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## MECHANIC'S LIEN BOOT CAMP

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### Presented by:

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## **I. Overview of New Hampshire Mechanic's Lien Law**

The core purpose of Mechanic's liens is protecting the benefit that a worker provides, such as the time and effort a carpenter puts into nailing the boards together on the job site. However, other types of contributions are less direct - the contribution of an architect, or the supply company that delivers materials, or a company that rents the backhoe to the contractor, or the company that rents the port-a-pots to the contractor, or the truck that brings food to the workers at lunchtime. There is no simple dividing line that is useful in every state, or even in every case. Often, determining whether a party has a legitimate lien right depends on examining other cases that have either upheld or rejected lien claims in the same state. Mechanic's liens are a reaction to the imbalance of power between a worker at a construction site, and an owner of that land. The worker makes the time and effort investment on the assumption that the owner will pay, but until the owner does pay, the owner is in a significantly superior power position. The improvements have already been made, and it will not significantly benefit the worker to demolish the work. Thus, unscrupulous owners could simply lock the tradesman out of the property, retain the benefit, and refuse to pay. Additionally, as a society we benefit by having improvements to buildings, and knocking them down as a resolution to disputes is economically inefficient. Because of the difficulties inherent in contract suits, most clearly time and cost, states decided to provide a simpler procedure for putting pressure on an owner to pay a claim, short of executing a judgment.

While the Mechanic's lien is overall a benefit to the worker, there are protections in the process for the owner. Generally, the worker must follow a strictly constrained process, and failure to follow that process will invalidate the lien. Some parts of that

process are intended to prevent disputes from occurring, such as a structure of mandatory notices and disclosures that provide the owner an opportunity to ensure that the project's finances are being properly managed, in addition to being able to monitor the physical progress of the work.

### **A. Origin**

Mechanic's liens in New Hampshire date back to at least the middle of the nineteenth century. Indeed, many provisions of the statute have remained unchanged for well over one hundred years.<sup>1</sup> A brief review of the Mechanic's lien statute also provides a glimpse into New Hampshire's economic history. The earliest provision, enacted in 1851, relates to liens on vessels.<sup>2</sup> The statute was amended by provisions related to buildings (1861)<sup>3</sup>, boomage (1861)<sup>4</sup>, lumber (1866)<sup>5</sup>, railroads (1871)<sup>6</sup>, and brick (1905).<sup>7</sup> Many of these provisions are, of course, totally or virtually obsolete as, for example, there are few (if any) commercially operating brick kilns left in New Hampshire.

### **B. How Mechanic's Liens Work**

Mechanic's liens are intended to afford contractors, subcontractors and material suppliers some protection from the risk that the owner and/or general contractor may

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<sup>1</sup> See, e.g., RSA 447:1 (vessels) and RSA 447:4 (lumber).

<sup>2</sup> RSA 447:1. This provision was supplemented by RSA ch. 450-A in 1977 (liens on vessels, boats, and vessel or boat motors).

<sup>3</sup> RSA 447:2.

<sup>4</sup> RSA 447:13. "Boomage" is a charge on logs for the use of a boom in collecting, storing, or rafting them. BLACK'S LAW DICTIONARY p. 166 (5<sup>th</sup> ed.1979).

<sup>5</sup> RSA 447:4.

<sup>6</sup> RSA 447:7.

<sup>7</sup> RSA 447:3.

prove insolvent, improvident or unscrupulous.<sup>8</sup> Liens are inchoate rights created by operation of law simply by virtue of work performed on, or material supplied to, a construction project.<sup>9</sup> The bulk of the statute is devoted to the procedures through which liens may be perfected and enforced, and their effect upon other lien rights. The distinction between the *creation* and *perfection* of lien rights is important, because lien rights that are not timely or properly perfected may be irretrievably lost. Briefly, liens are *created* when work is performed, but are not *perfected* (and, therefore, cannot be legally enforced) until the statutory requirements are met. The essential requirements of a Mechanic's lien are furnishing labor or materials for a building under a contract with the owner, and an attachment within one hundred twenty days.<sup>10</sup>

Mechanic's liens generally provide streamlined and simplified procedures for perfecting lien rights subject to specific requirements that must be strictly observed. For example, in New Hampshire, Mechanic's liens may be filed *ex parte* – without prior notice to the other party, and effectively moves the lienholder to the front of the priority line.

In exchange for these significant benefits, the contractor, subcontractor, or material supplier must perfect their Mechanic's liens within one hundred twenty days after the contractor, subcontractor, or material supplier last performs labor or supplies materials for the project.<sup>11</sup> It should also be noted here, and will be discussed further later, that Mechanic's lien rights in New Hampshire may be waived by contract.<sup>12</sup>

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<sup>8</sup> See *Innie v. W&R, Inc.*, 116 N.H. 315 (1976).

<sup>9</sup> *Duke/Fluor Daniel v. Hawkeye Funding, L.P.*, 150 N.H. 581 (2004).

<sup>10</sup> See *Pike v. Scott*, 60 N.H. 469 (1881).

<sup>11</sup> RSA 447:9 (“120 days after the services are performed, or the materials, supplies or other things are furnished”).

### **C. Effect of Mechanic's Liens**

Properly perfected Mechanic's liens give contractors, subcontractors, and material suppliers significant leverage in resolving payment issues. Mechanic's liens take precedence over all prior claims except for liens on account of taxes,<sup>13</sup> and all subsequent Mechanic's liens, except if the later work is done in the performance of a contract in existence when the attachment was made, or is necessary to preserve the property.<sup>14</sup> These precedence rules give Mechanic's liens precedence over all prior liens, which strongly implicates the mortgage holder's rights to the property. This issue will be discussed in more detail later.

### **D. Different Statutes for Different States**

Although virtually every state in the union has a Mechanic's lien statute, there is little uniformity and wide variations in their substantive and procedural features. For example, in Rhode Island, a Mechanic's lien "looks back only for a 120 day period after recording." See R.I. Gen. Laws §§ 34-28-4 and -9. Labor and material furnished prior to the 120 day period cannot be the subject of a lien. At the same time, the Rhode Island lien takes precedence even over recorded prior mortgages. See R.I. Gen. Laws § 34-28-25; *People Savings Bank v. Champlin Lumber Co.*, 106 R.I. 225 (1969). The Massachusetts Mechanic's lien statute provides that a lien is perfected by filing a lawsuit within ninety days after a notice of substantial completion has been filed, or within one

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<sup>12</sup> *Duke/Fluor Daniel v. Hawkeye Funding, L.P.*, 150 N.H. 581 (2004). The Legislature is currently considering a bill that would render Mechanic's liens waivers unenforceable. SB 299. The potential implications of this proposed statute will be discussed in more detail later.

<sup>13</sup> RSA 447:9.

<sup>14</sup> RSA 447:11.

hundred twenty days after the last day the contractor performs work on the project. Mass Gen. Laws. Ann. ch. 254, § 8 and § 11. This provision gives the owner, contractor, subcontractor and material supplier an opportunity to resolve any disputes before litigation must be commenced. On the other hand, as will be discussed in more detail below, the New Hampshire statute requires that a lawsuit and lien must be filed simultaneously. In Maine, both the timing and priority of lien are liberal. Pineland Lumber Co. v. Robinsons, 382 A.2d 33 (Me. 1982).

Suffice it to say that nothing one learns from New Hampshire lien law will be of much use in other states, except for the general rule that lien statutes are construed strictly and that parties seeking to create and enforce Mechanic's lien rights must follow the statutory requirements scrupulously. See Fastrack Crushing Servs. v. Abatement Int'l/Advatex Assocs., 149 N.H. 661, 666 (2003) ("Our law is well settled that in giving statutory notice the requirements of the statute must be strictly observed") (quotation omitted).

#### **E. Other Remedies Available**

It is important to note that a contractor, subcontractor, or material supplier who waives or fails to perfect a Mechanic's lien is not deprived of all remedies. They may still file a lawsuit and pursue an attachment under RSA 511-A. As in all contractual relationships, however, the parties should carefully consult their contract for any provisions relating to dispute resolution, and may want to consult legal counsel regarding the implications of any such provisions.

**I. Who Is Entitled to a Mechanic’s Lien**

A Mechanic’s lien may be filed by any person who, by himself or others, performs labor or furnishes materials to the amount of \$15 or more to any construction project. This general statement does not specifically answer the question of who among the people who contribute to the project is entitled to assert a lien. In general, the cases answer this question as follows:

**ENTITLED TO LIEN**

**NOT ENTITLED TO LIEN**

The general contractor

A material supplier to a second tier subcontractor

A first tier subcontractor

A material supplier to a material supplier

A second tier subcontractor

A supplier to a first tier subcontractor

**A. General Contractors and Others who Contract Directly with the Owner**

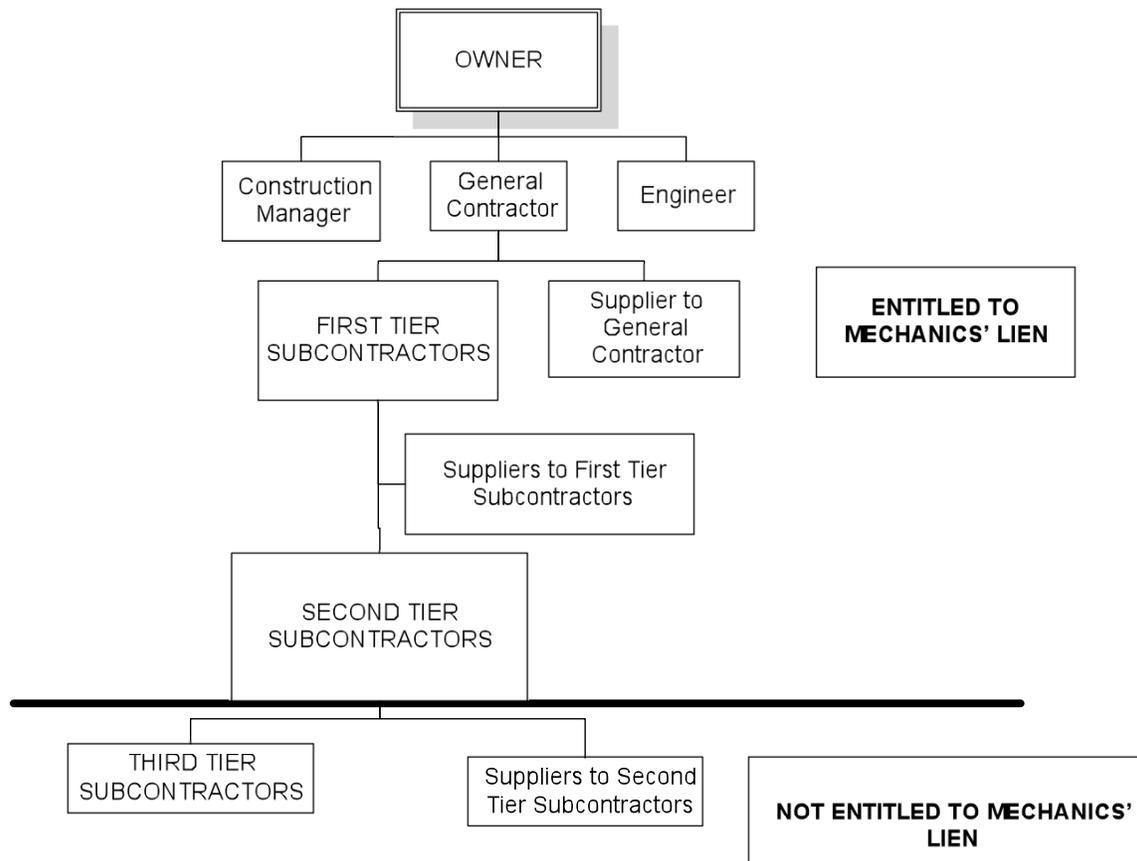
The general rule is that anyone who supplies labor or materials directly under contract with the owner is entitled to a lien under RSA 447:2. This includes the general contractor, construction managers, design-build teams, and others who have contracts directly with the owner.

**B. Subcontractors and Suppliers**

The rule regarding subcontractors and suppliers is found in RSA 447:5. The subcontractor or supplier must have a contract directly with either (a) the general contractor, or (b) a subcontractor of the general contractor. The statute grants anyone furnishing labor or materials “by virtue of a contract with an agent, contractor or subcontractor of the owner” the same lien as that provided to general contractors. RSA

447:5. Therefore, Mechanic’s lien rights extend to parties who have contractors directly with the general contractor (first-tier subcontractors and suppliers to the general), and those who have contracts directly with the first-tier subcontractor (second-tier subcontractors and suppliers to the first-tier subcontractor). *See Lyle Signs, Inc. v. Eyroks Corp.*, 132 N.H. 156, 159 (1989). It should also be noted that a subcontractor need not actually perform work at the site. So a subcontractor who designs and fabricates items entirely in their own shop that will be incorporated into the project is still considered a subcontractor for purposes of the Mechanic’s lien statute. *Id.* at 161.

The operation of RSA 447:2 and 447:5 is illustrated by this chart<sup>15</sup>:



<sup>15</sup> There is some question as to whether construction managers or design professionals may obtain a Mechanic’s lien.

### **III. Nature of Improvements**

The labor or material furnished must be used for the erection or repair of a house or other building or appurtenances, or for building any dam, canal, sluiceway, well or bridge, by virtue of a contract with the owner. The case law suggests that “appurtenances” includes roadways and driveways on the property. See Innie v. W&R, Inc., 116 N.H. 315 (1976).

### **IV. Property Subject to Mechanic’s Liens**

Unlike a general attachment, a Mechanic’s lien only attaches to the lot where the work was performed or for which the materials were supplied, and not to all of the defendant’s real and/or personal property. See RSA 447:2 (“[the contractor] shall have a lien on any material so furnished and on *said* structure....”) (emphasis added). The lien stands to the structure for which labor and materials were provided, and upon any right of the owner to the loss of land upon which the structure stands. RSA 447:2; see Wurm v. Reilly, 102 N.H. 558 (1960). The lien attaches to materials provided for the erection or repair of a structure even though such materials have become a part of the real estate at the time the attachment is made, Virginia v. Britton, 80 N.H. 340 (1922), as well as to fixtures. See Graton & K. Mfg. Corp. v. Woodworth Mason Co., 69 N.H. 177 (1897).

#### **A. Public v. Private Property**

##### **1. Public Property**

Public property is not subject to Mechanic’s liens. See RSA 447:2. Instead, public entities are required to obtain bonds on all projects over \$25,000 equal to at least 100 percent of the contract price conditioned upon the payment by the contractor and subcontractors for all labor performed and materials and equipment furnished for the

project. RSA 447:16; General Elec. Co. v. Dole Co., 105 N.H. 477 (1964) (the provisions of RSA 447:16 are mandatory). This bond is intended to protect suppliers and subcontractors who work on public projects. Westinghouse Elec. Supply Co v. Electromech, Inc., 119 N.H. 833 (1979). The State has an interest in reasonably ensuring that subcontractors and suppliers are not deterred from bidding and working on public construction projects. Accordingly, the bond requirement protects a material supplier to a subcontractor, General Elec. Co. v. Dole Co., 105 N.H. 477 (1964), but does not, however, protect a material supplier to a material supplier. Lyle Signs, Inc. v. Evroks Corp., 132 N.H. 156 (1989).

While a person cannot obtain a Mechanic's lien on publicly-owned real property or buildings, a lien may be filed on any money owed by the state or governmental entity to any contractor "by virtue of a contract for any public work or construction, alteration, or repair." RSA 447:15. Such liens must be filed within ninety (90) days after the completion and acceptance of the project by the contracting party. *Id.* As a practical matter, however, this provision is rarely invoked due to the mandatory availability of a bond to satisfy any unpaid subcontractors or suppliers on public projects. See RSA 447:16.

## 2. Private Property

Private property may, of course, be attached. The lien attached to the structure for which the labor and material were provided, and upon any right of the owner to the lot of land on which the structure stands. Wurm v. Reilly, 102 N.H. 558 (1960); Bouliia-Gorrell Lumber Co. v. East Coast Realty Co., 84 N.H. 174 (1929). The lien attaches to material provided for the erection or repair of a structure even though such materials have become

a part of the real estate at the time the attachment is made. *Virginia v. Britton*, 80 N.H. 340 (1922). Further, where a contractor agrees to build a number of houses under a single contract, a lien for work done on one house is not restricted to the lot where that house stands. *Cole v. Colby*, 57 N.H. 98 (1876).

## **B. Contents, Service, and Filing of Notice**

In order to obtain the benefits of RSA 447:5, however, a subcontractor or supplier must provide written notice to the owner or the person having charge of the property that he will claim the lien before he performs the labor or furnishes the material for which the lien is claimed. RSA 447:5. The owner may, however, waive this requirement either expressly or implicitly. See *Janvrin v. Powers*, 79 N.H. 44 (1918).<sup>16</sup> If the subcontractor or supplier fails to furnish this notice before starting his work, his lien may be limited to the amounts due to the general contractor, or that may become due after notice is given. RSA 447:6; *Russell v. Woodbury*, 135 N.H. 432, 435 (1992).

The statute does not require any particular form of notice. The notice should identify the project, the subcontractor, the entity with which the subcontractor has its contract, the date of the subcontract, and that the subcontractor or supplier intends to assert its Mechanic's lien rights under RSA 447. The subcontractor or supplier should, of course, maintain a copy of this notice in their files, and might be well-advised to send this notice by certified mail, return receipt requested. A suggested sample lien claim notice is attached to these materials.

In practice, very few subcontractors comply with the notice requirements. Some may simply not be aware of the requirement, or may not have the time or resources to

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<sup>16</sup> The New Hampshire Supreme Court has been fairly generous in finding waiver of notice requirements in other construction-related contexts. See, e.g., *Ekco Enterprises, Inc. v. Remi Fortin Const., Inc.*, 118 N.H. 37 (1978); *R.J. Berke & Co. v. J.P. Griffin, Inc.*, 116 N.H. 760 (1976).

handle the paperwork, or may want to avoid getting off on the wrong foot with the owner or contractor. The consequences of neglecting this requirement can, however, be severe.

Assume, for example, that a masonry contractor has a \$1,000,000 subcontract to erect concrete block walls for a new building and does not provide the note required under RSA 447:5. The masonry contractor completes his work and is still owed \$250,000. The general contractor becomes insolvent and can't pay the balance owed. The masonry contractor perfects its Mechanic's lien. The question is, how much is the masonry contractor entitled to recover? The answer to that question turns on how much the owner owed the general contractor at the time the masonry contractor gave notice of its lien (presumably not until the petition for a Mechanic's lien was served, which was not until the masonry contractor completed his work). If the owner has paid the general contractor all amounts owed under their contract, the masonry contractor might be completely out of luck. *Bennett v. Smith*, 85 N.H. 478 (1932) (a subcontractor has no lien where at the time of his notice nothing is due or thereafter becomes due from the owner to the subcontractor); see *Russell v. Woodbury*, 135 N.H. 432 (1992). If, on the other hand, the owner still owes the contractor \$250,000 (and that money is not also claimed by other Mechanic's lien holders – the issue of priority will be discussed below), then the masonry contractor may be able to recover the balance due. The point, of course, is that this unpleasant scenario can be avoided by filing the required notice before any work is performed.

The significance of the risk posed by not sending the RSA 447:5 notice may depend upon the nature of the work performed by the subcontractor. A site contractor who performs his work early in the project is probably less likely to face a shortage of

funds than a finish carpentry or flooring installation subcontractor who may, as a practical matter, be faced with a diminishing supply of funds owed to the general contractor. In any event, maximum protection is afforded by providing the notice regardless of where the subcontractor's work falls in the construction cycle.

In addition to the notice requirement, RSA 447:8 requires subcontractor to provide a written account of the labor and materials furnished. This requires the owner to retain a sufficient sum to satisfy that amount, unless the lienor has already been paid by the contractor or subcontractor, as the case may be. The initial accounting may be given at the time the initial notice of lien is forwarded, and it must be updated and forwarded to the owner every thirty (30) days. RSA 447:8. The monthly update should describe the labor and materials furnished, and state the current and total balance due. This may be done simply by submitting a copy of the subcontractor's detailed monthly invoice. If no work has been performed over the preceding thirty (30) days, then the failure to provide an accounting may be excused. See *McGranahan v. Standard Const. Co.*, 101 N.H. 46, 47 (1957). The owner may waive the accounting requirement. See *Janvrin v. Powers*, 79 N.H. 44 (1918). Of course, no accounting is required for labor and materials for which the subcontractor has already been paid. *Lawson v. Kimball*, 68 N.H. 549 (1896).

### **C. Completion of Contract**

The deadline for securing a Mechanic's lien is 120 days after the services are performed or the material is supplied. RSA 447:9. This timing requirement is not explicitly tied to completion of the subcontract.

## 1. Substantial Completion

The timing requirement for filing a Mechanic's lien is not tied to substantial completion of the entire project, but to the last day that the subcontractor performed work on, or supplied materials to, the project. *See* RSA 447:9.

## 2. Repairs and Extra Work

The applicable rule is that work of an "inconsequential nature" or work done to remedy defects will not extend the 120 day deadline. *See Bader Co. v. Concord Elec. Co.*, 109 N.H. 487, 488-89 (1969) (deadline not extended where subcontractor returned at request of owner to correct defects). Further, in *Peabody v. Weitzell*, 123 N.H. 416 (1983), the New Hampshire Supreme Court held that the 120 day deadline was not extended where the contractor returned to the site to perform work that was not included in the original contract.

Similarly, in *Tolles-Bickford Lumber Co. v. Tilton School*, 98 N.H. 55 (1953), the New Hampshire Supreme Court held that the statutory period commenced to run from the date a final bill was rendered to the owner, although the supplier later provided additional material to correct a shortfall.

On projects that extend over long periods of time, which may involve several distinct phases of construction, the contractor might be well-advised to raise this issue with the owner. The parties could include a simple provision acknowledging that the parties intend for all the work under the contract to constitute a single contract for Mechanic's lien purposes.<sup>17</sup>

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<sup>17</sup> Although the owner is probably more likely to require the contractor to waive Mechanic's liens altogether. *Duke/Fluor Daniel v. Hawkeye Funding, LP*, 150 N.H. 581 (2004).

## **V. Amount and Extent of Lien Claim**

It must be remembered that there is a difference between accruing a construction lien, and then perfecting that lien. The lien arises by operation of law simply by virtue of the fact that goods and/or services are provided to the project., Duke/Fluor Daniel v. Hawkeye Funding, LP, 150 N.H. 581 (2004). But, regardless of the amount of money at stake, this lien cannot be enforced until it is perfected. See Pine Gravel, Inc. v. Cianchette, 128 N.H. 460, 464 (1986). The perfection process will be discussed in more detail below. Further, it is important to recall that the amount that a subcontractor or supplier can recover on the lien may be limited by their failure to comply with RSA 447:5 and/or 447:6, or by specific contractual provisions. See Duke/Fluor Daniel, supra.

## **VI. Perfecting a Mechanic's Lien**

The statutory process for perfecting a Mechanic's lien must be strictly observed. See Fastrack Crushing Servs. v. Abatement Int'l/Advatex Assocs., 149 N.H. 661, 666 (2003) ("Our law is well settled that in giving statutory notice the requirements of the statute must be strictly observed") (quotation omitted). Anyone seeking to perfect a Mechanic's lien should consider hiring counsel for this purpose.

### **A. Time Limitations**

Mechanic's liens must be filed<sup>18</sup> within 120 days after the last day that the subcontractor or supplier performs services or supplies materials on the project.<sup>19</sup> The Mechanic's lien is lost if not filed within the statutory period. See Tolles-Bickford

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<sup>18</sup> While it is not clear what constitutes "filing", most attorneys prefer that the lien be granted by the court and filed in the appropriate registry of deeds within the 120 day period.

<sup>19</sup> RSA 447:9 was amended in 1991 to change the period from ninety to one hundred twenty days. Caution should be exercised in reading the older case law because many of them refer to the ninety-day period.

*Lumber Co. v. Tilton School*, 98 N.H. 55 (1953). As discussed previously, this rule essentially requires that the work be substantial or significant. The performance of punchlist repairs or work performed on the site under a separate contract will generally not extend the 120 day tolling period.

Counsel worked on a case under the Massachusetts bond claim statute that raised a similar issue. Massachusetts law requires that a claim on a bond for a public construction project be filed within one year after the last day of work “included in the claim.” Mass. Gen. Laws Ann. ch. 149, § 29. The contractor performed excavation work related to the Big Dig and completed its work on December 1, 2001.<sup>20</sup> In June 2002, the contractor returned to the site to remove a few barrels of light ballasts and other hazardous materials. The contractor filed its bond claim in March 2003. The owner filed a motion for summary judgment to knock out the contractor’s bond claim. The contractor argued that the June 2002 work tolled the one-year filing period. The Massachusetts Superior Court dismissed the claim because the June 2002 work was not “included in the claim.”

While RSA 447:9 does not explicitly require that the last work performed be “included in the claim”, it is probably more prudent for a subcontractor to assume that the date they last perform substantial or significant work on the project is the day the 120 day clock starts to run.

In addition, the statutory period for perfecting a lien is neither shortened nor extended by insolvency, receivership, death, or breach of contract. *Tolles-Bickford* *Lumber Co. v. Tilton School*, 98 N.H. 55 (1953); see *Russell v. Howell*, 74 N.H. 551 (1908 ) (death of owner does not terminate lien); *Freeto v. Houghton*, 58 N.H. 100 (1877)

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<sup>20</sup> These are hypothetical dates for the purposes of illustration only.

(running of lien period is not suspended by owner's breach of contract that caused the contractor to abandon the work).

**B. Contents, Service, and Filing of Notice**

1. Writ of Summons and Petition for Ex Parte Attachment on Mechanic's Lien

Under New Hampshire, a Mechanic's lien may only be perfected by filing a lawsuit through a Writ of Summons and a Petition for Ex Parte Attachment on a Mechanic's Lien.<sup>21</sup> Petitions for attachments on Mechanic's lien may be filed without prior notice to the other party pursuant to RSA 511-A:8, III. Anyone filing such a petition would be well-advised to specifically cite this provision in their petition. See attached examples. The New Hampshire Superior Court Rules include a form Petition for Ex Parte Attachment, a blank copy of which is attached to these materials. To obtain an attachment on a Mechanic's lien, however, the form should be modified to specify that the lien is sought in connection with a Mechanic's lien.<sup>22</sup> *Holden Eng'g & Surveying, Inc. v. Law Offices of Raymond P. D'Amante, P.A.*, 142 N.H. 213 (1997); *Mathers v. Connelly*, 95 N.H. 107 (1948) (a Mechanic's lien is not effectively secured unless the plaintiff states in his writ the purpose for which the suit is brought); see *Gothic Metal Lathing v. Federal Deposit Ins. Corp.*, 135 N.H. 262 (1992).

One example of how strictly the New Hampshire Supreme Court may interpret this requirement is *Rodd v. Titus Const. Co.*, 107 N.H. 264 (1966). In that case the writ of summons stated that the action was a "plea in Mechanic's lien", but the petition for

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<sup>21</sup> This is in direct contrast to Massachusetts law, under which a lawsuit need not be filed until ninety days after a Mechanic's lien is perfected. Lawyers, contractors, and others involved in the construction trades in both New Hampshire and Massachusetts should be aware of this important distinction.

<sup>22</sup> Some examples of forms that have been successfully used by counsel to perfect Mechanic's liens are attached to these materials.

attachment did not specify that it was for a Mechanic's lien, and the Sheriff made a general return on the lien. The Supreme Court held that the Mechanic's lien was not perfected. To make matters worse for Rodd (and his attorney), the Court held that the sheriff's return could not be amended to show a special attachment on a Mechanic's lien.

The petition for ex parte attachment must include a description of the property sufficiently accurate so that the real estate may be identified with reasonable certainty. *Innie v. W&R, Inc.*, 116 N.H. 315 (1976); *Wurm v. Reilly*, 102 N.H. 558 (1960). Ideally, the property description would consist of a copy of the recorded deed.<sup>23</sup> As can be seen from the attached documents, however, counsel has successfully obtained Mechanic's liens using information gleaned from tax maps obtained from the local municipal office.

A general contractor would name the property owner as the defendant, and a subcontractor would name the owner and general contractor as defendants. The "owner" for these purposes should be the owner of record at the time the party entered into the contract to furnish labor or materials. See *James Drywall v. Europa Development Corp.*, 116 N.H. 619 (1976).

The ex parte petition to attach must also include facts to demonstrate probable cause that the claimant is likely to recover on its claim. See attached blank Petition for Ex Parte Attachment form. While this can be done on the face of the Petition, counsel's preference is to attach a separate affidavit. See attached sample petitions. In either event, the subcontractor or supplier must sign the Petition under oath.

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<sup>23</sup> Many or all of the County Registries of Deeds in New Hampshire can be accessed and searched free of charge through [www.nhdeeds.com](http://www.nhdeeds.com). A fee must be paid, however, to print documents from the site. Counsel provides this information as a reference only, and do not endorse or warrant the accuracy of any information obtained from that website.

## 2. Writ of Attachment

Once the Petition for Ex Parte Attachment for Mechanic's Lien has been granted, the court will issue a writ of attachment. The writ of attachment must "distinctly express" that it is for the purpose of securing a Mechanic's lien. *See* RSA 447:10; *Gothic Metal Lathing v. Federal Deposit Ins. Corp.*, 135 N.H. 262 (1992); 2005 N.H. House Bill No. 299. To facilitate this process and (hopefully) minimize the risk of error, counsel generally prepares the writ of attachment and submits it to the court with the Ex Parte Petition, which is then signed by the Court and stamped with the Court's seal. See attached examples. The Writ of Attachment, Writ of Summons, and Ex Parte Petition are then all filed in the registry of deeds and served on the defendant(s). The documents may be served on the Registry of Deeds by the sheriff, the plaintiff, his attorney, or any other person. RSA 511:3. The plaintiff will also have to pay filing fees at the Court and at the Registry of Deeds.<sup>24</sup> Once service upon the Registry and all parties is complete, the plaintiff should file the original returns of service with the court.

## 3. Hearing on Attachment

The parties subject to the attachment may object to the attachments within fourteen (14) days after the writ of attachment is served upon them. See blank Petition for Ex Parte Attachment form attached to these materials. If they do so, the court will

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<sup>24</sup> As of the time of this writing, the filing fee in the Superior Court is \$145.00, and the Registries of Deeds charge \$10.00 for the first page, plus \$4.00 for each additional page, plus a \$2.00 per document surcharge. The Sheriff's Departments also charge a fee for serving writs of attachment and writs of summons. Counsel suggests that anyone seeking to serve papers should contact the Sheriff's Department in the county where the papers will be served for the latest information.

schedule a hearing within fourteen (14) days after it receives the objection. RSA 511-A:3.

At the hearing, the plaintiff need not meet the burdens imposed by RSA 511-A:3. Specifically, the defendant need not demonstrate a substantial likelihood of success on the merits, and the defendant(s) cannot defeat the lien either by posting a bond or demonstrating that they have sufficient assets to satisfy any judgment. *H.E. Contracting v. Franklin Pierce College*, Civil Op. No. 04-484-PB (Order) (U.S. District Court, Dist. of N.H.) (Muirhead, J.) (3/17/05); *Adam Windows & Doors, Inc. v. Eclipse Const., Inc.*, 05-C-278 (Order on Motion to Substitute Bond) (Hillsborough County Superior Court, Northern District) (Abramson, J.) (8/5/05); *Pinnacle Builders, LLC v. Tobelman*, 05-C-006 (Order) (Grafton County Superior Court) (Houran, J.) (4/14/05); *West Side Dev. Group, LLC v. D'Amour*, 04-C-018 (Order) (Carroll County Superior Court) (O'Neill, J.) (3/24/04); *Consolidated Electrical Dist., Inc. v. SES Concord Company, L.P.*, 89-C-571 (Order on Defendant's Motion to Release Mechanic's Lien Attachment) (Merrimack County Superior Court ) (Manias, J.) (11/21/89).<sup>25</sup> Instead, the plaintiff need only establish its basic right to recovery under RSA 511-A:8 – specifically that it has met the procedural requirements necessary to perfect an ex parte attachment on a Mechanic's lien. *See, e.g., H.E. Contracting v. Franklin Pierce College*, Civil Op. No. 04-484-PB (U.S. District Court, Dist. of N.H.) (Muirhead, Mag. J.) (3/17/05). The only permissible objections are that the plaintiff failed to comply with the statutory requirements, failed to give adequate notice of the Mechanic's lien, or that the amount of the attachment is excessive. *Id.*

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<sup>25</sup> For ease of reference, copies of these orders are included in these materials.

A subcontractor may, of course, choose to accept a note or bond in lieu of a Mechanic's lien. RSA 447:14; *Calef v. Brinley*, 58 N.H. 90 (1877) (whether a lien is waived by the taking of a note depends upon the understanding of the parties at the time). In addition, a subcontractor may by contract waive its right to assert a Mechanic's lien in the first place. *Duke/Fluor Daniel v. Hawkeye Funding, LP*, 150 N.H. 581 (2004).

**C. Work Stopped Prior to Completion**

The period for filing a lien is not tolled if the contractor stops work on the project before the contract is substantially complete. *Tolles-Bickford Lumber Co. v. Tilton School*, 98 N.H. 55 (1953); *Freeto v. Houghton*, 58 N.H. 100 (1877) (running of lien period is not suspended by owner's breach of contract that caused the contractor to abandon the work).

**D. Inaccuracies in the Lien Claim**

Defects, errors, or material inaccuracies in the lien claim may be fatal to perfecting the lien. *Tolles-Bickford Lumber Co. v. Tilton School*, 98 N.H. 55 (1953). While the Mechanic's lien law is designed to protect subcontractors, a Mechanic's lien is an extraordinary remedy and may only be granted when the applicant strictly complies with the statutory requirements.

**E. Amendment of the Lien Claim**

The Mechanic's lien statute does not expressly provide for amendments of the lien claim. Under RSA 511-A:7, the plaintiff may request permission to make new or additional attachments. While RSA 511-A:7 requires that any such request triggers a hearing under RSA 511-A:3, in light of the cases outlined above, it appears likely that the requirements of RSA 511-A:3 would not apply to any such additional attachment.

## **VIII. Brief Comparison: Massachusetts Construction Liens**

As mentioned previously, there are substantial differences between Mechanic's lien statutes and procedures from state to state. A brief comparison of some differences between the New Hampshire and Massachusetts Mechanic's lien statutes and procedures will illustrate some of these differences. This comparison is also intended as a caution to any attorney or contractor who works in both states. This comparison is intended to be an overview only. Anyone considering filing a Mechanic's lien in Massachusetts should consult a Massachusetts attorney.

### **A. Similarities Between New Hampshire and Massachusetts Construction Liens**

New Hampshire and Massachusetts Mechanic's lien law is similar in several substantive respects. Some examples of similarities follow:

#### **1. No Liens on Public Property**

In neither state may a contractor, subcontractor or supplier obtain a lien in public lands or buildings. RSA 447:2; Mass. Gen. Laws Ann. ch. 254, § 6.

#### **2. Persons Entitled to File Mechanic's Liens**

In both states, any person who enters into a contract with the owner, a contractor, or a subcontractor to the contractor, may obtain a Mechanic's lien. RSA 447:2 and 447:5; Mass. Gen. Laws. Ann. ch. 254, § 4.

#### **3. Automatic Dissolution Absent Timely Perfection**

In both states, the right to a Mechanic's lien is automatically terminated unless it is perfected within a specified period of time. RSA 447:9; Mass. Gen. Laws Ann. ch. 254, § 4.

## **B. Differences Between New Hampshire and Massachusetts Mechanic's Liens**

### **1. Filing and Notice Requirements**

Under New Hampshire law, subcontractors must provide the owner with a notice of Mechanic's lien and a monthly accounting. RSA 447:5 and 447:8. Those are the only pre-perfection filing requirements. Even if the subcontractor fails to comply with these requirements, the only specified penalty is a potential limitation on the amount that they may recover on their lien. *See* RSA 447:6.

Under Massachusetts law, the contractor or subcontractor must file in the appropriate registry of deeds an official notice of their contract. Mass. Gen. Laws Ann. ch. 254, § 2 (contractors) and § 4 (subcontractors). The subcontractor notice and accounting requirements under the Massachusetts statute are essentially the same as RSA 447:5 and 447:6, but must be filed in the registry of deeds rather than sent to the owner.

### **2. Notice of Substantial Completion**

Massachusetts law specifically requires that the owner and contractor must file in the registry of deeds a notice of substantial completion. Mass. Gen. Laws. Ann. ch. 254, § 2A. The owner must serve the notice by certified mail, return receipt requested upon every subcontractor who previously filed or recorded a notice of contract under § 4. *Id.* The New Hampshire statute contains no similar provision.

### **3. Notice of Identification**

The Massachusetts Mechanic's lien statute requires that the amount of any lien claimed by a second-tier subcontractor not exceed the amount due or to become due under the subcontract between the original contractor and the first-tier subcontractor unless, within thirty days after the date that the second-tier subcontractor commences

performance, the second-tier subcontractor mails, certified mail return receipt requested to the contractor a “notice of identification”. Mass. Gen. Laws Ann. ch. 254, § 4. This provision again, parallels RSA 447:5 and 447:8, but there is no precise parallel in New Hampshire law

## **IX. Priority of Liens**

One of the primary benefits of obtaining a Mechanic’s lien is the favorable priority position gained by doing so. Under RSA 447:9, Mechanic’s liens “shall take precedence of all prior claims except liens on account of taxes.” As between competing Mechanic’s liens, the general rule is that lienholders from the same project will share pro rata based upon their respective lien judgment. *See* RSA 447:11 and 447:2; *Goudie v. American Moore Tank Co.*, 81 N.H. 88 (1923).

Properly perfected Mechanic’s liens can also enjoy priority over prior record construction mortgages. However, the status provides lenders with the opportunity to retain priority by (a) demonstration that the proceeds of the mortgage were disbursed to pay subcontractors’ invoices, or (b) obtaining an affidavit from the borrower stating the subcontractors’ accounts have been satisfied. *See* RSA 447:12-a. This would typically be accomplished through lien waivers, whereby subcontractors acknowledge that they have been paid and agree to waive their lien rights, at least to the extent that they have been paid. Subcontractors should be careful to be sure that the lien waiver cover only lien rights as to payments that they have actually been paid.

RSA 447:12-b also provides further protection to subcontractors in the form of posting notices of construction mortgages on the jobsite. The statute requires that such notices must be posted “in a conspicuous place” on the jobsite for which the funds were

secured. RSA 447:12-b. The notice must include the name, address, and telephone number of the lender. *Id.* Anyone entitled to a lien must, within fifteen (15) days after the posting of the notice, provide written notice to the institution providing the construction funds that such person is furnishing services, materials, supplies or other things. *Id.* The written notice provided under this paragraph shall include the name and address of the jobsite. *Id.* Failure to provide the notice required by this paragraph shall not alone invalidate the lien. *Id.*

Moreover, at least 48 hours prior to requesting any construction mortgage requisition, the mortgagor or his agent shall post in a conspicuous place on the jobsite for which the construction funds were secured, the anticipated funding date for said requisition. *Id.* The mortgagee shall require a copy of said notice, which shall be certified as to its posting by the mortgagor or his agent prior to disbursing any funds. *Id.*

## **X. Security on Public Projects**

As discussed above, Mechanic's liens may not be obtained against public property. RSA 447:2. This does not mean, however, that a subcontractor working on public projects is without security.

### **A. Mechanic's Liens on Proceeds Only**

Under RSA 447:15, a subcontractor may obtain a lien on any money due or to become due from the state or any political subdivision thereof by virtue of any contractor for public work, construction, alteration or repair. Such liens must be filed within ninety (90) days after the completion and acceptance of the project by the contracting party. As with other Mechanic's liens, the lien under this provision arises according to performance

of the contract. *Guard Rail Erectors, Inc. v. Standard Surety and Casualty Co.*, 86 N.H. 349 (1933).

### **B. Bond Requirement**

If a public construction contract exceeds \$25,000 then, under RSA 447:16, the state or political subdivision thereof must obtain a bond with a penal sum equal to at least 100 percent of the contract price as a condition precedent to executing the contract. A bond may be required for construction contracts under \$25,000. This bond requirement applies to work on public water works. *Petition of Keyser, Inc.*, 97 N.H. 404 (1952). This section is also intended to provide the minimum bond requirements, and does not prohibit the incorporation of broader requirements. *Id.*

Despite the fact that this bond is intended to benefit subcontractors and suppliers, its terms are not read into a public contract where the town failed to demand the bond. *Westinghouse Elec. Supply Co. v. Electromech, Inc.*, 119 N.H. 833 (1979). Where the bond is demanded, however, the provisions of RSA 447:16 are automatically made part of the bond. *General Elec. Co. v. Dole Co.*, 105 N.H. 477 (1964).

### **C. Notice of Bond Claim**

If the State of New Hampshire is a contracting party, the person seeking to make a claim on the bond must file a statement of its claim in the office of the secretary of state within 90 days after the completion and acceptance of the project by the contracting party. RSA 447:17 (amended by 2005 N.H. Laws ch. 291 (HB 644)). If the New Hampshire Department of Transportation is a contracting party, the notice must be filed with such department. *Id.* If a political subdivision of the state is a contracting party, the notice must be filed in the office of the clerk of the superior court of the county within

which the contract is principally performed. *Id.* A copy of the statement of claim must be sent by mail by the office where it is filed to the principal and surety. *Id.*

A supplier to a subcontractor need not give advance notice of its intent to claim the benefits of the bond before filing a statement of claim. *Naylor Pipe Co. v. Murray Walter, Inc.*, 120 N.H. 696 (1980). A bond claim is not foreclosed if the statement of claim is filed prior to completion and acceptance of the work. *General Elec. Co. v. Dole Co.*, 105 N.H. 477 (1964). The principal and surety may waive the statutory notice requirement. *Petition of Keyser, Inc.*, 97 N.H. 404 (1952). Failure to comply with the statutory provisions bars the bond claim. *Fastrack Crushing Servs. v. Abatement Int'l/ Advatex Assocs.*, 149 N.H. 661, 666-67 (2003) (“Our law is well settled that in giving statutory notice the requirements of the statute must be strictly observed.... The claimant ... must follow not just the purpose, but the ‘plain and unequivocal language’ of the statute”) (quotations omitted); *American Fidelity Co. v. Cray*, 105 N.H. 132 (1963).

#### **D. Petition and Hearing on Bond Claim**

A person who has complied with RSA 447:17 (amended by 2005 N.H. Laws ch. 291 (HB 644)) must, within one year after such filing, file a petition in the superior court for the county in which the contract is principally performed to enforce his claim or intervene in another petition already filed. RSA 447:18. A copy of the petition must be provided to the principal and surety. *Id.*

The petition to enforce the bond claim must include an allegation of the nature and subject matter of the claim or contract or indebtedness relied upon, of the execution and delivery of the bond, and of the facts showing that the petitioner has complied with RSA 447:17 and 447:18. *Id.*

Any party in interest may file pleadings for the purpose of formulating issues under the direction of the court. *Id.* The court examines all claims which have been duly filed, and schedules a hearing on them, with notice to all creditors who have filed claims, and to the principal and surety or sureties. *Id.* After the hearing, the court finds the respective amounts due such party claimants and their rights to participate in the security and make such orders and decrees as justice may require. *Id.* The court may require at any hearing on said claims the attendance of any official with whom claims have been filed, with such claims, or require such official to furnish a copy of such claims for the use of the court. *Id.*

## **XI. Enforcing a Mechanic's Lien**

### **A. Lawsuit Requirement**

As discussed above, under New Hampshire law and practice a lawsuit must be filed along with the lien. Counsel found this out on an occasion when he was forced to type up a complaint and complete a writ of summons at the courthouse when he attempted to file a petition for ex parte attachment on a Mechanic's lien without filing a lawsuit.

### **B. ADR**

The question sometimes arises whether a party may obtain a Mechanic's lien when their contract calls for arbitration or some other form of dispute resolution other than litigation. The answer to this question depends, in the first instance, upon the terms of the contract. The parties should first carefully review the contract to see if it contains any provisions regarding when, if, and under what circumstances a Mechanic's lien may be filed. Assuming that it contains no such provisions, the parties may want to discuss with

their attorney whether they may file a “place holder” lawsuit in support of the Mechanic’s lien. The danger is that the other party may attempt to portray such a lawsuit as a waiver of any contractual right to arbitration. There is no specific procedure under New Hampshire law to address this situation, but the parties may want to consult counsel about spelling out, as clearly as possible, that the party does not intend to waive its right to arbitration, and is merely filing the lawsuit to support its attempt to obtain a Mechanic’s lien.

Counsel utilized this procedure in one case involving a party in Massachusetts and a party based in New Hampshire. Pursuant to the contract, the parties arbitrated the matter in Massachusetts. The arbitration was bifurcated into liability and damages phases. The arbitrator found in favor of counsel’s client on the liability phase. The client then became concerned about securing its right to recover damages and sought to obtain an attachment on the other party’s New Hampshire property. The client did not wish to relitigate the entire dispute in New Hampshire. Counsel filed a petition to register the arbitration decision in New Hampshire, and filed a petition for a Mechanic’s lien in connection with that proceeding. Counsel spoke at length with the clerk of court where the action was filed to establish and clarify a procedure to obtain the lien under these circumstances. Counsel made clear in the petition that the client did not intend to waive its right to arbitrate, and was only seeking to secure its judgment on the damage award. The Court ultimately accepted this approach and granted the attachment.

### **C. Construction Bonds**

In an effort to avoid liens, private project owners often require the general contractor to post a payment bond. The general contractor pays a premium to obtain the bond, and passes the cost to the owner through its bid. A bond provides financial backing

to the contractor. A payment bond is simply an agreement by the surety company (obligor) to assume certain obligations if the contractor (principal) default. Default would include failure to pay subcontractors, suppliers, etc., depending upon the language of the bond. The owner is referred to as the obligee.

Payment bonds are for the protection of unpaid subcontractors and suppliers. They should not be confused with performance bonds, which are commonly used on construction projects to protect the owner against the risk that the contractor will not or cannot complete the work, and bid bonds, which provides security to the owner in the event that a successful bidder withdraws its bid. Although less common, payment bonds and performance bonds can be required at the subcontractor level as well.

Surety law differs from insurance law in one important respect: the general indemnity agreement. This is a contract between principal and surety whereby the principal agrees to reimburse the surety for all costs expended by the surety on the bond. The indemnity agreement often includes personal guarantees by the principal's owners. Therefore, if the surety pays out \$100,000 to unpaid subcontractors, its can seek reimbursement of \$100,000 plus costs and attorneys' fees from the contractor and the individual guarantors.

Whether a particular claimant is entitled to rights under the payment bond depends upon the language of the bond itself. The bond may or may not extend right to anyone supplying labor or materials. The bond also may or may not explicitly give unpaid claimants the right to directly sue the surety. The modern trend is to allow subcontractors and suppliers to sue the surety directly, and the standard AIA bonds

clearly give such a right. *See* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 638 (6<sup>th</sup> ed. 2000).

Anyone seeking to recover on a surety bond needs to carefully read the bond, paying particular attention to notice and default provisions. The bond typically limits the time within which claims must be brought on the bond.

Owner need to understand, however, that simply having a surety bond does not automatically guarantee that claims will be paid. The surety is entitled to certain defenses. Most importantly, the surety is generally entitled to all the defenses that the contractor may have against the claimant. The surety may also raise technical defenses based upon the bond itself, such as failure to give proper notice. Finally, the surety is entitled to certain unique legal defenses, such as the owner's improper payment of funds to the general contractor, which may impair the surety's equitable right to the remaining contractor balance.

In sum, once disputes develop, the obligee and principal should notify the surety and keep it informed of the status of the dispute.

#### **D. Substitution of Collateral**

As discussed above, under New Hampshire law, an owner or contractor cannot compel the party who files the lien to accept a bond or (presumably) other forms of collateral in order to dissolve the lien. *H.E. Contracting v. Franklin Pierce College*, Civil Op. No. 04-484-PB (Order) (D.N.H.) (Muirhead, J.) (3/17/05); *Adam Windows & Doors, Inc. v. Eclipse Const., Inc.*, 05-C-278 (Order on Motion to Substitute Bond) (Hillsborough County Superior Court, Northern District) (Abramson, J.) (8/5/05); *Pinnacle Builders, LLC v. Tobelman*, 05-C-006 (Order) (Grafton County Superior Court)

(Houran, J.) (4/14/05); West Side Dev. Group, LLC v. D'Amour, 04-C-018 (Order) (Carroll County Superior Court) (O'Neill, J.) (3/24/04); Consolidated Electrical Dist., Inc. v. SES Concord Company, L.P., 89-C-571 (Order on Defendant's Motion to Release Mechanic's Lien Attachment) (Merrimack County Superior Court ) (Manias, J.) (11/21/89).

### **E. Bankruptcy and Liens**

The bankruptcy of a property owner or contractor may impact the Mechanic's liens. The bankruptcy statutes are complex, and the extent to which a bankruptcy may impact a particular project should be determined after consultation with a bankruptcy attorney, but some general principles appear to apply.

Bankruptcy filings trigger an automatic stay, under which collection efforts against the debtor may be suspended. 11 U.S.C. § 362. The automatic stay generally prohibits any act to create, perfect, or enforce any lien against property of the estate. *Id.* § 362(a)(4). However, a party may perfect a Mechanic's lien, or maintain or continue an action to perfect, a Mechanic's lien, notwithstanding the automatic stay. 11 U.S.C. § 546(b)(1); In Re Butler Constr. Co., 110 B.R. 281 (W.D. Ky. 1989).; In Re Cantrup, 38 B.R. 148 (D. Colo. 1984). Because the right to perfect a Mechanic's lien is not affected by the stay, the state-law time period for perfecting a Mechanic's lien is not tolled. *E.g.*, In Re Germansen Decorating, Inc., 149 B.R. 522 (N.D. Ill. 1993). The bankruptcy trustee may not be able to avoid Mechanic's liens that are perfected prior to the date the bankruptcy was filed. *See In Re Continental Country Club, Inc.*, 64 B.R. 177 (M. D. Fla. 1986); In Re Victoria Grain Co. of Minneapolis, 45 B.R. 2 (D. Minn. 1984).

### **XI. Lien Waivers and Releases**

As discussed above, New Hampshire permits contractors and subcontractors to waive their right to assert Mechanic's liens. *Duke/Fluor Daniel v. Hawkeye Funding, LP*, 150 N.H. 581 (2004). Many states, by contrast, have statutes that prohibit such waivers. See JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 568 (6<sup>th</sup> ed. 2000). Moreover, contractors and subcontractors are typically required by their contracts to provide partial and final lien waivers as they receive payments under their respective contracts.

## CHAPTER 447

### LIENS FOR LABOR AND MATERIALS

#### Section 447:1

**447:1 Vessels.** – If a person shall, by himself or others, perform labor or furnish materials toward building, repairing, fitting or furnishing a vessel within this state, payment for which is due, he shall have a lien therefor on the vessel for the space of 4 days after it is completed.

#### Section 447:2

**447:2 Buildings, etc.** – If any person shall, by himself or others, perform labor or furnish materials to the amount of \$15 or more for erecting or repairing a house or other building or appurtenances, or for building any dam, canal, sluiceway, well or bridge, or for consumption or use in the prosecution of such work, other than for a municipality, by virtue of a contract with the owner thereof, he shall have a lien on any material so furnished and on said structure, and on any right of the owner to the lot of land on which it stands.

#### Section 447:3

**447:3 Brick.** – If a person shall perform labor or furnish materials or fuel to the amount of \$15 or more for the making of brick, by virtue of a contract with the owner thereof, he shall have a lien upon said materials and fuel and upon the brick with the kiln containing said brick, for such labor, materials or fuel. Said lien shall continue for 90 days after said brick are burned, and may be secured by attachment as provided in RSA 447:10.

#### Section 447:4

**447:4 Lumber, etc.** – If a person shall, by himself or others, or by teams or machinery, perform labor or furnish supplies to the amount of \$15 or more toward rafting, driving, cutting, hauling, sawing or drawing wood, bark, lumber or logs, or toward cooking or hauling supplies in aid of such labor, by virtue of a contract with the owner of the wood, bark, lumber or logs, he shall have a lien thereon for such labor or supplies.

#### Section 447:5

**447:5 Subcontractors.** – If a person shall by himself or others perform labor or furnish materials to the amount of \$15 or more for any of the purposes specified in RSA 447:2, 447:3 and 447:4 and in RSA 453, by virtue of a contract with an agent, contractor

or subcontractor of the owner, he shall have the same lien as provided in said sections, provided, that he gives notice in writing to the owner or to the person having charge of the property that he shall claim such lien before performing the labor or furnishing the material for which it is claimed.

### **Section 447:6**

**447:6 Notice.** – Such notice may be given after the labor is performed or the material is furnished, and said lien shall be valid to the extent of the amount then due or that may thereafter become due to the contractor, agent or subcontractor of the owner. The account required under RSA 447:8 may also be given at the time said notice is given.

### **Section 447:7**

**447:7 Railroads.** – If a person shall, by himself or others, perform labor or furnish materials to the amount of \$15 or more, in the grading, masonry, bridging or track-laying of a railroad, under a contract with an agent, contractor or subcontractor of the proprietors thereof, he shall have a lien upon the railroad and the land upon which it is constructed; provided, that he gave notice in writing to such proprietors, or to the person having charge of the railroad, that he should claim such lien before performing the labor or furnishing the materials for which it is claimed.

### **Section 447:8**

**447:8 Account.** – Any person giving notice as provided in RSA 447:5-7 shall, as often as once in 30 days, furnish to the owner, or person having charge of the property on which the lien is claimed, an account in writing of the labor performed or materials furnished during the 30 days; and the owner or person in charge shall retain a sufficient sum of money to pay such claim, and shall not be liable to the agent, contractor or subcontractor therefor, unless the agent, contractor or subcontractor shall first pay it.

### **Section 447:9**

**447:9 Duration.** – The lien created by RSA 447:2-7, inclusive, shall continue for 120 days after the services are performed, or the materials, supplies or other things are furnished, unless payment therefor is previously made, and shall take precedence of all prior claims except liens on account of taxes.

### **Section 447:10**

**447:10 How Secured.** – Any such lien may be secured by attachment of the property upon which it exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose.

## **Section 447:11**

**447:11 Precedence.** – Such attachment shall have precedence over all lien claims for labor, materials or other things done or furnished after the attachment was made, except the same were done or furnished in the performance of a contract existing when the attachment was made, or were necessary for the preservation of the property attached.

## **Section 447:12**

**447:12 Share Pro Rata.** – Except as provided in RSA 447:11, all such attaching lien creditors shall share pro rata in accordance with the amounts of their respective lien judgments in the property attached or in its proceeds.

## **Section 447:12-a**

**447:12-a Attachment Priority.** – Such attachment shall have precedence and priority over any construction mortgage. For the purposes of this section, a construction mortgage shall mean any mortgage loan made for the purpose of financing the construction, repair or alteration of any structure on the mortgaged premises where the lien secured by such attachment arises from the same construction, repair or alteration work. However, such attachment shall not be entitled to precedence as provided in this section to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed either toward payment of invoices from or claims due subcontractors and suppliers of materials or labor for the work on the mortgaged premises, or upon receipt by the mortgagee from the mortgagor or his agent of an affidavit that the work on the mortgaged premises for which such disbursement is to be made has been completed and that the subcontractors and suppliers of materials or labor have been paid for their share of such work, or will be paid out of such disbursement. A mortgagee shall not knowingly accept a fraudulent affidavit, and shall encourage and promote the practices outlined in RSA 447:12-b. Any agreement waiving the precedence provided by this section shall be enforceable only upon like showing by the mortgagee. The precedence provided by this section shall not apply to wage claims of employees working for wages under an employer-employee relationship, as defined in RSA 275:42. A mortgagor or his agent making a willfully false affidavit under this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

## **Section 447:12-b**

### **447:12-b Additional Responsibilities; Construction Mortgages. –**

I. Within 10 business days of the execution of a construction mortgage, including any refinancing thereof, the mortgagor or his agent shall post in a conspicuous place on the jobsite for which the construction funds were secured, the name, address and telephone number of the institution providing the construction funds.

II. Any person entitled to a lien pursuant to RSA 447:2-7 shall, within 15 business days of the posting required in paragraph I or of commencing to furnish services, materials,

supplies or other things, whichever is later, provide written notice to the institution providing the construction funds that such person is furnishing services, materials, supplies or other things. The written notice provided under this paragraph shall include the name and address of the jobsite. Failure to provide the notice required by this paragraph shall not alone invalidate the lien created by RSA 447:2-7.

III. At least 48 hours prior to requesting any construction mortgage requisition, the mortgagor or his agent shall post in a conspicuous place on the jobsite for which the construction funds were secured, the anticipated funding date for said requisition. The mortgagee shall require a copy of said notice, which shall be certified as to its posting by the mortgagor or his agent prior to disbursing any funds.

IV. In the event that a written contract between the mortgagor or his agent and any person furnishing services, materials, supplies or other things shall provide that the disbursement of construction funds, a portion of which is intended to pay such person, shall be by a 2-party check, the mortgagor or his agent shall transmit a copy of such agreement to the mortgagee. Upon receipt of a copy of such written agreement, the mortgagee shall subsequently disburse funds intended in part to pay any such person only by a check made payable to the mortgagor or his agent and such person. Unless otherwise agreed by the mortgagor and mortgagee, disbursements shall be made only for actual work completed and materials consumed on the jobsite for which the construction funds were secured.

### **Section 447:13**

**447:13 Boomage.** – If logs are attached, the officer making the attachment may pay the boomage thereon, if any, and return the amount so paid on the writ, and it shall be included in the costs recovered.

### **Section 447:14**

**447:14 Taking a Note.** – No lien shall be defeated by taking a note, unless it was taken in discharge of the amount due and of the lien.

# Public Works

## Section 447:15

**447:15 State Work.** – The liens given by RSA 447:5-14, inclusive, shall attach to any money due or to become due from the state or from any political subdivision thereof by virtue of any contract for any public work or construction, alteration, or repair, in the performance of which contract the lienor participated by performing labor or furnishing materials or supplies. Such liens shall not attach, however, unless filed within 90 days after the completion and acceptance of the project by the contracting party, whether such contracting party is the state or any political subdivision of the state.

## Section 447:16

**447:16 Bond Required.** – Officers, public boards, agents or other persons who contract in behalf of the state or any political subdivision thereof for the construction, repair or rebuilding of public buildings, public highways, bridges or other public works shall if said contract involves an expenditure of \$25,000, and may if it involves an expenditure of less amount, obtain as a condition precedent to the execution of the contract, sufficient security, by bond or otherwise, in an amount equal to at least 100 percent of the contract price, or of the estimated cost of the work if no aggregate price is agreed upon, conditioned upon the payment by the contractors and subcontractors for all labor performed or furnished, for all equipment hired, including trucks, for all material used and for fuels, lubricants, power, tools, hardware and supplies purchased by said principal and used in carrying out said contract, and for labor and parts furnished upon the order of said contractor for the repair of equipment used in carrying out said contract.

## Section 447:16-a

**447:16-a Application of Statute.** – [Repealed 1981, 4:6, eff. March 6, 1981.]

## Section 447:17

**447:17 Notice.** – To obtain the benefit of the bond, any person, firm or corporation having any claim for labor performed, materials, machinery, tools, or equipment furnished as aforesaid shall, within 90 days after the completion and acceptance of the project by the contracting party, file in the office of the secretary of state, if the state is a contracting party, or with the department of transportation, if the state is a party to said contract by or through said department, or with the department of administrative services, if the state is a party to said contract by or through said department, or in the office of the clerk of the superior court for the county within which the contract shall be principally performed, if any political subdivision of the state is a contracting party, a statement of the claim, a copy of which shall forthwith be sent by mail by the office where it is filed to the principal and surety.

## Section 447:18

**447:18 Petition and Hearing.** – Said claimant shall, within one year after filing such claim, file a petition in the superior court for the county within which the contract shall be principally performed to enforce his claim or intervene in a petition already filed, with copy to the principal and surety, and such further notice as the court may order. Such petition shall contain an allegation of the nature and subject matter of the claim or contract or indebtedness relied upon, of the execution and delivery of the bond, and of the facts showing compliance by the claimant with the provisions of RSA 447:17 and this section relative to the filing of said claim. Subsequent pleadings may thereafter be filed by any party in interest for the purpose of formulating issues under the direction of the court. The court shall examine all claims which have been duly filed in accordance herewith, and fix a date for hearing thereon, with notice to all creditors who have filed claims as herein provided, and to the principal and surety or sureties, and find the respective amounts due such party claimants and their rights to participate in the security and make such orders and decrees as justice may require. The court may require at any hearing on said claims the attendance of any official with whom claims have been filed, with such claims, or require such official to furnish a copy of such claims for the use of the court.

**[Statutory Notice to Preserve Lien Rights at Outset of Project]  
[On Subcontractor's Letterhead]**

[Date]

[INSERT OWNER'S ADDRESS]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: \_\_\_\_\_ Project

To Whom It May Concern:

We are pleased to have been selected to serve as the \_\_\_\_\_ Subcontractor to \_\_\_\_\_ for purposes of providing \_\_\_\_\_ on the \_\_\_\_\_ project. New Hampshire R.S.A. 447:5, 447:6, and 447:8 requires us to advise you of our role in the project so that you will be aware of all parties who would have any rights pursuant to RSA 447 in connection with the project.

Please contact us if you have any questions. We look forward to working with you and \_\_\_\_\_ toward the successful completion of the project.

Very truly yours,

Subcontractor

cc: Contractor

**[Statutory Monthly Notice to Preserve Lien Rights]  
[On Subcontractor's Letterhead]**

[Date]

[INSERT OWNER'S ADDRESS]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: \_\_\_\_\_ Project

To Whom It May Concern:

We are pleased to have been selected to serve as the \_\_\_\_\_ Subcontractor to \_\_\_\_\_ for purposes of providing \_\_\_\_\_ on the \_\_\_\_\_ project. New Hampshire R.S.A. 447:5, 447:6, and 447:8 requires us to advise you of our role in the project so that you will be aware of all parties who would have any rights pursuant to RSA 447 in connection with the project. Please be advised that we have provided \_\_\_\_\_ in labor and/or materials during the last thirty days. Attached please find our invoice for your records.

Please contact us if you have any questions. We look forward to working with you and \_\_\_\_\_ toward the successful completion of the project.

Very truly yours,

Subcontractor

cc: Contractor