

Navigating Lien and Trust Fund Rights When a Party in the Construction Supply Chain Files for Bankruptcy

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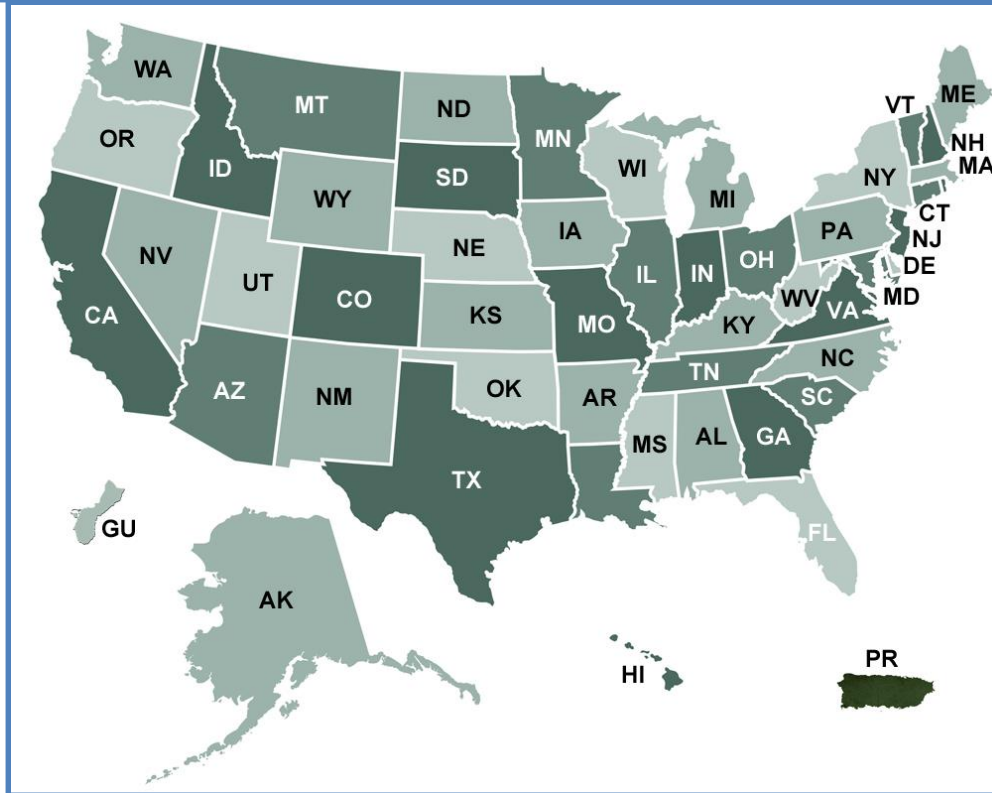
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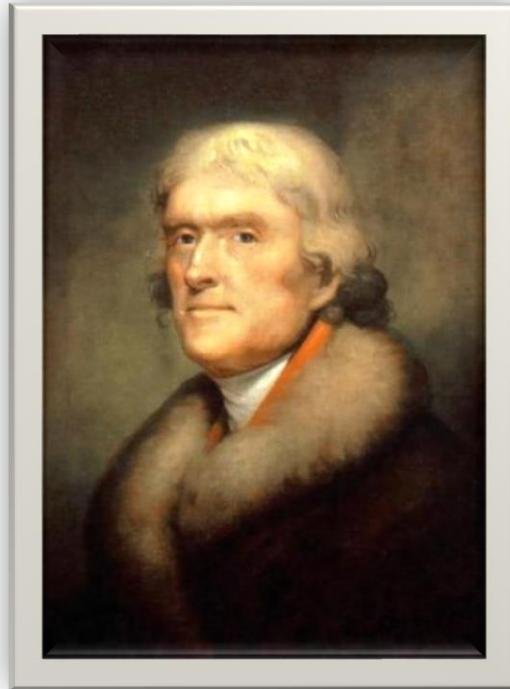
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Laying the Foundation

Lien rights in all 50 States



Thomas Jefferson wrote the first Mechanic's Lien Statute for Maryland in 1791



Jefferson frequently used the word
“Encourage”.

Five Cs of credit

- **Character**

The creditability of your customer.

- **Capacity**

Your customer's ability to manage their business.

- **Conditions**

The internal and external forces that we need to know about that affect the customer's business.

- **Capital**

The customer's worth.

- **Collateral**

Property pledged as a security to pay an obligation or loan.


If you reduce risk, you can sell more

\$5,000 credit line
14% Interest rate



\$500,000 credit line
4% Interest rate





**\$15,000 write off on an
order with 3% margin**

**Sales has to generate
\$500,000 in new business
to offset that loss**

JOB INFORMATION SHEET

Customer: _____ Phone: _____ Email: _____
 Street Address: _____
 City: _____ State: _____ ZIP: _____
 Customer: ☐ Owner ☐ General Contractor ☐ Subcontractor ☐ Material Supplier ☐ Leasehold Interest
☐ Supplier to Supplier ☐ Public/Private Partnership (P3) ☐ Sub-subcontractor ☐ Commercial Useful Function Verified

PROJECT INFORMATION

NAME: _____
 STREET ADDRESS: _____
 CITY: _____ STATE: _____ ZIP: _____
 SCR Number: _____ (CA PROJECTS ONLY) MNLR Number: _____ (AZ PROJECTS ONLY)
 Registry Number: _____ (PA and NJ)

PROPERTY OWNER/AWARDING AUTHORITY

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

PROPERTY LEASEHOLDER

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

LENDER - (CA & AZ Projects Only)

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

ARCHITECT

NAME: _____
 STREET ADDRESS: _____

ARCHITECT (continued)

PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

PRIME CONTRACTOR

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

PRIME'S BONDING COMPANY Is this a private bonded job? ☐

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

SUBCONTRACTOR (if other than customer)

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

SUB'S BONDING COMPANY

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

Estimated Quantity: _____ Estimated Dollar Value: _____
 Rental: Estimated Monthly Fee: _____ Estimated Term of Rental: _____
 This job will have: ☐ One furnishing ☐ Several furnishings First furnishing date: _____ Last furnishing date: _____
☐ Tax Exempt - Send exemption certificate with job sheet.
 Signature: _____ Date: _____ Company: _____

Construction Credit has unique terminology

Retainage

Back Charge

Pay if Paid

Unique Collection Objection

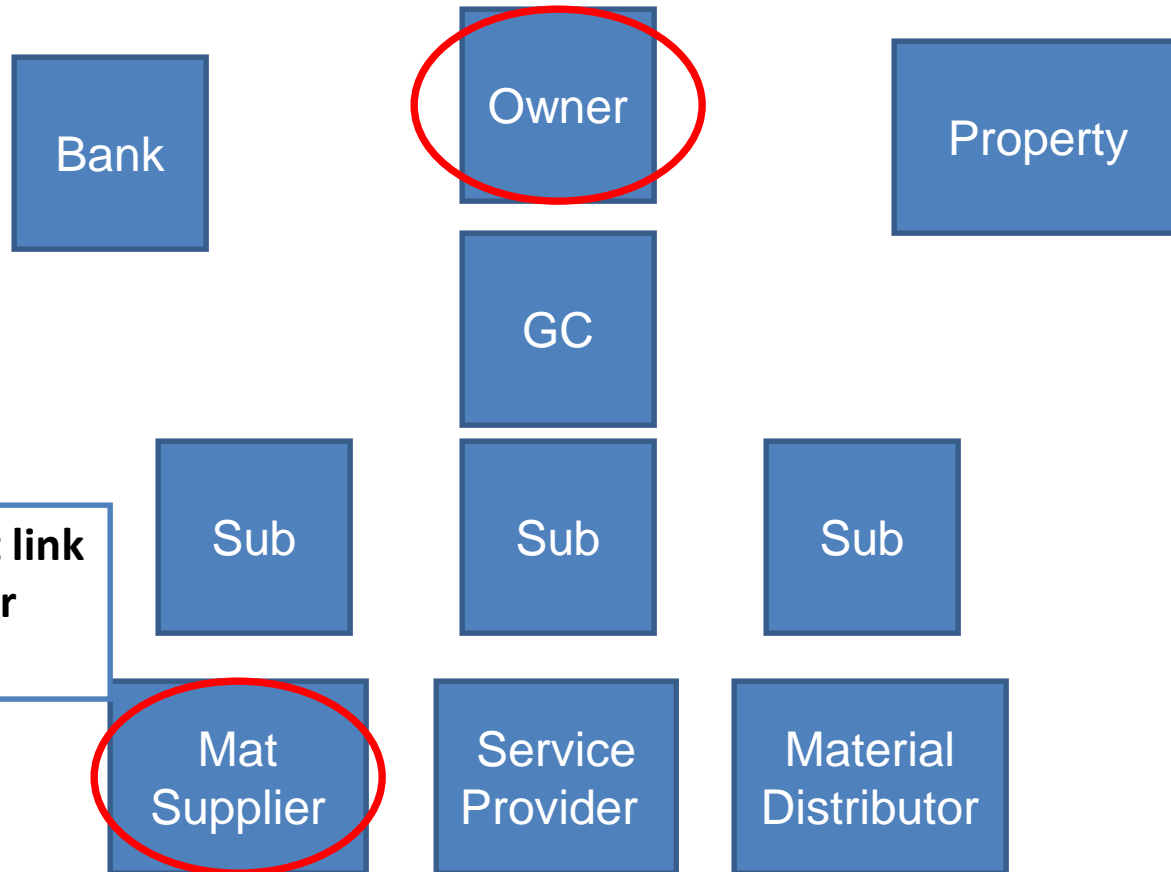


Can't pay you,
I haven't been
paid!

Construction Credit is Unique



The weak payment link
may not be your
customer



Construction Credit is Unique

NACM National Association of Credit Management

JOB INFORMATION SHEET

Customer: _____ Phone: _____ Email: _____
 Street Address: _____ City: _____ State: _____ ZIP: _____
 Customer: ☐ Owner ☐ General Contractor ☐ Subcontractor ☐ Material Supplier ☐ Commercial Lessor
☐ Supplier to Supplier ☐ Public/Private Partnership (P3) ☐ Sub-Subcontractor ☐ Commercial/Industrial/Residential

PROJECT INFORMATION

ARCHITECT (continued)
 AEC Number: _____ AEC Number: _____
 Project Number: _____ Project Number: _____
 Property Number: _____ Property Number: _____

PRIME CONTRACTOR
 AEC Number: _____ AEC Number: _____
 Project Number: _____ Project Number: _____
 Property Number: _____ Property Number: _____

PRIME'S BONDING COMPANY Is this a prime contractor? ☐
 AEC Number: _____ AEC Number: _____
 Project Number: _____ Project Number: _____
 Property Number: _____ Property Number: _____

SUBCONTRACTOR (if other than customer)
 AEC Number: _____ AEC Number: _____
 Project Number: _____ Project Number: _____
 Property Number: _____ Property Number: _____

LENDER - (CA & AZ Projects Only)
 AEC Number: _____ AEC Number: _____
 Project Number: _____ Project Number: _____
 Property Number: _____ Property Number: _____

SUB'S BONDING COMPANY
 AEC Number: _____ AEC Number: _____
 Project Number: _____ Project Number: _____
 Property Number: _____ Property Number: _____

ARCHITECT
 AEC Number: _____ AEC Number: _____
 Project Number: _____ Project Number: _____
 Property Number: _____ Property Number: _____

Customer County: _____ Address/Order Date: _____
 Agent: Customer Credit File: _____ Estimated Term of Order: _____
 The job will have: ☐ One Lending ☐ Several Lendings First Lending Date: _____ Last Lending Date: _____
☐ No Lending - Send completion certificate with job sheet.
 Signature: _____ Date: _____ Company: _____



Bank

Owner



Property



GC



**Gathering and Verifying
job information is
CRITICAL**

Sub

Sub

Sub

Mat
Supplier

Service
Provider

Material
Distributor

JOB INFORMATION SHEET

Customer: _____ Phone: _____ Email: _____
 Street Address: _____
 City: _____ State: _____ ZIP: _____

Customer: ☐ Owner ☐ General Contractor ☐ Subcontractor ☐ Material Supplier ☐ Leasehold Interest
☐ Supplier to Supplier ☐ Public/Private Partnership (P3) ☐ Sub-subcontractor ☐ Commercial Useful Function Verified

PROJECT INFORMATION

NAME: _____
 STREET ADDRESS: _____
 CITY: _____ STATE: _____ ZIP: _____

SCR Number: _____ MNLR Number: _____
(If FRANCHISE ONLY) (If New Mexico)

Registry Number: _____
(If and HQ)

PROPERTY OWNER/AWARDING AUTHORITY

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

PROPERTY LEASEHOLDER

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

LENDER - (CA & AZ Projects Only)

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

ARCHITECT

NAME: _____
 STREET ADDRESS: _____

ARCHITECT (continued)

PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

PRIME CONTRACTOR

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

PRIME'S BONDING COMPANY Is this a private bonded job? ☐

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

SUBCONTRACTOR (if other than customer)

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

SUB'S BONDING COMPANY

NAME: _____
 STREET ADDRESS: _____
 PHONE: _____ EMAIL: _____
 CITY: _____ STATE: _____ ZIP: _____

Estimated Quantity: _____ Estimated Dollar Value: _____
 Rental: Estimated Monthly Fee: _____ Estimated Term of Rental: _____

This job will have: ☐ One furnishing ☐ Several furnishings First furnishing date: _____ Last furnishing date: _____
☐ Tax Exempt - Send exemption certificate with job sheet.

Signature: _____ Date: _____ Company: _____

Who Gathers the job
information

Who VERIFIES the job
information

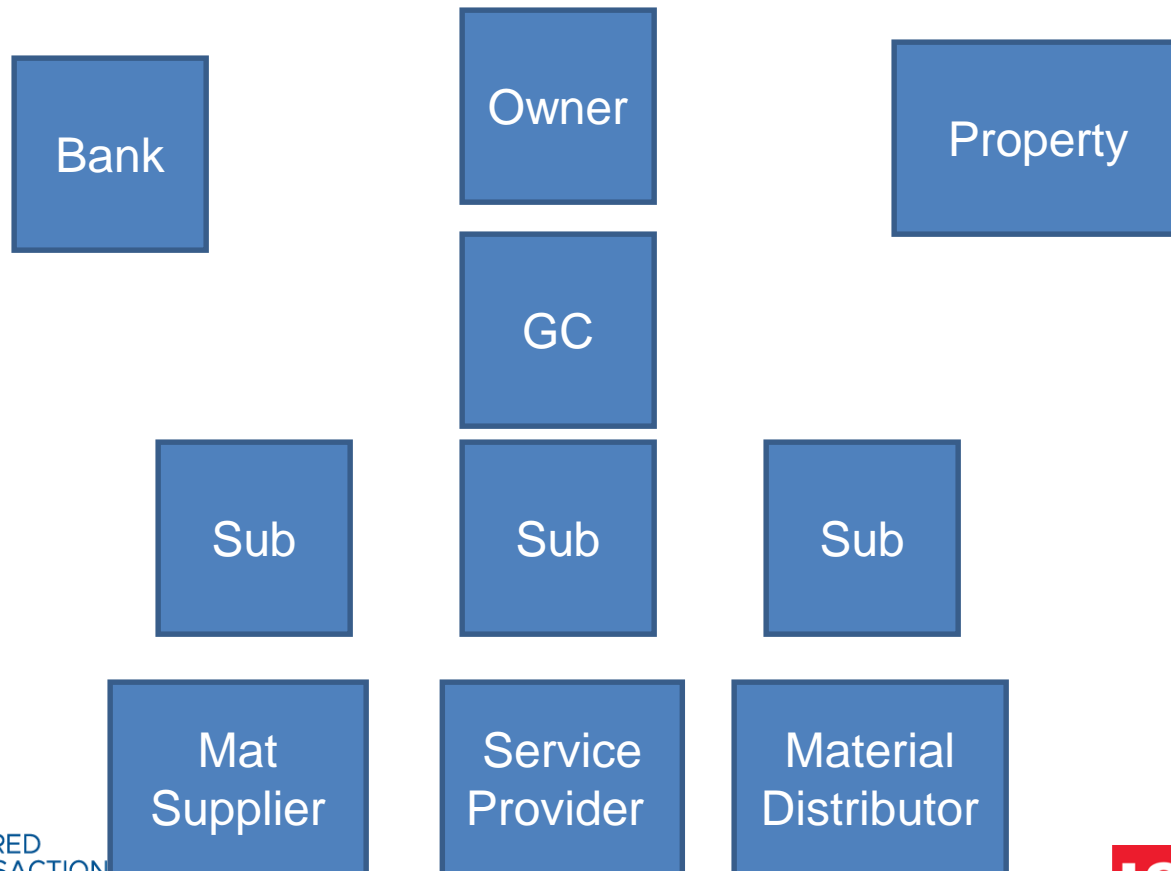
Recent Poll:

71% Sales gathers information

18% Credit gathers information

11% Combined effort of sales and credit

How do you tame this animal?



After you process the Credit Application

CREDIT APPLICATION AND AGREEMENT EXHIBIT

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Date _____

A. APPLICANT

\$40,000 job order

**Customer is worthy of
a \$5,000 credit line**

Property

Officer Contact _____ Acct. No. _____ Type of Acct. _____
Acct. No. _____ Type of Acct. _____

I hereby authorize bank named above to release information requested for the purpose of obtaining and/or reviewing credit.

Signature _____ Date _____

D. TRADE REFERENCES (Please provide three references)

| Name | Contact | Address |
|----------|---------|---------|
| 1. _____ | _____ | _____ |
| 2. _____ | _____ | _____ |
| 3. _____ | _____ | _____ |

The preceding information is for the purpose of obtaining credit and is warranted to be true. I/We hereby authorize [Your Company Name Here] to investigate all references and customary credit information sources including consumer credit reporting repositories (see Consent to Obtain Consumer Credit Report below) regarding my/our credit and financial responsibility for the purpose of obtaining credit and for periodic review for the purpose of maintaining

You're justifying the \$40,000 order against the property value

Owner

C

Sub

Sub

Mat
Supplier

Service
Provider

Material
Distributor



Property is worth \$40,000,000

Liens are a defined right

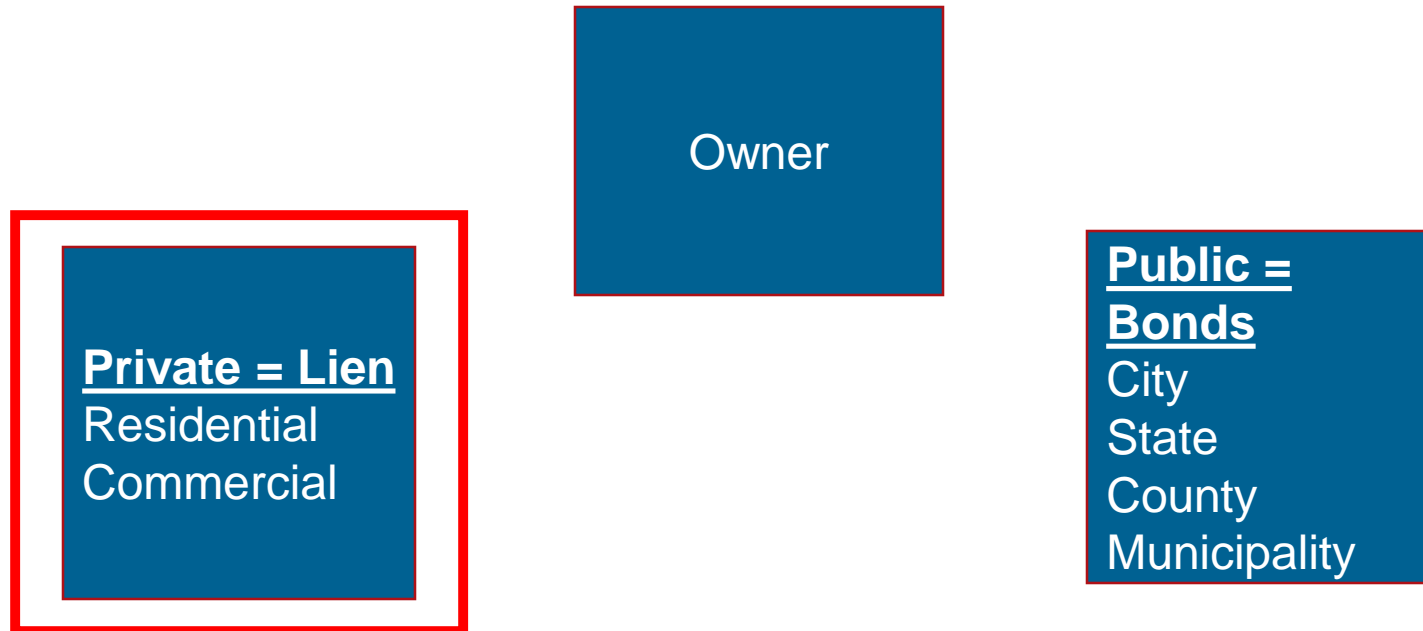
1. Be within 3 tiers of the owner.
2. Goods must be affixed, nailed, glued, bolted, painted on, etc.
3. No suppliers to suppliers.

Supplier

Provider

Distributor

Today we're focusing on Mechanics' Liens on "Private" construction. The playbook is different for "Public" construction and Payment Bonds.



■ Creation of Mechanics' Lien Rights

■ Attachment or Creation of Mechanics' Lien Rights Depends on State Law

- Some states provide that the lien is created when creditor first provides materials or services
- Other states require that creditor files or serves notice of right/intention to file lien in prescribed manner
- Other states provide that the lien is created when recorded in real property records of county or with locality where improved property is located

Perfection and Enforcement of Mechanics' Lien Rights

- Perfection of Mechanics' Lien Rights Require Recording of Lien in Real Property Records
 - Key question – does state law allow perfection to relate back to when lien arose?
- Those States that Allow Recorded Lien to Relate Back to Attachment or Creation of Lien Rights Have Different Deadlines for Perfection
- Once Lien Rights Arise and are Perfected, Lien Claimant Has Limited Period of Time to Commence Suit to Foreclose on its Lien
 - Depends on state law

■ Mechanics' Liens and Bankruptcy Code

- The Bankruptcy Code Defines a “Statutory Lien As Arising by Statute, But Does Not Include a Security Interest or Judicial Lien
 - A mechanics’ lien is a statutory lien
- General Bankruptcy Rule – Liens Filed Post-Petition Are Null and Void – Violating Automatic Stay
 - 11 U.S.C. § 362(a)(4) prohibits “any act to create, perfect or enforce any lien against property of the estate” after bankruptcy filing
- Per 11 U.S.C. § 545, a Debtor or Trustee May Avoid the Filing of a Statutory Lien on Property of Debtor to Extent Lien First Becomes Effective Against Debtor When Bankruptcy is Filed

Mechanics' Liens and the Bankruptcy Code – Automatic Stay Exception

- Automatic Stay Exception: 11 U.S.C. § 362(b)(3): Bankruptcy Filing Does Not Stay Any Act to Perfect or to Maintain or Continue the Perfection of an Interest in Property to the Extent the Trustee is Subject to Such Perfection Under Section 546(b)
- 11 U.S.C. § 546(b)(i) Creates An Exception to the Automatic Stay Based on Applicable Law That Permits Perfection of an Interest in Property to Be Effective Against an Entity that Acquires Rights in Such Property Before Date of Perfection
 - Depends on whether state allows a perfected mechanics' lien to relate back to the date of commencement of work and/or provision of materials and/or services
 - Bottom Line: Timely Post-Petition Perfection of Mechanics' Lien OK if Liened Property is In State Where Lien Relates Back to Pre-Petition Event (e.g., - Commencement of Work)

■ Mechanics' Liens and Bankruptcy

- Alternative: Creditor Can Preserve Its Mechanics' Lien Rights by satisfying 11 U.S.C. § 546(b)(2)'s Notice Requirement

“If – (A) a law...requires...commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and (B)...such an action has not been commenced before the date of the filing of the petition; such interest in such property shall be perfected, *or perfection of such interest shall be maintained or continued*, by giving notice within the time fixed by such law for...such commencement.”

■ Mechanics' Liens and Bankruptcy

- An 11 U.S.C. § 546(b)(2) Lien Preservation Notice States That a Mechanics' Lienholder Intends to Perfect or Maintain and Enforce its Mechanics' Lien
 - Notice should be filed with the bankruptcy court and properly served prior to expiration of state law deadline for commencing action to enforce lien rights

■ Mechanics' Liens and Bankruptcy

- What If Real Property Subject to Mechanics' Lien Rights is Located in State Without a Relation Back Provision?

Mechanics Lien and Bankruptcy Code – *In re Linear Electric Company Inc.*

- New Jersey Lien Law: New Jersey Construction Lien Law, N.J.S.A. 2A: 44(A)-1, et seq.:
 - “Any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract shall be entitled to a lien for the value of the work or services performed or material or equipment furnished in accordance with the contract and based on the contract price”
- Problem: Construction Liens Arising Under New Jersey Lien Law, Are Only Effective on Date of Filing of the Lien
 - New Jersey lacks any retroactive perfection of mechanics’ lien rights

Mechanics Lien and Bankruptcy Code – *In re Linear Electric Company Inc.*

- Creditors Sold Electric Materials to the Debtor – Linear Electric Co., An Electrical Contractor
- Linear Used These Materials on Various Construction Projects in New Jersey
 - Filed chapter 11 in New Jersey Bankruptcy Court on 7/1/015
 - Owed two creditors approximately \$1.4 million on petition date
- Two Weeks Later, the Creditors Filed Liens Against the Projects
 - Argued post-petition lien filings did not violate the automatic stay because filed against non-debtor owned projects/real property
- Linear Moved to Discharge the Liens As Violating Automatic Stay

Mechanics Liens and Bankruptcy Code – *In re Linear Electric Company Inc.*

- Bankruptcy Court, District Court and U.S. Court of Appeals for Third Circuit All Ruled: Mechanics' Liens Filed Post-Petition Violated Automatic Stay
- Mechanics' Liens Governed by New Jersey Lien Law – Do Not Relate Back to Pre-Bankruptcy Event
- Mechanics' Liens Attached to Property of Linear's Bankruptcy/Estate – Linear's Accounts Receivable Owed by Project Owners For Linear's Work on the Projects
 - Post-petition lien filing enabled creditors to collect Linear's A/Rs owing on the projects
 - Didn't matter that lien was filed against non-debtor owned projects

Mechanics Liens and Bankruptcy Code – *In re Linear Electric Company Inc.*

- The Third Circuit Distinguished the New Jersey Lien Law From Pennsylvania Lien Law Where Supplier's/Subcontractor's Lien Relates Back to Date Work on Project First Began
 - *In re Yobe Electric Inc.* – 3rd Circuit – 1984 – Per Pennsylvania lien law, construction lien timely filed post petition deemed to have related back to when lien attached pre-petition and, therefore, automatic stay did not apply

Mechanics' Liens and Bankruptcy Code – *In re Construction Supervision Services*

- North Carolina General Statute § 44A-18 – Subcontractor that furnishes labor, common materials or rental equipment on construction project can assert lien on monies owed on that project
- 2 different types of lien rights
 - All subcontractors have lien on funds acquired by party directly above them in contract chain
 - Second and third lien subcontractors also have a lien on funds owed to entities in the contract chain above the party with whom second and third tier contractor had contracted
- Liens in Project Funds Arise When Subcontractor Provides Materials, Labor or Rental Equipment to Contractor on Project
- Lien Perfected When Subcontractor Gives Written Notice of Lien To All Parties Above Subcontractor in Lien Chain, Including Higher Tiered Subcontractors, General Contractor and Owner

Mechanics' Liens and Bankruptcy Code – *In re Construction Supervision Services*

- U.S. Court of Appeals for 4th Circuit, in *In re Construction Services Inc*, Ruled that Subcontractors' Postpetition Perfection of Their Lien Rights In Project Proceeds Did Not Violate Automatic Stay
 - North Carolina law allowed relation back of post-petition perfected lien to pre-petition creation/attachment of lien (subcontractors' pre-petition delivery of goods)

Mechanics' Liens and Bankruptcy

- Automatic Stay Bars Mechanics' Lien Creditors from Enforcing (e.g., Foreclosing on) Lien Rights Unless Creditor Obtains Relief From Stay
 - 11 U.S.C. § 362(d) – grounds for lifting stay
- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
 - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
 - (2) with respect to a stay of an act against property under subsection (a) of this section, if—
 - (A) the debtor does not have an equity in such property; and
 - (B) such property is not necessary to an effective reorganization;

■ Priority of Mechanics' Lien Rights

- Need to Review DIP Financing Use of Cash Collateral Order to Protect Against Subordination of Lien Rights
- Priority Disputes Might Also Arise in Context of Section 363 Sales in Bankruptcy Cases
- 11 U.S.C. § 363 states:
 - (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate...
 - (e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest...[Invoked to protect lien rights]

■ Priority of Mechanics' Lien Rights

■ 11 U.S.C. § 363 Also States

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Priority of Mechanics' Lien Rights in Section 363 Bankruptcy Sales

- Order of Filing of Liens
- Exception for Mechanics' Liens in States Where Perfection Relates Back to Attachment/Creation of Lien Rights
- Governed by Bankruptcy Court Order (e.g., DIP Financing/Use of Cash Collateral Order)
- Can Be Priority Between Different Mechanics' Liens?

Mechanics' Liens and Bankruptcy Code – Preference Risk Issues

Elements of Preference Claim

- Any Transfer of an Interest of the Debtor in Property;
- To or for the Benefit of a Creditor;
- On Account of an Antecedent Debt Owed by Debtor Before Transfer;
- Made While the Debtor was Insolvent;
 - On or within 90 days before bankruptcy filing; or
 - Between 90 days and one year before bankruptcy filing for transfers to insider creditors; and

Mechanics' Liens and Bankruptcy Code – Preference Risk Issues

Elements of Preference Claim

- That Enables Such Creditor to Receive More Than Such Creditor Would Receive if:
 - The case were a Chapter 7 case;
 - The transfer had not been made; and
 - Such creditor received payment to the extent provided by other provisions of Title 11.
 - The greater than liquidation recovery requirement

Mechanics' Liens and Bankruptcy Code – Protection from Preference Risk

- Greater Than Liquidation Requirement Not Satisfied
- Creditor Fully Secured by Debtor's Assets or Paid from Collateral Proceeds Not Subject to Preference Risk
 - E.g., Mechanics' Lien Fully Secured by Debtor Property
- “Inchoate Lien Rights: Greater than Liquidation Requirement Satisfied Despite Absence of Lien Filing Where Creditor Has Right Under State Law to Record a Fully Secured Mechanics Lien On Debtor's Property that Relates Back to Pre-Petition Creation or Attachment of Lien

Mechanics' Liens and Bankruptcy Code – Protection from Preference Risk

- Contemporaneous Exchange For New Value Defense – 11 U.S.C. § 54(c)(1)
- Transfer was *Intended* by Debtor and Creditor to be Contemporaneous Exchange for New Value; and
- Transfer was Substantially Contemporaneous Exchange
- Examples:
 - Release of mechanics' lien in debtor's property in exchange for preference payment, provided value of released lien rights is not less than the payment
 - Beware of conditional release of lien rights and bounced check/ACH payment

Mechanics' Liens and Bankruptcy Code – Protection from Preference Risk

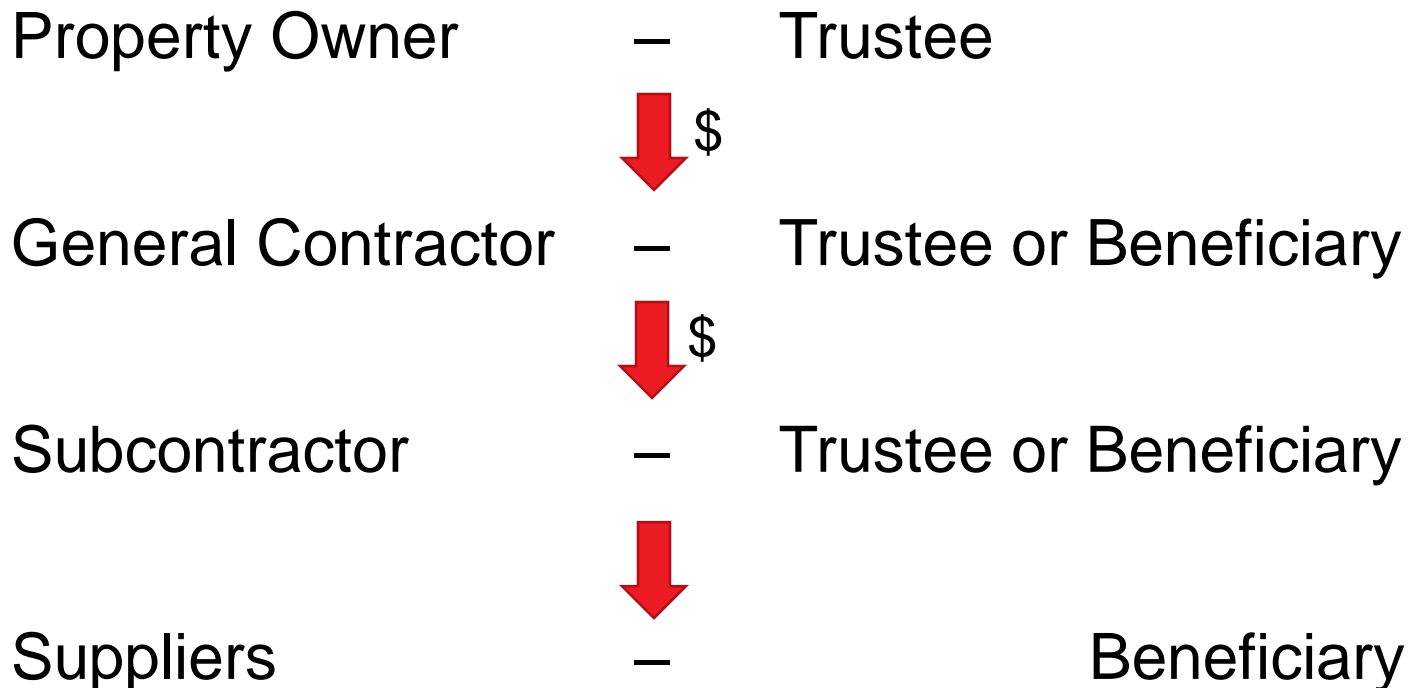
- New Value Defense – 11 U.S.C. § 547(c)(4)
- New Value Defense Can Apply to Release of Lien Rights In Debtor's Property With Value of at Least the Amount of the Preference Payment
- Section 547(c)(6) – No Preference If Transfer is Filing of Statutory Lien Not Avoidable Under Section 545

■ Builders/Construction Trust Fund Protection

- Certain States Have Enacted a Builders or Construction Trust Fund Statute
 - Typically provide that all accounts receivable owing on a construction project by an owner to a contractor and/or by the owner or contractor to a subcontractor will be held in trust by the contractor or subcontractor
 - Arises automatically – no notice/filing requirements
- Trust Fund Rights Could Also Be Created By Contract

How Does the Builders/Construction Trust Fund Work?

Construction Project



States That Have Construction/Builders Trust Fund Statutes

- Arizona
- Colorado
- Delaware
- Maryland
- Michigan
- New Jersey
- New York
- Oklahoma
- South Dakota
- Tennessee
- Texas
- Washington
- Wisconsin

Builders Trust Fund Beneficiaries Can Have Priority Over Trustee's Accounts Receivables Secured Lender

- Funds Held in Trust on a Construction Project Do Not Become Trustee's Property
 - Trust beneficiaries granted first dibs in trust assets in trustee's bankruptcy case
 - Lender's security interest in accounts receivables does not attach until trust fund beneficiaries are paid in full
 - The courts have generally granted priority to trust fund beneficiaries over prior perfected security interest in accounts
- Risk of Commingling of Trust Funds With Trustee's Other Cash that Dissipates the Trust
 - Trust fund beneficiaries have burden of tracing trust fund proceeds into cash

■ Builders/Construction Trust Fund Protection

- No Bankruptcy Preference Risk for Builders/Construction Trust Fund Beneficiaries If They Can Show the Alleged Preference Payment Was From Trust Assets;
 - Not property of the debtor (one of the requirements for a preference)
- Key Challenge: Can Builders/Construction Trust Fund Beneficiaries Trace Preference Payment Back to Trust Fund?
 - Risk of commingling of trust and non-trust assets
 - Beneficiaries have the tracing burden

■ Misappropriation of Trust Funds

- Construction Trust Fund Statutes Vary Widely By States
Re: Remedies For Misappropriation of Trust Funds
 - Civil remedies – e.g.,
 - Interest
 - Attorneys' fees
 - Criminal penalties
 - Both
 - Personal liability for officers and directors of contractor/subcontractor
 - Strict liability
 - Officers and directors who controlled disbursement of trust funds

Non-Dischargeability Re Misappropriation of Trust Funds

- Misappropriation of Trust Funds in States Where Construction Trust Fund Statutes Create Trust Obligation and/or Require Contractor/Subcontractor to Segregate and Keep Detailed Records Is a Ground Supporting Non-Dischargeability of Claim



QUESTIONS?

