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**AVOIDING THE WRECKING BALL: EFFECTIVELY DEALING
WITH COMPETING CLAIMS IN A CONSTRUCTION
BANKRUPTCY CASE
AN ANALYSIS FROM THE PERSPECTIVE OF THE M&M LIEN
CLAIMANTS.**

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State Bar of Texas
25th Annual Advanced Business Bankruptcy Course
February 22-23, 2007
Dallas, Texas

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I. INTRODUCTION

Generally, bankruptcy cases impact all parties having a business relationship with the debtor. The impact is amplified in a construction company bankruptcy because of the numerous competing creditors and interests that are typical in this type of bankruptcy. The creditors, who possess unique rights and protections pursuant to state law, compete with each other for the greatest recovery possible. However, this application of these rights and protection in the bankruptcy context, is not always discernable or intuitive. However, the holders of a mechanic's and materialman's lien ("M&M Lien") must develop a comprehensive strategy that allows the claimant to survive the sometimes complicated and protracted process that may be foreign to an unsuspecting bankruptcy neophyte.

This Article will focus on the serious and complex issues and problems that bankruptcy practitioners will encounter when representing a creditor in a construction company. This Article is not intended to address every legal issue that may arise in a construction company bankruptcy proceeding, nor is it intended to analyze how a factually sensitive determination might change under different scenarios or offer advice applicable to every situation. This Article is designed to address the likely challenges and problems an M&M lien claimant will encounter and some of the pitfalls that practitioners should avoid, or at least recognize, while serving as counsel to a M&M lien claimant.

II. M&M LIENS UNDER TEXAS LAW

M&M Liens are statutorily created interests, unique to each state, and outside the scope of the Uniform Commercial Code¹. There are two sources of protection for mechanics and materialmen in Texas: (1) article XVI, section 37, of the Texas Constitution (the "Constitutional M&M Lien") and (2) chapter 53 of the Property Code, formerly known as the Hardeman Act (the "Statutory M&M Lien").² A Statutory M&M Lien exists through compliance with the applicable statute, while a Constitutional M&M Lien arises by virtue of the Texas Constitution, without the aid of the statute.³ This Section will provide a basic understanding of each type of M&M Lien recognized in Texas.

¹ *H.B. Zachry Co. v. Waller Creek, Ltd. (In re Waller Creek Ltd.)*, 867 F.2d 228 (5th Cir. 1989).

² *Hayek v. Western Steel Co.* 478 S.W.2d 786, 790-91 (Tex. 1972).

³ *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896).

A. Types Of M&M Liens Under Texas Law

1. The Statutory M&M Lien

M&M liens did not exist at common law or in equity, but rather are creatures of statute.⁴ They protect people or entities who have furnished materials or services for the construction of buildings or other improvements to real property⁵. Unlike mortgages or other contract liens, mechanic's liens arise only by operation of law, never by grant or contract.⁶ Statutory M&M Liens in Texas are generally governed by Chapter 53 of the Texas Property Code. When called upon to interpret the Texas M&M lien statute, recognizing that they are not exactly a model of clarity, courts liberally construe them to protect the artisan, the laborer, and the materialman.⁷ When an M&M Lien is acknowledged and filed of record as required by the statute, it will be enforced against a subsequent purchaser without actual notice.⁸ An interesting fact is that the Texas M&M Lien statute does not focus on *who* does the work; it focuses on whether and when the work is actually completed.⁹

(i) Payments Secured by M&M Statutory Lien

The Statutory M&M Lien secures the payment of: (i) the labor done or material furnished for the construction or repair; (ii) the specially fabricated material, even if the material has not been delivered or incorporated into the construction or repair, less its fair salvage value; and (iii) the preparation of a plan or plat by an architect, engineer, or surveyor.¹⁰ The amount of payments secured by a Statutory M&M Lien may not include profit, but rather may extend only to the amount of the benefit conferred.¹¹ However, the

⁴ *Lippencott v. York*, 86 Tex. 276, 24 S.W. 275, 276 (1893).

⁵ *Strang*, 89 Tex. 525, 35 S.W. at 1055.

⁶ *Myers v. Houston*, 88 Tex. 126, 30 S.W. 912, 913 91895).

⁷ *First Nat'l Bank v. Sledge*, 653 S.W.2d 283, 286-288 (Tex. 1983).

⁸ *Apex Financial Corporation v. Brown*, 7 S.W.3d 820, 830 (Tex. 1999) *citing Tex. Prop. Code Ann. § 13.001* (Vernon Supp. 2000).

⁹ *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 730 (Tex. 2003).

¹⁰ *See id.* § 53.023(1)-(3).

¹¹ *In re Moussa*, 93 B.R. 96, 100-101 (Bankr. N.D. Tex. 1988); *Texas Bank & Trust Co. v. Campbell Bros. Inc.*, 569 S.W.2d 35, 42 (Tex. Civ. App. – Dallas 1978, *appeal dismissed*) ("it is clear that a profit is secured by a Statutory lien only to the extent that it may be considered compensation for

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amount of a Statutory M&M Lien that can be claimed by a subcontractor is limited to “an amount equal to the proportion of the total subcontract price that the sum of the labor performed, materials furnished, materials specially fabricated, reasonable overhead costs incurred, and proportionate profit margin bears to the total subcontract price” less “the sum of previous payments received by the claimant on the subcontract.”¹²

(ii) Property Subject to Statutory M&M Lien

Section 53.022 provides the Statutory description of property which is subject to a Statutory M&M Lien: the house, building, fixtures or improvements, the land reclaimed from overflow, or the railroad and all of its properties, and to each lot of land necessarily connected or reclaimed.¹³ Such a lien, however, does not extend to “abutting sidewalks, streets, and utilities that are public property.”¹⁴ In a city, town, or village, the lien extends to “each lot on which the house, building, or improvement is situated or on which the labor was performed.”¹⁵ In this respect, “lot” has been construed as the entire undivided tract of land as recorded in the deed records, and not merely to the improvement and the surrounding land.¹⁶ Therefore, a lien on the entire tract will survive, even if a portion of it is sold after the work is started.¹⁷ A lien against real property not located in a city, town, or village, however, extends to “not more than 50 acres on which the house, building, or improvement is situated or on which the labor was performed.”¹⁸ Of importance, once a Statutory M&M Lien is perfected, it extends to all future improvements, even if made by others (but it does not extend to fixtures that do not become improvements).¹⁹

When materials are supplied under a single contract for the improvement of multiple lots, the Statutory M&M Lien attaches to all lots, so long as the lots are contiguous. What constitutes a “contiguous”

services actually rendered as distinguished from the amount of the contractor's loss because of the owner's breach of the contract”).

¹² TEX. PROP. CODE ANN. § 53.024.

¹³ See *id.* § 53.022(a).

¹⁴ *Id.* § 53.022(b).

¹⁵ *Id.* § 53.022(c).

¹⁶ See *Valdez v. Diamond Shamrock Refining & Mktg. Co.*, 842 S.W.2d 273 (Tex. 1992).

¹⁷ See *id.*

¹⁸ *Id.* § 53.022(d).

¹⁹ See *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974).

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lot is subject to some uncertainty and may be a question of fact. The The Fifth Circuit has held that a contractor who performed work on a hotel's parking garage at the same time the hotel was being constructed was only entitled to a lien on the garage.²⁰ Similarly, one who performed work on a warehouse across the street from, but which was part of, a complex of offices being constructed could only assert a lien against the warehouse itself.²¹ As one court held, “[e]vidence that two lots were used by one business entity is not sufficient, without more, to show that a lot where no materials were supplied is necessarily connected to a lot where the materials were supplied and used.”²²

Statutory M&M Liens do not attach to federal projects, since state law M&M Liens cannot attach to federal property.²³ Instead, separate federal statutes, including the Miller Act²⁴, provide protections to contractors on federal projects.²⁵ Texas M&M Liens likewise do not extend to public buildings and real property owned by the State of Texas and its subdivisions, with certain exceptions, although, as with federal projects, contractors are not without some protections.²⁶ Because a state-law lien cannot attach to property of the national government, suppliers are deprived of their usual security, lien attachment.²⁷ Federal law requires contractors to obtain a payment bond to protect the rights of suppliers.²⁸

(iii) Persons Protected by Statutory M&M Lien

With respect to persons protected by the Statutory M&M Lien, the Property Code grants a lien upon real property to every contractor who furnishes labor or materials to improve property, regardless of whether

²⁰ See *H.B. Zachary Co. v. Waller Creek, Ltd. (In re Waller Creek, Ltd.)*, 867 F.2d 228 (5th Cir. 1989).

²¹ See *Houston Electrical Distributing Co., Inc. v. MMB Enterprises*, 703 S.W.2d 206 (Tex. App.–Houston [14th Dist.] 1985, no writ).

²² *Id.* at 208.

²³ *Tacon Mech. Contractors Inc. v. Aetna Cas. & Surety Co.*, 860 F. Supp. 385, 387 (S.D. Tex. 1994).

²⁴ *Id.*

²⁵ See *id.*

²⁶ *Quincy Lee Co. v. Lodal & Bain Engineers Inc.*, 602 S.W.2d 262, 264 (Tex. 1980); *City of Laporte v. Taylor*, 836 S.W.2d 829, 831 (Tex. App. – Houston [14th Dist.] 1992, no writ).

²⁷ *Tacon Mech. Contractors, Inc.*, 860 F.Supp. at 387

²⁸ See generally, *F.D.Rich Co. v. United States for use of Indus. Lumber Co.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed. 2d 703 (1974).

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the contractor has a direct contractual relationship with the property's owner.²⁹ A person is eligible for an M&M Lien if he labors, specially fabricates material or furnishes labor or materials for the construction or repair of buildings or improvements and the person performs these services under or by virtue of a contract with the owner or the owner's agent, trustee, receiver, contractor or subcontractor.³⁰ The labor or material must be used in the direct prosecution of the work.³¹ The labor or material need not be used only in the construction of an improvement, since the person providing the labor or material may also have a lien if these items are provided in connection with the demolition of a structure on real property.³² For additional protected parties, please refer to TEX. PROP. CODE ANN. § 53.021

(iv) Foreclosure of Statutory M&M Lien

The Legislature has made plain in Property Code § 53.154 that judicial action is the only means of enforcing a Constitutional or Statutory M&M Lien: "A mechanic's lien may be foreclosed only on judgment of a court of competent jurisdiction foreclosing the lien and ordering the sale of the property subject to the lien."³³ This requirement distinguishes mechanic's liens from mortgages and other contract lien, which may be enforced in any manner provided by the contract, including by an agreed power of sale.³⁴ The judicial foreclosure requirement means that a M&M Lienholder must file a lawsuit against the property owner within the prescribed limitations period in order to preserve its lien rights.³⁵ Once the lienholder has filed suit, it must prove up the contract and the amount of the debt owed under the contract, the location of the property, the supplying of qualified labor or material, and the perfecting of the lien.³⁶

The action to foreclose an M&M Lien must be brought within two (2) years after the last date for

filing a lien affidavit under Section 53.052 of the Property Code, or within one (1) year after the completion, termination, or abandonment of the work done under the original contract under which the lien is created, whichever is later.³⁷ For an M&M Lien related to a residential contract, the same time matrix applies, except that the two (2) year period above is reduced to one (1) year.³⁸

(v) Attorney's Fee

The right to recover and collect attorney's fees arises under section 53.156 of the Texas Property Code, which provides:

In any proceeding to foreclose a lien or to enforce a claim against a bond issued under Subchapter H, I, or J or in any proceeding to declare that any lien or claim is invalid or unenforceable in whole or in part, the court may award costs and reasonable attorney's fees as are equitable and just.³⁹

The language of Section 53.156 indicates that a trial court's award of attorney's fees is discretionary, not mandatory.⁴⁰ In a proceeding to foreclose a materialman's lien or declare such a lien or claim invalid, the court may award costs and reasonable attorney's fees that are equitable and just.⁴¹ Accordingly, the award of attorney fee's rests in the sound discretion of the court and will not be reversed absent a clear showing of abuse of discretion.⁴²

(vi) Perfection of Statutory M&M Lien

The perfection of liens is generally a matter of state law under the Bankruptcy Code.⁴³ A party seeking the protection of a Statutory M&M Lien must undertake certain affirmative actions in order to perfect the lien, including the preparation of a detailed

²⁹ *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 247 (Tex. 2002) citing *Tex. Prop. Code § 53.021*.

³⁰ *In re Moussa*, 93 B.R. 96 (Bank.N.D.Tex. 1988).

³¹ *See id.* §§ 53.001(3); 53.001(4).

³² *See id.* § 53.021(e).

³³ *See Exchange Sav. & Loan Ass'n v. Monocrete Pty. Ltd.*, 629 S.W.2d 34, 38 (Tex. 1982).

³⁴ *CVN Group, Inc.*, 95 S.W.3d at 247.

³⁵ *See Tex. Prop. Code §§ 53.158*.

³⁶ *See id.* § 53.054 (listing contents of affidavit required to perfect lien); *see also, e.g., First Nat'l Bank v. Sledge*, 653 S.W.2d 283, 286 (Tex. 1983)(reviewing whether liens met Statutory requirements).

³⁷ *See TEX. PROP. CODE ANN. § 53.158(a)*.

³⁸ *See id.* § 53.158(b).

³⁹ *See id.* § 53.156.

⁴⁰ *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 685 (Tex.App.Fort Worth 1998, pet. denied).

⁴¹ *Wesco Distribution, Inc. v. Westport Group, Inc.*, 150 S.W. 3d 553, 562 (Tex.App.-Austin 2004, no pet.).

⁴² *West Tex. Rehab. Ctr. v. Allen*, 810 S.W.2d 870, 874 (Tex.App.-Austin 1991, no writ).

⁴³ *See, e.g., In the Matter of Universal Seismic Assocs. Inc.*, 288 F.d 205, 207-08 (5th Cir. 2002).

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affidavit, the proper filing and recordation of that affidavit, and the sufficient service of that affidavit.⁴⁴

(a) Filing of Affidavit

To perfect a Statutory M&M Lien, the person claiming the M&M Lien must file an affidavit with the county clerk of the county in which the property is located, not later than the 15th day of the: (1) fourth calendar month after the date on which the indebtedness accrues regarding non-residential construction projects; or (2) third month after the day on which the indebtedness accrues regarding residential construction projects.⁴⁵

(b) Accrual of Indebtedness

The date on which the indebtedness accrues is important. This date is dictated by the Property Code. Indebtedness to an original contractor accrues on the last day of the month in which the original contract has been completed, or as to a subcontractor who has furnished labor or material to an original contractor, indebtedness accrues on the last day of the last month in which the labor was performed or the material furnished.⁴⁶ Indebtedness for specially fabricated material accrues on the last day of the last month in which materials were delivered.⁴⁷ Accrual of Indebtedness is discussed in detail in § 53.053 of the Texas Property Code.

(c) Contents of Affidavit

The affidavit must be signed by the claimant or by another person on the claimant's behalf, and must contain *substantially* the following information: (1) a sworn statement of the amount of the claim; (2) the name and last known address of the owner or reputed owner; (3) a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested; (4) the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor; (5) the name and last known address of the original contractor; (6) a

description, legally sufficient for identification, of the property sought to be charged with the lien; (7) the claimant's name, mailing address, and, if different, physical address; and (8) for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.⁴⁸

Generally, Statutory M&M Liens can only be established by fulfilling the Statutory requirements for the lien. However, substantial compliance with the lien statutes is sufficient to claim the Statutory lien rights.⁴⁹ Substantial compliance allows only a minor deficiency in an element of the affidavit as opposed to omitting a statutorily required element altogether.⁵⁰ The key to the affidavit is that it must *substantially* comply with the Statutory requirements concerning its contents.⁵¹ The required level of compliance has been aptly described as follows:

Texas is not a jurisdiction which applies a 'strict compliance' rule before a lien exists, but rather follows a 'substantial compliance' rule. 'No material departure from the requirements of the statute can be indulged, without fatal results to the lien; but a substantial compliance with the terms of the statute is all that is necessary to put the lien in operation, and give it full force and validity.'⁵²

(d) Notice of Filed Affidavit

The notice provision regarding lien affidavits is governed by § 53.055. The purpose of this section is to ensure that the owner receives *actual* notice that an affidavit has been filed against his property so that he

⁴⁴ See TEX. PROP. CODE ANN. § 53.051.

⁴⁵ *Gibson v. Bostick Roofing and Sheet Metal Co.*, 148 S.W. 3d 482, 495 (Tex.App-El Paso 2004) citing Tex. Prop. Code Ann § 53.052(Vernon Supp. 2004).

⁴⁶ *Id.*

⁴⁷ See *id.* § 53.053(d).

⁴⁸ See *id.* § 53.054(a).

⁴⁹ *First Nat. Bank of Claude v. Chaparral Elec. Supply Corp.*, 727 S.W.2d 353, 356 (Tex. App.-Amarillo 1987, no writ).

⁵⁰ *Olivares v. Nix Trust*, 126 S.W.3d 242 (Tex.App.-San Antonio 2003, no writ).

⁵¹ See *id.* See also *First Nat'l Bank in Graham v. Sledge*, 653 S.W.2d 283, 285 (Tex. 1983).

⁵² *Marathon Metallic Bldg. Co. v. Texas Nat'l Bank of Waco*, 534 S.W.2d 743, 747 (Tex. Civ. App. – Waco 1976, no writ) (quoting *Texcalco Inc. v. McMillian*, 524 S.W.2d 405, 407 (Tex. Civ. App. – Eastland 1975, no writ)); *Bishop v. Lusk*, 27 S.W. 306 (Tex. Civ. App. – Dallas 1894)).

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will be able to take steps to protect himself.⁵³ Accordingly, the claimant is required to "send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address."⁵⁴ If the claimant is not the original contractor, the claimant must also transmit a copy of the affidavit to the original contractor at its last known business address or residence.⁵⁵ A copy of the affidavit must be sent to the owner (and potentially the original contractor) "not later than the fifth day after the date the affidavit is filed with the county clerk."⁵⁶

(vii) Subcontractors Perfection of M&M Lien

The Texas Property Code provides two methods by which a subcontractor can perfect a lien upon the owner's property. Subchapter E, "Required Retainage For Benefit of Lien Claimants" (sections 53.101-53.105), is generally referred to as the "statutory retainage" method.⁵⁷ By statute, an owner is required to retain a percentage of the funds payable to a general contractor to protect against the general contractor's failure to pay its subcontractors. Specifically, the Texas Property Code requires owners to retain either 10 percent of the contract price of the work to the owner or 10 percent of the value of the work...using the contract price or, if there is not contract price, using the reasonable value of the completed work for 30 days after the work is completed.⁵⁸ These retained funds secure the payment of artisans and mechanics who perform labor or service, including subcontractors.⁵⁹ A subcontractor or other claimant who wants to make a claim on that retainage must properly give notice and file an affidavit claiming a lien not later than the 30th day after the work is completed.⁶⁰ The period during which a claimant can and must file a lien affidavit under section 53.103 is therefore the same period that an owner can and must hold retainage under section 53.101 (i.e. thirty days after the completion of work).⁶¹

It is consequently in the best interest of all construction participants to know when the thirty-day period terminates: the owner so that it can release the remaining funds, the original contractor so that it can budget for its final payment, and the claimant so that it can file the lien affidavit before that date.⁶²

Under the "fund-trapping" method, Subchapter D of the Texas Property Code, entitled "Funds Withheld by Owner Following Notice, (sections 53.081-53.084)" a subcontractor can trap, in the owner's hands, funds payable to the general contractor if the owner timely receives notice from the subcontractor that he has not been paid. If the owner pays any money to the general contractor after receiving this notice from the subcontractor, the owner's property will be subject to a lien to the extent of the money paid. This subchapter provides as follows:

(a) Except for the amount required to be retained under Subchapter E, the owner is not liable for any amount paid to the original contractor before the owner is authorized to withhold funds under this subchapter.

(b) If the owner has received the notices required by Subchapter C, if the lien has been secured, and if the claim has been reduced to final judgment, the owner is liable and the owner's property is subject to a claim for any money paid to the original contractor after the owner was authorized to withhold funds under this subchapter.⁶³ Under Texas law, a subcontractor enjoys no direct lien against the owner's property but must instead rely on his statutory, derivative rights to collect funds due by the owner to the contractor or, failing that, to impose a lien on the property.⁶⁴

2. The Constitutional M&M Lien

The Texas Constitution grants to mechanics, artisans, and materialmen of every class a lien on buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefore. The Texas Constitution requires that the Legislature provide by law for the speedy and efficient enforcement of such liens.⁶⁵ The Constitutional M&M

⁵³ *Cabintree Inc. v. Schneider*, 728 S.W.2d 395, 396 (Tex. App. – Houston [1st Dist.] 1986, *writ ref'd*) (emphasis in original).

⁵⁴ TEX. PROP. CODE ANN. § 53.055(a).

⁵⁵ *See id.* § 53.055(b).

⁵⁶ *Id.* § 53.055(a).

⁵⁷ *Ambassador Development Corp. v. Valdez*, 791 S.W.2d 612, 620 (Tex.App-Fort Worth 1990, no writ).

⁵⁸ *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 730 (Tex. 2003).

⁵⁹ *Id.*

⁶⁰ *See* § 53.103.

⁶¹ *Page*, 102 S.W.3d at 722

⁶² *Id.*

⁶³ *Ambassador Development Corp.*, 791 S.W.2d at 621.

⁶⁴ *Thermo Tech, Inc. v. Goodyear Tire and Rubber Co., Inc.*, 643 F.2d 1173, 1178 (5th Cir. 1981).

⁶⁵ *Texas Wood Mill Cabinets, Inc. v. Butter*, 117 S.W.3d 98, 105 (Tex. App-Tyler 2003, no writ).

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Lien exists independently and apart from any legislative act.⁶⁶ However, as interpreted by the Texas Supreme Court, while the constitutional right to a mechanic's or materialman's lien is broad, the Texas constitution creates a "self-executing" lien in favor of only original or general contractors (those who contract directly with the property owner or its agents).⁶⁷

Constitutional M&M Lien analysis can be distilled as follows: a materialman is entitled to a constitutional lien if it can prove that: (1) the debtor is the owner of a building or article; (2) the materialman had privity of contract with the debtor; (3) the materialman made or repaired the building or article by (a) supplying goods and constructing all or part of the building or article, (b) supplying goods and repairing the building or article, (c) supplying unique goods manufactured in accordance with the debtor's specifications, or (d) furnishing off-the-shelf general inventory goods with the intent of both the materialman and debtor that such goods be incorporated into specified buildings or articles; (4) the materialman actually supplied those goods to the debtor; and (5) the goods were incorporated into the building or article.⁶⁸

The self-executing aspect of the Constitutional M&M Lien is vital because it provides the chief advantage over Statutory M&M Liens: the lienholder does not need to give notice or record his lien; his protection is automatic.⁶⁹ Persons not contracting directly with the owner do not have a "self-executing" lien. In Texas, unlike many states, only an original contractor enjoys a direct lien on the property because the lien may only be asserted by one in privity with the owner of the property in question. The subcontractor must rely on his Statutory lien rights to collect funds due from the owner to his contractor.⁷⁰ This does not mean that a subcontractor or other person not in privity with the owner is not protected, it simply means that

his Statutory M&M Lien requires affirmative and timely actions to perfect it, as required by statute.⁷¹

The privity requirement is essential to balance the vital need of businessmen to be paid, with the necessity of guarding unsuspecting property owners from hidden liens acquired by someone with whom the owner has not conducted business.⁷² Similarly, the lien is ineffective against a subsequent bona fide good faith purchaser for value without notice. The reason, of course, is that surprising later purchasers with unrecorded constitutional M&M Liens places too heavy of burden on real estate transactions.⁷³ Accordingly, while the Constitutional M&M Lien is an available safeguard to mechanics, artisans and materialmen, claimants find its protections limited and restricted.

III. AVOIDANCE OF M&M LIENS

A. Statutory M&M Liens

The Bankruptcy Code defines a Statutory lien as a lien arising solely by force of statute on specified circumstances or conditions, or lien of distress for rent, whether or not Statutory, but does not include a security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.⁷⁴ Under the Bankruptcy Code, a trustee is granted the powers of a judicial lien creditor and the ability to avoid unperfected liens.⁷⁵ In bankruptcy cases, the trustee's powers are the same as those of a hypothetical creditor of the debtor who has completed the legal process for perfection of his lien upon all property available for the satisfaction of his claim against the debtor.⁷⁶

An unperfected Statutory M&M Lien is avoidable under section 545 of the Bankruptcy Code. The Trustee (or a debtor in possession) is the only party who has standing to exercise section 545 powers to

⁶⁶ *The Ralph H. Parsons Company v. South Coast Supply Company, Inc.*, (In re A&M Operating Co., Inc.), 182 B.R. 997, 1000 (E.D.Tex 1995).

⁶⁷ *Exchanger Contractors Inc. v. Comerica Bank-Tex.* (In the Matter of Waterpoint Int'l LLC), 330 F.3d 339, 343 (5th Cir. 2003).

⁶⁸ *Id.* at 1004.

⁶⁹ *In re A&M Operating Co. Inc.*, 182 B.R. at 1000.

⁷⁰ *Id.*

⁷¹ See, e.g., *Cabintree Inc. v. Schneider*, 728 S.W.2d 395, 396 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.).

⁷² *In re A&M Operating Co. Inc.*, 182 B.R. at 1001.

⁷³ *Id.*

⁷⁴ 11 U.S.C. §101(53).

⁷⁵ 11 U.S.C. § 544

⁷⁶ *Bakst v. Lifestyle Tree Maintenance Landscape Service, Inc.* (In re HDI Partners), 202 B.R. 524 (Bankr. S.D.Fla. 1996).

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avoid a Statutory lien.⁷⁷ That section provides that a “Statutory lien” may be avoided to the extent it is “not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of state or local law.”⁷⁸

The Bankruptcy Code is not the only source of law for the avoidance of unperfected M&M Liens. The Texas Property Code likewise provides a mechanism for the removal of an invalid M&M Lien (whether perfected or not).⁷⁹ The provision is available to any party, whether an owner or a general contractor, and provides for relief on an expedited basis. The party objecting to the validity of a lien may file a motion to remove the lien.⁸⁰ The motion may be granted only for certain specified defects, including failure to give proper notice and failure to properly file the lien affidavit. The court is directed to “promptly determine” a motion to remove an M&M Lien.⁸¹ Additionally, a lien may be removed if the party seeking its removal deposits all funds subject to the notice with the court. Since the trustee succeeds to all of the debtor’s available defenses, the trustee may invoke these provisions of the Texas Property Code, in addition to his “strong arm” powers to attack an unperfected or defective M&M Lien.⁸²

There is no doubt that an unperfected Statutory M&M Lien is avoidable in bankruptcy. However, this is not the only problem faced by an unperfected M&M Lien claimant. An unperfected lien is not only inferior to the trustee’s hypothetical lien creditor status, but also fails to confer *any* priority. In other words, the avoidance of an unperfected lien does not mean that the creditor is subordinated to other lien claimants, but is still superior to general unsecured creditors.⁸³ Rather, the holder of an avoided lien is reduced to the

Chapter 9 status of a general unsecured creditor.⁸⁴ What this means is that an M&M Lien claimant must ensure that he takes the appropriate steps to perfect his lien rights under Texas law. Given the minimal efforts involved, and the draconian consequences of non-perfection in the bankruptcy context, the efforts are well worth the potential reward. Conversely, an estate representative should always evaluate the validity and perfection of M&M Liens, because the ability to defeat them in the bankruptcy context is readily available and may be of significant value to the estate.

B. Constitutional M&M Liens

The fact that a Constitutional M&M Lien is self-executing does not allow it to bind subsequent purchasers without actual or constructive notice.⁸⁵ It is because of this bedrock legal principle that a Constitutional M&M Lien can be readily avoided under the Bankruptcy Code and, therefore, offers its holder little, if any, comfort and protection in the wake of bankruptcy.

The Bankruptcy Code grants the trustee (which may be the debtor-in-possession) so called “strong-arm” powers, derived from section 544 of the Bankruptcy Code. Among these powers:

The trustee shall have, as of the commencement of the case, and *without regard to any knowledge of the trustee or of any creditor*, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.⁸⁶

⁷⁷ *In re A & R Wholesale Distrib., Inc.*, 232 B.R. 616, 620 (Bankr. N.J. 1999) citing 5 *Collier on Bankruptcy*, (15th Rev.Ed. 1996), ¶ 545.01[3].

⁷⁸ 11 U.S.C. § 545(2).

⁷⁹ See TEX. PROP. CODE ANN. § 53.208(c) (Vernon 2005).

⁸⁰ See *id.*

⁸¹ See *id.* § 53.160.

⁸² See 11 U.S.C. § 558.

⁸³ See *In the Matter of Wheaton Oaks Partners Ltd. P’ship*, 27 F.3d 1234, 1244 (7th Cir. 1994).

⁸⁴ See *id.*; *Dunes Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 492, 501 (D.S.C. 2000).

⁸⁵ *McEvoy v. Ron Watkins Inc.*, 105 B.R. 362, 365 (N.D. Tex. 1987).

⁸⁶ 11 U.S.C. § 544(a)(3) (2006) (emphasis added).

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The Bankruptcy Code, therefore, automatically clothes the trustee with exactly the status that, under Texas law, renders a Constitutional M&M Lien ineffective, since the trustee is deemed to be: (i) a subsequent bona fide purchaser; (ii) of the real property that is the subject of the Constitutional M&M Lien; (iii) without notice of the Constitutional M&M Lien – even if the trustee, in fact, has actual notice thereof.

However, while federal courts in Texas agree that the trustee's strong-arm powers permit him to avoid a Constitutional M&M Lien on real property, at least one court has held that a trustee lacks the ability to avoid a Constitutional M&M Lien on personal property, because section 544 of the Bankruptcy Code grants the trustee the rights of a bona fide purchaser of real property only.⁸⁷

It appears therefore that the Constitutional M&M Lien, at least insofar as it extends to real property, is readily avoidable by a bankruptcy trustee.⁸⁸ This renders the Constitutional M&M Lien of little value in bankruptcy and is an additional reason why every M&M Lien claimant should file and serve the necessary affidavits and perfect a Statutory M&M Lien as well, since the Statutory M&M Lien is not avoidable by the trustee under section 544(a)(3) of the Bankruptcy Code (although it may be avoidable under other powers). Nevertheless, avoidance is not automatic and affirmative action on the part of the trustee is required to avoid a Constitutional M&M Lien, by the filing and prosecution of an adversary proceeding against the M&M Lien claimant.⁸⁹

The Statutory M&M Lien, on the other hand, is not subject to avoidance (if it is otherwise perfected under Texas law) under section 544 of the Bankruptcy Code, although it may be subject to avoidance as a preference or fraudulent transfer. This is because a Statutory M&M Lien, since it is filed by way of affidavit, provides constructive notice to the world of its existence regardless of the actual knowledge of any party.⁹⁰ The bankruptcy trustee is charged with such constructive notice and may not, therefore, invoke section 544 "strong arm" powers against the Statutory

M&M Lien despite any lack of actual knowledge thereof, so long as the lien is perfected under Texas law.⁹¹

IV. COMPETING LIENS

A. Contractor's Property

Section 53.121 of the Texas Property Code confirms that all subcontractors, laborers, and materialmen who have an M&M Lien have preference over other creditors of the original contractor.⁹² Thus, in addition to the right to force the sale of the owner's property, if need be, to assure payment, subs and suppliers also enjoy a preferred status against the principal contractor itself, over other creditors of the principal contractor.⁹³ This additional protection is available only to subcontractors and suppliers who have properly perfected their mechanic's lien against the property on which their work was done or their supplies were delivered or installed.⁹⁴ Accordingly, it appears that the preference available under Section 53.121 is limited to Statutory M&M Liens since a subcontractor or supplier is unable to secure a Constitutional M&M Lien.

B. Other M&M Liens

As a general rule, "perfected mechanic's liens are on equal footing without reference to the date of filing the affidavit claiming the lien."⁹⁵ There is, therefore, no first-in-time or other priority rule affecting the priority of M&M Liens against other M&M Liens: such liens "are of equal dignity."⁹⁶ If the proceeds of a foreclosure sale on an M&M Lien are insufficient to pay in full all valid M&M Liens against the property, such proceeds are to be paid *pro rata*, but only "on the perfected mechanic's liens *on which suit is brought*."⁹⁷

One exception to this general rule, however, is that "[t]he priority of a lien . . . under Section 53.021(c), (d) or (e) with respect to other mechanic's liens is determined by the date of recording."⁹⁸ This

⁸⁷ See *In re Hydro-Action Inc.*, 2004 Bankr. LEXIS 262 *26 (Bankr. E.D. Tex. 2004).

⁸⁸ See *McEvoy*, 105 B.R. at 365; *In re Ernst & Assocs. Inc.*, 59 B.R. at 497.

⁸⁹ See, e.g., *Brady v. Andrew (In re Commercial W. Fin. Corp.)*, 761 F.2d 1329 (9th Cir. 1985).

⁹⁰ See, e.g., *Cavazos v. Munoz*, 305 B.R. 661, 681 (S.D. Tex. 2004).

⁹¹ See *id.*

⁹² TEX. PROP. CODE ANN. § 53.121 (Vernon 2005).

⁹³ *In re Huber Contracting, Ltd.*, 347 B.R. 205, 209 (Bankr. W.D. Tex. 2006).

⁹⁴ *Id.*

⁹⁵ TEX. PROP. CODE ANN. § 53.122(a) (Vernon 2005).

⁹⁶ *Lane-Wells Co. v. Continental-Emsco Co.*, 397 S.W.2d 217, 220 (Tex. 1965).

⁹⁷ TEX. PROP. CODE ANN. § 53.122(b) (emphasis added).

⁹⁸ *Id.* § 53.124(e). See also § 53.122(a).

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means that the priority of Statutory M&M Liens for architects, engineers, surveyors, demolition contractors, and landscaping providers are subject to the first-in-time rule as against other Statutory M&M Liens; a priority measured by the recording of an affidavit, as opposed to the inception of the lien (which could be two significantly different dates).⁹⁹ The other exception to this general rule concerns Statutory M&M Liens in and to retainage.¹⁰⁰ With respect to retainage, “[i]ndividual artisans and mechanics . . . share proportionately to the extent of their claims for wages and fringe benefits earned” and, only after these claims are paid in full, “other participating claimants share proportionately in the balance” of the retainage.¹⁰¹

C. Owner’s Property Subject to Prior Lien

One of the most frequent priority issues faced by M&M Lien claimants in Texas is the priority of the Statutory M&M Lien in the owner’s property as against prior lien claimants in that same property, usually in the form of a vendor’s lien or a deed of trust lien. By statute, “a mechanic’s lien attaches to the house, building, improvements, or railroad property in preference to any prior lien, encumbrance, or mortgage on the land on which it is located.”¹⁰² However, “[t]he mechanic’s lien does not affect any lien, encumbrance, or mortgage on the land or improvement at the time of the inception of the mechanic’s lien.”¹⁰³ The general rule, therefore, is that “a mechanic’s and materialmen’s Statutory lien upon improvements made is superior to a prior recorded deed of trust lien where the improvements made can be removed without material injury to the land and pre-existing improvements, or to the improvements removed.”¹⁰⁴ “This preference lien accorded to materialmen also attaches to materials that the supplier has delivered but which have not yet been incorporated into the building or improvement.”¹⁰⁵

An item may be a removable even if it was the intention of the parties that it be permanent and even if, under other law, the item may be considered an

attached fixture.¹⁰⁶ For example, light fixtures, wall switches and plugs, and electrical control panels are most likely removables.¹⁰⁷ Toilets and sinks, unless they are cemented in place, are most likely removables because any damage that might result from their removal is minor.¹⁰⁸ Air conditioning compressors and furnaces most likely are removable, since their removal does not cause material damage and since they are made to be (and frequently are) removed.¹⁰⁹ On the other hand, heating and cooling ducts, plumbing, wiring, and sheet rock most likely are not removables because of the extent of damage caused to remove them and because they are not “separate” from what they are being removed from: the walls and infrastructure of an improvement.¹¹⁰

The removables that are the subject of the lien do not necessarily have to be only those removables supplied by or attributable to the M&M Lien claimant. Since the statute grants priority in all removables on the property, the lien preference extends to all removables “without regard to who placed them there.”¹¹¹ This is the case with respect to a general contractor, who may be able to obtain priority on all removables furnished under his contract, even though the removables themselves were furnished by one or more subcontractors.¹¹² When a subcontractor furnishes supplies, materials or labor along with other subcontractors, he may be required to identify the specific materials he furnished and may be limited in his preference over prior creditors to those removables which he provided or improved.¹¹³

⁹⁹ See *id.* See also TEX. PROP. CODE ANN. § 53.021(c)-(e).

¹⁰⁰ See TEX. PROP. CODE ANN. § 53.122(a).

¹⁰¹ *Id.* § 53.104(a)-(b).

¹⁰² *Id.* § 53.123(a).

¹⁰³ *Id.* § 53.123(b).

¹⁰⁴ *First Nat’l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974).

¹⁰⁵ *Suburban Homes Lumber Co. v. Lomas & Nettleton Fin. Corp. (In the Matter of Jamail)*, 609 F.2d 1387, 1389 (5th Cir. 1980).

¹⁰⁶ See, e.g., *Houk Air Conditioning Inc. v. Mortgage & Trust Inc.*, 517 S.W.2d 593 (Tex. Civ. App. – Waco 1974, *no writ*).

¹⁰⁷ See, e.g., *Parkdale State Bank v. McCord*, 428 S.W.2d 121 (Tex. Civ. App. – Corpus Christi 1968, *writ ref’d n.r.e.*).

¹⁰⁸ See *In re Orha Wall Fin. Corp.*, 84 B.R. at 446-47.

¹⁰⁹ See *id.* at 446.

¹¹⁰ See *id.* at 446-47.

¹¹¹ *L&N Consultants Inc. v. Richard H. Sikes, Inc.*, 648 S.W.2d 368, 371 (Tex. App. – Dallas 1983, *writ ref’d n.r.e.*); *Richard H. Sikes Inc. v. L&N Consultants*, 586 S.W.2d 950, 956 (Tex. Civ. App. – Waco 1979, *writ re’f n.r.e.*).

¹¹² See *L&N Consultants*, 648 S.W.2d at 371.

¹¹³ See, e.g., *In the Matter of Jamail*, 517 S.W.2d at 1390.

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V. M&M LIEN ISSUES IN CONSTRUCTION BANKRUPTCY CASES

A. Adequate Protection

Adequate protection is governed by the provisions of Section 361.¹¹⁴ Section 361 of the Bankruptcy Code requires an M&M Lien claimant to receive cash payment or periodic cash payments if property in which the M&M Lien is attached is sold, leased, or otherwise reduced in value.¹¹⁵

The M&M Lien claimant may have rights in the retainage held by the owner or trapped funds. Once again, the question is whether these assets belong to the debtor. Since the retainage and trapped funds are held by the property owner who contracted for the construction services or goods, adequate protection is not required unless the debtor owns the property.

B. Automatic Stay

The automatic stay prevents creditor actions, absent court approval, against the debtor, the estate, and the estate's property. The automatic stay provisions of the Bankruptcy Code operate as a stay, applicable to all entities, of: the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have

been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case.¹¹⁶ The automatic stay prohibits the commencement of continuation of a judicial proceeding, the enforcement of a judgment against the estate or its property, any act to enforce a prepetition lien, and any act to obtain possession of, or exercise control over, property of the estate.¹¹⁷

The scope of the automatic stay is undeniably broad and applies to all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy case.¹¹⁸ The automatic stay may prohibit actions against a non-debtor party or against property that is not property of the estate, if the estate otherwise has interests in that property.¹¹⁹ This may be a trap for those without extensive bankruptcy experience who may find themselves subject to an action for a violation of the stay, or who may find their transfers or other actions subject to avoidance. Thus, for example, if the debtor is a general contractor who has claims to retainage and trapped funds held by an owner, a subcontractor who initiates an extra-bankruptcy proceeding against that retainage or trapped funds is attempting to exercise control over, and obtain, property in which the estate has an interest and which may be estate property. Without thinking that the stay is being violated, the subcontractor may walk into a trap. In any situation where questions such as this one exist, counsel is cautioned to proceed out of an abundance of caution and obtain proper relief from the bankruptcy court.

C. Setoff Issues

Subject to the automatic stay, the Bankruptcy Code generally preserves non-bankruptcy setoff rights, with certain important considerations.¹²⁰ Specifically, the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case."¹²¹ In order for the creditor to exercise a

¹¹⁴ Section 361 provides:
When adequate protection is required under section 362, 363, or 364 of this title [11 USC § 362, 363, or 364] of an interest of an entity in property, such adequate protection may be provided by—
(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title [11 USC § 362], use, sale, or lease under section 363 of this title [11 USC § 363], or any grant of a lien under section 364 of this title [11 USC § 364] results in a decrease in the value of such entity's interest in such property;
(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title [11 USC §503(b)(1)] as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.
11 USC § 361.

¹¹⁵ *Id.* §361.

¹¹⁶ *American Guaranty, Inc. v. Miller (In re Miller)*, 58 B.R. 192, 196 (Bankr. S.D.Tex. 1985).

¹¹⁷ See 11 U.S.C. § 362(a)(1)-(4) (2006).

¹¹⁸ See H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977).

¹¹⁹ See *Reliant Energy Services, Inc. v. Enron Canada Corp.*, 349 F. 3d 816 (5th Cir. 2003).

¹²⁰ See 11 U.S.C. § 553 (2006).

¹²¹ *Id.* § 553(a).

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right of setoff, therefore, the creditor: (i) must first obtain relief from the automatic stay; (ii) be the holder of a claim against the debtor; (iii) the debtor must hold a mutual claim against the creditor; (iv) the mutual claims must be prepetition; and (v) the creditor must hold a non-bankruptcy right to setoff.¹²² Some of the exceptions to this general right to setoff include situations wherein the creditor's claim against the debtor is disallowed, the claim of the creditor was transferred to the creditor postpetition, and the claim of the creditor was transferred to the creditor within ninety (90) days prior to the petition date, while the debtor was insolvent, and for the purpose of obtaining certain kinds of setoff rights.¹²³ With respect to a bankruptcy court's allowance of setoff rights, general principles of equity apply,¹²⁴ although certain courts have held that there is a presumption in favor of setoff unless permitting the setoff would prejudice a third party.¹²⁵ Moreover, if the creditor has a valid right of setoff recognized and preserved under section 553(a) of the Bankruptcy Code, the creditor's claim is deemed a secured claim to the extent of his right of setoff.¹²⁶

Setoff rights can, therefore, be exceedingly valuable in bankruptcy, especially in the case of M&M Lien rights, and can shield the owner or general contractor that pays the bankruptcy contractor's obligations because, in addition to preserving setoff rights, the Bankruptcy Code further provides that the trustee's right to a turnover is subject to the owner's setoff rights against the estate.¹²⁷

D. Postpetition Attorney's Fees and Interest on M&M Liens

Postpetition attorney's fees are generally allowed on account of secured claims if the secured claim is oversecured and certain other conditions are met.¹²⁸ Since it is feasible that a secured claim on account of a Statutory M&M Lien, if it enjoys higher priority, will be oversecured, this raises the issue of whether

postpetition attorney's fees under a Statutory M&M Lien are allowable.

The Fifth Circuit has long held that postpetition attorney's fees are available only under consensual liens and not under Statutory liens.¹²⁹ A Statutory M&M Lien is, by definition, a Statutory non-consensual lien.¹³⁰ Accordingly, the Fifth Circuit recently held that postpetition attorney's fees are not allowable under section 506(b) of the Bankruptcy Code on a Statutory M&M Lien.¹³¹ As pointed out by the Fifth Circuit, the former version of section 506(b) of the Bankruptcy Code provided for postpetition interest only "under the agreement under which such claim arose," which does not apply to Statutory M&M Liens.¹³² As former section 506(b) allowed postpetition interest "without qualification," if the secured claim is oversecured, postpetition interest on a Statutory M&M Lien was otherwise allowable.¹³³

By the same token, however, the Fifth Circuit has recognized that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has changed this rule. Under that act, section 506(b) of the Bankruptcy Code now permits postpetition attorney's fees, if the secured claim is oversecured, and if "provided for under the agreement or state statute under which such claim arose."¹³⁴ This would encompass the Statutory M&M Lien, since Texas law does provide for attorney's fees to collect that lien (with certain qualifiers). Therefore, it appears the Bankruptcy Code amendments have improved the postpetition rights of Statutory M&M Lien claimants insofar as postpetition attorney's fees are concerned. However, because the change to section 506(b) is not retroactive, and many cases under the pre-amendments version of the Bankruptcy Code continue to make their way through the courts, practitioners must be aware of the different treatments under the two versions of section 506(b).

¹²² See, e.g., *In re Corland Corp.*, 967 F.2d 1069, 1076 (5th Cir. 1992).
¹²³ See 11 U.S.C. § 553(a)(1)-(3).
¹²⁴ See, e.g., *Gilbert v. First National Bank*, 633 F.2d 686 (5th Cir. 1980).
¹²⁵ See, e.g., *In re Larbar Corp.*, 177 F.3d 439, 447 (6th Cir. 1999).
¹²⁶ See 11 U.S.C. § 506(a).
¹²⁷ See *id.* § 542(b).
¹²⁸ See 11 U.S.C. § 506(b).

¹²⁹ See *City of Farmers Branch v. Pointer (In re Pointer)*, 952 F.2d 82, 89 (5th Cir. 1992).
¹³⁰ See *Bridgeport Tank Trucks v. West Fork Tank Trucks Inc. (In the Matter of Enre L.P.)*, 457 F.3d 493, 494-95 (5th Cir. 2006).
¹³¹ See *id.* at 495-96.
¹³² *Id.* at 494.
¹³³ *Id.*
¹³⁴ *Id.*

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VI. CONCLUSION

The objective of the Texas Constitution and of the Property Code is to ensure payment is made to mechanics and materialmen (and others who provide goods or services in connection with construction projects), provided they comply with the requirements to obtain valid Constitutional and Statutory M&M Liens. While there are certain steps that must be taken to obtain the benefits of such liens, in most cases, such a lien, whether statutory or constitutional, can be an effective weapon to ensure or extract payment. As the Article demonstrates, however, in a bankruptcy scenario, those protections may evaporate or become ethereal if proper steps to perfect the lien are not taken

(and even if the proper steps are taken). Moreover, the holders of M&M Liens can face additional challenges imposed or created by the Bankruptcy Code even if the M&M Lien is otherwise valid under State law. Due to the competing claims, rights and interests of the various constituencies typically found in a construction company bankruptcy, and the likelihood that sufficient assets to pay all creditors will not exist, it is critical that experienced practitioners are aware of the typical problems and pitfalls likely to be encountered. More importantly, practitioners need a sound strategy and effective tactics to survive the battle that will certainly occur in a construction company bankruptcy and to maximize recovery for their clients.

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BACKGROUND

Patrick is an Associate with the firm and has been practicing law since 1997. He represents clients in bankruptcy, business reorganization, commercial litigation and real estate matters. Prior to joining Munsch Hardt, he was an Associate with Floyd Jones Rios Wahrlich, P.C. Before joining Floyd Jones in May 2001, he worked for a law firm in Nebraska. While practicing in Nebraska, he co-authored *Effective Legal Writing for Paralegals in Nebraska*. His practice is focused on business restructuring as well as handling civil litigation and real estate issues. He also represents purchasers and sellers of assets from financially distressed companies and advises parties on insolvency issues and complex transactions.

Notable cases include: *American Homestar Corporate, et al.* (represented the twenty-two debtor entities); *Neodyme Technologies Corporation* (represented the Chapter 7 Trustee); *Mathey-Leland Manufacturing Corporation*; *Cooper Manufacturing Corporation*; *Integrated Health Services, Inc.* (represented several personal injury claimants) and numerous other companies.

EDUCATION

Creighton University School of Law, Juris Doctor 1997
University of Houston, Bachelor of Arts 1993

PROFESSIONAL AFFILIATIONS

State Bar of Texas
Houston Bar Association
Nebraska Bar Association
Association of Trial Lawyers of America
(President, Creighton Chapter, 1996 – 1997)
Turnaround Management Association
The Honorable Arthur L. Moller/David B. Foltz, Jr. American Inn of Court

BAR MEMBERSHIPS

Nebraska - 1997
Texas - 2001
All State Courts in Texas and Nebraska
United States District Court for the Southern, Western, Eastern and Northern Districts of Texas
United States District Courts for Nebraska
United States Court of Appeals for the Fifth Circuit

