

**Friday, October 24, 2014
9:00 – 10:15 AM**

Seminar 13: Don't Lien on Me: Dealing with a Mechanics Lien on Your Property

Presented to

**2014 U.S. Shopping Center Law Conference
JW Marriot Grande Lakes
Orlando, Florida
October 22-25, 2014**

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OVERVIEW OF PROTECTING AGAINST MECHANICS LIENS AT A SHOPPING CENTER

by

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****The information in this article is of a general nature only and is not intended to be relied upon as, nor a substitute for, specific professional advice.***

I. Introduction

There are many players involved in the construction and development of a shopping center. The owner typically develops and builds the shopping center and involves a lender for a construction loan and hires contractors and architects to perform the work. Then there are the tenants that commonly contract for their own tenant improvements, retain their own contractors, and obtain a loan for the work. Problems arise when contractors are not paid and a mechanics lien is placed on the shopping center. The owner and tenants run the risk of foreclosure on the shopping center they worked to build and develop if they do not take the necessary precautions. Mechanics liens can be daunting. They are a powerful tool for contractors to ensure payment for the work they performed. The following hypothetical illustrates how overwhelming it can be:

- ACME Worldwide Developers (“ACME”) is going to build a 1,000,000 square foot shopping center. On January 15, 2012, ACME acquires the land, which consists of four separate contiguous parcels. The next day, ACME hires Joe the Architect to design the center. The next day, ACME signs a construction contract with Bob the Builder, a general contractor. Over the course of the next 30 days, Bob the Builder signs deals with all of the necessary subcontractors. All subcontracts have been executed by February 17, 2012. After the general contract has been signed, but before all of the subcontracts have been signed, ACME and Usury Bank and Trust execute a construction loan agreement and record a mortgage.
- On March 1, 2012, ACME signs a lease with Super Giant Department Stores (“Super Giant”) for a 500,000 square foot department store. ACME will provide the shell and Super Giant will do its own tenant finish work. A memorandum of lease is recorded the same day. On March 15, 2012, Super Giant enters into a construction contract with Carl the Contractor for the tenant improvement (TI) work. On March 16, 2012, Super Giant obtains a loan for the TI work from Shyster Loan Company (“Shyster Loan”). A Leasehold Mortgage is recorded that day. Construction on the shopping center begins on June 1, 2012. The initial work is site improvements. The TI work begins six months later, on December 1, 2012.
- On June 19, 2012, Bob the Builder signs a subcontract with Sam’s Soil Removal Service but does not inform ACME. On June 30, 2012, Joe the Architect files a lien for \$50,000 for the work he did on the project and for which he was not paid. On December 15, 2012 Sam’s Soil Removal files a lien for \$100,000 of work for which it was not paid. Sam’s Soil Removal never appeared on a contractor’s sworn statement. On December 17, 2012, Carl the Contractor files a lien for \$500,000 for its work for Super Giant’s tenant work. On January 1, 2013 Shyster Loan files an action to foreclose its leasehold mortgage. The next day, Bob the Builder, having not been paid in 60 days, files suit to foreclose its mechanics lien.

This article examines mechanics lien law generally and in four representative states – California, Florida, Illinois and New York – to provide a diverse and broad base of state laws to help the players at the shopping center navigate in dealing with and protecting against mechanics liens. This article does not examine mechanics liens for public projects. It is important to note that mechanics lien law is state specific and, therefore, this article provides the general framework regarding mechanics liens, but closer examination of the specific mechanics lien law is necessary.

II. General Overview of Liens

For the development of a shopping center, there is likely multiple players performing work to develop the center. The owner builds the overall center and may build the shell for the various tenant locations. The owner usually hires its own contractors. Typically, the owner takes out a construction loan agreement. As in the hypothetical, ACME builds the center, hires its own architect and general contractor, and executes a construction loan agreement. In addition to the owner, shopping center tenants commonly contract to perform their own tenant improvements and hire their own contractors. As in the hypothetical, ACME signs a lease with Super Giant for a department store, ACME agrees to provide the shell, and Super Giant performs the TI work.

When a contractor or subcontractor performs work for the owner or the tenant and is not paid, the contractor or subcontractor, in most states, has a right to record a mechanics lien against the shopping center to secure payment for work performed on the premises. A mechanics lien is a right created by state statute such as the four states examined in this article.¹ Mechanics liens are in derogation of the common law and

¹ The mechanics lien law for these four states are: (1) California – Cal. Civ. Code § 8400, *et. seq.*; (2) Florida – F.S.A. § 713.001, *et seq.*; (3) Illinois – 770 ILCS 60/1, *et seq.*; and (4) New York – McKinney’s Lien Law § 1, *et seq.*

are remedial in nature designed to protect those who have directly provided labor or materials to improve real property at the direction of the owner or contractor of a construction project.² Lien law must be strictly complied with, but when complied is given a liberal construction to protect the beneficial interest of lien holders.³ The mechanics lien relates back to the date of the contract between the owner and the contractor or when the work began on the property.⁴

If there are multiple parcels on the Property, as is common with a Shopping Center, most states recognize the validity of a blanket lien if the work is being done under the same contract. The lienholder should allocate and apportion its lien to the multiple parcels where the work was performed to avoid further confusion or litigation on what the lien covers and the validity of the lien, especially if there are multiple parties or contracts or there is an issue with tardy claims based on when the work was performed. As one example, California lien law provides that a “claimant may record one claim of lien on two or more works of improvement” if the work for improvement is for the same owner or contracted for by the same person and designated the amount due⁵. Another example, Florida lien law provides that: “A lienor is required to record only one claim of lien covering his or her entire demand against the real property when the amount demanded is for labor or services or material furnished for more than one improvement under the same direct contract. The single claim of lien is sufficient even though the improvement is for one or more improvements located on separate lots, parcels, or tracts of land.”⁶ However, “where the arrangements between the owner and the contractor for various projects do not arise from the “same direct contract,” a single claim of lien is improper.”⁷

A mechanics lien on a property at the shopping center could have dramatic effects to the center. If the lien is placed on the property by the owner’s contractor, then the owner will have to pay that lien or face foreclosure. If the lien is caused by the tenant’s contractor, then unless the tenant pays the lien or there are protections in the tenant’s lease to deal with the lien, the owner will bear the responsibility to pay the lien or face foreclosure of the tenant’s property. Foreclosure of a tenant’s space could have repercussions on the remainder of the other tenants depending on requirements in their leases regarding the development or occupancy of the tenant space not constructed or being foreclosed upon. In addition, the owner may owe the lender certain duties under the loan documents regarding notifying the lender and resolving the lien as condition to the disbursement of funds. In addition, the lien itself may be an event of default of the loan threatening the lender could seek foreclosure.

III. Protections Against Liens

A. Owners/Tenants

There are various tactics for landlords and tenants to protect themselves and the shopping center before and once a mechanics lien ties up the property.

1. Lease Requirements

As in the hypothetical, it is common that the tenant, such as Super Giant, performs its own tenant improvements and retains their own contractors. When a tenant does not pay the contractor, subcontractor or material supplier, the shopping center owner may be stuck to pay for the work to prevent a foreclosure of a mechanics lien. One precaution the owner can take is to make the tenant responsible under the lease. A common provision in the lease is:

² See *Brewer Corp. v. Point Center Fin., Inc.*, 167 Cal.Rptr.3d 555, 560 (Cal. Ct. App. 2014); *Mid-State Contractors, Inc. v. Halo Development Corp.*, 342 So.2d 1078, 1080 (Fla. Ct. App. 1977); *Parkway Bank and Trust Co. v. Maseljevic*, 940 N.E.2d 215, 226 (Ill. App. 2010); *West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 661 N.E.2d 967, 970 (N.Y. 1995).

³ See *Brewer Corp.*, 167 Cal.Rptr.3d at 560; *Angeles Welding & Mfg., Inc. v. Chemoil Terminals Corp.*, 2012 WL 6617118, at * 5 (Cal. Ct. App. 2012); *Home Elec. Of Dade County, Inc. v. Gonas*, 547 So.2d 109, 111 (Fla. 1989); *Mid-State Contractors*, 342 So.2d at 1080; *Parkway Bank*, 940 N.E.2d at 226-27; *Mahan Constr. Corp. v. 373 Wythe Realty, Inc.*, 31 Misc.3d 252, 255-56 (N.Y. Sup. Ct. 2011); *Manniello v. Ghadimi* 279 A.2d 460, 461 (N.Y. App. Div. 2001).

⁴ See *Forsgren Assocs., Inc. v. Pacific Golf Cmty. Dev. LLC*, 105 Cal.Rptr.3d 654,662 (Cal Ct. App. 2010); *Acco, Inc. v. Biscayne Fed. Fed. Sav. And Loan Ass’n* 352 S.3d 884, 885 (Fla. Dist. Ct. App. 1977) (mechanics lien relates back to the date of filing the notice of commencement); *Petroline Co. v. Advanced Env’l Contractors, Inc.*, 711 N.E.2d 1146, 1149 (Ill. App. 1999) (subcontractor’s lien relates back to the date of the contract and the owner); *In re Lionel Corp.*, 29 F.3d 88, 91, 95 (2d Cir. 1994) (citing to Mckney’s Lien Law § 13(5) that lien relates back to when the work was performed).

⁵ Cal. Civ. Code § 8446.

⁶ F.S.A. § 713.09.

⁷ *Lee v. All Florida Constr. Co.*, 662 So.2d 365, 366-67 (Fla. Dist. Ct. App. 1995).

Mechanics Lien. Tenant shall not permit to be created nor to remain undischarged any lien, encumbrance or charge arising out of any work of any contractor, mechanic, laborer or materialman which might be or become a lien, encumbrance or charge upon the Demised Premises or the Shopping Center of which the Demised Premises are a part or the income therefrom; and, Tenant shall not suffer any other matter or thing whereby the estate, right and interest of Landlord in the Demised Premises or in the Shopping Center of which the Demised Premises are part might be impaired. If any lien or notice of lien on account of an alleged debt of Tenant or any notice of contract by a party engaged by Tenant or Tenant's contractor to work in the Demised Premises shall be filed against the Demised Premises or the Shopping Center of which the Demised Premises are a part, Tenant shall, within ten (10) days after notice of the filing thereof, cause the same to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction or otherwise and the failure of Tenant to do so shall immediately entitle Landlord to (i) all its remedies in the Event of Default, and (ii) in addition to any other right or remedy of Landlord, Landlord may discharge the same by paying the amount claimed to be due, and the amount so paid by Landlord, together with interest thereon at the Default Rate, and all costs and expenses, including reasonable attorneys' fees incurred by Landlord in procuring the discharge of such lien, shall be due and payable by Tenant to Landlord as additional rent on the first day of the next following month.

Based on this sample lease provision, the tenant is responsible to remove the lien or challenge it, and the landlord retains the right to default the tenant and choose to pay the lien and charge it back to the tenant as part of additional rent.

In Florida, Section 713.10 of the Florida Statutes protects a landlord from a mechanics lien arising from tenant improvement if (1) the landlord expressly provides in its lease with the tenant that there may be no liens against the landlord's interest in the property for tenant improvements; and (2) the landlord records in the clerk's office where the property is located the lease or a memorandum of lease, which contains the prohibition against liens.⁸ Sample language for a lease in Florida:

In accordance with the applicable provisions of the Florida Mechanic's Lien Law and specifically Florida Statutes, Section 713.10, and notwithstanding anything to the contrary contained in this Lease, the interest of Landlord, whether real or personal, in and to the Premises, the Property, the Project or any part thereof shall not be subject to or chargeable with any liens for labor performed or material supplied in connection with any work or improvements performed or caused to be performed by Tenant or any of Tenant's Agents, and Tenant shall have no right, power or authority to create or allow to be created any such liens regardless of whether Landlord has approved or consented to such work or improvements. All persons and entitled contracting or otherwise dealing with Tenant relative to the Premises and the Project are hereby placed on notice of the provisions of this paragraph, and Tenant hereby agrees to notify such persons or entities in writing of the provisions hereof prior to the commencement of any such work or improvements.⁹

Moreover, it would also be advisable to include a provision that requires the tenant to notify the owner when tenant improvement work begins at the property because certain lien rights against the owner and protection for the owner are tied to the owner's knowledge of the work, which, in some states, can be when the work is visible. Therefore, owners can better protect themselves with actual knowledge. To further protect the owner, the lease should provide that the tenant shall notify any and all contractors making any tenant improvements of the lease prohibition of liens against the landlord's interest in the property. Ideally, owner would require that the contract between the tenant and its contractor specifically acknowledge that mechanic's liens will not be effective against the owner. To help accomplish this, landlord should include in the lease a provision that all contracts for tenant improvements are subject to the landlord's review and approval. This would ensure that the landlord can verify whether the contractor's contract contains the provision acknowledging the lien prohibition. Finally, the landlord could require the tenant pay a higher security deposit until the improvements are completed and the tenant provides the appropriate releases/lien waivers.

2. Owner Disclaims Responsibility

In certain states, a shopping center owner may disclaim responsibility for paying for the improvement in the lease or by posting a notice on the property depending on the state.

⁸ F.S.A. § 713.10.

⁹ Matt Bales, Esq., "Landlord Protection Against Construction Lien Claims For Tenant Improvements," Ezine Articles (Feb. 23, 2010).

In California, for example, the notice is referred to as a "Notice of Non-Responsibility."¹⁰ If posted and recorded correctly, a Notice of Non-Responsibility may protect an owner from the recording of a mechanics lien when the owner is not the contracting party or caused the improvement work. A Notice of Non-Responsibility, however, will not protect against the recording of a mechanic's lien in all circumstances. In California, a Notice of Non-Responsibility is invalid if the owner ordered or caused the improvement work, such as when the lease requires tenant improvements or it is anticipated that a tenant will construct tenant improvements. In Florida, in addition to recording the lease or memorandum of lease that includes the lien prohibition, if all the leases entered into by the landlord in a shopping center prohibit liability for liens for tenant improvements, Section 713.10(2) provides that the landlord may record a master notice in lieu of recording each lease or lease memorandum.

Therefore, in the hypothetical above, if in California, Florida or another state that recognizes these notices, ACME would want to limit its exposure that upon knowledge of Carl the Contractor's tenant improvement work, it would post and record a Notice of Non-Responsibility or equivalent notice. If ACME's lease with Super Giant required Super Giant to perform tenant improvements or ACME and Super Giant anticipated the tenant improvement work, such Notice of Non-Responsibility or similar notice may be invalid.

3. Sworn Statements/Payment Applications and Waiver/Releases

Before making any payment, the owner should require a pay application that delineates which contractors and subcontractors are getting paid and for what scope of work. With each monthly pay application, the owner/lender should request a lien waiver from the contractor and each subcontractor as described below. In Illinois, for example, there is a document called a sworn statement, which requires the contractor to furnish to the owner. The sworn statement sets forth all of the contractor's, subcontractors and direct suppliers, their subcontract amounts (including approved credits), payments made to date, and the current payments made to each of them.¹¹ The failure of an original contractor to deliver a sworn statement defeated an original contractor's mechanics lien.¹² An owner may rely on the sworn statement even if it false and make payments. In addition, the sworn statement limits the subcontractor's lien to the amount in the sworn statement under certain circumstances.

If the owner is paying for the cost of the tenant improvements, the owner should require that the tenant provide applicable mechanic's lien releases before payments are made to the contractor, subcontractors and material suppliers. Even if the owner is not paying for the improvements, the owner may want to require the tenant to provide monthly releases. The reason for the lien waivers is that a contractor or subcontractor may waive a future lien right to the disputed property for the portion released by a lien waiver. Advanced lien waivers in the contract are generally prohibited; rather waivers must be tied to payment of work performed.¹³ In some states a general contractor can waive a subcontractor's right to a mechanics lien, which owners and lenders, in those states, should require contractors to do in order to minimize the impact.

Depending on the state, there are different types of acceptable waivers, including partial (progress payment) or full (final payment) waivers and conditional or unconditional waivers. A "Conditional Waiver and Release Upon Progress Payment" discharges all claimant rights through a specific date, provided the payments have actually been received and processed. An "Unconditional Waiver and Release Upon Progress Payment" discharges all claimant rights through a specific date, with no stipulations. A "Conditional Waiver and Release Upon Final Payment" extinguishes all claimant rights upon receipt of payment, with certain provisions. An "Unconditional Waiver and Release Upon Final Payment" extinguishes all claimant rights upon receipt of payment. Appendix A provides samples of such waiver forms.

Some states require specific forms by statute and others are governed more by common law. For example, in California, the statute requires a specific form for all four types of waivers:

Partial Conditional Waiver (Cal. Civ. Code. § 8132): If a claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be null, void, and unenforceable unless it is in substantially the following form (set forth herein in Appendix A).

¹⁰ Cal. Civ. Code § 8444.

¹¹ 770 ILCS 60./5.

¹² *Weydert Homes, Inc. v. Kammes*, 395 Ill.App.3d 512, 1516-17 (2d Dist. 2009) .

¹³ California – Cal. Bus. & Prof. § 7034; Cal. Civ. Code § 8122; Florida – F.S.A. § 713.20(2); Illinois – 770 ILCS §§ 60/1(d), 60/21(e); and New York – McKinney's Lien Law § 34.

Partial Unconditional Waiver (Cal. Civ. Code. § 8134): If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver that the claimant has, in fact, been paid the progress payment, the waiver and release shall be null, void, and unenforceable unless it is in substantially the following form, with the text of the "Notice to Claimant" in at least as large a type as the largest type otherwise in the form (set forth herein in Appendix A)

Final Conditional Waiver (Cal. Civ. Code. § 8136): If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a final payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be null, void, and unenforceable unless it is in substantially the following form (set forth herein in Appendix A)

Final Unconditional Waiver (Cal. Civ. Code. § 8138): If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a final payment and the claimant asserts in the waiver that the claimant has, in fact, been paid the final payment, the waiver and release shall be null, void, and unenforceable unless it is in substantially the following form, with the text of the "Notice to Claimant" in at least as large a type as the largest type otherwise in the form (set forth herein in Appendix A).

Florida recognizes all types of waivers. For conditional waivers, whether partial or final, there is a statutory form (set forth herein in Appendix A), which a person may not require a lienor to furnish in a different form.¹⁴ Illinois recognizes all four types of waivers and require that the waiver states the amount paid. In New York, partial or final conditional waivers are not permitted, but partial or final unconditional waivers are allowed and can only be obtained with or after payment of goods and services.¹⁵

4. Construction Escrow/Retainage

The owner should require that a percentage of the contractor's payments will be kept as retainage. A typical holdback might be five to 10 percent of the total amount. The withheld money can be used later to pay off suppliers or to cover additional work, if any performed by the subcontractor.

5. Defense of Payment

Some states, such as New York, have a defense of payment where the owner or general contractor is required to pay for construction only once. Therefore, if the owner or general contractor can show payment in full, then the mechanics lien would not be enforceable. On the other hand, California has no defense of payment and, therefore, a property owner can be liable to subcontractors if the general contractor has been paid in full.

6. Performance and Payment Bonds

As explained herein, to protect from default by the general contractor and against mechanics liens, owners can require payment and performance bonds as part of the construction contract. (See *infra*, Sec. III.C).

B. Lenders

With the priority of a mechanics lien tied to when work began in some states and in other states when recorded, lenders should make sure their mortgage is recorded immediately to obtain and secure their priority. In the hypothetical, ACME, the shopping center owner, entered into the contract with the general contractor before executing a loan agreement. Therefore, as explained in Section IV herein, the general contractor's lien has absolute priority over the lenders. The lender immediately recorded its mortgage before the subcontractor's contracts and, therefore, because of the recordation, the lender would have priority over the subcontractors that came after the recorded mortgage, but not Joe the Architect or Bob the Builder's contracts that predated the lender, unless the subcontractor liens are subsumed by the general contractor's lien. The tenant's lender in the hypothetical, Shyster Loan, would not have priority because it recorded its mortgage after Joe the Architect and Bob the Builder's contracts assuming that any of their lien is on the tenant's property.

For many states, payment to a general contractor is not a defense against a mechanic lien. Certainly in those states, but generally as well, lenders might consider (1) requiring the general contractor to pay its subcontractors before the general contractor obtains reimbursement from the lender or owner; (2) paying subcontractors directly; or (3) paying contractors and subcontractors by two-party checks. Lenders should

¹⁴ F.S.A. § 713.20(4)-(6).

¹⁵ McKinney's Lien Law § 34.

require lien waivers prior to each loan distribution and payment. As explained herein, just like owners, lenders could procure and record a payment bond in order to remove the lien from the property.

C. Performance and Payment Bonds

Performance bonds guarantee the performance of the contractor under the construction contract. Payment bonds provide protection to the owner if the contractor fails to pay subcontractors and suppliers because the unpaid subcontractor or supplier can make a claim against the payment bond as opposed to having a lien on the property. Appendix B provides sample performance and payment bonds. A bond in lieu of a mechanics lien is valuable because it keeps the property and/or assets from being tied up. Owners typically include a requirement that obligates the prime contractor to bond off any liens that might be filed against the project. This is done to protect project owners from contractors who do not forward payments onto their subcontractors and suppliers. Florida law, for example, allows a payment bond to protect against a lien, except for the lien of a contractor, if provided before the commencement of the project:

The payment bond required to exempt an owner under this part shall be furnished by the contractor is at least the amount of the original contract price before commencing the construction of the improvement under the direct contract, and a copy of the bond shall be attached to the notice of commencement when the notice of commencement is recorded.¹⁶

If a property is already subject to a recorded lien, most states allow the owner to record a bond and release the property from the lien, known as bonding over. For example, California lien law provides:

An owner of real property or an owner of any interest in real property subject to a recorded claim of lien, or a director contractor or subcontractor affected by the claim of lien, that disputes the correctness or validity of the claim may obtain release of the real property from the claim of lien by recording a lien release bond....¹⁷

In Florida, any claimed lien may be transferred by any person having an interest in the property by other security, including depositing in the clerk's office a sum of money or filing in the clerk's office a bond executed as surety.¹⁸ Almost all the states have a bonding off procedure in its lien statute. Illinois oddly does not. However, that may change, because there is an amendment to Illinois' Mechanics Lien Act under consideration to add a bonding off procedure.

D. Title Insurance

Title insurance typically insures against the title company's past failure to uncover defects in the public records regarding title. If a defect in title arises that interferes with a property owner's continued use or possession of the property, title insurance would cover financial loss resulting from the interference or even loss of ownership of the property. The typical title insurance does not cover for mechanics liens that are placed on the property after the insurance policy is issued. This is problematic for lenders that foreclose on its lien and mechanics liens are placed on the property. Therefore, it became common for lenders to negotiate for extended coverage for mechanics liens for the duration of the construction of the property. A sample extended coverage provides:

Lack of priority of the lien of the insured mortgage over any statutory over any statutory lien for services, labor or material: (a) arising from an Improvement or work related to the land which is contracted for or commences prior to Date of Policy; or (b) arising from an Improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at date of Policy the insured has advanced or is obligated to advance.¹⁹

The extended coverage provides lenders with coverage for liens that may have pre-existed the issuance of the title policy but the lienholder did not file until afterwards. This provision also secures coverage for mechanics liens that result from work done that is paid for by the lender if contemplated by the original loan.²⁰

¹⁶ F.S.A. § 713.23.

¹⁷ Cal. Civ. Code § 8424.

¹⁸ F.S.A. § 713.23.

¹⁹ Noel C. Paul and Andrea Yassemedis, "Title Insurance Coverage for Mechanics Liens: A Lender's Guide) (ABA Section of Insurance Oct. 2012) (citing John C. Murrar & James F. Karela, "The ALTA Standard Loan Policy," in *The Attorney's Guide To Title Insurance* 4-1, at 4-11 (Ill. Inst. Of Continuing Legal Education 2005)).

²⁰ *Id.* at 4-12.

These policies though often have a broad exclusion for “[d]effects, liens, encumbrances, adverse claims or other matters: created, suffered, assumed, or agreed to by the Insured Claimant.”²¹ As some examples, this exclusion arises when the lender does not fully fund construction for improvements done before default, or when the insured lender intentionally funds only a part of the construction costs and the borrower then has to fund the rest.²²

As a result of changing market conditions companies, as well as certain states’ mechanics lien laws becoming more contractor friendly, title companies are becoming more restrictive in their coverage. Many title insurance companies are refusing to insure against the possibility of mechanics liens or are imposing additional and onerous requirements to do so. Such a shift by title insurance companies can severely impact whether a development project can proceed.

IV. Foreclosing on a Mechanics Lien

Foreclosing on a mechanics lien is usually a fact-intensive endeavor. If a lienholder forecloses on part of the shopping center it has liened, and the lienholder is not paid, then the owner, tenant and lender run the risk of the property being sold and the funds being allocated to the lien claimants. In addition to proving the validity of the lien, the contractor will need to prove that a valid contract exists as well as the work done and amounts. The main issue that arises is once a lien is proven, how is priority allocated and what happens if there are not enough funds to pay all the liens? Though this will differ depending on the state, the general rule is that all liens have priority in the order that they have been recorded so that a first lien holder has a higher priority to the proceeds of a sale and receives all the proceeds of the sale until paid in full and so on. There are exceptions to that general rule, such as states where the lien relates back to when the work began on the property and counts the lien from that date. Also, states like Illinois apportion the proceeds if not enough funds exist to pay all lienholders so that no one lienholder receives all the sale proceeds. Here are examples from the four states used as a sample herein.

CALIFORNIA

A lien has priority over a lien, mortgage, deed of trust, or other encumbrance on the work of improvement or the real property on which the work of improvement is situated, that (1) attaches after commencement of the work of improvement or (2) was unrecorded at the commencement of the work of improvement and of which the claimant had no notice.²³ A mortgage executed and recorded has priority over a mechanics lien accruing subsequent to recording of mortgage.²⁴ However, as a departure from most state’s lien laws, a lender can record a deed of trust against real property before any work commences and still lose priority to subsequent recorded site improvement liens.²⁵ If a payment bond is recorded and meets the requirement of Section 8452, then “a mortgage or deed of trust, otherwise subordinate to a lien under Section 8450, has priority over a lien for work provided after recordation of a payment bond.”²⁶

FLORIDA

Liens have priority based on first in time, except for subrogation.²⁷ All liens shall have priority over any conveyance, encumbrance or demand not recorded against the real property prior to the time lien attached or the Notice of Commencement, if one is recorded. All liens relate back to the date of recording of the Notice of Commencement.²⁸ Liens shall have preference in the following order: (1) laborers, (2) all persons other than the contractor, and (3) contractor. Should the total contract amount be less than all claims, all liens in a class must be allowed their full amounts before any liens of a subsequent class are allowed; if amount is insufficient for class, pro rata share will be paid, if the owner has made proper payments. Proper payments require the owner to obtain a release of lien from all lienors giving notice as the time of payment.²⁹

²¹ *Id.* (citing James L. Gosdin, *Title Insurance: A Comprehensive Overview* 82, 179 (ABA Section of Real Property, Probate and Trust Law 3d ed. 2007)).

²² *Id.*

²³ Cal. Civ. Code § 8450.

²⁴ *Brush v. E.R. Bohan & Co.*, 283 P. 126, 127 (Cal. Dist. Ct. App. 1929).

²⁵ *Id.* § 8458.

²⁶ *Id.* § 8452.

²⁷ *National Loan Investors, L.P. v. Burher*, 742 So. 2d 406 (Fla. Dist. Ct. App. 1999); *Wolf v. Spariosu*. 706 S. 2d 881, 883 (Fla. Dist. App. 1998).

²⁸ F.S.A. § 713.07(2).

²⁹ F.S.A. § 713.06(4)(a),(b).

ILLINOIS

Priority is determined by the timing of the recording of mortgage and time of contract. If contract is entered into before recordation of mortgage, then the contract has priority. If mortgage is recorded first then the mortgage has first priority. When there are sufficient funds from the sale of the foreclosed property to cover all the liens, then full payment is made. If there are insufficient funds, then the mortgagee and contractor share in the proceeds *pro rata* based on Section 16 of Illinois' Mechanics Lien Act if lienholder can prove it enhanced the Property. The Section provides:

No incumbrance upon land, created before or after the making of the contract for improvements under the provisions of this act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished material (hereinafter "lien creditor") shall have been satisfied, and upon any questions arising between incumbrancers and lien creditors, all previous incumbrances shall be preferred only to the extent of the value of the land at the time of making of the contract for improvements, but shall not be preferred to the value of any subsequent improvements, and each lien creditor shall be preferred to the value of all the subsequent improvements erected on said premises, whether or not provided by the lien creditor, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest. All incumbrances, whether by mortgage, judgment or otherwise, charged and shown to be fraudulent, in respect to creditors, may be set aside by the court, and the premises freed and discharged from such fraudulent incumbrance. When the proceeds of a sale are insufficient to satisfy the claims of both previous incumbrancers and lien creditors, the proceeds of the sale shall be distributed as follows: (i) any previous incumbrancers shall have a paramount lien in the portion of the proceeds attributable to the value of the land at the time of making of the contract for improvements; and (ii) any lien creditors shall have a paramount lien in the portion of the proceeds attributable to the value of all subsequent improvements made to the property.³⁰

Before the amendment in 2013, the lender was able to collect not only the *pro rata* percentage for its mortgage, but also to share in the funds segregated for the lienholders based on the mortgagors' contribution to the improvements. The lien claimant only had priority to the extent of the increased value of the property due to the claimant's specific improvement on the property.³¹ The amended Section 16 makes clear that the lender only gets the value of the land at the time of the making of the contract and the lienholder shall be preferred to the value of all subsequent improvements.

NEW YORK

Section 13 of New York lien law sets forth in detail the priorities for lienholders, as well as advances made from mortgages.³² Generally:

A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, mortgage, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien, except as hereinafter in this chapter provided; over advances made upon any mortgage or other encumbrance thereon after such filing, except as hereinafter in this article provided....If several buildings are demolished, erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular part of the real property or upon the particular building or premises where his labor is performed or his materials are used....³³

Mechanic lien claimants have no priority as among themselves solely on account of the time of filing of their notices. All such liens are on a parity. New York lien law provides for a subsequent mortgage to subordinate current liens and have priority over a current lienholder based upon "executing and delivering a bond" and obtaining consent of the lienholder.³⁴

³⁰ 770 ILCS 60/16.

³¹ *LaSalle Bank Nat'l Ass'n v. Cypress Creek 1, LP*, 950 N.E.2d 1109, 1114-19 (2011).

³² McKinney's Lien Law § 13.

³³ *Id.*

³⁴ *Id.* § 29.

V. Impact of Tenant Bankruptcy

Even though a tenant files for bankruptcy, the owner/landlord would still be on the hook for a mechanics lien filed on the property. Most courts find that a contractor can record a mechanics lien after a tenant has filed its bankruptcy petition as an exception to the automatic stay of the Bankruptcy Code.³⁵ Once perfected against the real property, the mechanics lien is afforded the same priority as they receive under state law. If the lien relates back to when the work began, then the lienholder is a secured creditor. If the state does not relate back the lien payment date, the lienholder will remain an unsecured creditor.

If the debtor/tenant elects to assume the lease, the mechanics lien must be paid or otherwise satisfied or released. If the debtor/tenant rejects the lease, the debtor/tenant walks away from the project and the landlord would be left to settle with the lien claimants directly and seek reimbursement for the settlement payments as an unsecured creditor. This often resulted in the owner/landlord recovering from the debtor/tenant a fraction of the mechanics lien settlement payment. However, the owner/landlord can minimize or recoup its losses.

For example, in *WM Inland Adjacent, LLC v. Mervyn's, LLC (In re Mervyn's Holdings, LLC)*³⁶, the tenant, Mervyn's, entered into a lease to construct a department store. That lease required the tenant to indemnify the landlord for mechanics lien. After Mervyn's filed for bankruptcy, mechanics liens were filed on the property and the general contractor sought to foreclose the mechanics liens. After the tenant-debtor rejected the lease, the landlord expended several million dollars to settle the lien claims. Based on the indemnity provision, the landlord filed a motion to obtain administrative priority treatment of its indemnity claim under § 365(d)(3) and thus recover 100% of the mechanics lien settlement payment from the tenant-debtor. The Bankruptcy Court agreed with the landlord and required the tenant-debtor to reimburse the landlord, finding that while the conduct giving rise to the indemnity obligation occurred pre-petition, the tenant-debtor's obligation to indemnify the landlord arose when the mechanics lien were recorded and the general contractor sued the landlord to foreclose the mechanics liens.

Therefore, depending on the right indemnity language, and depending on whether the jurisdiction is a "billing date" or "proration" jurisdiction³⁷, landlords might have indemnification rights for amounts expended to resolve mechanics lien left behind by a bankrupt tenant that rejected its lease.

VI. Conclusion

There are a lot of pitfalls for the unwary with respect to mechanics liens. Mechanics liens are a powerful tool to make sure the contractors and subcontractors are properly paid. There are protections the players at the shopping center can take to minimize the impact to the development of the center and still make sure the contractors and subcontractors that legitimately perform the work get paid without disrupting the shopping center. Depending on the state, the key is early action and detection in terms of securing protections in the lease or construction contracts, obtaining lien waivers after work is completed tied to payments, securing payments bonds or title insurance, and making sure the responsible party is resolving the lien by payment or in court.

³⁵ See generally Brian D. Huben, "A Matter of Priorities: Mechanics' Liens and Landlord Indemnity Claims in Retail Tenant Bankruptcies," ICSC Shopping Center Legal Update, Vol. 22, Issue 3, pp. 2-4 (Fall/Winter 2013).

³⁶ Adv. No. 09-50920 (KG), 2013 WL 85169 (Bankr. D. Del. Jan. 8, 2013).

³⁷ Some Courts, such as the Third and Eighth Circuits, have adopted the "billing date" approach, which looks at whether the obligation arose post-petition but pre-rejection of the lease so that the landlord would be entitled to recover dollar-for-dollar what it paid to settle the mechanics lien. On the other hand, other courts (e.g., courts in the Second, Fourth and Ninth Circuits) have adopted the "proration" approach (also sometimes referred to as the "accrual" approach), which account for the amounts prepetition and postpetition and is payable on a pro rata basis with all other unsecured creditors.

**APPENDIX A
SAMPLE LIEN WAIVER FORMS**

WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT

OWNER: _____

GENERAL CONTRACTOR: _____

PROJECT NAME: _____

STATE OF _____
COUNTY OF _____

The undersigned, in consideration of the sum of \$ _____, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through _____ (date of this waiver) to _____ on the job of _____ to the following property: _____ (Name and Address of Project). This waiver and release does not cover any retention on this payment of \$ _____, or labor, services or materials furnished after the date specified.

Any and all contractors, subcontractors, laborers, suppliers and materialmen that have provided labor, material or services to the undersigned for use or incorporation into the construction of the improvements to the Property have been paid and satisfied in full, and there are no outstanding claims of any character arising out of, or related to, the undersigned's activities on, or improvements to, the Property.

This Waiver constitutes a representation by the undersigned signatory, for and on behalf of the firm or company listed below, that the payment referenced above, once received, constitutes full and complete payment for all work performed, and all costs or expenses incurred (including, but not limited to, costs for supervision, field office overhead, home office overhead, interest on capital, profit, and general conditions costs) relative to the work or improvements at the Property as of the date of this Waiver, except for the payment of retainage. The undersigned hereby specifically waives, quitclaims and releases any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have against the Owner and its lender, any tenant of the Owner, the Owner's project and/or development manager (if any), the General Contractor (if this Waiver is signed by a subcontractor or supplier), or any other person or entity with a legal or equitable interest in the Property, as of the date of this Waiver, except as follows: _____
_____.

This Waiver is specifically made for the benefit of the Owner and the Owner's lender, and any other person or entity with a legal or equitable interest in the Property. The amount of money set forth as due and owing in the immediately preceding Waiver dated _____, 20__, has been received, and is deemed paid in full.

(SIGNATURE ON NEXT PAGE)

WAIVER AND RELEASE OF LIEN UPON FINAL PAYMENT

OWNER: _____

GENERAL CONTRACTOR: _____

PROJECT NAME: _____

STATE OF _____
COUNTY OF _____

The undersigned, in consideration of final payment in the amount of \$_____, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished to _____ on the job of _____ to the following described property: _____
(Name and Address of Project).

Any and all contractors, subcontractors, laborers, suppliers and materialmen that have provided labor, material or services to the undersigned for use or incorporation into the construction of the improvements to the Property have been paid and satisfied in full, and there are no outstanding claims of any character arising out of, or related to, undersigned's activities on, or improvements to, the Property. This Waiver is specifically made for the benefit of Owner and the Owner's lender, and any other person or entity with a legal or equitable interest in the Property.

This Waiver constitutes a representation by the undersigned signatory, for and on behalf of the undersigned, that the payment referenced above, once received, constitutes full and complete payment for all work performed, and all costs or expenses incurred (including, but not limited to, costs for supervision, field office overhead, home office overhead, interest on capital, profit, and general conditions costs) relative to the work or improvements at the Property. The undersigned hereby specifically waives, quitclaims and releases any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have against the Owner and its lender, any tenant of the Owner, the Owner's project and/or development manager (if any), the General Contractor (if this Waiver is signed by a subcontractor or supplier), or any other person or entity with a legal or equitable interest in the Property, relative to the work or improvements at the Property.

In Witness Whereof, the undersigned signatory, acting for and on behalf of the firm or company listed below and all of its laborers, subcontractors, and suppliers, has placed his hand and seal this ____ day of _____, 20__.

FIRM OR COMPANY:

Sworn to and subscribed
Before me this ____ day of
_____, 20__.

By: _____

Print Name: _____

Its: _____

Notary Public

(NOTARY SEAL)

My Commission Expires:

CALIFORNIA

CONDITIONAL WAIVER AND RELEASE OF PROGRESS PAYMENT (Cal. Civ. Code. § 8132)

NOTICE: THIS DOCUMENT WAIVES THE CLAIMANT'S LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS EFFECTIVE ON RECEIPT OF PAYMENT. A PERSON SHOULD NOT RELY ON THIS DOCUMENT UNLESS SATISFIED THAT THE CLAIMANT HAS RECEIVED PAYMENT.

Identifying Information

Name of Claimant:

Name of Customer:

Job Location:

Owner:

Through Date:

Conditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job through the Through Date of this document. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn:

Maker of Check:

Amount of Check: \$

Check Payable to:

Exceptions

This document does not affect any of the following:

(1) Retentions.

(2) Extras for which the claimant has not received payment.

(3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date(s) of waiver and release:

Amount(s) of unpaid progress payment(s): \$

(4) Contract rights, including (A) a right based on rescission, abandonment, or breach of contract, and (B) the right to recover compensation for work not compensated by the payment.

Signature

Claimant's Signature:

Claimant's Title:

Date of Signature:

UNCONDITIONAL WAIVER AND RELEASE OF PROGRESS PAYMENT (Cal. Civ. Code. § 8134)

NOTICE TO CLAIMANT: THIS DOCUMENT WAIVES AND RELEASES LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER AND RELEASE FORM.

Identifying Information

Name of Claimant: _____

Name of Customer: _____

Job Location: _____

Owner: _____

Through Date: _____

Unconditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job through the Through Date of this document. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. The claimant has received the following progress payment: \$

Exceptions

This document does not affect any of the following:

- (1) Retentions.
- (2) Extras for which the claimant has not received payment.
- (3) Contract rights, including (A) a right based on rescission, abandonment, or breach of contract, and (B) the right to recover compensation for work not compensated by the payment.

Signature

Claimant's Signature: _____

Claimant's Title: _____

Date of Signature: _____

CONDITIONAL WAIVER AND RELEASE OF FINAL PAYMENT (Cal. Civ. Code. § 8136)

NOTICE: THIS DOCUMENT WAIVES THE CLAIMANT'S LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS EFFECTIVE ON RECEIPT OF PAYMENT. A PERSON SHOULD NOT RELY ON THIS DOCUMENT UNLESS SATISFIED THAT THE CLAIMANT HAS RECEIVED PAYMENT.

Identifying Information

Name of Claimant:

Name of Customer:

Job Location:

Owner:

Conditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn:

Maker of Check:

Amount of Check: \$

Check Payable to:

Exceptions

This document does not affect any of the following:

Disputed claims for extras in the amount of: \$

Signature

Claimant's Signature:

Claimant's Title:

Date of Signature:

UNCONDITIONAL WAIVER AND RELEASE OF FINAL PAYMENT (Cal. Civ. Code. § 8138)

NOTICE TO CLAIMANT: THIS DOCUMENT WAIVES AND RELEASES LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER AND RELEASE FORM.

Identifying Information

Name of Claimant:

Name of Customer:

Job Location:

Owner:

Unconditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for all labor and service provided, and equipment and material delivered, to the customer on this job. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. The claimant has been paid in full.

Exceptions

This document does not affect the following:

Disputed claims for extras in the amount of: \$

Signature

Claimant's Signature:

Claimant's Title:

Date of Signature:

FLORIDA

WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT

The undersigned lienor, in consideration of the sum of \$____, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through (insert date) to (insert the name of your customer) on the job of (insert the name of the owner) to the following property:

(description of property)

This waiver and release does not cover any retention or labor, services, or materials furnished after the date specified.

DATED on ____, (year). (Lienor)

By: _____

(5) When a lienor is required to execute a waiver or release of lien in exchange for, or to induce payment of, the final payment, the waiver and release may be in substantially the following form:

WAIVER AND RELEASE OF LIEN UPON FINAL PAYMENT

The undersigned lienor, in consideration of the final payment in the amount of \$_____, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished to (insert the name of your customer) on the job of (insert the name of the owner) to the following described property:

(description of property)

DATED on ____, (year). (Lienor)

APPENDIX B
SAMPLE PAYMENT AND PERFORMANCE BONDS

PAYMENT BOND

KNOW ALL MEN BY THESE PRESENTS that _____ [insert name of contractor] (hereinafter called the "Principal") and _____ [insert name of surety] (hereinafter called the "Surety"), are held and firmly bound unto _____ (hereinafter called the "Owner"), its successors and assigns as obligee, in the penal sum of _____ Dollars (\$_____) [contract amount], lawful money of the United States of America, for the payment of which the Principal and the Surety bind themselves, their administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered, or is about to enter, into a certain written contract with the Owner, dated _____ [insert date of contract], which is incorporated herein by reference in its entirety (hereinafter called the "Construction Contract"), for the construction of a project known as _____ [insert name of project], as more particularly described in the Construction Contract (hereinafter called the "Project");

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall promptly make payment to all persons working on or supplying labor or materials under the Construction Contract, and any amendments thereto, with regard to labor or materials furnished and used in the Project, and with regard to labor or materials furnished but not so used, then this obligation shall be void; but otherwise it shall remain in full force and effect.

1. A "Claimant" shall be defined herein as any subcontractor, person, party, partnership, corporation or other entity furnishing labor, services or materials used, or reasonably required for use, in the performance of the Construction Contract, without regard to whether such labor, services or materials were sold, leased or rented, and without regard to whether such Claimant is or is not in privity of contract with the Principal or any subcontractor performing work on the Project, including, but not limited to, the following labor, services, or materials: water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Construction Contract.

2. In the event a Claimant files a lien against the property of the Owner, and the Principal fails or refuses to satisfy or remove it promptly, the Surety shall satisfy or remove the lien promptly upon written notice from the Owner, either by bond or as otherwise provided in the Construction Contract, whether or not the Principal and/or Surety dispute the claim.

3. The Surety hereby waives notice of any and all modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and any other amendments in or about the Construction Contract and agrees that the obligations undertaken by this Bond shall not be impaired in any manner by reason of any such modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and amendments.

4. The Surety hereby agrees that this Bond shall be deemed amended automatically and immediately, without formal or separate amendments hereto, upon any amendment or modification to the Construction Contract, so as to bind the Principal and Surety, jointly and severally, to the full payment of any Claimant under the Construction Contract, as amended or modified, provided only that the Surety shall not be liable for more than the penal sum of the Bond, as specified in the first paragraph hereof.

5. This Bond is made for the use and benefit of all persons, firms, and corporations who or which may furnish any materials or perform any labor for or on account of the construction to be performed or supplied under the Construction Contract, and any amendments thereto, and they and each of them may sue hereon.

6. No action may be maintained on this Bond after one (1) year from the date the last services, labor, or materials were provided under the Construction Contract by the Claimant prosecuting said action.

IN WITNESS WHEREOF, the Principal and Surety have hereunto affixed their corporate seals and caused this obligation to be signed by their duly authorized representatives this _____ day of _____, 20__.

Attest: [Principal]

[Title]

Attest: [Surety]

[Title]

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS that _____ [insert name of contractor] (hereinafter called the "Principal") and _____ [insert name of surety] (hereinafter called the "Surety"), are held and firmly bound unto _____ (hereinafter called the "Owner"), its successors and assigns as obligee, in the penal sum of _____ Dollars (\$ _____) [contract amount], lawful money of the United States of America, for the payment of which the Principal and the Surety bind themselves, their administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered, or is about to enter, into a certain written contract with the Owner, dated _____ [insert date of contract], which is incorporated herein by reference in its entirety (hereinafter called the "Construction Contract"), for the construction of a project known as _____ [insert name of project], as more particularly described in the Construction Contract (hereinafter called the "Project");

NOW, THEREFORE, the conditions of this obligation are as follows: that if the Principal shall fully and completely perform all the undertakings, covenants, terms and conditions contained in the Construction Contract, including all modifications, amendments, changes, deletions, additions, and alterations thereto that may hereafter be made, then this obligation shall be void; otherwise it shall remain in full force and effect.

Whenever the Principal shall be, and declared by the Owner to be, in default under the Construction Contract, the Surety shall promptly remedy the default and complete the Construction Contract according to all of its terms and conditions. If the Surety fails to diligently commence completion of the Construction Contract within fourteen (14) days of notice of default, the Owner, in its sole discretion, may complete the Construction Contract, and have the Surety reimburse the Owner for all costs and expenses incurred by the Owner. If the Surety completes the Construction Contract, the selection of any completing contractor, and the form of any completion contract, shall be subject to the approval of the Owner, and such approval shall not be unreasonably withheld.

In addition, the Surety shall indemnify and hold harmless the Owner from any and all losses, liability and damages (including delay damages), claims, judgments, liens, and costs of every description which the Owner may incur, sustain or suffer by reason of the failure or default on the part of the Principal in the performance of any or all of the terms, provisions and requirements of the Construction Contract, including any and all amendments and modifications thereto, or which the Owner may incur by making good any such failure of performance on the part of the Principal; provided that the liability of the Surety shall not exceed the liability of the Principal or the penal sum of the Bond.

The Surety hereby waives notice of any and all modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and any other amendments in or about the Construction Contract and agrees that the obligations undertaken by this Bond shall not be impaired in any manner by reason of any such modifications, omissions, additions, changes, alterations, extensions of time, change in payment terms, and amendments.

The Surety hereby agrees that this Bond shall be deemed amended automatically and immediately, without formal or separate amendments hereto, upon any amendment to the Construction Contract, so as to bind the Principal and Surety to the full and faithful performance of the Construction Contract as so amended or modified, provided only that the Surety shall not be liable in an amount more than the penal sum specified above.

No right of action shall accrue on this Bond to or for the use of any person, entity or corporation other than the Owner named herein, or their executors, administrators, successors or assigns.

IN WITNESS WHEREOF the undersigned have caused this instrument to be executed and their respective corporate seals to be affixed and attested by their duly authorized representatives this _____ day of _____, 20__.

Attest: _____ [Principal]

[Title]

Attest: _____ [Surety]

[Title]