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Constitutional Due Process and Mechanic's Liens: Do Public Mechanic's Lien Laws Stand Up to the Challenge?

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I. Introduction

Every state and the District of Columbia long ago enacted statutes giving subcontractors, suppliers, laborers, and others who provide labor and material to improve private property an interest in the improved property, referred to as a mechanic's lien. These liens can be enforced by the party that was not paid for its work by requiring the property to be sold to satisfy the lien. Over the years, several of these statutes have been challenged successfully for lack of constitutional due process, and invariably have resulted in amendments to the statutes to provide appropriate due process protections.

While the United States Supreme Court has not directly ruled on the constitutionality of mechanic's lien statutes, it has issued a series of decisions on the constitutionality of various pre- and post-judgment attachment statutes, providing the foundation for many states to assess the adequacy of their lien laws. In these decisions, the U.S. Supreme Court generally has tried to balance the need to protect the unpaid creditor with the harm to the debtor caused by an improper attachment of its property. The factors considered by the Court include the requirements to obtain the attachment, the speed with which the debtor can force a hearing to remove the attachment, and the right of the debtor to bond off the attachment. From these Supreme Court decisions, a set of principles has emerged for judging the constitutionality of private mechanic's lien statutes.

Ordinarily, due to sovereign immunity, a subcontractor, supplier, or laborer cannot obtain a property interest or lien on public property or require the sale of the public property if the party is not paid. Instead, the interest of unpaid subcontractors, suppliers, and laborers on public projects typically are protected by labor and material payment bonds. However, a number of states also have enacted public mechanic's lien laws, which allow the subcontractor, supplier, or laborer to attach the funds held by the public owner for the prime contractor. Many of these statutes, though, do not afford the constitutional due process protections required by the Supreme Court.

This article summarizes the due process requirements handed down by the U.S. Supreme Court, analyzes the application of those requirements to the challenges of private lien laws, and then applies the principles derived from these cases to several public lien law statutes.

II. Mechanic's Liens — Overview

Mechanic's liens, also referred to as construction liens, are unknown to the Common Law [2] and are devices created primarily by statute. [3] The first such statute was enacted by Maryland in 1791 to spur rapid development of the City of Washington. [4] Today, every state in the United States and the District of Columbia has a private improvement mechanic's lien statute on its books, most of which were originally enacted more than one century ago. While every state has a mechanic's lien law for work performed on private improvements, only twelve states have legislation providing for mechanic's liens and other similar devices on public improvement projects. [5]

The general purpose of a mechanic's lien is to provide security to certain classes of persons who, in good faith, furnish material or labor for the construction of buildings or other improvements to real property. [6] The nature of the security

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afforded by the mechanic's lien statute will differ depending on whether the construction is for a public or private owner. On private projects, payment is secured by allowing the persons improving real property to attach a lien to the improved buildings and land of the owner for the price or value of the work, labor, materials, or other services that they furnished. [7] The contractor then can force the sale of the property if the lien is not satisfied.

Mechanic's liens on public projects are dramatically different than their private counterparts. Because of sovereign immunity, public mechanic's liens generally do not attach to the interests of the public owner in the real property. [8] The subcontractor, for instance, cannot force the sale of public property to satisfy the debt owing to it. Instead, in those states that permit such liens, the lien attaches to the moneys due or to become due the contractor from the public entity, essentially allowing a subcontractor to impound the construction funds. It is significant to note that on public projects in these states, payments to subcontractors and suppliers also are secured by little Miller Act statutes, which require the general contractor to furnish a labor and material payment bond. [9]

Despite the longevity of mechanic's lien statutes, over the last several decades there have been a number of constitutional attacks on these statutes on the grounds that they constitute a taking without due process of law in violation of the U.S. Constitution and various state constitutions. While some state lien statutes have survived the constitutional challenges and others have not, all of the challenges involved mechanic's liens on private projects. No similar challenge appears to have been instituted against public mechanic's lien laws, even though the impounding of the general contractor's earned payments also would constitute a taking of property. Nonetheless, in order to analyze the constitutionality of a state's public mechanic's lien law, it is essential to first understand how the Due Process clause has been applied to prejudgment attachment statutes, which are analogous to mechanic's lien laws.

III. Evolution of Present Day Procedural Due Process Analysis in Mechanic's Lien and Pre-Judgment Attachment Cases

A person's due process rights are derived from the Fifth and Fourteenth Amendments to the U. S. Constitution; the Fifth Amendment applying to actions of the federal government and the Fourteenth Amendment applying to state actions. [10] Generally, each state's constitution provides similar due process protections, and those provisions typically are interpreted consistently with the U.S. Constitution. [11]

The Fourteenth Amendment states: "No State shall ... deprive any person of life, liberty, or property, without due process of law." [12] Despite the simplicity with which this right is articulated, the application of the right can be far more elusive. However, from 1969 through 1976, the U.S. Supreme Court issued a series of rulings on the constitutionality of some states' pre- and post-judgment attachment statutes, modernizing its analytical approach to procedural due process cases.

A. The Supreme Court's Formulation of a Due Process Test

Sniadach v. Family Finance Corp. [13] started the due process evolution. In that case, the U.S. Supreme Court invalidated a Wisconsin statute that permitted a judgment creditor to garnish the wages of the judgment debtor without notice or an opportunity for a hearing. [14] The statute was found to be self-executing in that once the clerk of the court issued the summons for a garnishment complaint, at the request of the creditor's attorney, the employer was required to withhold the debtor-employee's wages, except for a nominal subsistence allowance. [15] The wages could be unfrozen only if there was a trial of the main suit and the wage earner won on the merits. [16] Finding that the result of "a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall," the Court held that where "the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process." [17]

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Three years later, in *Fuentes v. Shevin,* [18] the Supreme Court invalidated Florida's and Pennsylvania's pre-judgment replevin statutes, which permitted a secured retail installment vendor to repossess goods that it sold, without notice, without a hearing, and without a judicial order or supervision, simply by use of the sheriff who acted on authority from a writ issued by the clerk of the court.

Under the Florida law, in order to obtain the writ, the vendor merely was required to file a form with the clerk stating that the goods were being "wrongfully detained" and post a bond for double the value of the property. The vendor then could immediately commence a lawsuit for repossession of the goods. [19] If the consumer prevailed in the vendor's lawsuit, the vendor was required to return the property and pay the defendant any damages resulting from the wrongful replevin. [20] The consumer was provided with no prior notice of the seizure and was allowed no opportunity to challenge the writ, except as a defendant in a trial of the repossession action. [21] Other than succeeding at trial, the consumer could only recover the seized goods by posting its own bond for double the amount of the goods within three days after they were replevied. [22]

Like the Florida statute, the Pennsylvania statute merely required the filing of an ex parte form and a bond for double the value of the goods. [23] Similarly, there was no notice or opportunity to be heard prior to the seizure, nor was there any requirement that the vendor ever commence a lawsuit to adjudicate its entitlement to repossess the goods. [24] If the consumer wished to regain possession, it either had to post its own bond for double the value of the goods or commence its own lawsuit. [25]

The vendors argued that the statutory safeguards afforded adequate due process protections to the consumer. The Court disagreed, remarking that those requirements "test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. ... Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides." [26] Instead, the Court held that due process requires an opportunity for notice and a hearing at a meaningful time, so that the deprivation can still be prevented. [27] Here, the prejudgment replevin provisions "work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." [28] The Court found further that the furnishing of a bond to cover the consumer's damages in the event of a wrongful replevin was not a substitute for the right to a prior hearing. [29]

Articulating the fundamental principle of procedural due process, the Court explained:

> [t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." [30]

Following its decision in *Fuentes*, the Court, in *Mitchell v. W. T. Grant Co.*, [31] upheld a Louisiana sequestration statute that allowed a retail installment vendor to cause the sheriff to take possession of the property. The Court found the Louisiana statute fundamentally different in several respects from its Florida and Pennsylvania counterparts. First, the

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writ was issued by a judge only after the seller-creditor filed a verified petition or affidavit stating more than mere conclusory allegations of ownership and clearly setting out the facts entitling the creditor to the relief requested and after filing a bond. [32] The Louisiana law also was distinguishable in that, although the writ was issued ex parte and without a prior hearing, the debtor was entitled to an immediate hearing after seizure, whereby if the creditor failed to prove the existence of the debt, lien, and delinquency, the court could dissolve the writ, order the property to be returned, and assess damages and attorneys' fees. [33] In addition, the debtor had the right to post its own bond to recover possession of the property during the pendency of the litigation. [34]

The Court noted that this was not a case where the debtor's property was being seized by creditors that held no present interest in the property sought to be seized, but rather both seller and buyer had current, real interests in the property. [35] Due process considerations must strike a balance between the interests of not only the purchaser of the property, but the seller as well. [36] The Court concluded that given the statutory protections afforded to the purchaser, the creditor required the right to the sequestration because absent the debtor posting a bond, the seller creditor would be wholly unprotected pending a prior hearing and there was a real risk that the debtor, with possession and power over the goods, would conceal, destroy, or alienate the merchandise to the detriment of the creditor. [37]

The following year, the Supreme Court again addressed the constitutionality of a pre-judgment attachment remedy; this time, a garnishment statute. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, [38] the Court invalidated a Georgia statute that permitted the garnishment of a person's property (specifically, the impounding of the defendant's bank account) while suit was pending, but before a judgment was entered. The Court found that the statute deprived the defendant of the use of its property during the pendency of the litigation. [39] It further ruled that despite the plaintiff having posted a bond at double the amount sworn to be due, the statute violated the defendant's due process rights by authorizing a court clerk to issue the writ of garnishment, without judicial participation, merely upon the filing of an affidavit by plaintiff or his attorney containing only conclusory allegations without any requirement of personal knowledge. [40] Further, there was no opportunity for an early hearing and the only method for dissolving the writ was for the defendant to file its own bond. [41] Indeed, the lawsuit commenced by the plaintiff appears to be the only mechanism for challenging the propriety of the garnishment. [42]

Contrasting the statute before it with the sequestration statute in *Mitchell*, the Court concluded that the Georgia garnishment statute had none of the saving characteristics of the Louisiana statute. [43] In so ruling, the Supreme Court noted that it was immaterial that the property at issue was a commercial bank account, instead of necessary household consumer goods. [44] The only relevant inquiry was whether the probability of irreparable injury from the garnishment was sufficiently great to require some procedures to avert such errors. [45]

The last case in the Supreme Court's series of decisions was *Mathews v. Eldridge*, [46] which dealt with the termination of social security disability benefits. The Court used the rulings in *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia Finishing* to synthesize a three-part approach to analyze constitutionality in procedural due process cases. The three-prong analysis must consider: (1) the degree of potential deprivation that may be created; [47] (2) the fairness and reliability of the procedures in avoiding an erroneous deprivation of property, and the probable value, if any, of additional procedural safeguards; [48] and (3) the governmental/public interest. [49]

Applying these factors to the case before it, the Court noted that while the potential impact of a wrongful termination of disability benefits could be significant, since an erroneous deprivation of benefits could last over one year, disability benefits were not based on financial need and other government assistance programs and private sources were available if the cessation of benefits placed the individual below the subsistence level. [50] As to the second prong, the Court

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found that the entitlement inquiry was not based on witness credibility, but rather on the medical reports of treating physicians and other documentary proofs, thereby generally resulting in a low risk of error in the truth-finding process. [51] Further safeguards also were afforded by allowing the recipient to respond to the agency's evidence by providing her own documentary materials supporting the disability. [52] Finally, the Court found that the public interest in conserving scarce fiscal and administrative resources, by avoiding payment of benefits to ineligible recipients pending a hearing, weighed in favor of the government. [53]

The foregoing decisions make it clear that the determination of whether the type and timing of a particular notice and hearing satisfy due process is highly fact sensitive. "The requirements of due process of law are not technical, nor is any particular form of procedure necessary. Due process of law guarantees no particular form of procedure; it protects substantial rights. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." [54] One court aptly summarized the Supreme Court's due process approach as follows:

> What we glean from *Sniadach*, *Fuentes*, *Mitchell* and *North Georgia Finishing* is that, lacking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior probable-cause-type hearing are, as held in *Fuentes*, unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in *Mitchell* and *North Georgia Finishing* are present and even then, although this is less clear, the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized. [55]

B. Challenging Private Mechanic's Lien Laws in the Wake of the Due Process Evolution [56]

The only mechanic's lien case to come before the U.S. Supreme Court during this period (or since) was *Spielman-Fond v. Hanson's Inc.* [57] *Spielman-Fond* was decided shortly after *Mitchell* and before *North Georgia Finishing* and, until the Supreme Court's next landmark due process decision in *Doehr v. Connecticut* [58] seventeen years later, it was viewed as the Court's definitive pronouncement on the treatment of private mechanic's liens. In that case, however, the Supreme Court did not directly identify the specific procedural requirements that were necessary for a mechanic's lien law to satisfy due process. [59] Rather, the Court summarily affirmed the decision of the three-judge district court, [60] which ruled that Arizona's mechanic's lien statute did not violate procedural due process, even though no prior notice or hearing was required before filing the lien, because a lien upon real property does not amount to the taking of a significant property interest. [61]

During that intervening period, many courts ruled on whether their state's mechanic's lien law, as applied to private construction projects, satisfied the due process requirements of the Fourteenth Amendment and/or under the state's own constitution. These challenges were met with markedly mixed results. The vast majority of states upheld their mechanic's lien laws by interpreting the Supreme Court's summary affirmance in *Spielman-Fond* as reflecting the Court's opinion that mechanic's lien laws are different than other pre-judgment attachment statutes and ruling that the incidental attachment of a lien to an owner's property did not constitute the type significant property deprivation necessary to implicate due process considerations. [62] Notwithstanding the decision in *Spielman-Fond*, several courts did address the substantive procedures of their lien laws; some concluding that their state's mechanic's lien laws provided adequate safeguards to comply with procedural due process requirements, [63] while others concluded that their statutes did not provide adequate due process protections and declared the lien laws unconstitutional. [64]

Both Florida and California determined that their mechanic's lien statutes were constitutional. In *Ruocco v. Brinker*, [65] the Florida district court ruled that the procedures set out in Florida's mechanic's lien law satisfied the requirements of procedural due process. First, Florida's Mechanics' Lien Law provided that the lien claim must be recorded with the county clerk and verified by one with personal knowledge, setting forth the name and address of the lienor, the person by whom it was employed, a description of services provided, a description of the real property, the name of the owner, and the time when the first and the last item of labor or service or materials were furnished. [66] After filing, the claim must be served on the owner. [67] The lien then was valid only for one year and could be discharged if the lienor failed to enforce the lien within that period. [68] Any time before the expiration of that one year, an interested person could institute a proceeding to compel the lienor to show cause why its lien should not be enforced by action or vacated and cancelled of record. [69] The owner also had the right to file a "notice of contest of lien," requiring the lienor to bring suit to enforce the lien within sixty days. [70]

In *Connolly Development, Inc. v. Superior Court*, [71] the California Supreme Court struck a balance between the competing interests of the property owner and the contractor. Finding that laborers and materialmen have an interest in the property whose value they enhance and that the recording of the lien inflicts only a minimal deprivation of property, the court held that the challenged California statutes provided sufficient safeguards to protect property owners against unjustified liens in order to comply with due process requirements. [72] California's Lien Law requires that lien claims and stop notices be verified, that the claimant must notify the owner before it asserts the lien, and that the claimant must commence suit within a ninety day period. The owner also can release the mechanics' lien or stop notice by filing a bond [73] and may seek a mandatory injunction ordering the claimant to release the lien or can commence its own immediate suit for declaratory relief as to the validity of the lien. [74]

While not dramatically dissimilar to the lien statutes of Florida and California, both Connecticut and Maryland rejected their mechanic's lien laws, finding that the procedures in their states failed to provide adequate due process protections. In Connecticut, a lien was perfected when the person performing the services filed a sworn certificate (containing certain required information about the property, services and amount due) with the town clerk within sixty days after ceasing the work. [75] The lien was then valid for two years, unless a foreclosure action was commenced, in which case it could remain in force for up to four years. [76] If the lien was no longer valid (*e.g.*, two years had elapsed) and was not discharged of record, any person having an interest in the property could give notice to the lienor to discharge the lien and, if not discharged within thirty days, could bring its own complaint to discharge the lien. [77] The lien could also be discharged by the owner posting a bond. [78]

The Connecticut Supreme Court, in *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.*, [79] ruled that Connecticut's mechanic's lien statute did not comport with constitutional requirements of procedural due process because: (1) the party claiming the lien was not required to post a bond or provide security to protect the owner of the property subjected to the lien against damages from an unsupportable lien; (2) the filing and perfection of the lien could be done by a claimant ex parte, without authorization, supervision, or control by a judicial officer; (3) the certificate supporting the lien was conclusory, devoid of any substantive underlying facts justifying the lien, and only was required to describe the property, the date work was commenced, the amount claimed, and contain a statement that the amount claimed was justly due. [80] Moreover, the court observed that the statute lacked any procedure for a timely hearing, either before or after the recording of the lien, which would give the property owner an opportunity to be heard or require the lienor to justify the lien. Instead, the statute allowed the lien to continue for two years without any further action on the part of the lienor, during which time the owner of the property was without recourse in the courts to contest the merits of the claim underlying the lien. [81] The owner's only recourse was to post a bond. [82]

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These constitutional deficiencies were rectified when the Connecticut legislature amended the lien law in 1975. Pursuant to the amendment, the time period for the commencement of a foreclosure action on a lien was reduced to one year, [83] after which time it was automatically extinguished by operation of law and no longer served as an encumbrance upon the property, [84] and by permitting the property owner to commence an action to discharge or reduce the amount of the lien, any time after the lien was filed. [85]

In *Barry Properties, Inc. v. Fisk Bros. Roofing Co.*, [86] the Maryland Court of Appeals similarly concluded that Maryland's mechanic's lien law could result in an owner being deprived of a significant property interest without either notice or a prior hearing, and was unconstitutional by failing to provide the protections required by *Mitchell* and *North Georgia Finishing*. [87] Pursuant to the Maryland statute, a lien generally was created and attached to the property as soon as work was performed or materials were supplied and lasted until 180 days thereafter. [88] To perfect the mechanics' lien, a claim containing certain specified information had to be filed with the clerk of the court within the 180 day period, after which the claimant had one year to commence a proceeding to enforce the lien. [89] During that one-year period, however, any person with an interest in the property had a right to bring an action to compel the claimant to prove the validity of the lien or have it declared void, or that party could release the property from the lien by posting a bond. [90]

In ruling that the statute was unconstitutional, the court concluded that there was no requirement that the creditor provide a sworn affidavit on personal knowledge setting forth the facts on which the lien was based; file a bond to protect the debtor; submit the lien to preliminary judicial scrutiny; or that the debtor be granted an opportunity for a prompt post-seizure hearing. [91] The court concluded that the statute only granted the owner a hearing in the ordinary course of the lawsuit [92] and ruled that a mechanic's lien claim could not stand as an encumbrance upon property until there first was a hearing and judicial determination as to the *prima facie* merits of the lien. [93] As a result, the statute failed to provide the essential requirements for due process. This due process deficiency was cured in 1976 by Maryland's enactment of an interlocutory lien/probable cause procedure, which requires the court to determine whether the lien should attach after the claimant makes the necessary preliminary showing to establish the lien. [94]

The significant difference between the results in these cases is that the Florida and California statutes provided the opportunity for an immediate post-encumbrance/deprivation hearing. However, none of the courts, except Maryland, deemed it necessary to require a hearing prior to the lien becoming an encumbrance on the property. Perhaps explaining the disparate decisions are the sentiments expressed in the Florida and California court's rulings that although a significant property interest was at issue, [95] the property deprivation to the private owner was not severe. [96] This rationale follows the same inference drawn by most courts from the Supreme Court's summary affirmance in *Spielman-Fond*. However, the basis for this rationale was rejected in 1991, when the U.S. Supreme Court issued its landmark decision in *Doehr v. Connecticut*. [97]

C. Doehr and Modern Due Process Analysis

While the issue in *Doehr* did not involve a mechanic's lien, the Court devoted significant attention to explaining its summary affirmance in *Spielman-Fond* and distinguishing mechanic's liens on real property from other pre-judgment attachments of real property. Regardless, the Court dispelled any fallacy that may have existed that mechanic's liens do not raise the same due process concerns as other attachment statutes. [98]

The issue before the Court in *Doehr* was whether Connecticut's pre-judgment attachment statute satisfied the requirements of procedural due process, where the statute permitted a plaintiff in a tort action to attach the defendant's home, in which the plaintiff had no pre-existing interest, without the plaintiff posting a bond, without any prior notice or hearing, and based solely upon a judge's review of a one-sided affidavit by the plaintiff that there was probable

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cause to sustain the claims underlying the complaint.[99] Preliminarily, the Court determined that since pre-judgment attachment statutes utilize state procedures and state officials to effect a remedy for the benefit of private parties, the test it previously laid out in *Mathews* needed to be modified to now account for the private interests affected by the pre-judgment measures, as well as the ancillary interest of the government in providing such measures or forgoing the burdens of greater protections.[100] Balancing the competing interests and protections, the Court concluded that the Connecticut statute violated the Due Process Clause of the Fourteenth Amendment.

The first factor in the Court's analysis is whether the attachment affects a significant property interest, such as to justify due process protections.[101] The Supreme Court decisively ruled that a homeowner has a significant interest in keeping his property free from the encumbrance of liens and attachments because, among other reasons, it clouds title, impairs alienation, and can place an existing mortgage in technical default.[102] In view of this ruling, the Court emphasized that its decision was not controlled by *Spielman-Fond* and that its summary affirmance was not an endorsement or concurrence of the district Court's ruling that the filing of a mechanic's lien did not amount to the taking of a significant property interest.[103] Instead, the Court explained that its disposition was based upon an alternative basis for affirming the result derived from the facts presented in that case.[104]

The second factor involved a two-step approach of assessing whether the procedures employed by the state would result in a significant risk of an erroneous deprivation and whether sufficient safeguards existed to mitigate the risk of, or consequences from, a wrongful attachment.[105]

Addressing the first step, the Supreme Court found that, even though the attachment was issued by a judge, the risk of an erroneous deprivation was "substantial" because he could not make a legitimate assessment of the likelihood of the merits based on the skeletal, "one-sided, self-serving and conclusory" affidavit submitted by the plaintiff.[106] Significant to the Court's finding was that the allegations supporting the affidavit were wholly subjective, unlike determining the existence of a debt or delinquent payments, which ordinarily concern "uncomplicated matters that lend themselves to documentary proof."[107]

In connection with the second part of this prong, the Court found that the safeguards provided by Connecticut — an expeditious post-attachment hearing, judicial review of adverse decisions, and double damages if the suit was commenced without probable cause — are inadequate to mitigate the risk of a wrongful attachment.[108] Though similar safeguards were available and deemed adequate in saving the statute at issue in *Mitchell*, the Court explained that, unlike the statute before it, the risk of error in *Mitchell* was minimal because the facts involved matters that lent themselves to documentary proof, and the plaintiff was required to post a bond.[109]

The third factor concerned the significance of the plaintiff's interest in obtaining the pre-judgment attachment, i.e., the ability of the plaintiff to recover or protect itself at the time of a later judgment. The Court concluded that the plaintiff's sole interest was to ensure available assets in the event it was successful in its lawsuit and that generally this interest was too minimal to justify the ex parte procedures employed, absent a pre-existing interest in the defendant's home or allegations that the defendant was about to transfer or encumber his home, to make it unavailable to satisfy a judgment.[110]

While the safeguards were not sufficient to save Connecticut's pre-judgment attachment statute, the Court implied that they might be sufficient for a mechanic's lien against real property. The Court recognized that where the creditor had a pre-existing interest in the property at issue, such a heightened interest might provide sufficient grounds for sustaining due process procedures that are otherwise suspect.[111] In fact, this heightened interest was the Court's alternative basis for its summary affirmance of *Spielman-Fond*.[112]

The final consideration was the state's substantive interest in protecting a creditor's rights and in not furnishing any further safeguards to the debtor. To this end, the Court found, as a general principle, that the state's interest could not be any greater than the litigant's rights themselves. [113] Accordingly, since it already determined that the plaintiff's interests were *de minimis*, and because the requirement of a pre-deprivation hearing would not result in any additional financial or administrative burdens, the Court found that any perceivable interest that the state might have would not affect its conclusion that Connecticut's procedures failed to provide adequate due process. [114]

In view of the foregoing analysis, the Supreme Court ruled that Connecticut's pre-judgment attachment statute violated the requirements of due process by authorizing the attachment without a prior notice or a prior hearing. [115]

Following the Supreme Court's decision in *Doehr*, a fairly clear picture emerged of the relevant inquiries and factors that would be considered in determining whether pre-judgment attachment statutes, such as mechanic's liens, constitute a wrongful deprivation of property or satisfy due process:

1. Whether the Debtor had been deprived of a significant interest in the property being attached;

2.
    a) The risk/likelihood that the procedures employed would result in a wrongful attachment;

        i) Whether the attachment was authorized by a judge or a clerk;

        ii) Whether the attachment was obtained after prior notice or by an ex parte application;

        iii) Whether support for the attachment was based upon a preliminary hearing or upon one-sided, self-serving affidavits;

        iv) Whether the facts contained in the affidavits had to be on personal knowledge and whether the affidavits had to be sworn;

        v) The level of factual detail that had been in the supporting affidavits or presented at the hearing;

        vi) Whether the facts were purely subjective/conclusory and were dependent upon witness credibility or whether the facts were uncomplicated and readily lent themselves to documentary proofs;

    b) The safeguards employed to mitigate against the risk or consequences of a wrongful attachment;

        i) The availability of a prompt post-deprivation hearing to vacate the attachment and the promptness within which that hearing could achieved;

        ii) Whether the creditor was required to post a bond to obtain the attachment;

        iii) Whether the debtor could post a bond to vacate the attachment;

        iv) Whether the creditor was liable for double damages or costs and attorney's fees for a wrongful attachment;

3. The significance of the creditor's interest in the attached goods;

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a) General interest to secure payment of a future judgment;

b) Pre-existing or other specific/heightened interest in the property sought to be attached;

c) Existence of extraordinary circumstances or exigent circumstances making prior notice or a pre-attachment hearing impossible or impractical;

d) Existence of other procedures or mechanisms that protect the creditor's interests; and

4. The significance of the state's interest in providing for the attachment right or in not providing further safeguards.

D. Post-Doehr Due Process Challenges to Private Mechanic's Lien Laws

In view of the *Doehr* Court's decisive ruling that liens impressed upon real property deprive the owner of a significant property interest, it would appear that the pre-*Doehr* mechanic's lien cases that relied on the common inference drawn from *Spielman-Fond* (that mechanics' liens did not affect a significant property interest) are of dubious precedential value. [116] As such, *Doehr* opened the door (so to speak) to the due process challenge of private mechanic's lien laws.

Interestingly, though, in the years that followed, there were few rulings addressing constitutional due process challenges to mechanic's lien laws. [117] However, in 2003, twelve years after *Doehr*, a Rhode Island Superior Court in *Sells/Greene Bldg. Co., LLC v. Rossi* [118] ruled that Rhode Island's mechanic's lien law statute violated the requirements of due process.

Rhode Island's mechanic's lien law, as it existed at the time of the court's decision in *Sells/Greene*, provided that a person could obtain a mechanic's lien against a landowner's property by filing a sworn notice of intention that essentially contained only the name of the property owner, a general description of the land and nature of the work performed, the name and address of the person for whom the work was performed, and a statement that the person had not been paid for the services provided. [119] Once the lien was perfected, the lienor had to commence an action to enforce its lien claim within 120 days of filing the notice of intention. [120] The court observed that the mechanic's lien law failed to provide the property owner with any opportunity for a hearing either before or immediately after the filing of the lien and that it instead had to await the ultimate determination on the merits. [121] The only relief available to the property owner was the posting of a bond or other adequate security with the court. [122]

Upon analyzing the U.S. Supreme Court's decisions regarding pre-judgment attachment statutes, the court found, as the Court did in *Doehr*, that the property owners were deprived of a significant property interest and that the risks of an erroneous deprivation were substantial. [123] Specifically, the court emphasized that the statutory framework required the property owner to suffer the consequences of the deprivation based upon bald assertions without "any opportunity whatsoever to challenge the truth, accuracy, or validity of the amounts claimed under the lien" until the property owner "either makes payment in full, purchases a bond, deposits sufficient cash to cover the claim ... or hires an attorney to contest the claim at some later unspecified time." [124] The court held that any plausible safeguards contained in the statute [125] "are too little and too late to satisfy the requirements of due process" and ruled that Rhode Island's mechanic's lien law was unconstitutional. [126]

Three months later, in response to the decision in *Sells/Greene*, the Rhode Island legislature amended the state's mechanic's lien law by enhancing the rights of property owners to promptly have the lien discharged at a time prior to an ultimate determination on the merits of the dispute. [127] This new enactment provided that if an owner or contractor alleged that (1) financing or construction services were denied or halted because of the filing of the lien; (2) that the lien

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was facially invalid; (3) the lien was improperly filed; or (4) the lien was otherwise invalid due to the failure to comply with the provisions of the lien law, it could immediately make an application to the court for an order to have the lienor show cause why it was not improbable that a judgment would be rendered in favor of the lienor. [128]

The constitutional question decided by the court in *Sells/Greene* made its way to the Rhode Island Supreme Court under the caption *Gem Plumbing & Heating Co., Inc. v. Rossi.* [129] However, because of the intervening change in the Rhode Island mechanic's lien law while the case was on appeal, the Rhode Island Supreme Court held that it was required to determine the constitutionality of the mechanic's lien law as amended and not as it existed at the time of the lower court decision. [130] Accordingly, it began to analyze the new statute under the U.S. Supreme Court's *Mathews-Doehr* balancing test. [131]

In the first step of the analysis, the court found no meaningful difference between the impact of the attachment statute at issue in *Doehr* and the mechanic's lien statute before it and concluded that the lien amounted to the deprivation of a significant property interest warranting due process protection. [132]

Addressing the second prong — the risk of erroneous deprivation — the court observed that the lien law, as amended, provided the following mitigating procedures to limit the risk of an erroneous deprivation: (1) a prompt post-deprivation hearing; (2) a detailed sworn affidavit; (3) the property owner's ability to pay cash or post a bond to clear title; and (4) the payment of costs and fees to the prevailing party. The court pointed out that the most significant of these protections was the availability of a prompt post-deprivation hearing on the grounds specified in the statute. The court found that this procedure provided considerable due process protection, which weighed in favor of constitutionality. [133] The court concluded that although the sworn affidavit ordinarily involved uncomplicated facts and generally had to be detailed, it nonetheless was mostly conclusory, and therefore, only slightly weighed in favor of constitutionality. The court similarly found that the prevailing party provisions of the Rhode Island statute would dissuade claimants from filing improper liens and that the ability of the owner to discharge the lien by posting a bond, also weighed in favor of finding the statute constitutional. [134]

Lastly, in analyzing the final steps of the *Mathews-Doehr* test, the court concluded that the mechanic's lienor had a heightened, pre-existing interest in the real property that it improved and that the state, likewise, had a weighty interest in providing a protective mechanism to contractors and suppliers, which furthered the state's balance of competing property interests and its policy choice intended to encourage construction. [135] These interests were found to "weigh strongly in favor of constitutionality." [136]

Based on all these factors, the Rhode Island Supreme Court concluded that the state's mechanic's lien law, as amended, provided adequate due process protections. According to the court, the combination of the lienor's pre-existing interest in the property and the availability of a prompt post-deprivation hearing ultimately tipped the scale in favor of constitutionality. [137]

IV. Constitutional Considerations of Public Mechanic's Lien Statutes Under the Modern Due Process Analysis

It is clear from the Supreme Court's decision in *Doehr* that fundamental principles of due process require a prior notice or a hearing before a person's property interests are attached. The only exception is where there are exigent circumstances that make such preliminary procedures infeasible or if the claimant has a pre-existing/heightened interest in the subject property, in which case, the notice and hearing can wait until after attachment, provided adequate safeguards are available in the event of a wrongful attachment. For mechanic's liens on private construction projects, this distinction is significant, since contractors and suppliers typically are granted a specific interest in the property they improved. But, therein lies the fundamental difference between liens on private improvement projects and those on public projects.

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On public projects, the lien does not attach to the public property that is the subject of the improvement. Instead, the lien attaches to the money that is payable from the public entity to the general contractor. Thus, the fundamental question is whether contractors or suppliers have a heightened interest in the money payable to the general contractor, so as to obviate the due process requirement of a prior notice or hearing. Of the roughly twelve states that provide mechanic's liens on public improvement projects, none of them require notice or a hearing prior to the imposition of the lien that results in the public entity's withholding of payment to the general contractor. In this author's opinion, in the absence of a construction trust fund statute or other similar statutory mechanism, a subcontractor or supplier on a public improvement project has no greater interest in the moneys received by the general contractor than any of its other creditors.

A. Attachment of a Significant Property Interest

The *Mathews-Doehr* test first requires a determination of the attachment of a significant property interest. Unlike private improvement projects where the interests of the property owner are encumbered by the lien, in public improvement projects the lien is on the general contractor's right to receive payment from the public owner for work performed.

The attachment in the public context typically causes more severe consequences than in the private context. On a private improvement project the lien is on the property. While the owner has a significant interest in a clear title to the property, there may be no immediate or perceivable impact from the imposition of the lien. [138] However, on a public project, where the lien is on the money due the contractor, there is an immediate and total deprivation of the money. This consequence should weigh strongly in favor of the need for substantial procedural safeguards to render a public mechanic's lien law constitutional. [139]

This type of attachment is directly analogous to the pre-judgment wage garnishment statute invalidated by the Supreme Court in *Sniadach.* [140] There, the Court held that where "the taking of one's property is so obvious, it needs no extended argument to conclude that, absent notice and a prior hearing, this prejudgment garnishment procedure violates the fundamental principles of due process." [141] Thus, the general contractor's interest in payments warrants due process protection.

B. Creditor's Interest in Obtaining the Attachment

The second prong of the *Mathews-Doehr* test deals with whether the procedures afforded by the statute are likely to result in a wrongful attachment and whether there are sufficient safeguards in place to mitigate against that risk. However, it is more appropriate to next analyze the third prong of the test — the creditor's interest in obtaining the attachment — for if the plaintiff/creditor has a pre-existing or heightened interest in the property, then the requirement for a prior notice or hearing may be dispensed with in favor of the opportunity for a prompt post-attachment hearing. [142] Only then does an analysis of the various risk and mitigating factors become relevant. [143]

So, what interest does a subcontractor or a supplier have in the money being withheld by a public entity? On a private mechanic's lien, the subcontractor or supplier has an interest in the property it has improved. As Chief Justice Rehnquist observed in his concurring opinion in *Doehr*:

> Materialman's and mechanic's lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property owner who has defaulted on

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> his promise to pay for the labor and the materials. To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes. [144]

While perhaps an apt observation for a private mechanic's lien, it is not an entirely accurate analysis for public mechanics' liens.

First, though the subcontractor's work may have resulted in part in the general contractor's right to receive payment, this ordinarily would not yield the subcontractor a greater interest or legal standing to the money owed by the owner to the general contractor over any of its other creditors. In contrast, one of the underlying purposes of mechanic's lien laws on private improvements is to ensure payment to those enhancing the value of a person's property and to prevent the unjust enrichment of the property owner. [145] The need for such a remedy is particularly significant to subcontractors and suppliers since they do not have a contract with the property owner and since there generally is no right to assert claims against the owners for *quantum meruit* or unjust enrichment. [146]

This consideration is inapposite in the public mechanic's lien context, since the person whose real property has been enhanced is not the one that suffers the effects of the lien and there are contractual and other remedies available to the subcontractor to get its money from the general contractor. Ordinarily, a subcontractor on a public construction project has no greater right or interest to the money in the hands of the public entity than a parts manufacturer has to money in the hands of a consumer that purchases a product that incorporating the manufacturer's parts. Certainly, in that context, the manufacturer does not have a "heightened" interest in the money being paid by the consumer, and thus, no heightened interest would generally attach to the subcontractor either. However, a heightened or special interest in the moneys held by the public entity would exist, if the state had enacted a construction trust fund statute.

Referred to by many different names, construction trust fund statutes usually are part of a state's mechanic's lien laws and mandates that payments received by a party in connection with a construction project be held by that party "in trust" for the payment of a defined class of individuals. [147] Typically, the statutes are directed at general contractors (but may also include subcontractors), which are required to hold the payments they receive from the owner for the benefit of their subcontractors and suppliers. Thus, the money received by the general contractor is not its own property, but rather the property of its subcontractor's and suppliers. [148] As such, a subcontractor or supplier in a state that has a trust fund statute has a real and substantial property interest in the money to be paid by the public owner. Absent a construction trust fund statute, however, the subcontractor's or supplier's interest in attaching or impounding the money in the hands of the public entity is simply to ensure the availability of assets to satisfy any judgment it obtains against the general contractor in a subsequently filed suit, just as in *Doehr*.

Second, Chief Justice Rehnquist's comment that the pre-judgment mechanic's lien "is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property owner who has defaulted on his promise to pay for the labor and the materials" [149] is not entirely correct in the context of public improvement projects. Every state has a little Miller Act statute or other comparable statute requiring general contractors to furnish a labor and material payment bond on most public improvements, which guaranties payment to subcontractors and suppliers for the labor and materials furnished to the project. Being that subcontractors and suppliers on most public improvement projects are fully secured through the various state bond acts, even if a state does have a trust fund statute, it is highly questionable whether the subcontractor's heightened interest in the money should justify dispensing with a prior hearing.

The Court in *Doehr* was very sensitive to pre-judgment attachment procedures being used as "a tactical devise to pressure an opponent to capitulate." [150] Given the additional and complete protections afforded by the bond acts in every state, a subcontractor or supplier may be very tempted to use its statutory lien right solely to exert additional pressure on the

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general contractor. Moreover, in this regard, it would be difficult for subcontractors and suppliers to argue that they would be prejudiced, or their interests otherwise impaired, by first being required to establish their lien rights by way of a prior hearing. It is suggested that the existence of these alternative bond remedies would offset the otherwise heightened interest that the subcontractor would have by way of a construction trust fund statute. [151]

C. Risk of Wrongful Attachment

The second prong of the *Doehr* test [152] is the risk of a wrongful attachment. There are many possible safeguards that may be implemented to mitigate the risk of a wrongful attachment or to minimize the effects to a debtor whose property was wrongfully attached. It must be re-emphasized, though, that the availability of a prompt post-attachment hearing is not a mitigating measure, but rather a minimum requirement of due process. The promptness within which that hearing is held, however, is a mitigating factor to be weighed as part of the analysis. [153] As such, due process requires either a prior notice or hearing or the opportunity for a prompt post-attachment hearing. A hearing by way of a trial in the ordinary course of a dispute has been held insufficient. [154]

Most private mechanic's lien statutes that have been upheld as constitutional do not necessarily provide the right to an immediate post-deprivation, probable cause type hearing though some states allow an immediate application to be brought to challenge the facial validity of the lien. [155] Instead, most statutes allow the contractor to either commence its own proceeding to terminate or determine the lien [156] or to serve the lienor with a notice to compel the foreclosure of the lien within a prescribed time (usually thirty days), after which the lien is discharged if the foreclosure action is not timely filed. [157] In either case, the substantive merits of the lien are not capable of being challenged until the actual trial of the dispute.

Despite the fact that the Supreme Court rejected such a measure as inadequate in connection with the consumer retail credit dispute at issue in *Fuentes*, arguably, given the nature and purpose of mechanic's liens and the pre-existing or heightened interest in the improved property that most mechanic's lien statutes provide, it could be an acceptable post-attachment hearing, as long as adequate additional safeguards are available. Even though the attachment of goods in *Fuentes* is analogous to the attachment of real property, subcontractors and suppliers arguably have greater interests to protect than retailers or consumer credit companies, especially since at the end of a trial, they can generally recover the goods, whereas, as recognized by Chief Justice Rehnquist, "neither the labor nor the material can be reclaimed once it has become a part of the realty." [158] Thus, it would appear that the nature of the hearing afforded should be viewed as just another factor to be weighed in the balancing test, though it may require significant additional safeguards to overcome the preference for an early hearing. [159]

In addition, based on the Supreme Court's rulings, once a post-deprivation hearing is made available, there remains the issue of whether the dispute involves uncomplicated facts that are readily established by documentary proofs. The Court, in overturning the statute in *Doehr*, placed considerable weight on the fact that the supporting affidavit for the alleged assault did not involve "ordinarily uncomplicated matters that lend themselves to documentary proof," like determining the existence of a debt or delinquent payments, and, as such, resulted in a substantial risk of a wrongful attachment. [160] It further determined that even though the Connecticut statute contained many of the same mitigating considerations that were present in the Louisiana statute upheld by the Court in *Mitchell*, the mitigating considerations were insufficient to offset the risk of error from a lack of uncomplicated proofs. [161]

As anyone who regularly practices construction law can attest, construction disputes are rarely "uncomplicated." Though the apparent existence of a debt may readily be established from payment requisitions, unlike the consumer credit transaction in *Mitchell*, the basis for the non-payment often is complicated by issues of defective, incomplete, and/or delayed performance and is not subject to simple documentation. The Rhode Island Supreme Court in *Gem*,

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addressed the constitutional sufficiency of the contents of the sworn affidavit for the notice of lien (which is similar to the information required by other mechanic's lien statutes; public and private) and concluded that even though it is "mostly conclusory," this factor weighs only slightly in favor of constitutionality. [162] Thus, although it may be questionable whether public mechanic's liens involve uncomplicated matters, for present purposes this risk factor still should be accorded some minor weight in favor of upholding a public mechanic's lien statute.

D. The State's Interest in Providing Public Mechanic's Liens and Not Providing Additional Safeguards

Generally, public entities have an indisputable interest in making certain that persons who furnish labor and materials on a public improvement project are fully compensated for those services, especially since they cannot assert lien rights against public property. [163] In most instances, subcontractors and suppliers are protected against non-payment by virtue of the mandatory payment bonds required on public improvement projects. [164] If the subcontractors and suppliers are fully protected by a payment bond, it stands to reason that the state's interest in providing duplicative security to the subcontractors and suppliers by way of a public mechanic's lien would be negligible at best. Often the public mechanic's lien is used as pressure to compel the general contractor either to pay the money claimed, which may or may not be due, or to post another bond to secure the release of the impounded moneys. [165] The result is that there are two bonds securing the same claim; the payment bond and the lien discharge bond. It is difficult to find a reason justifying a requirement for two bonds.

However, there may be times when a subcontractor or supplier on a public project will not be protected by a payment bond, such as where the bond is not required because the value of the project is below the statute's monetary threshold, [166] the public entity is not one that is required by statute to secure a bond for its public improvement projects, [167] or the public entity fails to require the general contractor to post a bond. [168] In this event, since there is no other mechanism providing security to subcontractors and suppliers, the state clearly has a significant interest in making the public mechanic's lien mechanism available.

E. Summary of Due Process Considerations for Public Mechanic's Lien Laws

In sum, due process requires either notice or a hearing in advance of the attachment or a prompt post-attachment hearing. However, if a state has enacted a construction trust fund statute, giving the subcontractor/supplier a heightened interest in the moneys payable to the general contractor, a post-deprivation hearing that occurs only as part of a trial of the dispute at the end of a litigation may be sufficient to satisfy due process, as long as there are adequate additional risk-mitigating safeguards available.

If there is no trust fund statute nor another statute granting the subcontractors and suppliers a heightened interest in the moneys earned by the general contractor, a public mechanic's lien law likely will not survive a due process challenge unless it provides for notice or a hearing prior to the impounding of the money. Even if the facts supporting the lien affidavit are deemed "uncomplicated," a prompt post-deprivation hearing still would be insufficient since this factor only weighs slightly in favor of constitutionality and the interests of the subcontractor/supplier and the state in affording this form of pre-judgment relief is *de minimis* in view of the complete relief afforded by the mandatory payment bond. Nonetheless, a prompt post-deprivation hearing could be adequate if the public improvement project is not covered by a payment bond or there are significant additional safeguards and mitigating measures established to diminish the risk of a wrongful attachment and to protect the general contractor against the consequences of a wrongful attachment.

V. Analysis of Specific State's Public Mechanic's Lien Laws

As evident from the Supreme Court's due process cases, the specific nuances of each statutory scheme must be closely examined to determine whether the process satisfies constitutional scrutiny. However, it is difficult to predict how

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states will view the constitutionality of their public mechanic's lien laws, particularly given the general presumption of constitutionality that statutes enjoy. [169] It is not the intent of this article to opine as to the constitutionality of each state's public mechanic's lien law, but merely to provide some examples to demonstrate which factors may lead to a statute being found constitutionally infirm and which combination of factors may result in a statute being found to satisfy due process.

1. Colorado

Pursuant to Colorado's public mechanic's lien law, [170] a subcontractor or supplier claiming to be unpaid by the general contractor or by a subcontractor to the general contractor needs only to file with the contracting body a verified statement of the amount claimed to be due and unpaid at any time before the final settlement of the project. [171] Once the claim is filed, the public entity is required to "withhold from all payments to said contractor sufficient funds to insure the payment of said claims until the same have been paid or such claims as filed have been withdrawn." [172] These funds are retained by the public entity for no more than ninety days after the date for final settlement of the project, unless an enforcement action is commenced by the claimant within that time, in which case the moneys are held to the conclusion of the suit. [173] The only mechanism available to the general contractor to release the withheld payments is for it to make an ex parte application to the courts for the court's approval of a substitute bond in the amount of 1-1/2 times the claim. [174] The only other safeguard afforded to the general contractor is an award of costs and attorney's fees for the willful exaggeration of the claim. [175]

As enacted, the Colorado statute allows a person to have the general contractor's money impounded by the public entity merely by filing a statement that it is owed money. There are no available means afforded to the general contractor to expeditiously have the money released except by posting a bond. [176] Depending upon how long the project is expected to last and how early in the job the claim is filed, it is conceivable that the general contractor's money could be impounded for several years.

Colorado has a trust fund statute on public improvement projects that provides subcontractors and suppliers with a pre-existing, and thus significant interest in the moneys withheld by the public entity. [177] In addition, Colorado also requires payment bonds on all public improvements in the state in excess of $50,000, [178] which affords subcontractors and suppliers full security. For this reason, the state's interest in providing this pre-judgment attachment remedy is minimal.

Given the minimal interests of the public entity, the subcontractors/suppliers interests do not outweigh the contractor's substantial interest in being paid the money that has been earned and is due and payable. Further, in view of the nominal safeguards afforded to avoid the risk of an improper deprivation of funds and to mitigate the consequences of such deprivation, the Colorado statute seems to suffer from the same infirmities as the pre-judgment attachment and garnishment statutes invalidated by the U.S. Supreme Court in *Fuentes* [179] and *North Georgia Finishing*. [180]

The one significant and controlling difference between this Colorado statute and private mechanic's lien statutes of other states that have been held to provide due process is that these latter statutes contain provisions allowing the owner to either compel the lienor to commence the enforcement action or allows it to bring its own action at any time to determine or terminate the lien. [181] No such opportunity is available in the Colorado statute.

Moreover, these infirmities would not be alleviated even if the project was not subject to the payment bond act. The ability to discharge the lien by posting a bond and the threat of liability for costs and attorney's fees do not cure the lack of a post-deprivation hearing in advance of a trial commenced at some future date, solely at the subcontractor's

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whim. [182] Accordingly, Colorado's public mechanic's lien/impound law likely would not withstand a constitutional due process challenge.

2. New Jersey

Like Colorado, New Jersey's Municipal Mechanic's Lien Law [183] also may not survive a constitutional due process challenge. Though New Jersey has a construction trust fund statute applicable to public improvement projects, [184] providing a heightened interest to subcontractors and suppliers in privity with the general contractor, [185] it also has a payment bond act, [186] which diminishes any such heightened interest.

Pursuant the Municipal Mechanic's Lien Law, a subcontractor/supplier can file a lien with the municipality at any time up to sixty days after formal acceptance of the project by the municipality. [187] The lien claimant must submit a detailed factual claim [188] that is verified under oath by the claimant or its agent. [189] Once the lien is filed, it attaches to funds due or to become due to contractor. [190] The liened funds then are withheld by the municipality and may be released if the contractor posts a bond in double the amount of the lien claim. [191] The lien claim expires at a fixed time after the completion of the project [192] and may be discharged if no enforcement action is commenced within that timeframe. [193] Moreover, the general contractor has the statutory right to immediately commence a lawsuit to determine or terminate the lien. [194]

This statutory framework is very similar to that of Colorado; the only difference being that New Jersey allows the contractor to commence an immediate action, and Colorado allows for damages in the event of a willful exaggeration. Despite the ability of the contractor to compel an earlier enforcement action on the lien claim, which appears to have been the saving grace of many of the private mechanic's lien laws discussed *supra*, it likely is insufficient to save New Jersey's statute from violating the contractor's due process rights. The primary distinction between the private mechanic's lien laws that have been upheld and this one is that contractors on private projects have a greater interest in the property than the already protected subcontractors in the public mechanic's lien context. The greater the protectable interest in the balancing analysis, the more delayed a hearing can be.

New Jersey's public lien law is very similar to the private lien law invalidated in *Barry Properties*, in that they both required a detailed (though conclusory) lien affidavit, the right to discharge the lien by posting a bond, and an opportunity for the lienee to commence its own action to contest the lien. However, in *Barry Properties*, the lien law was found to be unconstitutional even though the contractor had a heightened interest. As a result, the New Jersey's Municipal Mechanic's Lien Law also likely would be found insufficient. The only circumstance that might alter this result would be if the public project was not covered by the New Jersey bond act, thereby giving the subcontractors a more heightened interest.

3. South Dakota

South Dakota's public mechanic's lien law [195] is virtually identical to that of New Jersey. In addition, like New Jersey, South Dakota has a public bond act, [196] which lessens any interest the lienor and state might have in the availability of this mechanic's lien procedure. But, unlike New Jersey, South Dakota does not have a construction trust fund statute applicable to public projects, [197] thereby relegating the subcontractor or supplier to the status of an ordinary creditor. Hence, in order to survive a due process challenge, South Dakota must either require a prior notice or hearing or provide a prompt post-deprivation hearing coupled with substantial measures to mitigate the risk of a wrongful deprivation.

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In South Dakota, the public mechanic's lien attaches upon the subcontractor/supplier filing of an affidavit of account of the amount due or to become due to it after allowance of any credits. [198] The lien claim expires at a fixed time after the completion of the project [199] and may be discharged if no enforcement action is commenced within that time frame. [200] Any time after the lien is filed, the contractor may commence an action to determine the validity or extent of the lien. [201] However, the lien may only be discharged by (1) filing a satisfaction of the lien; (2) the lienor's failure to timely commence an enforcement action; and (3) satisfaction of any judgment that may be rendered in an action to foreclose the lien. [202] Thus, there is no statutory right to post a bond to discharge the lien in South Dakota.

The lack of an ability to discharge the lien by posting a bond, presents a major defect in the due process balancing analysis. While the contractor has the ability to promptly start an action to vacate the lien, there is no ability to quickly discharge the lien except to wait for the conclusion of the trial, which, depending on the complexity of the case, could take several years. Further, there are no other risk mitigation factors available to the contractor either before or after its property is attached, except to await the conclusion of a trial. Certainly, it cannot be argued that the state has an interest in not affording more protections to the general contractor. Being that the lienor does not have a heightened interest, and South Dakota's public mechanic's lien law affords less protection than New Jersey's lien law, it too would likely fail to satisfy the requirements of procedural due process.

4. New York

By contrast to Colorado, New Jersey, and South Dakota, New York's public mechanic's lien law [203] reflects due process procedures that likely would withstand constitutional scrutiny. New York has a comprehensive construction trust fund statute, [204] which, for due process purposes, is tempered against the labor and materials payment bond requirement for public improvement projects. [205] Thus, the general contractor's interest in the withheld payments is greater than the subcontractors' interest and the state's interest in providing this form of security. As such, significant safeguards and risk mitigation measures are required to overcome the fact that there is no right to a prior hearing and that the initial balance (based on the parties respective interests) weighs against constitutionality. However, New York's law steps up to the challenge.

Under New York's law, at any time up to thirty days after the completion and acceptance of the project, a notice of lien can be filed containing relatively detailed information in support of the lien. [206] The notice must be verified, but the verification may be based solely on information and belief. [207] The lien then is valid for one year, after which the lienor must either commence a suit to enforce the lien or file an extension of the lien for an additional year. [208] Thereafter, the lien can be extended for two additional one year periods by court order. [209] If the lien is not timely extended during each period or an enforcement action is not commenced during these extension periods, the lien will expire. [210]

Next, the statute provides various mechanisms by which the lien may be discharged. One such mechanism is for the contractor to serve the subcontractor with a notice demanding that it commence an enforcement action within the time specified in the notice (at least thirty days from service) or else show cause before the court why the lien should not be discharged. [211] In addition, the lien may be discharged by: (1) the lapse of time without extending or commencing an action on the lien; (2) the contractor posting a bond; or (3) the contractor making an application to the court for an order summarily discharging the lien: (a) where the lien is invalid on its face by reason of the character of the labor or materials furnished and for which a lien is claimed or (b) where the notice of lien is invalid by reason of failure to comply with the provisions of section twelve (filing and contents of the lien). [212]

As well as providing the contractor with an opportunity for a prompt post-deprivation hearing, the lien law also mitigates the risk of a wrongful attachment by providing significant penalties for a willfully overstated lien. Not only is the entire

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lien invalidated and the lienor prohibited from filing any subsequent lien for any part of the money claimed in the invalidated lien,[213] but the lienor is liable to the contractor for the costs of bonding off the lien, reasonable attorney's fees, and damages in the amount found to have been willfully overstated.[214] Because of these possible extreme consequences, the risk of an overstated lien is greatly reduced.

The protections afforded by New York in connection with liens on public improvements are at least as substantial as the private lien laws in other states that have been found to satisfy constitutional requirements of procedural due process. Accordingly, it is more than likely that New York's public mechanic's lien law would survive a constitutional challenge.

VI. Conclusion

Despite the questionable adequacy of the due process protections afforded by many state's public mechanic's lien laws, these laws have not experienced the degree of constitutional challenges faced by private lien laws. Since litigating constitutional claims is not a simple, cheap, or low-risk venture, contractors likely view the approach of bonding off the lien (to the extent that option is available) as yielding the better cost-benefit than challenging the constitutionality of the statute. However, as the price of public infrastructure projects continue to escalate to upwards of $1 billion and more, the potential for multi-million dollar lien claims also increases, thereby increasing the cost of the bond. Also, as the surety market continues to shrink and consolidate, further driving up the cost of bonds, contractors may begin to re-think whether to challenge the constitutionality of some of these suspect laws. Likewise, states ought to examine their public mechanic's lien laws and re-evaluate whether they need to be amended to bring them in line with modern concepts of procedural due process.

Footnotes

1 Michael S. Zicherman is a member of Peckar & Abramson, PC in River Edge, New Jersey.

2 *See* Gem Plumbing & Heating Co., Inc. v. Rossi, *867 A.2d 796, 803 (R.I. 2005)*; In re Concrete Structures, Inc., 261 B.R. 627, 633 (E.D. Va. 2001).

3 While most states provide for mechanic's lien rights by statute, some states guarantee mechanic's lien rights in their constitution and the manner in which those rights are implemented is set out by statute. *See, e.g.,* Cal. Const., Art. XIV, § 3.

4 Southern Management Corp. v. Kevin Willes Const. Co., Inc., 382 Md. 524, 543, 856 A.2d 626, 638 (2004).

5 **California**—Cal. Civ. Code §§ 3181, et seq.; **Colorado**—Colo. Rev. Stat. §§ 38-26-107, et seq.; **Illinois**—770 Ill. Comp. Stat. 60/23; **Indiana**—Ind. Code §§ 4-13.6-7-2, et seq. (State pub works), §§ 5-16-5-1, et seq. (state/commission public works), §§ 8-23-9-26, et seq. (Indiana Dept. of Transportation), §§ 36-1-12-12, et seq. (Local government); **Kentucky**—Ky Rev. Stat. Ann. §§ 376.210, et seq.; **Maine**—Me. Rev. Stat. Ann tit. 10, § 3251; **New Hampshire**—N.H. Rev. Stat. Ann. § 447:15; **New Jersey**—N.J. Stat. Ann. §§ 2A:44-125, et seq.; **New York**—N.Y. Lien Law §§ 1, et seq.; **South Dakota**—S.D. Codified Laws §§ 5-22-1, et seq.; **Washington**—Wash. Rev. Code § 60.28.011; **Wisconsin**—Wis. Stat. §§ 779.15, et seq.

6 3 Bruner & O'Connor, Construction Law § 8:125.

7 *See* 3 Bruner & O'Connor, Construction Law § 8:125.

8 3 Bruner & O'Connor, Construction Law § 8:125. Some states, however, do allow mechanic's liens to attach to the real property interests of certain quasi-public entities. By way of example, Maine's lien law permits the contractor's lien to attach to property owned by a city, town, county, school district or other municipal corporation. Me. Rev. Stat. Ann tit. 10, § 3251. Nonetheless, because states have the ability to waive their sovereign immunity to allow the attachment of their property, the constitutionality of such public mechanic's liens is presumed, and thus, outside the scope of this article.

9 The Miller Act is a federal statute, originally enacted in 1935. The Miller Act currently requires all persons who are awarded a contract, exceeding $100,000, by the United States, or any agency or department thereof, for the construction, alteration, or repair of any public building or work to provide, among other things, a payment bond for the protection of all persons supplying labor and material in the prosecution of the public building or work. 40 U.S.C.A. § 3131. Because there are no mechanic's lien rights against federal property, the Miller Act was enacted to provide payment security to those furnishing labor and materials to federal projects. Since the creation of the Miller Act, every state in the United States (even those states

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that have public mechanic's lien laws) has enacted a similar statute, most modeled directly on the Miller Act, to similarly guaranty payment to those that furnish labor and materials to public improvement projects.

10 *See* U.S. Const., amends. V, XIV, ¶2; Rini v. Zwirn, 886 F. Supp. 270, 289, R.I.C.O. Bus. Disp. Guide (CCH) P 8868 (E.D. N.Y. 1995)("The plaintiffs' right to due process of law with respect to action by a state or any of its subdivisions is derived from the Fourteenth Amendment. The Fifth Amendment in and of itself pertains only to actions of the federal government.")

11 *See, e.g.*, Roundhouse Const. Corp. v. Telesco Masons Supplies Co., Inc., 170 Conn. 155, 159, 365 A.2d 393, 395 (1976).

12 U.S. Const., amend. XIV, ¶2.

13 Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, 19 Wage & Hour Cas. (BNA) 5 (1969).

14 *Sniadach*, 395 U.S. at 338, 89 S.Ct. at 1821.

15 *Sniadach*, 395 U.S. at 338, 89 S.Ct. at 1821.

16 *Sniadach*, 395 U.S. at 339, 89 S.Ct. at 1821.

17 *Sniadach*, 395 U.S. at 341–342, 89 S.Ct. at 1822–1823 (internal citation omitted).

18 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

19 *Fuentes*, 407 U.S. at 73, 92 S.Ct. at 1990.

20 *Fuentes*, 407 U.S. at 73, 92 S.Ct. at 1990.

21 *Fuentes*, 407 U.S. at 75, 92 S.Ct. at 1991.

22 *Fuentes*, 407 U.S. at 73, 92 S.Ct. at 1990.

23 *Fuentes*, 407 U.S. at 75–77, 92 S.Ct. at 1991–1992.

24 *Fuentes*, 407 U.S. at 77–78, 92 S.Ct. at 1992–1993.

25 *Fuentes*, 407 U.S. at 78, 92 S.Ct. at 1993.

26 *Fuentes*, 407 U.S. at 83, 92 S.Ct. at 1995.

27 *Fuentes*, 407 U.S. at 80–81, 92 S.Ct. at 1994.

28 *Fuentes*, 407 U.S. at 96, 92 S.Ct. at 2002.

29 *Fuentes*, 407 U.S. at 83, 92 S.Ct. at 1995.

30 *Fuentes*, 407 U.S. at 80–81, 92 S.Ct. at 1994.

31 Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, 15 U.C.C. Rep. Serv. 263 (1974).

32 *Mitchell*, 416 U.S. at 605–606, 94 S.Ct. at 1899.

33 *Mitchell*, 416 U.S. at 606, 94 S.Ct. at 1899.

34 *Mitchell*, 416 U.S. at 607, 94 S.Ct. at 1900.

35 *Mitchell*, 416 U.S. at 604, 94 S.Ct. at 1898.

36 *Mitchell*, 416 U.S. at 604, 94 S.Ct. at 1898.

37 *Mitchell*, 416 U.S. at 608–609, 94 S.Ct. at 1900–1901.

38 North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

39 *North Georgia Finishing*, 419 U.S. at 606, 95 S.Ct. at 722.

40 *North Georgia Finishing*, 419 U.S. at 606–607, 95 S.Ct. at 722.

41 *North Georgia Finishing*, 419 U.S. at 607, 95 S.Ct. at 723.

42 *See North Georgia Finishing*, 419 U.S. at 607, 95 S.Ct. at 723.

43 *North Georgia Finishing*, 419 U.S. at 607, 95 S.Ct. at 722.

44 *North Georgia Finishing*, 419 U.S. at 608, 95 S.Ct. at 723.

45 *North Georgia Finishing*, 419 U.S. at 608, 95 S.Ct. at 723.

46 Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

47 *Mathews*, 424 U.S. at 341, 96 S.Ct. at 906.

48 *Mathews*, 424 U.S. at 343, 96 S.Ct. at 907.

49 *Mathews*, 424 U.S. at 347, 96 S.Ct. at 908.

50 *Mathews*, 424 U.S. at 343, 96 S.Ct. at 906.

51 *Mathews*, 424 U.S. at 343–344, 96 S.Ct. at 907.

52 *Mathews*, 424 U.S. at 345–346, 96 S.Ct. at 908.

53 *Mathews*, 424 U.S. at 347–348, 96 S.Ct. at 909.

54 *Mitchell*, 416 U.S. at 610, 94 S.Ct. at 1901 (internal citations omitted).

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55 Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 30, 353 A.2d 222, 231 (1976).

56 Though the property deprivation at issue with a private mechanic's lien is very different from that of a public mechanic's lien, the fundamental analytical approach used by the courts in addressing the constitutionality of private mechanic's lien statutes is relevant and instructive.

57 Spielman-Fond, Inc. v. Hanson's Inc., 379 F. Supp. 997 (D. Ariz. 1973), judgment aff'd, 417 U.S. 901, 94 S. Ct. 2596, 41 L. Ed. 2d 208 (1974).

58 Connecticut v. Doehr, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991).

59 *See Barry Properties,* 277 Md. at 25, 353 A.2d at 229.

60 *See* Spielman-Fond, Inc. v. Hanson's Inc., 417 U.S. 901, 94 S. Ct. 2596, 41 L. Ed. 2d 208 (1974).

61 Spielman-Fond, 379 F.Supp. at 1000.

62 *See* Nelson-American Developers, Ltd. v. Enco Engineering Corp., 337 So. 2d 729 (Ala. 1976); Spielman-Fond, Inc. v. Hanson's Inc., 379 F. Supp. 997 (D. Ariz. 1973), judgment aff'd, 417 U.S. 901, 94 S. Ct. 2596, 41 L. Ed. 2d 208 (1974); Bankers Trust Co. v. El Paso Pre-Cast Co., 192 Colo. 468, 560 P.2d 457 (1977); Eastern Electric and Heating, Inc. v. Pike Creek Professional Center, Inc., 1986 WL 9031 (Del. 1986); Tucker Door & Trim Corp. v. Fifteenth St. Co., 235 Ga. 727, 221 S.E.2d 433 (1975); Matter of Jacobson, 30 B.R. 965, 967 (Bankr. D. Idaho 1983); Keith Young & Sons Const. Co. v. Victor Senior Citizens Housing, Inc., 262 N.W.2d 554 (Iowa 1978); C.J. Richard Lumber Co., Inc. v. Melancon, 476 So. 2d 1018 (La. Ct. App. 3d Cir. 1985), writ denied, 478 So. 2d 1236 (La. 1985); Williams & Works, Inc. v. Springfield Corp., 81 Mich. App. 355, 265 N.W.2d 328 (1978), decision rev'd on other grounds, 408 Mich. 732, 293 N.W.2d 304 (1980); Home Bldg. Corp. v. Ventura Corp., 568 S.W.2d 769 (Mo. 1978); Carl A. Morse, Inc. (Diesel Const., Division) v. Rentar Indus. Development Corp., 56 A.D.2d 30, 391 N.Y.S.2d 425 (2d Dep't 1977), order aff'd, 43 N.Y.2d 952, 404 N.Y.S.2d 343, 375 N.E.2d 409 (1978); Mobile Components, Inc. v. Layon, 1980 OK 173, 623 P.2d 591 (Okla. 1980), First National Bank of Tulsa v. Layon, 454 U.S. 963, 102 S. Ct. 502, 70 L. Ed. 2d 378 (1981); B and P Development v. Walker, 420 F. Supp. 704 (W.D. Pa. 1976); Cook v. Carlson, 364 F. Supp. 24 (D.S.D. 1973); Silverman v. Gossett, 553 S.W.2d 581 (Tenn. 1977); In re Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. 1976), aff'd, 562 F.2d 47 (4th Cir. 1977) and aff'd, 562 F.2d 48 (4th Cir. 1977).

63 Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974); Connolly Development, Inc. v. Superior Court, 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637 (1976).

64 Roundhouse Const. Corp. v. Telesco Masons Supplies Co., Inc., 168 Conn. 371, 362 A.2d 778 (1975), judgment vacated, 423 U.S. 809, 96 S. Ct. 20, 46 L. Ed. 2d 29 (1975) (The U.S. Supreme Court vacated and remanded the case to the Supreme Court of Connecticut to consider whether its judgment was based upon federal or state constitutional grounds, or both.); Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976).

65 Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974).

66 *Ruocco*, 380 F.Supp. at 433–434.

67 *Ruocco*, 380 F.Supp. at 434.

68 *Ruocco*, 380 F.Supp. at 437.

69 *Ruocco*, 380 F.Supp. at 437.

70 *Ruocco*, 380 F.Supp. at 437.

71 Connolly Development, Inc. v. Superior Court, 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637 (1976).

72 *Connolly Development,* 17 Cal.3d at 827–828, 132 Cal.Rptr. at 493–494, 553 P.2d at 653–654.

73 *Connolly Development,* 17 Cal.3d at 820, 132 Cal.Rptr. at 488, 553 P.2d at 648.

74 *Connolly Development,* 17 Cal.3d at 822–823, 553 P.2d at 650–650, 132 Cal.Rptr. at 490.

75 *See Roundhouse,* 168 Conn. at 374–375, 362 A.2d at 780.

76 *See Roundhouse,* 168 Conn. at 375, 362 A.2d at 780.

77 *See Roundhouse,* 168 Conn. at 375–376, 362 A.2d at 780–781.

78 *See Roundhouse,* 168 Conn. at 375, 362 A.2d at 780.

79 Roundhouse Const. Corp. v. Telesco Masons Supplies Co., Inc., 168 Conn. 371, 362 A.2d 778 (1975), judgment vacated, 423 U.S. 809, 96 S. Ct. 20, 46 L. Ed. 2d 29 (1975) (The U.S. Supreme Court vacated and remanded the case to the Supreme Court of Connecticut to consider whether its judgment was based upon federal or state constitutional grounds, or both.)

80 *See Roundhouse,* 168 Conn. at 382–383, 362 A.2d at 784.

81 *See Roundhouse,* 168 Conn. at 383, 362 A.2d at 784.

82 *See Roundhouse,* 168 Conn. at 375, 362 A.2d at 780.

83 Conn. Gen. Stat. Ann. § 49-39.

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84 Conn. Gen. Stat. Ann. § 49-40a.

85 Conn. Gen. Stat. Ann. § 49-35a.

86 Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976).

87 *Barry Properties,* 277 Md. at 30–31, 353 A.2d at 232.

88 *Barry Properties,* 277 Md. at 19, 353 A.2d at 225–226.

89 *Barry Properties,* 277 Md. at 20, 353 A.2d at 226. Persons not in privity of contract with the owner had the additional requirement of serving the owner with a written notice of intention to file a lien within ninety days after furnishing the work or material, in order to be entitled to the lien. *Barry Properties,* 277 Md. at 19–20, 353 A.2d at 226.

90 *Barry Properties,* 277 Md. at 19–20, 353 A.2d at 225–226.

91 *Barry Properties,* 277 Md. at 31–32, 353 A.2d at 232.

92 *Barry Properties,* 277 Md. at 31–32, 353 A.2d at 232.

93 Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 30, 353 A.2d 222, 231 (1976).

94 Md. Real Prop. Code Ann. § 9-106; York Roofing, Inc. v. Adcock, 333 Md. 158, 165, 634 A.2d 39, 42 (1993).

95 *Connolly Development,* 17 Cal.3d at 813–814, 132 Cal.Rptr. at 484, 553 P.2d at 644; *Barry Properties,* 277 Md. at 24, 353 A.2d at 228.

96 *Connolly Development,* 17 Cal.3d at 825, 132 Cal.Rptr. at 492, 553 P.2d at 652; Ruocco, 380 F.Supp. at 437.

97 Connecticut v. Doehr, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991).

98 The Court emphasized that due process concerns are implicated from only partial or temporary impairment of rights and explained that "[w]ithout doubt, state procedures for creating and enforcing attachments, *as with liens,* 'are subject to the strictures of due process.'" *Doehr,* 501 U.S. at 12, 111 S.Ct. at 2113. (emphasis added) (citations omitted).

99 *Doehr,* 501 U.S. at 5–6, 111 S.Ct. at 2109–2110.

100 *Doehr,* 501 U.S. at 10–11, 111 S.Ct. at 2112. Accordingly, the Court established the following four-part analysis:

1. Consideration of the private interest that will be affected by the prejudgment measure;
2. An examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards;
3. The interest of the party seeking the prejudgment remedy; and
4. Any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. *See Doehr,* 501 U.S. at 11, 111 S.Ct. at 2112.

101 *Doehr,* 501 U.S. at 11, 111 S.Ct. at 2112–2113.

102 *Doehr,* 501 U.S. at 11–12, 111 S.Ct. at 2112–2113.

103 *Doehr,* 501 U.S. at 12, 111 S.Ct. at 2112, n.4.

104 *Doehr,* 501 U.S. at 12, 111 S.Ct. at 2112, n.4.

105 *Doehr,* 501 U.S. at 12–15, 111 S.Ct. at 2113–2115.

106 *Doehr,* 501 U.S. at 13–14, 111 S.Ct. 2114.

107 *Doehr,* 501 U.S. at 14, 111 S.Ct. 2114, *citing Mitchell,* 416 U.S. at 609, 94 S.Ct. at 1901.

108 *Doehr,* 501 U.S. at 14–15, 111 S.Ct. 2114.

109 *Doehr,* 501 U.S. at 15, 111 S.Ct. at 2115.

110 *Doehr,* 501 U.S. at 16, 111 S.Ct. at 2115. *See also, e.g.,* Neb. Rev. St. § 25-1001 (setting forth 8 required exigent-type circumstances warranting the use of the state's pre-judgment attachment statute).

111 *Doehr,* 501 U.S. at 12, 111 S.Ct. at 2112, n.4.; *Cf. Sniadach,* 395 U.S. at 339, 89 S.Ct. at 1821 (Wherein the Supreme Court in that case noted, "in the present case no situation requiring special protection to a state or creditor interest is presented by the facts.")

112 *Doehr,* 501 U.S. at 12, 111 S.Ct. at 2112, n.4; As Chief Justice Rehnquist explained in his concurring opinion:

[I]n Spielman-Fond, Inc., *supra,* there was, as the Court points out, ... an alternative basis available to this Court for affirmance of that decision. Arizona recognized a pre-existing lien in favor of unpaid mechanics and materialmen who had contributed labor or supplies which were incorporated in improvements to real property. The existence of such a lien upon the very property ultimately posted or noticed distinguishes those cases from the present one, where the plaintiff had no pre-existing interest in the real property which he sought to attach. Materialman's and mechanic's lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be

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given a remedy against a property owner who has defaulted on his promise to pay for the labor and the materials. To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes. *Doehr,* 501 U.S. at 28, 111 S.Ct. 2121–2122 (Rehnquist, J., concurring opinion).

113 *Doehr,* 501 U.S. at 16, 111 S.Ct. at 2115.

114 *Doehr,* 501 U.S. at 16, 111 S.Ct. at 2115.

115 *Doehr,* 501 U.S. at 24, 111 S.Ct. at 2119.

116 ***But see,*** Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95 (Ind. Ct. App. 1995). In ***Haimbaugh***, the appellate court held that the property owners were not deprived of a significant property interest, since the filing of a mechanic's lien was merely an interference with their interest and only represented a contingent cloud on title in the sense that unless the owner attempts to convey or mortgage the property (which was not the case here), the lien is totally innocuous. The court further found the holding in ***Doehr***, in this respect, to be inapposite, since the holding was limited to the facts before the Supreme Court and because the Court did not specifically find that the same deprivation exists with regards to mechanic's liens. *Haimbaugh Landscaping, Inc.*, 653 N.E.2d at 107–108.

117 Two cases arose shortly after ***Doehr*** was decided, both of which found their respective state's private mechanic's lien laws (Indiana and Virginia) to provide adequate due process protections. ***See*** Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 103, (Ind. Ct. App. 1995); ATW & Co. v. CBV, Inc., 1992 WL 884983 (Va. Cir. Ct. 1992). Without much substantive analysis, the court in ***Haimbaugh*** concluded that a balancing of a subcontractor's pre-existing interests in the property it improved and the contingent, theoretical impairment of the landowner's title, weighed in favor of finding that due process does not require more process than that afforded under Indiana's mechanic's lien statutes, which provided as follows: (1) after receiving notice of the lien, a property owner has the right to file a notice to commence suit, which then compels the lienholder to file a foreclosure action within thirty days or lose the lien. Ind. Code § 32-8-3-10 (Burns Code Ed.Repl.1980); (2) if the property owner does not file a notice to commence suit, the lienholder still must file suit to foreclose the lien within one year. Ind. Code § 32-8-3-6 (Burns Code Ed.Repl.1980); (3) the property owner may contest the lienholder's allegations at a foreclosure hearing; and (4) alternatively, a property owner may choose to release the property from the lien by posting a bond from which to pay any judgment later entered against him as a result of the foreclosure suit. Ind. Code § 32-8-3-11 (Burns Code Ed.Repl.1980). *See Haimbaugh,* 653 N.E.2d at 103, 110. In the summary opinion issued by the court in ***ATW***, all the court said was that ***Doehr*** was distinguishable from the perfection and enforcement of mechanic's liens in Virginia, since the law struck down by the Court in ***Doehr*** did not require the creditor to have a pre-existing interest in the property subject to attachment. See ATW & Co. v. CBV, Inc., 1992 WL 884983 (Va. Cir. Ct. 1992). Thus, it is presumed that the reason the court found the due process procedures afforded by Virginia's mechanic's lien law to be appropriate was that the lien holder had a pre-existing interest in the property. The substance of Virginia's mechanic's lien law is analogous to that of Indiana, except that Virginia does not have a procedure whereby affected persons can compel the lienor to commence a foreclosure action, though it does provide affected persons with the independent right to commence a proceeding in equity to determine the validity of the lien. ***See*** Va. Code Ann. § 43-17.1

118 See Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

119 Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 *4 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

120 Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 *5 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

121 Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 *5–6 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

122 Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 *6 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

123 Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 *13–14 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

124 Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 *14 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

125 Rhode Island's mechanic's lien law also provided that a property owner that prevailed on the merits may be entitled to costs and, in the court's discretion, attorney's fees. ***See*** *Gem,* 867 A.2d at 805.

126 Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 *15–16 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

127 ***See*** *Gem,* 867 A.2d at 802.

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128 *See* R.I. Gen. Laws § 34-28-17.1; *Gem*, 867 A.2d at 805.

129 *Gem*, 867 A.2d 796 (R.I. 2005).

130 *Gem*, 867 A.2d at 802.

131 *Gem*, 867 A.2d at 809.

132 *Gem*, 867 A.2d at 810.

133 *Gem*, 867 A.2d at 810–812.

134 *Gem*, 867 A.2d at 813.

135 *Gem*, 867 A.2d at 815–817.

136 *Gem*, 867 A.2d at 818.

137 *Gem*, 867 A.2d at 818.

138 *See Haimbaugh*, 653 N.E.2d at 107–108.

139 *C.f.*, *Gem*, 867 A.2d at 818 (Tipping the scales in favor of constitutionality is the combination of the claimant's statutory preexisting interest in the property and the availability of a prompt post-deprivation hearing. The claimant's preexisting interest is especially weighty when compared with the property owner's interest in a clear title, the deprivation of which was not a "temporary total deprivation.") (emphasis added). Unlike the interest in clear title that was at issue in *Gem*, a public mechanic's lien results in a temporary total deprivation.

140 Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, 19 Wage & Hour Cas. (BNA) 5 (1969).

141 *Sniadach*, 395 U.S. at 341–342, 89 S.Ct. at 1822–1823 (internal citation omitted).

142 *Doehr*, 501 U.S. at 16, 111 S.Ct. at 2115.

143 *See Doehr*, 501 U.S. at 12, 111 S.Ct. at 2112, n.4.

144 *Doehr*, 501 U.S. at 28, 111 S.Ct. at 2121–2122.

145 *Gem*, 867 A.2d at 803.

146 Insulation Contracting and Supply v. Kravco, Inc., 209 N.J. Super. 367, 507 A.2d 754 (App. Div. 1986); Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 219 A.2d 332 (App. Div. 1966).

147 *See, e.g.*, N.J. Stat. Ann. § 2A:44-148. "Money paid to contractor trust fund for payment of claims. All money paid by the state of New Jersey or by any agency, commission or department thereof, or by any county, municipality or school district in the state, to any person pursuant to the provisions of any contract for any public improvement made between any such person and the state or any agency, commission or department thereof, or any county, municipality or school district in the state, shall constitute a trust fund in the hands of such person as such contractor, until all claims for labor, materials and other charges incurred in connection with the performance of such contract shall have been fully paid."

148 *See* In re Casco Elec. Corp., 35 B.R. 731, 732, Bankr. L. Rep. (CCH) P 69445 (E.D. N.Y. 1983) (Holding that a contractor-debtor did not have a "property" interest in funds impressed with a statutory trust for the benefit of subcontractors under the Article 3-A trust fund provisions of the New York Lien law).

149 *Doehr*, 501 U.S. at 28, 111 S.Ct. at 2121–2122.

150 *Doehr*, 501 U.S. at 21, 111 S.Ct. at 2118 (finding that the possibility of an award of double damages at the end of a suit does not provide an adequate remedy for a wrongful attachment, since the settlement of the action precludes the damages remedy, and thereby encourages the use of the attachment mechanism to pressure the debtor).

151 *Cf.*, *Mathews*, 424 U.S. at 343, 96 S.Ct. at 906 (Finding that while the potential impact on the claimant from a wrongful termination of disability benefits could be significant, her interest in these benefits was not great, since other government assistance programs were available to her, as were various private sources.). Even though the Supreme Court's analysis pertained to the first part of the Court's test, the rationale should be equally applicable to the creditor's interests as part of the analysis of the second prong of the Court's test.

152 *See* Section III.C, *supra*.

153 As the Court in *Doehr* pointed out, the fact that the debtor was deprived only temporarily of the use and possession of his property did not put the seizure beyond scrutiny under the Due Process Clause. "'The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.' *Fuentes*, 407 U.S. at 86, 92 S.Ct. at 1997." *Doehr*, 501 U.S. at 15, 111 S.Ct. at 2115. Although the length or severity of a deprivation would be another factor to weigh in determining the appropriate form of hearing, it is not determinative of the right to a hearing. *See Fuentes*, 407 U.S. at 86, 92 S.Ct. at 1997; *see also Gem*, 867 A.2d at 811 ("The question of *when* that hearing is to take place is critical in limiting the risk of erroneous deprivation: the more prompt the hearing, the less the risk of erroneous deprivation.") (emphasis in original).

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154 *Sniadach,* 395 U.S. at 339, 89 S.Ct. at 1821; *Fuentes,* 407 U.S. at 75, 92 S.Ct. at 1991. However, the Supreme Court has not addressed the issue of whether a trial of the disputed claim could meet due process concerns in the context of a mechanic's lien action. *But see Barry Properties,* 277 MD at 31–32, 353 A.2d at 232 (Rejecting Maryland's mechanic's lien law for, among other reasons, only providing a hearing through the ultimate trial of the dispute); Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005)(same, but dealt with Rhode Island's mechanic's lien law); *compare* Conn. Gen Stat. Ann. § 49-35a (enacted in response to *Roundhouse*, and allows an owner to commence its own suit at any time to determine or terminate the lien, but which still leaves the determination of merits of the lien to the conclusion of that trial).

155 *See, e.g.,* Va. Code Ann. § 43-17.1.

156 *Connolly,* 17 Cal.3d at 822–823, 553 P.2d at 650, 132 Cal.Rptr. at 490.

157 *See, e.g., Haimbaugh,* 653 N.E.2d at 103.

158 *Doehr,* 501 U.S. at 28, 111 S.Ct. at 2121–2122 (Rehnquist, C.J., concurring opinion).

159 *See* note 153.

160 *Doehr,* 501 U.S. at 14, 111 S.Ct. at 2114 (citing *Mitchell,* 416 U.S. at 609, 94 S.Ct. at 1901).

161 *See Doehr,* 501 U.S. at 14–15, 111 S.Ct. at 2114–2115. While the Court in *Doehr* also noted that the plaintiff in *Mitchell* had a vendor's lien to protect (i.e., a pre-existing interest in the goods being attached) and that the plaintiff posted a bond (*see Doehr,* 501 U.S. at 14–15, 111 S.Ct. at 2114–2115), it is uncertain the extent to which these additional factors played into the Court's decision to sustain the statute in *Mitchell* or whether the Court would have reached the same result based solely on the low risk of error attendant to an uncomplicated documentable debt.

162 *Gem,* 867 A.2d at 813.

163 *But see*, Me. Rev. Stat. Ann. tit. 10, § 3251 (lien actually attaches to property owned by city, town, county, school district or other municipal corporation).

164 *See* note 9.

165 *Doehr,* 501 U.S. at 21, 111 S.Ct. at 2118 (The Court rejecting pre-judgment attachment procedures that allow a creditor to use them as "a tactical devise to pressure an opponent to capitulate.").

166 Most payment bond statutes have a monetary threshold, whereby states do not require a contractor to furnish a bond if the project or prime contract is less than a stated dollar value. *See, e.g.,* N.J.Stat. Ann. § 2A:44-143a(2) (The State of New Jersey may waive the payment bond requirement on all contracts it enters into that are less than $200,000); N.J.Stat. Ann. § 2A:44-143a(3) (Other New Jersey public entities may waive the bonding requirement on all contracts less than $100,000); Colo Rev. Stat. § 38-26-110 (Bonds required for county, municipality, and school district projects in Colorado in excess of $50,000); Colo Rev. Stat. § 24-105-202 (Bonds required on state projects in Colorado in excess of $50,000).

167 *See, e.g.,* Windalume Corp. v. Rogers & Haggerty, Inc., 36 Misc. 2d 1066, 234 N.Y.S.2d 112 (Sup 1962)(Holding that public benefit corporations, such as the Dormitory Authority of the State of New York, are independent corporate agencies with governmental functions delegated to them by the state. They are not arms of the state through which the state acts directly in carrying out governmental functions, and thus, the payment bond requirement of N.Y. State Finance Law § 137 is inapplicable to their construction projects).

168 Despite a public entity being required by statute to ensure that the general contractor posts a bond, there are rare times that the public entity neglects this duty, leaving the subcontractors and suppliers without security. *See* Newt Olson Lumber Co. v. School Dist. No. 8 in Jefferson County, 83 Colo. 272, 263 P. 723 (1928) (overruled in part by, Evans v. Board of County Com'rs of El Paso County, 174 Colo. 97, 482 P.2d 968 (1971), superceded by Colo. Rev. Stat. Ann. § 24-10-106) (The court in *Newt* holding that a school district was not liable to a materialman in either tort or contract for its failure to obtain the statutorily mandated payment bond from the contractor, but the court in Evans later holding that the doctrines of governmental immunity and sovereign immunity were prospectively overruled as defenses to tort claims against counties, school districts and the state, which in turn was superceded by the legislature's enactment of a sovereign immunity statute.).

169 *See, e.g., Haimbaugh,* 653 N.E.2d at 105 (Holding that all duly enacted statutes are accord a strong presumption of constitutionality and that it is not the court's role to question the wisdom or the desirability of legislative actions).

170 Colo. Rev. Stat. §§ 38-26-101, et seq. Colorado does not classify its impound remedies as liens.

171 Colo. Rev. Stat. § 38-26-107(1).

172 Colo. Rev. Stat. § 38-26-107(2).

173 Colo. Rev. Stat. § 38-26-107(2), (3).

174 Colo. Rev. Stat. § 38-26-108.

175 Colo. Rev. Stat. § 38-26-110.

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176 It also is rather curious that Colorado imposes more rigorous requirements to release the impounded moneys (application to the courts for approval of the bond or other form of undertaking) than it requires in order to have the moneys impounded (merely filing a statement with the public entity that moneys are claimed to be due). *See* Colo. Rev. Stat. § 38-26-108.

177 Colo. Rev. Stat. § 38-26-109. The pre-existing interest actually is limited to only those subcontractors and suppliers that are in direct contractual privity with the contractor having the contract with the public entity, since it appears that only such persons are beneficiaries of the contractor's trust. Colo. Rev. Stat. § 38-26-109(1) ("All funds disbursed to any contractor or subcontractor under any contract or project subject to the provisions of this article shall be held in trust for the payment of any person that has furnished labor, materials, sustenance, or other supplies used or consumed by the contractor in or about the performance of the work contracted to be done.")

178 Colo. Rev. Stat. § 38-26-110 (applicable to county, municipality, and school district projects); Colo. Rev. Stat. § 24-105-202 (applicable to state projects).

179 In *Fuentes*, which involved a consumer retail sales transaction, the subject statute provided the consumer with no prior notice of the seizure of its property; he was allowed no opportunity to challenge the seizure, except as the defendant in a trial of the repossession action (407 U.S. at 75, 92 S.Ct. at 1991); and other than succeeding at trial, the only other means for the consumer to recover the seized goods was to post its own bond (407 U.S. at 73, 92 S.Ct. at 1990).

180 In *North Georgia Finishing*, the garnishment/impound statute that was at issue there denied the debtor due process because only conclusory affidavit needed to be filed (419 U.S. at 606–607, 95 S.Ct. at 722); there was no opportunity for an early hearing (419 U.S. at 607, 95 S.Ct. at 723); the lawsuit commenced by the plaintiff was the only means to challenge the garnishment (419 U.S. at 607, 95 S.Ct. at 723); and the only method for dissolving the writ to recover the property was for the defendant to file its own bond (419 U.S. at 607, 95 S.Ct. at 723).

181 *See Ruocco* 380 F.Supp. at 437; *Connolly Development,* 17 Cal.3d at 822–823, 553 P.2d at 650–650, 132 Cal.Rptr. at 490; *Haimbaugh,* 653 N.E.2d at 110; *see also* Conn. Gen. Stat. Ann. § 49-35a (enacted by the Connecticut Legislature to cure the due process deficiencies found to exist in Connecticut's mechanic's lien law by the court in *Roundhouse*). While the owner's ability to commence or compel the enforcement action at an earlier time than the contractor otherwise would have started suit may satisfy due process on a private project, where the contractors have a heightened interest, it may not be sufficient in a public context where the subcontractor's do not have as significant an interest.

182 *See* Sells/Greene Bldg. Co., LLC v. Rossi, 2003 WL 21018168 (R.I. Super. Ct. 2003), judgment vacated, 867 A.2d 796 (R.I. 2005).

183 N.J. Stat. Ann. §§ 2A:44-125, et seq. New Jersey's Municipal Mechanic's Lien Law does not apply to state construction projects, nor is there a corollary lien law statute for state projects. *See* N.J. Stat. Ann. §§ 2A:44-125, et seq.; Morris County Indus. Park v. Thomas Nicol Co., 35 N.J. 522, 528, 173 A.2d 414, 417 (1961).

184 N.J. Stat. Ann. § 2A:44-148.

185 *See* Universal Supply Co. v. Martell Const. Co., Inc., *156 N.J. Super. 327, 383 A.2d 1163 (App. Div. 1978)* (As long as prime contractor on public works project paid in full all materialmen and subcontractors who were in a direct contractual relationship with it, prime contractor fulfilled its trust obligations under Trust Fund Act and had no legal duty to satisfy a claimant who furnished materials to its subcontractor.)

186 N.J. Stat. Ann. §§ 2A:145, et seq.

187 N.J. Stat. Ann. § 2A:44-132.

188 N.J. Stat. Ann. § 2A:44-133. This section requires that the notice of claim state: (a) The name and residence or place of business of the claimant; (b) The amount claimed and from whom due and if not due when it will be due; (c) The amount, as near as may be, of the demand after deducting all just credits and offsets; (d) The name of the person by whom employed or to whom the materials were furnished and whether he is the contractor with the public agency or a subcontractor; (e) The general nature of the public work to which the contract relates; (f) The name of the contractor and the name of the public agency with which the contract was made; and (g) That the labor was performed for, or materials furnished to, the contractor or subcontractor, specifying which, and that they were actually performed or used in the execution or completion of the contract with the public agency.

189 N.J. Stat. Ann. § 2A:44-132.

190 N.J. Stat. Ann. § 2A:44-129.

191 N.J. Stat. Ann. § 2A:44-130.

192 N.J. Stat. Ann. § 2A:44-138.

193 N.J. Stat. Ann. § 2A:44-142.

194 N.J. Stat. Ann. § 2A:44-137.

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195 SD Codified Laws §§ 5-22-1, et seq.

196 SD Codified Laws §§ 5-21-1, et seq.

197 South Dakota only has a trust fund statute applicable to private projects. *See* SD Codified Laws § 44-9-13.

198 SD Codified Laws §§ 5-22-2, 3.

199 SD Codified Laws §§ 5-22-7, 9 to 11.

200 SD Codified Laws § 5-22-8.

201 SD Codified Laws § 5-22-4.

202 SD Codified Laws § 5-22-8.

203 N.Y. Lien Law §§ 1, et seq., § 5.

204 N.Y. Lien Law, Article 3-A.

205 N.Y. State Finance Law § 137.

206 N.Y. Lien Law § 12. Under this section the notice is required to provide: (1) the name and residence of the lienor; (2) the name of the contractor or subcontractor for whom the labor was performed; (3) the amount claimed to be due and the date when due; (4) a description of the public improvement and the kind of services performed; (5) a general description of the contract pursuant to which such public improvement was constructed; and (6) the lienor's business address or principal place of business within the state.

207 N.Y. Lien Law § 12.

208 N.Y. Lien Law § 18.

209 N.Y. Lien Law § 18.

210 N.Y. Lien Law § 18.

211 N.Y. Lien Law § 21-a.

212 N.Y. Lien Law § 21.

213 N.Y. Lien Law § 39. Under this section, if the lienor does file a new lien claiming moneys that were part of the invalidated lien, the contractor may move to have the subsequent lien discharged on 2 days notice.

214 N.Y. Lien Law § 39-a.

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