover reasonable attorneys’ fees for successfully enjoining a mechanic’s lien or for recovering damages caused by an invalid lien.<sup>10</sup>

Other states give the courts discretion regarding what to do about an excessive lien. So filing an excessive mechanic’s lien can result in either the forfeiture of the entire mechanic’s lien or simply a reduction in the lien amount. The California mechanic’s lien statute, for instance, expressly provides for the forfeiture of a lien if the claimant willfully includes in the lien labor, services, equipment, or materials not furnished.<sup>11</sup> But pursuant to the state’s case law, the California courts may reduce an excessive lien to its proper amount if they so choose.<sup>12</sup> In Michigan, an excessive lien is generally just reduced, unless bad faith is involved, in which case the lien is lost entirely.<sup>13</sup> Such bad faith can be shown by evidence proving that the mechanic’s lien included amounts for labor not actually performed and materials not actually furnished. But where the lien was overstated simply as a result of a faulty calculation methodology of the costs of labor actually performed and materials actually furnished, then bad faith will not be found.<sup>14</sup>

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In Florida, the stakes for knowingly recording an excessive mechanic's lien are even higher. A mechanic's lien in Florida can be deemed "fraudulent" if the amount of the lien is willfully exaggerated.<sup>15</sup> And not only can a "fraudulent lien" be a complete defense to enforcement of a lien<sup>16</sup> and result in the loss of the lien and an award of damages and attorneys' fees,<sup>17</sup> the person who caused the fraudulent lien to be recorded can be charged with a felony.<sup>18</sup> Similarly, Utah makes it a misdemeanor to intentionally submit for recording a mechanic's lien containing a greater demand than the sum due with an intent to either cloud title, exact more than is due, or procure any unjustified advantage or benefit.<sup>19</sup>

Even if a state does not provide for statutory penalties specifically for the recording of an excessive lien, other common-law or statutory avenues may provide relief for an injured property owner who is harmed by an excessive lien. For example, Connecticut's lien statute only authorizes a court to reduce the amount of a lien if it is shown by clear and convincing evidence that the amount of a lien is excessive.<sup>20</sup> The statute does not provide any monetary penalties for an overstated lien. But at least one appellate court in Connecticut has held that intentionally filing a manifestly excessive lien also can subject the lien claimant to claims for abuse of process and unfair trade practices.<sup>21</sup> In Illinois, recording an excessive mechanic's lien can subject the lien claimant to liability for constructive fraud.<sup>22</sup> And certain states may allow for the maintenance of a slander of title action if a lien is indeed invalid. Therefore, even in states where the only obvious downside to recording an excessive lien is a reduction of the lien amount, an overstated lien can still result in claims against the party who caused the excessive lien to be recorded.

The risks of having a lien completely invalidated and having to pay an opposing party's attorneys' fees make it important for lien claimants to carefully consider exactly what to include in their lien claims, and not simply pursue a lien for what they believe is owed them contractually. Of course, it is unnecessary to warn attorneys against knowingly recording an excessive lien. But the problem comes when deciding whether or not to include claims for additional compensation above the original contract price in a mechanic's lien. And trial courts are sometimes willing to rule that a lien claimant's failure to prove entitlement to a change order means that its mechanic's lien was excessive.

## II. If a Claim Is Not Proven, Is the Lien Excessive?

Nowhere is the friction between trying to maximize the value of a mechanic's lien claim and trying to avoid the pitfalls of recording a potentially overstated lien more prevalent than in the area of claims for alleged extra work, delays, or impacts. Generally, if entitlement is proven, then the costs associated with performing extra work can be included in the recovery for a mechanic's lien claim. In *Belmont Electric Service, Inc. v. Dohrn*, for example, an owner and an electrician entered into a fixed-price contract for a certain scope of work.<sup>23</sup> The contractor,

however, performed work outside of the original scope of its contract at the owner's request.<sup>24</sup> The trial court did not allow the claim for the extra work, but the appellate court reversed on appeal.<sup>25</sup> More importantly, the appellate court held that the contractor was entitled to a mechanic's lien for the full amount of its judgment against the owner, which would include the claim for performing extra work.<sup>26</sup> The end result was correct, but it took an appeal to arrive there.

## In Illinois, recording an excessive mechanic's lien can subject the lien claimant to liability for constructive fraud.

Mechanic's lien claimants do not have crystal balls, and cannot foresee whether they will be able to prove entitlement to their claims for performing additional work or for incurring additional costs. And some courts have held that a failure to prove entitlement to extra compensation for a claim means that the lien was excessive when originally recorded. In *LSV, Inc. v. Pinnacle Creek, LLC*,<sup>27</sup> for example, an owner and construction manager ended up in a dispute over claims for alleged extra work. The parties eventually abandoned the contract because of the dispute, and the construction manager then recorded a mechanic's lien and filed a foreclosure lawsuit. The mechanic's lien included amounts for both the construction manager's contractual fee and the claim for costs for the alleged extra work. Of the contractor's \$75,000 mechanic's lien, \$25,000 of it was for the construction manager's claim for costs associated with the alleged extra work. The trial court determined that the construction manager was entitled to recover its unpaid fee, and even made factual findings regarding the percentage of the project complete at the time the contract was abandoned and the percentage of costs and cost savings that the construction manager was entitled to.

But despite finding that the construction manager was owed money under its contract, the trial court also concluded that the construction manager's mechanic's lien was excessive for including the \$25,000 claim related to the extra work. As a result, the trial court completely invalidated the construction manager's mechanic's lien and awarded the owner its attorneys' fees for defending against the mechanic's lien claim. Thus, although the construction manager was found to be entitled to payment from the owner under the contract, the construction manager lost its mechanic's lien rights entirely and had to pay

part of the owner's attorneys' fees. This was all due to the contractor including a claim for alleged extra work in its mechanic's lien that it ultimately could not prove entitlement to at trial.

In North Dakota, an owner that successfully contests the validity or accuracy of a construction lien is entitled to an award of costs and reasonable attorneys' fees.<sup>28</sup> And owners have used this statute to seek and recover attorneys' fees when the lien claimant is unable to prove entitlement to the full amount of its mechanic's lien. In *North Excavating Co., Inc. v. Sisters of Mary of Presentation Long Term Care*,<sup>29</sup> the parties entered into a time-and-materials contract for the repair of a water main.<sup>30</sup> Following completion of the work, the parties could not agree on the price owed, so the contractor recorded a mechanic's lien for \$98,806.98 and the owner filed a counterclaim for breach of contract, unlawful sales practices, and invalid construction lien/slander of title.<sup>31</sup> The owner believed that the contractor was only entitled to approximately \$47,000.<sup>32</sup> The contractor was found to be entitled to \$81,694.23 plus interest.<sup>33</sup>

Despite the jury verdict in favor of the contractor, the owner filed a motion for fees and costs, claiming that it successfully challenged the contractor's lien.<sup>34</sup> Specifically, the owner argued that it successfully contested the validity of the lien "because the jury awarded [the contractor] approximately \$17,000 less than it claimed under the lien."<sup>35</sup> The contractor disagreed, arguing that "it was unreasonable to require lienholders to pay costs and attorney's fees when a lienholder does not recover the precise amount claimed in a lien."<sup>36</sup> But the trial court granted the owner's motion and awarded the owner part of its attorneys' fees.<sup>37</sup>

On appeal, the Supreme Court of North Dakota concluded that, because the contractor was awarded \$81,694.23 of its \$98,806.98 claim, it was deemed to be the "prevailing party" for purposes of an award of costs.<sup>38</sup> But the court also concluded that the fee-shifting statute applied in favor of the owner because the contractor's lien amount was not accurate.<sup>39</sup> The contractor argued that the fee-shifting statute should apply only if a lien claimant knowingly files an inaccurate lien. But the court disagreed. According to the court, the contractor's lien was inaccurate because of the outcome of the jury verdict.<sup>40</sup> As such, even though the contractor was the "prevailing party" for purposes of an award of costs, the owner was entitled to an award of attorneys' fees under the mechanic's lien statute for successfully defending against the accuracy of the contractor's mechanic's lien.<sup>41</sup>

Results like this should cause contractors some pause in deciding whether or not to include disputed amounts in a mechanic's lien claim. If you include claims for additional compensation in your mechanic's lien and cannot prove them, there are some courts that will deem the mechanic's lien as originally recorded excessive and impose penalties.

But other cases have recognized that the inability to

prove entitlement to a claim for extra compensation should not automatically invalidate a mechanic's lien. At least one appellate court in Florida has held that an unsuccessful claim for extra costs or compensation does not automatically expose the lien claimant to all of the pitfalls of an exaggerated lien. In *Gator Boring & Trenching, Inc. v. Westra Construction Corp.*,<sup>42</sup> a subcontractor recorded a lien for \$889,792.70, \$676,556.90 of which was for costs associated with an alleged changed conditions claim.<sup>43</sup> The defendants filed a motion for partial summary judgment, arguing that the subcontractor was not contractually allowed to recover for alleged changed conditions, that the subcontractor assumed the risk of any changed conditions under the terms of its subcontract, and that the lien was therefore exaggerated and fraudulent.<sup>44</sup> The trial court granted the motion for summary judgment, but the appellate court reversed. According to the appellate court, "[t]he reasoning that [the subcontractor]'s lien was fraudulent as a matter of law simply because it lost on its changed conditions claim is erroneous."<sup>45</sup> The appellate court noted that the changed conditions claim was a hotly contested and complex issue that required discovery, research, argument, and the involvement of counsel from the beginning:

The record and the parties' briefs reflect that [subcontractor]'s claim that it was entitled to recover additional monies . . . as a result of the changed site conditions was a hotly contested and complex issue involving the legal construction of [the] subcontract and other documents as well as an analysis of the law concerning the assumption of the risk for differing site conditions. . . . [T]he parties engaged in substantial discovery and legal analysis before [defendants] filed their motion for partial summary judgment concerning [subcontractor]'s entitlement to payment on its changed site conditions claim. . . . The parties' pleadings reflect that they had a genuine dispute about [subcontractor]'s entitlement to payment on its changed conditions claim, for which [it] was represented by counsel. In addition, the record on appeal reflects that [subcontractor]'s claim of lien was, in fact, prepared by [its] counsel.<sup>46</sup>

Again, just like in *Belmont Electric Service, Inc.*, the end result in *Gator Boring & Trenching, Inc.* seems correct, but it took an appeal to get there, and both the opposing party and the trial court believed that the subcontractor's inability to sustain its burden of proof with respect to its differing site conditions claim meant that the subcontractor's mechanic's lien was excessive when originally filed.

But not all trial courts impose liability when a lien claimant fails to prove entitlement to the entire amount of its claim. In *Weaver v. Acampora*,<sup>47</sup> the contractor recorded and pursued a mechanic's lien claim in the amount of \$60,113.38, which included change orders.<sup>48</sup> The trial court determined that the contractor was entitled

to recover only \$53,118.72 plus interest.<sup>49</sup> On appeal, the owners argued that the trial court erred in refusing to find that the contractor had willfully exaggerated its lien “by significantly overcharging for some additional work . . .”<sup>50</sup> The appellate court in New York disagreed:

While Supreme Court found that the actual cost of implementing defendants’ change orders was somewhat less than that claimed by plaintiff, the value of the changes was the subject of conflicting testimony, and we cannot say that it was unreasonable for the court to conclude that defendants failed to show that the discrepancy was the result of an intentional or deliberate overstatement, rather than merely an honest disagreement as to value.<sup>51</sup>

The more reasoned approach is that a good-faith disagreement should not be the basis of invalidating a mechanic’s lien or imposing penalties.<sup>52</sup> And even an overstated lien should not be the basis of invalidating the entire lien in the absence of some intent to defraud.<sup>53</sup> But not all courts follow this approach, and trial courts unfamiliar with how construction claims work may be persuaded to find that a mechanic’s lien was overstated or exaggerated simply because the parties have a disagreement regarding entitlement to additional compensation.

### III. Certain Components of Claims

Although mechanic’s lien statutes vary state to state, the amount of a lien is typically based on the “value” of the labor performed and equipment and materials supplied. And oftentimes, the claimant’s contract amount is the best indication of what that “value” is. In fact, some states limit lien claims to the contract amount. But simply because a claim for additional compensation might be allowable under a contract or subcontract does not mean that the costs or damages associated with that claim can be included in a mechanic’s lien. As one court put it, “a mechanic’s lien proceeding is not intended to settle the contractual obligations of the parties.”<sup>54</sup> And just because a claim is allowable under a breach-of-contract theory does not mean that the associated costs can be recovered as part of a mechanic’s lien. The items that seem to be the subject of most of the disputes are costs for idle and standby time, delay and impact costs, overhead and profit, interest and late charges, and attorneys’ fees.

#### A. Idle and Standby Time

Consider a situation where, through no fault of the subcontractor or the owner, a subcontractor is required to temporarily shut down its work and remain on standby status. The subcontractor may incur significant costs during the standby, including equipment rental costs, labor costs for employees stationed near the site, and overhead costs. But idle time does not necessarily contribute to the value of the improvements, and the cost of idle time required as a result of an unforeseen suspension of work

does not necessarily factor in when determining the value of the work ultimately performed.

The Supreme Court of Colorado’s decision in *Tabor v. Armstrong*<sup>55</sup> illustrates how certain costs for idle time cannot be included in a mechanic’s lien while other impact costs can. In *Tabor*, the court adopted the rule that, for costs associated with a claim to be lienable, “the demand ‘must be due as a consequence of actual performance’” under the contract, as opposed to idleness.<sup>56</sup> Based on this concept, the court in *Tabor* ruled that a subcontractor’s lien is not always measured by the extent of its valid claim for breach of contract against the principal contractor.<sup>57</sup> Instead, if a subcontractor, due to the fault of the principal contractor, is made to remain idle and suffers damages as a result, the subcontractor may have a claim against the principal contractor, but cannot claim a mechanic’s lien against the owner for such “idle time” damages. In the court’s words:

Where, by the default or neglect of the principal contractor, the subcontractor is obliged to remain idle, and suffers loss in consequence, he may undoubtedly recover of the contractor; but such damages could constitute no valid claim, under the statute, against the owner.<sup>58</sup>

But the court did not hold that all impact claims cannot be included in a mechanic’s lien. In fact, the court in *Tabor* held that the subcontractor would be entitled to a mechanic’s lien for extra work required in moving stone poorly placed about the project by the principal contractor.<sup>59</sup> The principal contractor apparently delivered the stone in such a way that the subcontractor had to first remove the second-story stone in order to reach the first-story stone, and then had to move the stone from one street to another where it belonged. According to the Supreme Court of Colorado, if the subcontractor could establish a valid claim against the general contractor for this extra work, then the subcontractor would be entitled to have the costs associated with the claim included in its mechanic’s lien claim against the property.<sup>60</sup>

Similarly, in *Nelson v. Boise Petroleum Corp.*,<sup>61</sup> plaintiff sought to foreclose a mechanic’s lien related to work for drilling and casing a well.<sup>62</sup> In addition to payment for actually performing the work, plaintiff also was contractually entitled to payment for a period of 127 days when he was required to stand ready to perform services as necessary.<sup>63</sup> The Supreme Court of Idaho held that, although plaintiff was entitled to payment under his contract for the idle time, plaintiff was not entitled to a lien for idle time.<sup>64</sup>

When labor can be diverted to other areas or projects, idle or “downtime” costs sometimes can involve equipment only. In *Missouri Land Development Specialties, LLC v. Concord Excavating Co.*,<sup>65</sup> the lien claimant argued that costs for “downtime” or nonuse of machinery was lienable as labor.<sup>66</sup> The Missouri Court of Appeals

disagreed, and noted that the downtime was the result of a shutdown and that the equipment at issue was later removed without being used again after the shutdown.<sup>67</sup> According to the court:

Even under the most liberal of interpretations, however, we cannot construe charges for equipment that was sitting idle, without operators, and then later removed from the jobsite, doing no further work after the shutdown, as “labor,” as that term is plainly and ordinarily understood.<sup>68</sup>

The Supreme Court of Arizona also has held that costs for idle equipment are not recoverable under a mechanic’s lien.<sup>69</sup>

But other courts have held that mechanic’s liens may include standby time. In *Prepakt Concrete Co. v. Fidelity & Deposit Co. of Maryland*,<sup>70</sup> the defendants claimed that a subcontractor’s mechanic’s lien improperly included charges for “waiting time.”<sup>71</sup> The Seventh Circuit Court of Appeals disagreed, holding that idle time could be included in a mechanic’s lien under Illinois law:

[Subcontractor’s] personnel and equipment were moved on the job site at [prime contractor’s] request. The possibility of waiting time while [subcontractor] was at the job site, but was unable to work, was contemplated by [prime contractor] and [subcontractor] and they agreed upon an hourly rate to be paid during waiting time. We agree with [subcontractor] that the personnel and equipment was being furnished [prime contractor] while it stood ready on the site, and the value of that time was part of the labor cost which ultimately produced the building under construction.<sup>72</sup>

Similarly, in *Skinner v. Quadrangle Oil Co.*,<sup>73</sup> the contract for drilling a well expressly provided for compensation for any period of shutdown unless caused by the contractor.<sup>74</sup> The Supreme Court of Kansas thus held that such “waiting time” could be included in a lien. According to the court:

[U]nder the contract time consumed in waiting for materials or delay caused by the [owner] must be considered as a part of the labor necessary to drill the well. In such work, delays must occur, and labor, not directly connected with the well, must be performed before the well can be completed. All becomes a necessary part of the labor in putting down the well, and the statute contemplates that a lien shall attach for all that is necessary to be done, including waiting for supplies and time lost when operations are shut down on account of the fault of the owner.<sup>75</sup>

As with most categories of claims, deciding whether

or not to include a claim for idle or standby time in a mechanic’s lien will depend on the specific jurisdiction and how the courts have interpreted their statutes. Unfortunately, not every state has addressed this issue, and there is a split in the jurisdictions that have.

### **B. Delay and Impact Costs**

Like claims for idle and standby time, how courts treat claims for delays with respect to mechanic’s liens also varies. This is not surprising given the fact that some of the categories of damages and costs for a delay claim can be similar to, if not the same as, those for a standby claim.

In *Lambert v. Superior Court*,<sup>76</sup> homeowners hired a contractor to perform major renovations to their home. After two years and several change orders later, the owners terminated the contractor and hired another to finish the work. The terminated contractor recorded and pursued a claim on a mechanic’s lien that included “charges for delay.”<sup>77</sup> The construction contract itself characterized delay claims as “extra work.”<sup>78</sup> In California, pursuant to California Civil Code § 3123(a), mechanic’s lien claimants are entitled to a lien for “the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, whichever is less . . . .”<sup>79</sup> So the issue that the California Court of Appeals was faced with was, “may delay damages be considered part of the reasonable value of labor and services?”<sup>80</sup> The court answered “no” and explained its answer as follows:

Contractor has presented no authority for recording a mechanic’s lien to recover damages based on delay. Our research has uncovered only the following commentary: “Claimants often assert that the amount of the lien should include ‘impact claims’ to compensate them for items such as delay, disruption, acceleration, and other contract claims in addition to the contract balance plus any extras. There is no reported law concerning such impact claims, and they do not appear to be encompassed within the language of CC § 3123.” (Cal. Mechanic’s Liens and Other Remedies, *supra*, at § 1.43, p. 26.)

We agree that Civil Code section 3123 does not permit a lien for delay damages, whether or not the contract describes them as extra work. The function of the mechanic’s lien is to secure reimbursement for services and materials actually contributed to a construction site, not to facilitate recovery of consequential damages or to provide a claimant with leverage for imposing the claimant’s view of who caused the breakdown in the contract.<sup>81</sup>

In an unpublished opinion, a division of the Court of Appeals of California applied *Lambert* to hold that acceleration costs for schedule recovery caused by a delay also

cannot be recovered as part of a mechanic's lien claim.<sup>82</sup> Similarly, the U.S. District Court for the Northern District of Illinois ruled in an unpublished opinion that delay claims cannot be part of a mechanic's lien under Illinois law, even though such damages may be available under a breach of contract theory.<sup>83</sup>

Some secondary sources cite *California Commercial v. Amedeo Vegas I, Inc.*,<sup>84</sup> for the proposition that Nevada's lien statute does not allow for the recovery of delay damages. But the opinion is more focused on whether the claimant was contractually entitled to additional delay damages. The answer was no, so the claimant also was not entitled to a mechanic's lien for the same damages. The parties in *Amedeo Vegas I* entered into change orders for the performance of extra work on the project.<sup>85</sup> But the contractor later submitted a claim for "delay-related" damages, which allegedly included materials, labor, and extra overhead.<sup>86</sup> The Supreme Court of Nevada held that the extra materials, labor, and delay-related compensation that the contractor sought in its lien claim should have been addressed by the contractor when the parties were bargaining over the amounts of the previously executed change orders.<sup>87</sup> So the *Amedeo Vegas I* opinion more accurately stands for the proposition that a contractor may not recover damages via a mechanic's lien that it contractually is not entitled to. In fact, in Nevada, if the parties agreed by contract to a specific methodology for determining payment for the work, then a contractor may assert a lien for "the unpaid balance of the price agreed upon for such work . . . ."<sup>88</sup> If a party is contractually entitled to recover delay damages, then it would follow that the lien can include such damages.

In contrast, in *In re Regional Building System, Inc.*, a bankruptcy court in Maryland has ruled that, under New York law, costs associated with delay claims may be recoverable under the mechanic's lien statute in certain circumstances, and that the critical focus of the inquiry for the lienability of delay claim costs should be whether the added labor cost was part of the labor necessarily used in performance of the contract.<sup>89</sup> Equally important to the court was whether costs associated with a delay are recoverable as part of the contract price.<sup>90</sup> The court appropriately explained that, as to the "lienability" of delay costs, "the question is a confusing one, upon which reasonable minds could differ."<sup>91</sup>

Like costs for idle time and standby costs, there is a split of authority regarding whether costs associated with delay claims can be included in a mechanic's lien. Even in situations where delay-related costs are for mitigating the impact of a delay and getting the project back on schedule, courts have rejected attempts to include delay-claim costs in a mechanic's lien.

### C. Overhead and Profit

It would seem a given that the amount of a mechanic's lien should include profit and overhead on the work performed as allowed by the parties' contract. But that's not

always the case. Lost profit on unperformed work is generally not lienable. And some courts have held that claims for lost profits should not be part of any mechanic's lien claim, including profit on work actually performed.

In *East Hills Metro, Inc. v. J.M. Dennis Construction Corp.*,<sup>92</sup> for example, plaintiff recorded a lien that included the balance due on the adjusted contract price, damages for extra work, and damages caused by the general contractor's alleged breaches of contract.<sup>93</sup> The defendants argued that plaintiff's lien was invalid and willfully exaggerated for including unanticipated costs incurred by plaintiff due to the general contractor's breaches.<sup>94</sup> The New York court agreed that the claim for lost profits due as a result of the general contractor's breach of contract sought damages beyond what may be included in a mechanic's lien.<sup>95</sup> Profits lost as a result of not being allowed to finish a project also are not recoverable as part of a mechanic's lien in New York.<sup>96</sup>

The issue of lost profits on work not performed is fairly straightforward. Liens typically are only available for actual labor performed and materials and equipment supplied, and do not cover amounts associated with non-performance. The Supreme Court of Nebraska has held that a contractor may not recover lost profits suffered as a result of a breach of contract as part of its mechanic's lien.<sup>97</sup> In New Jersey, lost profits are not recoverable under the mechanic's lien statute.<sup>98</sup> In Arizona, lost profits and overhead are not part of the mechanic's lien remedy.<sup>99</sup> Washington does not allow a lien to include lost future profit.<sup>100</sup> And in Texas, the lien may not cover lost profit on work not performed.<sup>101</sup>

Profit and overhead, however, can sometimes be included in a lien if they relate to work actually performed. The Supreme Court of Kansas explained the difference over 100 years ago in *Elder Mercantile Co. v. Ottawa Investment Co.*<sup>102</sup> There, the court held that a reasonable profit was allowable as part of a mechanic's lien, noting that "certainly it cannot be expected that materialmen are to furnish their goods without any profit whatever . . . ." <sup>103</sup> But the court did not allow the recovery of lost anticipated profit on work not performed. "As this amount was not furnished, and as the material which otherwise would have gone into this building was still the property of the company, no ground exists for charging . . . profit on something which never was furnished or used."<sup>104</sup>

Georgia courts had once interpreted their state's mechanic's lien statute to allow a lien only for value of the materials and labor that directly improved the property. As a result, costs of cleanup, insurance, and other overhead costs to manage the job were not allowed to be part of a lien in Georgia. This included all manner of general conditions costs.<sup>105</sup> But the Georgia legislature amended the state's mechanic's lien statute to allow the inclusion of profit and overhead.<sup>106</sup> Other states also allow for inclusion of profit in a lien. In Nevada, the mechanic's lien statute specifically allows for recovery of overhead and

profit in a lien.<sup>107</sup> In South Carolina, overhead and profit are recoverable on a mechanic's lien claim only "where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract."<sup>108</sup> And in Arkansas, a material supplier is entitled to profit as part of its lien, but a contractor is not.<sup>109</sup>

Finally, the Supreme Judicial Court of Maine had to address the issue of profit in the form of "bonus payments" in *Combustion Engineering, Inc. v. Miller Hydro Grp.*<sup>110</sup> In *Combustion Engineering*, the contractor was required to design, engineer, construct, and start up a hydroelectric facility.<sup>111</sup> In addition to the contract price, the contractor could earn a bonus if the facility reached a certain threshold of energy output, and an additional bonus for finishing early.<sup>112</sup> The contractor included \$894,000 as part of its claim for the unpaid bonuses.<sup>113</sup> The trial court held that the contractor willfully overstated its lien by including profit in the form of the bonuses and that the bonus payments were not lienable.<sup>114</sup> But the Supreme Judicial Court reversed. According to the court:

The fact that the bonus payments are computed separately from other payments under the contract and may reflect profit to [the contractor] does not take them outside the purview of the statute. All of the payments in issue are part of [the contractor's] compensation for enhancing the value of the property; they all establish the debt to be secured by the lien.<sup>115</sup>

#### **D. Interest and Late Charges**

Interest and late charges allowable under a contract do not represent the value of the work performed. Nevertheless, some states allow the inclusion of interest in a mechanic's lien while others do not. The Superior Court of Pennsylvania has held that interest should not be part of a mechanic's lien.<sup>116</sup> The Supreme Court of Massachusetts has held that a mechanic's lien cannot include interest, even though it may be recoverable under the parties' contract.<sup>117</sup> The Supreme Court of Nebraska has held that a contractor may not recover financing charges for late payments as part of its mechanic's lien.<sup>118</sup> The Supreme Court of Wisconsin has held that prejudgment interest is not lienable.<sup>119</sup> Finance charges are not lienable in Alabama.<sup>120</sup> And in Texas, a successful lien claimant may be entitled to recover prejudgment interest, but the prejudgment interest amount should not be included in the mechanic's lien itself.<sup>121</sup>

In contrast, the Court of Appeals of North Carolina held that interest can be included in a lien claim if interest is allowed under the parties' contract.<sup>122</sup> Similarly, in Georgia, interest on the amount of a lien may not be claimed in the absence of an agreement or judgment fixing such amount as liquidated.<sup>123</sup> In Virginia, interest may be included in a lien.<sup>124</sup> And while not addressing directly the issue of whether interest can be included in the amount of the lien as recorded, the Missouri Court

of Appeals reasoned that "it would be an incomplete remedy to allow a lien for the reasonable cost of labor and materials but not interest thereon" from the date that payment was due.<sup>125</sup>

In *Honnen Equipment Co. v. Never Summer Backhoe Service, Inc.*,<sup>126</sup> a division of the Colorado Court of Appeals drew a distinction between interest and late charges included in a mechanic's lien. Specifically, the court held that the inclusion of interest in a lien statement does not render the lien void as an excessive lien. But in doing so, the court had to distinguish prior Supreme Court of Colorado precedent holding that a mechanic's lien may not include late charges. In *Honnen Equipment Co.*, the lien claimant included accrued interest in its mechanic's lien statement itself. The owner argued that interest may not be included in a mechanic's lien because interest does not represent the value of the work performed to benefit the property. Therefore, according to the owner, the inclusion of accrued interest in a mechanic's lien statement renders it excessive and therefore invalid. A division of the Colorado Court of Appeals disagreed. In its holding, the court distinguished prior Supreme Court of Colorado precedent holding that late charges recoverable by contract are not lienable.<sup>127</sup> While the Colorado Court of Appeals acknowledged that interest, like late charges, does not represent the value of the work performed, the court held that interest can be included in a mechanic's lien because it is specifically mentioned in the mechanic's lien statute as being recoverable.<sup>128</sup>

#### **E. Attorneys' Fees**

Like interest and late charges, attorneys' fees and costs incurred in pursuing a mechanic's lien obviously do not contribute to the value of the property improved. Some statutes, nevertheless, expressly allow mechanic's lien claimants to recover attorneys' fees and costs if they are successful in pursuing a mechanic's lien claim. The parties' contract also might allow for the recovery of attorneys' fees by the prevailing party. This does not mean, however, that attorneys' fees and costs should be included in the amount of the mechanic's lien itself.

In *Ton Plumbing, L.L.C. v. Thorgaard*,<sup>129</sup> a contractor initially recorded a lien for the principal amount owed for the work performed, "plus interest, costs and attorney fees."<sup>130</sup> But after efforts to collect did not result in timely payment, the contractor amended its lien by adding interest, costs, and attorneys' fees to the amount of the lien itself.<sup>131</sup> After more time passed, the contractor recorded a second amended notice of lien, again increasing the lien amount to add ongoing accrued interest, costs, and attorneys' fees.<sup>132</sup> The applicable mechanic's lien statute actually provided for the recovery of attorneys' fees to be taxed as costs to the prevailing party in a mechanic's lien foreclosure action.<sup>133</sup> But according to the court, this did not mean that costs and attorneys' fees could be included in the mechanic's lien itself. Part of the court's reasoning was that the issue of whether attorneys' fees would

be recoverable would be premature at the time the lien is recorded.<sup>134</sup> Additionally, the relevant Utah statute limited mechanic's liens to the value of the work performed.<sup>135</sup> Despite the fact that the contractor's amended lien statements improperly included attorneys' fees, the court held that the two amended lien statements were invalid but did not invalidate the original lien statement that did not include the interests, fees, and costs.<sup>136</sup>

The fact that attorneys' fees do not contribute to the value of the work performed makes the decision not to include attorneys' fees in a mechanic's lien an easier call, but that does not stop lien claimants from trying. Courts in at least North Carolina,<sup>137</sup> Pennsylvania,<sup>138</sup> California,<sup>139</sup> Virginia,<sup>140</sup> and Massachusetts<sup>141</sup> have all had to address this issue, and all have held that attorneys' fees should not be included in a mechanic's lien.

#### IV. Conclusion

State mechanic's lien statutes are the first place to start when determining whether and to what extent costs associated with a claim for additional compensation should be included in a mechanic's lien. Searching case law for additional answers is also a must. But many states have never addressed issues such as whether delay damages can be included in a lien, and there is a split among the states that have done so. This, coupled with the risk of being penalized for recording an excessive mechanic's lien, means that lien claimants must proceed cautiously in deciding whether and to what extent to include claims in a mechanic's lien claim. And any attorney who decides to include costs associated with a claim for additional compensation in a mechanic's lien claim had better be prepared to explain why such costs are properly included because those defending against the lien will be ready to argue that the inclusion of certain claims renders the lien excessive. 🏗️

#### Endnotes

1. COLO. REV. STAT. §§ 38-22-123, 38-22-128; *Pope Heating & Air-Conditioning Co. v. Garrett-Bromfield Mortg. Co.*, 480 P.2d 602, 604 (Colo. App. 1971); *Heating & Plumbing Eng'rs, Inc. v. H. J. Wilson Co.*, 698 P.2d 1364, 1367 (Colo. App. 1984).
2. *Pope Heating & Air-Conditioning Co.*, 480 P.2d at 602.
3. N.Y. LIEN LAW § 39; *Goodman v. Del-Sa-Co Foods, Inc.*, 205 N.E.2d 288, 289 (N.Y. 1965).
4. N.Y. LIEN LAW § 39-a.
5. TENN. CODE ANN. § 66-11-139.
6. *Seaboard Constr. Co. v. Kent Realty Brunswick, LLC*, 771 S.E.2d 429, 430 (Ga. App. 2015).
7. NEV. REV. STAT. § 108.2275(6)(b).
8. WASH. REV. CODE § 60.04.081(4).
9. *Moore v. Alaska Metal Bldgs., Inc.*, 448 P.2d 581, 584 (Alaska 1968).
10. *Lakloey, Inc. v. Ballek*, 211 P.3d 662, 667 (Alaska 2009).
11. CAL. CIV. CODE § 8422.
12. *Basic Modular Facilities, Inc. v. Ehsanipour*, 83 Cal. Rptr. 2d 462 (Cal. Ct. App. 1999).
13. *Tempo, Inc. v. Rapid Elec. Sales & Serv., Inc.*, 132 Mich. App. 93, 104, 347 N.W.2d 728, 733 (Mich. App. 1984).
14. *Id.*
15. FLA. STAT. § 713.31(2)(a).

16. *Id.* § 713.31(2)(b).
17. *Id.* § 713.31(2)(c).
18. *Id.* § 713.31(3).
19. UTAH CODE ANN. § 38-1a-308.
20. CONN. GEN. STAT. § 49-35b.
21. *Coppola Constr. Co., Inc. v. Hoffman Enter. Ltd. P'ship*, 117 A.3d 876 (Conn. App. Ct. 2015).
22. *Lohmann Golf Designs, Inc. v. Keisler*, 632 N.E.2d 121, 127 (Ill. App. 1994), *appeal allowed, cause remanded*, 640 N.E.2d 630 (Ill. 1994), *and supplemented*, 646 N.E.2d 1313 (Ill. App. 1995).
23. 516 P.2d 130, 131 (Colo. App. 1973).
24. *Id.*
25. *Id.*
26. *Id.* at 131-32.
27. 996 P.2d 188 (Colo. App. 1999).
28. N.D. CENT. CODE § 35-27-24.1.
29. 815 N.W.2d 280 (N.D. 2012).
30. *Id.* at 282.
31. *Id.*
32. *Id.* at 286.
33. *Id.* at 282.
34. *Id.*
35. *Id.* at 283.
36. *Id.* at 282.
37. *Id.*
38. *Id.* at 286.
39. *Id.* at 283-84.
40. *Id.* 284.
41. *Id.* at 285. By contrast, in Florida, to be entitled to fees for an excessive lien, the owner must both prove that the lien was fraudulent and be the prevailing party. *Newman v. Guerra*, 208 So. 3d 314, 319 (Fla. Dist. Ct. App. 2017).
42. 210 So. 3d 175 (Fla. Dist. Ct. App. 2016).
43. *Id.* at 178.
44. *Id.* at 179.
45. *Id.* at 183.
46. *Id.* at 183-84.
47. 642 N.Y.S.2d 339 (N.Y. App. Div. 1996).
48. *Id.* at 340.
49. *Id.*
50. *Id.* at 341.
51. *Id.*
52. *See, e.g., A-C Constr., Inc. v. Bakke Corp.*, 956 P.2d 219, 224 (Or. App. 1998).
53. *See, e.g., Cordeck Sales, Inc. v. Constr. Sys., Inc.*, 887 N.E.2d 474, 513 (Ill. App. 2008) (\$74,901.86 lien not invalid even though it was overstated by \$24,819.15 because no fraud shown).
54. *Artsmith Dev. Grp., Inc. v. Updegraff*, 868 A.2d 495, 496 (Pa. Super. Ct. 2005).
55. 9 Colo. 285, 12 P. 157 (1886).
56. *Id.* at 289, 12 P. at 160 (citation omitted).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. 32 P.2d 782 (Idaho 1934).
62. *Id.* at 782.
63. *Id.*
64. *Id.* at 783.
65. 269 S.W.3d 489 (Mo. App. 2008).
66. *Id.* at 501.
67. *Id.* at 502.
68. *Id.*
69. *Kerr-McGee Oil Indus., Inc. v. McCray*, 89 Ariz. 307, 312, 361 P.2d 734, 737 (1961).
70. 393 F.2d 187 (7th Cir. 1968).
71. *Id.* at 190.



72. *Id.*
73. 212 P. 684 (Kan. 1923).
74. *Id.* at 686.
75. *Id.*
76. 228 Cal. App. 3d 383, 279 Cal. Rptr. 32 (1991).
77. *Id.* at 385, 279 Cal. Rptr. at 33.
78. *Id.*
79. *Id.* at 388, 279 Cal. Rptr. at 36.
80. *Id.*
81. *Id.* at 388–89, 279 Cal. Rptr. at 36.
82. *Haskell Corp. v. ConocoPhillips Co.*, No. A124446, 2012 WL 845398, at \*19 (Cal. Ct. App. Mar. 14, 2012).
83. *Antonic Rigging & Erecting, Inc. v. MDCON, Inc.*, No. 90-C-4800, 1991 WL 56351, at \*2–3 (N.D. Ill. 1991).
84. 119 Nev. 143, 67 P.3d 328 (2003).
85. *Id.* at 147, 67 P.3d at 332.
86. *Id.* at 147–48, 67 P.3d at 332.
87. *Id.* at 148, 67 P.3d at 332.
88. NEV. REV. STAT. § 108.222.
89. 273 B.R. 423, 446 (Bankr. D. Md. 2001), *subsequently aff'd*, 320 F.3d 482 (4th Cir. 2003).
90. *Id.* at 447.
91. *Id.* at 446.
92. 703 N.Y.S.2d 897 (N.Y. Sup. Ct. 2000), *aff'd*, 717 N.Y.S.2d 202 (N.Y. App. Div. 2000).
93. *Id.* at 898.
94. *Id.*
95. *Id.* at 899.
96. *Goldberger-Raabin, Inc., v. 74 Second Ave. Corp.*, 252 N.Y. 336, 340, 169 N.E. 405, 406 (1929).
97. *Tilt-Up Concrete, Inc. v. Star City/Fed., Inc.*, 582 N.W.2d 604, 613–14 (Neb. 1998).
98. *Gallo v. Sphere Constr. Corp.*, 293 N.J. Super. 558, 565, 681 A.2d 1237, 1241 (Ch. Div. 1996).
99. *Fortune v. Superior Court in & for Maricopa Cty.*, 159 Ariz. 549, 552, 768 P.2d 1194, 1197 (Ct. App. 1989).
100. *CSR Contractors, Inc. v. Kendall Constr., Ltd.*, 45 Wash. App. 648, 651, 726 P.2d 1018, 1020 (1986).
101. *Tex. Bank & Trust Co. v. Campbell Bros.*, 569 S.W.2d 35, 42 (Tex. Civ. App. 1978), *dismissed* (Nov. 1, 1978).
102. 165 P. 279 (Kan. 1917).
103. *Id.* at 283.
104. *Id.*
105. 182 Tenth, LLC v. Manhattan Constr. Co., 316 Ga. App. 776, 780, 730 S.E.2d 495, 500 (2012).
106. *Stock Bldg. Supply, Inc. v. Platte River Ins. Co.*, 336 Ga. App. 113, 119, 783 S.E.2d 708, 713 (2016).
107. NEV. REV. STAT. § 108.222.
108. *Zepa Constr., Inc. v. Randazzo*, 357 S.C. 32, 38, 591 S.E.2d 29, 32 (Ct. App. 2004).
109. *John E. Bryant & Sons Lumber Co. v. Moore*, 264 Ark. 666, 670, 573 S.W.2d 632, 634 (1978).
110. 577 A.2d 1186 (Me. 1990).
111. *Id.*
112. *Id.*
113. *Id.* at 1188.
114. *Id.* at 1187–88.
115. *Id.* at 1188.
116. *Artsmith Dev. Grp., Inc. v. Updegraff*, 868 A.2d 495, 496 (Pa. Super. Ct. 2005).
117. *Nat'l Lumber Co. v. United Cas. & Sur. Ins. Co., Inc.*, 802 N.E.2d 82, 84–85 (Mass. 2004).
118. *Tilt-Up Concrete, Inc. v. Star City/Fed., Inc.*, 582 N.W.2d 604, 615 (Neb. 1998).
119. *Torkel Wirthl Pujara, Ltd. v. Lakeshore Towers of Racine*, 531 N.W.2d 419, 421 (Wis. Ct. App. 1995).
120. *Sherman Int'l Corp. v. Greater Mt. Olive Baptist Church No. 2*, 678 So. 2d 156, 157 (Ala. Civ. App. 1996).
121. *Ambassador Dev. Corp. v. Valdez*, 791 S.W.2d 612, 624 (Tex. App. 1990).
122. *Paving Equip. of the Carolinas, Inc. v. Waters*, 122 N.C. App. 502, 503, 470 S.E.2d 546, 547 (1996).
123. *Bush v. Northside Trucking, Inc.*, 252 Ga. App. 729, 731, 556 S.E.2d 909, 911 (2001).
124. *Am. Standard Homes Corp. v. Reinecke*, 245 Va. 113, 123, 425 S.E.2d 515, 520 (1993); *In re Kiser*, 344 B.R. 432, 436 (Bankr. W.D. Va. 2004).
125. *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924, 933 (Mo. Ct. App. 1992).
126. 261 P.3d 507 (Colo. App. 2011).
127. *See* *Indep. Trust Corp. v. Stan Miller, Inc.*, 796 P.2d 483 (Colo. 1990).
128. COLO. REV. STAT. § 38-22-101(5).
129. 345 P.3d 675 (Utah 2015).
130. *Id.* at 677.
131. *Id.* at 678.
132. *Id.* at 679.
133. *Id.* at 683.
134. *Id.* at 684.
135. *Id.*
136. *Id.* at 686.
137. *Paving Equip. of the Carolinas, Inc. v. Waters*, 122 N.C. App. 502, 503, 470 S.E.2d 546, 547 (1996).
138. *Artsmith Dev. Grp., Inc. v. Updegraff*, 868 A.2d 495, 496 (Pa. Super. Ct. 2005).
139. *Abbott Elec. Corp. v. Cal. Fed. Sav. & Loan Ass'n*, 230 Cal. App. 3d 355, 360, 281 Cal. Rptr. 362, 365 (1991).
140. *Am. Standard Homes Corp. v. Reinecke*, 245 Va. 113, 124, 425 S.E.2d 515, 521 (1993).
141. *Nat'l Lumber Co. v. United Cas. & Sur. Ins. Co., Inc.*, 802 N.E.2d 82, 84–85 (Mass. 2004).