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discrimination in education just as Title VI seeks to eradicate discrimination based on race, color, and national origin. Discrimination on the basis of sex is no less invidious and no more socially useful than discrimination on the basis of race or national origin. If the decision in *University of Richmond* is upheld, Title IX enforcement will be severely weakened.<sup>76</sup> This is a crucial point in the history of Title IX,<sup>77</sup> and the courts should construe Title IX broadly in the spirit of equality and justice in which it was conceived.

*Kelsey Lynne McNaught*

*Editor's Note:* Subsequent to the writing of this note, the Sixth Circuit Court of Appeals has ruled that a private college whose students receive loans and/or grants from the government is not subject to Title IX regulation except with respect to its handling of such loans or grants.<sup>78</sup>

## Liens: Mechanics' and Materialmen's Liens: Conforming to New Statutes and the Bankruptcy Code

Title 42 of the Oklahoma Statutes<sup>1</sup> provides the legal guidelines for the establishment and termination of liens. When the laws change,<sup>2</sup> practitioners and other parties affected should be alerted to the new requirements. The purpose of this note is to explain the most recent changes in mechanics' and materialmen's liens and to evaluate the ramifications of the changes. Further, the note will relate the effect of new sections 142.1 and 142.2<sup>3</sup> (describing the new requirement of *actual* notice to the owner of an owner-occupied dwelling before a lien may arise) in regard to the trustee's authority in bankruptcy to avoid certain debts of the debtor once the petition in bankruptcy is filed.<sup>4</sup> The importance of sections 142.1 and 142.2 on the trustee's voiding powers in bankruptcy is manifested in the change of the time period during which a debt may be secured. Knowledge of the effect of these statutes on the time for perfection of a debt will allow the practitioner in this area to avail himself of the changes in order to protect his client's interests.

76. No appeal has been taken by the Department on *Richmond v. Bell*. However, on Feb. 22, 1983, the Supreme Court took certiorari on *Grove City College v. Bell*.

77. Since the defeat of the Equal Rights Amendment, sex discrimination can be redressed solely through statutory remedies such as Title IX.

78. *Hillsdale College v. Department of Health, Education & Welfare*, 696 F.2d 418 (6th Cir. 1982) (one judge dissenting). See also *Recent Development*, 36 OKLA. L. REV. 245 (1983).

1. 42 OKLA. STAT. § 1-178 (1981).

2. For example, this note will be dealing with new sections added to the statutes by the 1980 amendments.

3. 42 OKLA. STAT. §§ 142.1, 142.2 (1981).

4. 11 U.S.C. § 544 (Supp. III 1979).

*Lien Defined*

“A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.”<sup>5</sup> A lien enables a person who provides labor, material, or equipment to be sure of being compensated for such services. This is accomplished by allowing the provider of the services the right to an interest in some particular property until that person is indemnified for such services. A lien can be created either by contract or by operation of law.<sup>6</sup> Normally a lien is the result of a person furnishing labor, material, or equipment that is used in erecting, altering, or repairing a building.<sup>7</sup> The concept of attaching a lien on the item produced has been codified since the early 1900s.<sup>8</sup> The person who furnishes labor gets a mechanic’s lien; the person who furnishes material gets a materialmen’s lien.

A lien normally arises as the result of a person providing labor or material or both. One notable exception to be discussed later is a lien for renting or leasing equipment.<sup>9</sup> The procedural aspects of perfecting a lien vary, depending on the type of lien involved. A lien is perfected when the statutory guidelines are complied with and as a result of such compliance the lienholder’s interest in the property cannot be cut off by a subsequent lien. These variations may result in the unwary losing a valid lien for failing to comply with the proper procedures. To avoid any problems in this area, one must keep up with the changes to the statutes and be careful to follow them.

*Priority of Mechanic’s and Materialmen’s Liens*

A mechanic’s or materialmen’s lien takes preference to all liens and encumbrances that may attach after the commencement of the labor or the providing of the material.<sup>10</sup> A lien attaches to property when particular services—labor, material, or leased or rented equipment—are provided in the construction or improvement of that property. A subsequent party seeking a security interest in the property on which a lien has attached is charged with full notice of such lien claims.<sup>11</sup> However, the lien must be perfected within the statutory time limits to be superior to claims arising after the commencement of work. Thus, even though the holder of a lien that attached by the commencement of work prior to a subsequent claim fails to perfect his lien by filing a lien statement before the second claim is made, if he perfects his lien within the statutory time allowances, it will be superior to the subsequent claim.<sup>12</sup>

5. 42 OKLA. STAT. § 1 (1981).

6. 42 OKLA. STAT. § 6 (1981).

7. 42 OKLA. STAT. § 141 (1981).

8. The first codification of the definition of a lien, 42 OKLA. STAT. § 1, occurred in 1910.

9. See *infra* text accompanying notes 18-24.

10. 42 OKLA. STAT. § 141 (1981).

11. *American-First Title & Trust Co. v. Ewing*, 403 P.2d 488 (Okla. 1965). See also *Thompson v. Smith*, 420 P.2d 526 (Okla. 1966).

12. *Local Fed. Sav. & Loan Ass’n v. Davidson & Case Lumber Co.*, 208 Okla. 155, 255

Although normally a lien that attached prior to the mechanic's or materialmen's lien is preferred to the subsequent mechanic's or materialmen's lien, there is at least one instance where the prior lien is not preferred. That one exception arises when a lien claimant applies a mechanic's or materialmen's lien to property already covered under a mortgage lien. Case law has held that where advances under a mortgage lien are permissive, rather than obligatory, the subsequent mechanic's or materialmen's lien is preferred.<sup>13</sup> An example of a prior lien is a mortgage securing a construction loan. If the loan proceeds are paid during the course of construction, rather than before it, the duty to pay the money to the mortgagor must be obligatory for the mortgage lien to be superior to the mechanic's or materialmen's lien.<sup>14</sup> The duty to pay the proceeds of a mortgage loan is obligatory when the loan agreement provides for money to be paid out or advanced to the mortgagor upon construction reaching a certain stage or stages. The duty to pay out loan proceeds is not obligatory when payment is contingent on the mortgagor meeting certain conditions. In the latter situation, a subsequent mechanic's or materialmen's lien will take priority.<sup>15</sup> The general rule is stated as follows:

In a majority of jurisdictions, a mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens, at least where the mortgage was recorded prior to the performance of services or the furnishing of the materials, and the making of the advances was obligatory on the mortgagee under the terms of his contract with the mortgagor. . . .<sup>16</sup>

### *Analysis and Scope of the Statutory Changes*

#### *Section 141*

Section 141 provides for when and under what circumstances a lien arises.<sup>17</sup> The 1980 amendment to section 141 added an additional circumstance under which a lien may attach. The statute now allows a lien for anyone "who shall build, alter, repair or furnish labor, material or *lease or rent equipment* used on said land. . . ."<sup>18</sup>

Prior to this amendment, a mechanic's lien could not be based on an equipment lease or equipment rental.<sup>19</sup> The court in *Producers Energy Corp.*<sup>20</sup> noted with interest that section 141 was amended to include leased or rented

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P.2d 248 (1953). See also *Claude Ricker Lumber & Paint Co. v. Barger*, 195 Okla. 504, 158 P.2d 1021 (1945).

13. *Tulsa Ready-Mix Concrete Co. v. Dale Carter Lumber Co.*, 381 P.2d 849 (Okla. 1963).

14. *Id.*

15. *Home Sav. & Loan Ass'n v. Sullivan*, 140 Okla. 300, 284 P. 30 (1929).

16. 57 C.J.S. *Mechanic's Liens* § 205(b) (1948).

17. 42 OKLA. STAT. § 141 (1981).

18. *Id.* (emphasis added).

19. *In re Producers Energy Corp. v. Kelley*, 11 Bankr. 669 (Bankr. W.D. Okla. 1981).

20. *Id.*

equipment. However, the events of *Producers* occurred prior to the time when the amendment to section 141 was to become effective; thus the lien in *Producers* based on the leased or rented equipment could not be allowed.<sup>21</sup> In a future case, however, it is clear that such a lien would be allowed. The practical effect of this amendment is to allow the owner of leased or rented equipment to stand in the shoes of a materialman or mechanic; he is entitled to file a lien whenever one of them could do so.

A lien based on the use of leased or rented equipment must have been preceded by written notice to the owner of the real property prior to the use of the equipment on the land.<sup>22</sup> The notice must be given on the day the leased equipment is first used on the premises.<sup>23</sup>

The notice is intended to inform the real property owner of a new possible lienor. Such notice was not provided for prior to the amendment of section 141. If this notice is not filed with the lien, the lien cannot be perfected under the existing lien laws.<sup>24</sup>

A lien for the use of leased or rented equipment cannot arise from the use of such equipment on property qualified for homestead exemption or property used for agricultural purposes.<sup>25</sup> Therefore, an owner-occupied homestead is not subject to a lien if leased or rented equipment is used to improve the property, nor is a farm or ranch. Leased or rented equipment used for the development or production of oil and gas also cannot be a basis for a lien.<sup>26</sup>

#### *Sections 142.1 and 142.2*

Sections 142.1 and 142.2<sup>27</sup> deal with an important addition to mechanic's and materialmen's lien law.<sup>28</sup> Section 142.1 deals with the enforcement of such a lien against an owner-occupied dwelling and the required notice to the owner.<sup>29</sup> The basic provision of the section is that prior to the creation of an enforceable lien against an owner-occupied dwelling, the original contractor must have provided a written notice to one of the owners.<sup>30</sup> The notice must include the following language:

#### NOTICE TO OWNER

**YOU ARE HEREBY NOTIFIED THAT any persons performing labor on your property or furnishing materials for the construction, repair, or improvement of your property will be entitled to a lien**

21. The amendment to 42 OKLA. STAT. § 141 (1981) became effective on May 30, 1980.

22. 42 OKLA. STAT. § 143.2 (1981).

23. *Id.*

24. *Id.*

25. 42 OKLA. STAT. § 143.3 (1981).

26. 42 OKLA. STAT. § 143.4 (1981). 42 OKLA. STAT. § 144 (1981) allows liens on the leasehold in certain instances, but the statute does not mention a lien based on the use of rented or leased equipment.

27. 42 OKLA. STAT. §§ 142.1, 142.2 (1981).

28. 42 OKLA. STAT. §§ 141-178 (1981).

29. 42 OKLA. STAT. § 142.1 (1981).

30. *Id.*

against your property if he is not paid in full, even though you may have paid the full contract price to your contractor. This could result in your paying for labor and materials twice. This lien can be enforced by the sale of your property. To avoid this result, you may demand from your contractor lien waivers from all persons performing labor or furnishing materials for the work on your property. You may withhold payment to the contractor in the amount of any unpaid claims for labor or materials. You also have the right to demand from your contractor a complete list of all laborers and material suppliers under your contract, and the right to determine from them if they have been paid for labor performed and materials furnished.<sup>31</sup>

The reasoning behind the prior notice of possible liens against the owner-occupied dwelling is based on a public interest standard. Earlier case law had held that prior notice of a possible lien and its effects was not absolutely necessary to perfect an enforceable lien.<sup>32</sup> Even though notice to the owner of the property after the lien statement had been filed was required,<sup>33</sup> the property owner had to show prejudice in not receiving such notice to negate the lien.<sup>34</sup>

The new statutory notice must be signed and dated by one of the owners of the real property in order to be effective.<sup>35</sup> The signature indicates that the owners understand the notice and its effect.

A subcontractor, laborer, or seller of materials may rely on such a notice provided to the owner by the contractor.<sup>36</sup> The intent of section 142.1 seems to be that if the original contractor does not provide the notice required, the lien will not be enforceable. Liens are enforceable only by lien claimants.<sup>37</sup> Therefore, reading section 142.1 alone, some claimants may not be able to enforce their liens if the original contractor did not give the owner-dweller the required notice.

A possible problem in this area concerns the language:

A subcontractor, laborer or materialman . . . that has been furnished a copy of the above-described notice by said original con-

31. *Id.*

32. *Mobile Components, Inc. v. Layon*, 623 P.2d 591 (Okla. 1980), *cert. denied*, 454 U.S. 963 (1981), held that in the normal situation, a person must be given notice of a creditor's claim and an opportunity to be heard before that person is deprived of a significant property interest. The case further holds that the filing of a lien statement under the mechanics' and materialmen's lien statutes is only a *de minimis* interference with the use and enjoyment of property involved and does not amount to taking of a significant property interest to which requirements of due process attach.

33. 42 OKLA. STAT. § 143.2 (1981).

34. *Joe Brown Co. v. Best*, 601 P.2d 755 (Okla. App. 1979). The property owners claimed prejudice from lack of notice but failed to show such prejudice to the court.

35. 42 OKLA. STAT. § 142.2 (1981).

36. *Id.*

37. 42 OKLA. STAT. § 142.1 (1981).

tractor or subcontractor bearing a date and signature represented by said original contractor or subcontractor to be that of the owner, shall be permitted to rely on said representation and liens filed by said subcontractor, laborer or materialman shall be enforceable notwithstanding any provisions herein to the contrary.<sup>38</sup>

What if the original contractor or subcontractor deliberately fails to comply with the notice requirement? The language indicates that a subcontractor, laborer, or materialman will be able to file a lien based on a copy of the notice,<sup>39</sup> but the unscrupulous contractor or subcontractor could supply a completely falsified copy. The statute makes no provision for this situation.

The confusing aspect of these two sections<sup>40</sup> is that while one section prohibits the establishment of an enforceable lien if the notice requirement is not met,<sup>41</sup> the subsequent section allows an enforceable lien where the lienor has relied on a copy of the notice as evidence of compliance with the notice requirement.<sup>42</sup> The statute could be interpreted to mean that a falsified copy is a valid copy of the notice for statutory purposes. The owner of an owner-occupied dwelling who knew that the contractor had not met the notice requirement might think that an enforceable lien could not be filed on his property, but section 142.2 perhaps would allow an enforceable lien to be filed on it if the copy of the notice was falsified. Of course, the ultimate responsibility should rest on the person who provided the subcontractor, laborer, or materialman with a falsified or noncomplying notice, but the fact remains that a lien can apparently be based on such a notice. The problem of the validity or invalidity of a lien based on a falsified notice has not been decided by the courts.

The intent of section 142.2 is clear. Allowing the subcontractors, laborers, and materialmen to rely on a copy of the notice provided by the contractor or subcontractor relieves them of the responsibility of providing notice to the owner before performing any services. This intent seems to be thwarted, however, by allowing a lien to be filed when the lien is based upon a falsified proof of notice. The apparent conflict between sections 142.1 and 142.2, considering the possibility of a falsified notice, should be resolved in favor of the owner-occupier. Section 142.1 was enacted to provide protection to the owner-occupier. This statutory protection should not be lessened simply because a falsified notice has appeared. The persons relying on the falsified notice should only have a cause of action against the provider of such notice and not a lien on the owner-occupier's residence.

#### *Applying the New Notice Requirement to the Bankruptcy Code*

In order to perfect a mechanic's or materialmen's lien, the lienor must file

38. 42 OKLA. STAT. § 142.2 (1981).

39. *Id.*

40. 42 OKLA. STAT. §§ 142.1, 142.2 (1981).

41. 42 OKLA. STAT. § 142.1 (1981).

42. 42 OKLA. STAT. § 142.2 (1981).

a statement with the proper county clerk within the prescribed statutory time period.<sup>43</sup> If the owner of the real property or the contractor has filed for bankruptcy during this time period, the trustee in bankruptcy will probably seek to avoid the lien.<sup>44</sup>

The trustee in bankruptcy is the person elected by the creditors to administer the estate of the bankrupt debtor.<sup>45</sup> "Avoiding" the lien means the trustee will attempt to stop the lienor from perfecting the lien. If the lien cannot be perfected, then the lienor becomes a general creditor, i.e., a member of the class of creditors who do not have a right to certain property.

Under section 544 of the Bankruptcy Act, the trustee can avoid the perfection of any lien once the petition in bankruptcy is filed.<sup>46</sup> However, this avoiding power is limited by any generally applicable law that permits the perfection of an interest in property against an entity that acquires an interest in the property after the lien has attached but before it has been perfected.<sup>47</sup> The mechanics and materialmen statutes are such generally applicable laws.<sup>48</sup>

For example, suppose that work commences on property on July 1 (the lien attaches when the work commences),<sup>49</sup> and the owner of the property files the petition in bankruptcy on July 15. The trustee's lien arises on the 15th. If a prior lien has not been perfected before the 15th, then the trustee could normally avoid such an unperfected lien.<sup>50</sup> Section 546(b),<sup>51</sup> however, allows a mechanic, materialman, or equipment lessor to perfect his lien if the statutory time limit has not expired. If the mechanic or materialman files within the statutory time limit, his lien is perfected and superior to the trustee's claim regardless of the fact that a petition in bankruptcy was filed between the time the lien attached and when the lien was perfected.

Further, the lienor will not have to ask for relief from the automatic stay<sup>52</sup> because section 362(b)(3) exempts from the stay any act to perfect an interest in property.<sup>53</sup> If the lien statement is not filed within the statutory period, the lien cannot be perfected; the lienor loses secured status and is placed in the general creditor group.

When the property subject to the lien is an owner-occupied dwelling, an additional notice requirement must have been met.<sup>54</sup> Failure to give such notice

43. A contractor has four months after completion of work within which to file a lien under 42 OKLA. STAT. § 142 (1981). Any person employed by, furnishing material to, or leasing or renting equipment to a contractor has 90 days after their work has been completed to file a claim. 42 OKLA. STAT. § 143 (1981).

44. 11 U.S.C. § 544 (Supp. III 1979) allows the trustee in bankruptcy to void certain liens.

45. 11 U.S.C. § 702 (Supp. III 1979) provides for the election of a trustee by the qualifying creditors.

46. 11 U.S.C. § 544 (Supp. III 1979).

47. 11 U.S.C. § 546(b) (Supp. III 1979).

48. *Id.*

49. 42 OKLA. STAT. § 141 (1981).

50. 11 U.S.C. § 544 (Supp. III 1979).

51. 11 U.S.C. § 546(b) (Supp. III 1979).

52. 11 U.S.C. § 362 (Supp. III 1979).

53. 11 U.S.C. § 362(b)(3) (Supp. III 1979).

54. 42 OKLA. STAT. § 142.1 (1981).



precludes the perfection of a lien,<sup>55</sup> regardless of whether a petition in bankruptcy has been filed. However, when the notice requirement has been complied with, the only remaining problem is timely filing of the lien statement.

Some problems could easily arise in this area if the notice requirement of section 142.1 is executed later or falsified. When the notice is furnished late (after construction has begun), section 142.5 states that: "The written notice required in Section 1 of this act shall be satisfied by furnishing one notice *during the course of construction or during the course of the business transaction in which the labor or materials are furnished.*"<sup>56</sup> Section 142.5 apparently allows the contractor to cure the failure to give notice before the commencement of the first performance of labor or first furnishing of materials by complying with section 142.5. If one of the owners signs the late notice, the notice becomes effective and an enforceable lien may be perfected. If such late notice and a lien statement is filed within the statutory period and before the petition in bankruptcy has been filed, then the trustee in bankruptcy cannot void the lien. But the owner's refusal to sign the late notice would render the liens ineffective and incapable of perfection,<sup>57</sup> so that the trustee in bankruptcy would then be able to void the liens.

A problem easier to resolve concerns the situation in which the contractor gives a falsified notice to the subcontractor, laborer, or materialman. As previously discussed, the person given this notice may rely on it to assure the enforceability of his lien.<sup>58</sup> Because the lien may be based on a falsified notice,<sup>59</sup> the time for perfecting such a lien will be the same as though the notice requirement had been fully and correctly complied with. Consequently, a lien based on a falsified notice would be good against the avoiding power of the trustee in bankruptcy provided the statement was filed within the statutory time.

### Conclusion

In order for a mechanic or materialman to protect his lien, he must be aware of the new mechanic's and materialmen's lien laws. These laws have provided a new area in which a lien can arise—where leased or rented equipment is used in improving real property. To perfect this lien a statutory notice requirement must be met. Prior to these new statutes, the provider of leased or rented equipment could not file a lien on the property on which the equipment was used.

Another new law requires that a contractor provide the owner of an owner-occupied dwelling with notice of the possibility that a lien could attach because of the services performed on his property. This notice was not required prior to the passage of section 142.1. By providing for this notice, the legislature

55. *Id.*

56. 42 OKLA. STAT. § 142.5 (1981) (emphasis added).

57. 42 OKLA. STAT. § 142.2 (1981).

58. *Id.*

59. See *supra* text accompanying note 39.