

## Lean Times Beget Lien Times

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*I like my players to be married and in debt.  
That's the way you motivate them.* Ernie Banks

Alright already! Three months ago, you invoiced one of your customers for equipment and services you provided for their operations, and despite the exercise of every gentle reminder you can think of, there still has been no check in the mailbox. Is it time to secure your debt by perfecting a mechanics' and materialmen's lien? Although, generally speaking, there are numerous legal avenues available in attempting to remedy a debt, this article will present a brief summary of some basic dynamics and issues of a mechanics' and materialmen's ("M&M") lien<sup>1</sup>, as they are frequently available in the oilfield.

At the time of its establishment as the National Capitol, the city of Washington was in deplorable shape. Members of Congress and Justices of the Supreme Court resorted to living in tents and other undesirable habitats. The United States economy was in shambles and Thomas Jefferson instituted a movement to pass a law giving the builder of a structure a lien upon the newly created values of his labors to insure him against loss.<sup>2</sup> Such protections can trace their roots back to the Roman Empire and

are commonly referred to in the United States as M&M liens. They are a tool that virtually everyone in the construction, auto repair, and oil field services business is aware.

Given the current times within which the oil patch is operating, it is a good time for all contractors and subcontractors, who service oil and gas operations and production players, to review their knowledge of the availability and use of M&M liens in the jurisdictions where they are providing services or materials.

All states have enacted general M&M lien laws within their statutes or codes, and most state legislatures have further refined such regulatory schemes by enacting specific statutes designed to protect those who provide labor, services or materials to operators and the like, in the pursuit of oil and gas production. Although specific oil and gas oriented M&M lien statutes are frequently beneficial to contractors and sub-contractors, such statutes generally do not limit the use of more general M&M lien laws, when needed or when the specific oil and gas M&M lien statutes do not apply.

The general intent of M&M liens is to protect the contractor, sub-contractor, or supplier of labor or materials, who has added value to property they do not possess, in the event of non-payment. Protection beyond the basic right to sue for non-payment is necessary because often the provider of services or materials does not have a contract with the party who ultimately enjoys the benefit of the improvement made by the provider; and generally, once the service is provided, the provider has lost all control of the benefit he or she has bestowed. M&M liens generally attach

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<sup>1</sup> Due to the multi-jurisdictional distribution of this article, the author has kept it generic in scope. Statutes covering M&M liens vary between the States, and interpretation of rights and requirements are not always consistent. Therefore, the reader is advised to seek guidance from an attorney licensed in the state where services or materials are provided, and to not rely upon the general information contained herein.

<sup>2</sup> From Chas. E. Davidson, *The Mechanic's Lien Law of Illinois: A Lawyers Brief on the Topic, 1922*, St. Louis University Law Library

automatically at the time labor, services, or materials are furnished. However, to be enforced, they must be “perfected” so as to provide proper notice. If not properly perfected, the rights of a M&M lien claimant may be lost.

*Better three hours too soon  
than a minute too late.*

William Shakespeare

All states have specific requirements as to how an M&M lien should be perfected, and these requirements are important. Although specifics vary from one state to another, generally, perfection of an oil and gas M&M lien requires that a person claiming the lien (1) must file an affidavit or other form of notice with the public records maintained by the county clerk of the county in which the property is located, (2) not later than six months from the last day of completion or delivery of the materials or services. Additionally, some states require that a claimant serve the party debtor with written notice, within a certain amount of time prior to filing such affidavit or notice. Therefore, it is important to realize that unless the calendar is closely monitored, unfettered good faith collection efforts, without more, may cause the right of enforcement of a M&M lien to dissipate. For example, a contractor who completes a job and waits 3 months for payment may have less than 3 months to perfect an M&M lien. An unperfected lien holder will lose his or her right to judicially enforce their M&M lien if it is not timely perfected. After a M&M lien is perfected, the claimant typically has a 2 year window to prosecute his or her claim in a court of law.

The required affidavit or other form of notice will typically require information such as: (1) the name of the mineral property owner, (2) name and address of the lien claimant, (3) dates of performance or furnishing, (4) legal description of the land, leasehold interest, pipeline or pipeline right-of-way involved, and (5) an itemized list of amounts claimed. Sub-

contractors should be aware that there are additional considerations and requirements in the pursuit of their claims.

*The secret of all victory lies in  
the organization of the non-  
obvious.* Marcus Aurelius

It is imperative that a contractor know what property interests, if any, are actually owned by the party with whom they have contracted. M&M liens in the oil patch are often limited and must be filed against a mineral property owner. Therefore, issues are created when a contractor’s agreement is with a non-owner operator, such as a separate LLC, established by the working interests, but which itself owns no rights in the lands or leasehold under consideration. Today, this is a common organizational structure utilized by working interest owners.

It is typical for an M&M lien statute to extend its coverage so that it is applicable against a trustee or agent of the owner. However, today most joint operating agreements specifically address this type of liability by containing limiting language, such as “Operator shall be an independent contractor not subject to the control or direction of the Non-Operators . . . .” and “Operator shall not be deemed, or hold itself out as the agent of the Non-Operators with authority to bind them to any obligation or liability assumed or incurred by Operator as to any third party.”<sup>3</sup> While this type of language is not always conclusive, it can offer a persuasive defense for protecting mineral and working interest owners from M&M liens and some other claims by a contractor. The course of dealing, or representations made, between the mineral leasehold owners and the contract operator, contractor or subcontractor, may, in some instances, defeat such a defense to a claim. However, the readers “take away” on this point should be this: in many states it can

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<sup>3</sup> From A.A.P.L. Form 610 – Model Form Operating Agreement - 1989

be difficult to reach a mineral interest owner with whom the contractor or subcontractor is not in privity, depending upon the circumstances.

It is important for a materials or service provider to be aware of the mineral and leasehold ownership status of the party with whom the provider contracts, because it may determine whether the provider is a contractor, or sub-contractor. When a contractor obtains a contract with a non-owner operator who has been hired as an independent contracting operator for the working interest partners, a provider of materials or services is actually a sub-contractor, even though such provider has dealt directly with the independent contracting operator. However, it is also common for the operator to be a working interest partner in the leasehold, and in such instances the contractor is indeed just that, the contractor to the operator (and likely a subcontractor to the non-operating working interest partners.)

Each state has its own statutory scheme which impacts the rights between contractors, sub-contractors, the contracting operator and mineral owners. Both a contractor and sub-contractor have rights to employ the use of M&M liens, but the application is somewhat different between the two. For example, in Texas<sup>4</sup>, a subcontractor lien can only be enforced against the mineral owner if he or she still owes the contractor for the work or materials supplied by the subcontractor, and then only if the mineral owner receives notice from the subcontractor. Therefore, it behooves all subcontractors in Texas to be more diligent in their collections because once the contractor is paid, the owner is probably "off the hook" as to moneys owed a subcontractor by the contractor.

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<sup>4</sup> The author apologizes to his friends in Pennsylvania, Oklahoma, and elsewhere, and respectfully acknowledges that most places are not Texas.

*You have to learn the rules of the game. And then you have to play better than anyone else.*

Albert Einstein

Although the requirements to properly file an M&M lien can vary by State, below is a checklist of basic essential information which may be necessary to analyze or properly perfect a lien.

1. Lien claimant identity, including name and address
2. Amount of money the lien claimant is owed
3. Name of the owner of the mineral property- all associated equipment, and under some circumstances, possibly the surface estate and other personal property
4. Identity of the person in possession of the property
5. Identity of the parties to the agreement
6. Complete legal description of the property, leasehold interest, pipeline or pipeline right-of-way, where the work was performed or materials provided
7. Copy or terms of the written or oral contract
8. Itemized description of the project, the work performed, and the dates of performance or furnishing:
  - a. all work orders, time sheets, materials invoices, change orders, etc.
  - b. list of all materials used and labor performed (or if not performed, reason thereof)
  - c. beginning date and completion date of all work performed
9. Copy of all invoices and other charges

As stated earlier, subcontractors should be aware that there are additional considerations and requirements for parties who furnish materials or services under an agreement with a contractor.

In conclusion, M&M liens are a frequently used tool for securing the payment of a debt because they are relatively efficient. M&M liens often fail because they are not timely or correctly

filed. They also can fail if they are missing an important requirement, such as a correct legal description. It is imperative that a claimant contractor or subcontractor be aware of the mineral ownership interests in the leasehold land, and the relationship of such interests to the debtor.

M&M liens are but one option in a stable of legal options available for use in an attempt to collect a debt, but it is a commonly preferred tool of choice when the requirements can be met and the contracting operator or other party has a mineral leasehold ownership interest in the lands where services or materials are provided.

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