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MECHANIC'S LIEN PRIORITY RIGHTS FOR DESIGN PROFESSIONALS

To ensure that parties providing labor and materials for improvements to real property receive compensation for their services, state legislatures have enacted mechanic's lien statutes.¹ A mechanic's lien statute grants construction contractors² the right to seek a judicial sale of the real property to satisfy the contractor's unpaid claim against the owner³ of the real property for services that the contractor has provided to the owner.⁴ Consequently, mechanic's liens have the effect of making the owner a guarantor of payment to builders and construction contractors.⁵ Although state legislatures originally enacted mechanic's lien statutes solely to protect builders or construction contractors⁶, nearly all legislatures have extended some degree of mechanic's lien protection to architects and engineers (design professionals).⁷ The majority of state mechanic's lien statutes specifically grant mechanic's lien rights to design professionals.⁸ Several states, however,

1. See *Anderson v. Sokolik*, 88 So.2d 511, 515 (Fla. 1956) (noting that purpose of mechanic's lien statute is to prevent unfairness to builders and to safeguard their economic security); Comment, *Mechanic's Liens—Priority Over Mortgages and Deeds of Trust*, 42 Mo. L. REV. 53, 53 (1977) (noting that mechanic's lien statutes are based on principle that workers who improve real property are entitled to security interest in real property for compensation).

2. See 1 AMERICAN INSTITUTE OF ARCHITECTS, *THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE* 1.1:9 (1988) (defining construction contractors as parties that provide goods and services under contract to execute construction project).

3. See *id.* at 1.1:6 (defining owners as those who establish construction project by obtaining financial resources and assembling design and construction expertise for project).

4. See Comment, *Mechanics' Lien and Surety Bonds in the Building Trade*, 68 YALE L.J. 138, 141 (1958) (discussing mechanic's lien statutes); see also *Smith v. Guannis*, 144 P.2d 186, 189 (Mont. 1943) (explaining that mechanic's lien laws provide for payment of claims of builders and materialmen out of property that has increased in value as result of their work); *Frehner v. Morton*, 424 P.2d 446, 447 (Utah 1967) (noting that purpose of mechanic's lien law is to protect persons who have increased value of real property by performing labor or furnishing materials); Note, *Priorities and Statutory Construction: Mechanic's Liens in New York*, 7 CARDOZO L. REV. 585, 588 (1985) (noting that mechanic's liens generally provide a statutory right to persons furnishing labor or materials for construction of buildings or improvement of real property).

5. *Goulden & Dent, More on Mechanic's Liens, Stop Notices and the Like*, 54 CALIF. L. REV. 179, 180 (1966).

6. SIEGFRIED, *INTRODUCTION TO CONSTRUCTION LAW* 65 (1987).

7. See SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* 81 (1977) (discussing mechanic's liens for architects and engineers). The terms "architect" and "engineer" are interchangeable from a legal standpoint because the functions of an architect and engineer are analogous. 1 DIBB, *FORMS AND AGREEMENTS FOR ARCHITECTS, ENGINEERS AND CONTRACTORS* ch. 2 § 1 (1986); see *Dunham Associates v. Group Investments*, 301 Minn. 108, —, 223 N.W.2d 376, 380 (1974) (noting that design services of architects and engineers are identical for mechanic's lien purposes).

8. See ROTH, *LIEN LAWS FOR DESIGN PROFESSIONALS: A SURVEY AND ANALYSIS* 17-54 (2d ed. 1986) (discussing state mechanic's lien statutes that specifically grant mechanic's lien rights to design professionals); *infra* note 48 (surveying state mechanic's lien statutes that specifically provide mechanic's lien rights to design professionals).

have constructed their mechanic's lien statutes in a general manner without specifically granting mechanic's lien rights to design professionals.⁹ In states in which the mechanic's lien statute does not specifically grant mechanic's lien rights to design professionals, state courts differ in their determinations of whether design professionals should have mechanic's lien rights.¹⁰ Furthermore, state courts that extend mechanic's lien statutes to include design professionals differ in their determinations of what conditions must exist before a design professional has a right to obtain a mechanic's lien.¹¹ While some courts allow design professionals to obtain mechanic's liens for the design professional's work in preparing plans and specifications,¹² other courts refuse to grant mechanic's lien rights to design professionals unless the design professional supervises work at the construction site.¹³ Because the design professional's duties often do not extend to on-site construction supervision and because design professionals that undertake on-site supervision unnecessarily may expose themselves to liability for construction delays and construction site accidents, all states should grant mechanic's lien rights to design professionals regardless of whether the design professional provides on-site supervision.¹⁴

In granting mechanic's lien rights to design professionals, state legislatures should enact an attachment rule that adequately balances the security interests of design professionals and other parties that have a security interest in the real property.¹⁵ States that currently extend mechanic's lien rights to design professionals have adopted different rules for determining when a design professional's mechanic's lien attaches.¹⁶ Specifically, conflicting state mechanic's lien attachment rules provide that mechanic's liens attach either on the date the lien claimant files for the mechanic's lien,¹⁷ the date the lien claimant records the original contract for the improvement

9. See *infra* note 57 (surveying state mechanic's lien statutes that do not specifically grant mechanic's lien rights to design professionals).

10. See *ROTH*, *supra* note 8, at 17-54 (discussing conflicting interpretations of generally-worded mechanic's lien statutes); Annotation, *Architect's Services as within Mechanic's Lien Statute*, 28 A.L.R.3D 1014, 1014 (1969 & Supp. 1988) (same); *infra* notes 60, 64 and accompanying text (discussing state court determinations of whether mechanic's lien statutes provide right of lien to design professionals).

11. See *infra* notes 60, 64 and accompanying text (discussing state court interpretations of what conditions must exist before design professional has right to mechanic's lien).

12. See *infra* note 60 (discussing state court decisions that allow design professional to obtain mechanic's lien for preparing plans and specifications).

13. See *infra* note 64 (discussing state court decisions that require design professional to perform on-site supervision before granting design professional mechanic's lien rights).

14. See *infra* notes 69-86 and accompanying text (criticizing courts that impose conditions on design professional's right to mechanic's lien).

15. See *infra* notes 154-180 and accompanying text (analyzing need for state legislatures to enact attachment rules that balance interests of all parties that become creditors during construction process).

16. *Id.*

17. See *infra* note 94 (surveying state mechanic's lien statutes which provide that mechanic's liens attach on date lien claimant files for mechanic's lien).

to real property,¹⁸ or, most commonly, the date of commencement of construction on the improvement.¹⁹ The majority of state courts have held that commencement of construction occurs when workers visibly improve the property.²⁰ Courts that require visible improvements, however, delay the date the mechanic's lien attaches for the design professional's nonvisible design services until construction actually begins.²¹ In contrast, state legislatures that allow mechanic's lien rights to attach on the date the design professional records his contract to do work, protect the design professional's interest in obtaining priority over subsequent encumbrancers and protect construction lenders who can rely on the record to determine if prior mechanic's liens have attached to property.²² Accordingly, to balance the interests of the design professional and other encumbrancers, state legislatures should enact mechanic's lien statutes that allow a design professional's mechanic's lien rights to attach on the date the design professional records the contract to provide design services for the improvement of real property.²³

I. HISTORICAL DEVELOPMENT OF MECHANIC'S LIENS

To encourage construction of our nation's capitol, statesmen including Thomas Jefferson and James Madison first introduced the concept of a mechanic's lien statute to the Maryland General Assembly in 1791.²⁴ Pro-

18. See *infra* note 149 (surveying state mechanic's lien statutes which provide that mechanic's liens attach on date lien claimant makes original contract for improvement).

19. See *infra* note 97 (surveying state mechanic's lien statutes which provide that mechanic's liens attach on date of commencement of construction).

20. See Annotation, *What Constitutes "Commencement of Building or Improvement" for purposes of Determining Accrual of Mechanic's Lien*, 1 A.L.R.3d 822, 822 (1965 & Supp. 1988) (discussing state court determinations of what constitutes commencement of improvements); *infra* note 113 (noting state courts that require that workers visibly improve property before mechanic's lien attaches).

21. See *infra* notes 157-164 and accompanying text (analyzing application of visible commencement requirement to design professional's services).

22. See *infra* notes 174-180 and accompanying text (analyzing advantages to design professionals and construction lenders of mechanic's lien statute that allows design professional's mechanic's lien to attach on date design professional records original contract for improvement).

23. See *infra* notes 185-190 and accompanying text (concluding that state legislatures should enact mechanic's lien statutes that allow design professional's mechanic's lien rights to attach on date design professional records contract for improvement).

24. See *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 179 A.2d 683, 685 (Md. 1962) (noting that Thomas Jefferson and James Madison encouraged Maryland General Assembly to enact first mechanic's lien law); HOUCK, *MECHANIC'S LIEN LAW IN THE UNITED STATES* 33-41 (1867) (discussing history of mechanic's lien statutes); Comment, *The Priority Problem Between Construction Mortgages and Mechanic's Liens in Alabama*, 6 CUMB. L. REV. 243, 243 (1975) (same). Commentators note that some evidence exists that real estate liens existed under Roman law and that the Napoleonic Code included a mechanic's lien. Scholl, *Priorities Between Mechanic's Liens and Construction Loan Mortgages in Alabama*, 23 ALA. LAW. 398, 401 (1962); Note, *The Proposed Uniform Mechanic's Lien Act*, 19 VA. L. REV. 406, 407 (1932); see MOCKELDY *HANDBOOK OF ROMAN LAW* 274 (Dropsies Trans.); CODE NAPOLEON, PRIVILEGES AND MORTGAGES § 2, at 2103.

ponents of the mechanic's lien argued that the mechanic's lien statute would encourage builders to build under contract for an agreed price by providing builders with a security interest in improved land for the debt that the landowner owed to the builder.²⁵ The Maryland General Assembly subsequently passed the first mechanic's lien law on December 19, 1791,²⁶ and today, all fifty states have mechanic's lien statutes.²⁷ State legislatures have enacted mechanic's lien statutes to protect parties that furnish labor or materials for the improvement of real property.²⁸ Legislatures seek to protect parties involved in construction projects because the projects are inherently risky and because builders generally require long-term credit and commit large amounts of capital to construction projects.²⁹ Mechanic's liens protect a construction contractor's extensions of credit by providing construction contractors with a firm assurance that the contractors will collect their agreed contract price.³⁰ Consequently, by providing construction contractors

25. See Proceedings of Commissioners from 1791 to 1795, at 28 (noting that proponents of mechanic's lien argued before Maryland legislature that mechanic's lien would encourage builders to contract for erection of houses by guaranteeing builder security for his just claim); see generally Comment, *supra* note 24, at 243 (discussing original purpose of mechanic's lien statutes).

26. Acts of the General Assembly of Maryland, Ch. 5, § 10 (Dec. 18, 1791). See generally Comment, *supra* note 24, at 243 (discussing original mechanic's lien statute).

27. See Comment, *supra* note 24, at 244 (discussing current status of mechanic's lien statutes).

28. See Note, *Notice of Commencement and Completion: A Recommendation For The Minnesota Mechanic's Lien Statute*, 13 WM. MITCHELL L. REV. 193, 194 (1987) (noting that purpose of mechanic's lien statute is to protect those who improve real property and to prevent unjust enrichment of owner whose property is improved at expense of construction contractor). Mechanic's lien statutes allow mechanic's liens to attach only to real property and the improvements on it, and not to personal property. SIEGFRIED, *supra* note 6, at 67; see *Blalack v. Hoshall's A & A Plumbing Co.*, 318 P.2d 878, 881 (Okla. 1957) (noting that lien of mechanic or materialman against property does not extend to personal property that is not affixed to realty). In addition, mechanic's lien statutes generally provide that mechanic's liens may attach only to private property, and not to property that a state, county, municipality or government agency owns for the benefit of the public. See MASS. GEN. LAWS ANN. ch. 254, § 6 (West 1988) (providing that mechanic's lien provisions shall not apply to any public building, structure or improvement); UTAH CODE ANN. § 38-1-1 (1988) (same); see generally SIEGFRIED, *supra* note 6, at 67 (noting that mechanic's lien statutes generally apply to private property).

29. See Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 411 (1977) (discussing construction industry); Comment, *Mechanics' Lien and Surety Bonds in the Building Trade*, 68 YALE L.J. 138, 139 (1958) (noting that construction contractors are subject to market and seasonal changes and to risks beyond contractor's control). The construction industry is subject to many risks, including bad weather, changes in prices of materials, seasonal employment, workers' union disturbances, contractor dishonesty, and contractor default. *Id.*; see *Winder v. Caldwell*, 20 U.S. (14 How.) 272, 275 (1825) (noting that insolvent owners and dishonest contractors often defraud laborers and materialmen in the construction industry); Comment, *The Release Bond Statutes: Achieving Balance in the Mechanic's Lien Laws*, 28 UCLA L. REV. 95, 95 (1980) (noting that few American Institutions produce more litigation than construction projects).

30. See Dawson, *The Self-Serving Intermeddler*, 51 HARV. L. REV. 1409, 1451 (1974) (discussing mechanic's lien protection of construction contractors).

with greater protection for extensions of credit than traditional contract remedies provide, mechanic's lien statutes encourage construction of improvements to real property.³¹ Although mechanic's lien laws originally provided protection only to builders or general contractors,³² current mechanic's lien statutes protect other construction contractors, including subcontractors, suppliers, laborers, and often, design professionals.³³

II. THE ROLE OF THE DESIGN PROFESSIONAL IN THE CONSTRUCTION PROCESS

Assuming professional responsibility for critical design and construction decisions, the design professional plays a central role in the process of constructing improvements to real property.³⁴ The design professional provides services dating from the owner's initial concept of the construction project to the actual building of the project.³⁵ The American Institute of Architects (AIA) has categorized the design professional's services into five phases that apply to the majority of construction projects.³⁶ Under the first phase, which the AIA terms the schematic design phase, the design profes-

31. *Id.*; see Note, *supra* note 29, at 411 (discussing construction liens).

32. See SIEGFRIED, *supra* note 6, at 65 (noting that original mechanic's lien laws provided protection only to builders or general contractors in privity with owners); 1 AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE 1.1:9 (1988) (defining general contractors as those who build under contract to execute complete construction project for owner).

33. See Goulden & Dent, *supra* note 5, at 179 (noting that, although term "mechanic" in mechanic's lien statutes originally referred to laborers or workmen, today's legislators use term "mechanic" to include builders, subcontractors, and materialmen); *Mazel v. J.W. Bain*, 272 Ala. 640, —, 133 So.2d 44, 46 (1961) (noting that general policy of mechanic's lien law is to secure to mechanic, materialman, or laborer just compensation for his labor and materials); see also 1 AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE 1.1:9 (1988) (defining subcontractors as persons who are responsible for a portion of construction project such as masonry, carpentry or roofing); *id.* (defining suppliers as persons who manufacture, fabricate, or sometimes install components used in construction); *id.* at 1.1:11 (defining laborers as skilled mechanics and unskilled persons who fabricate, install, and physically construct project). In addition to protecting a variety of construction contractors, mechanic's lien statutes protect owners by guaranteeing the owner that, unless he fails to comply with the mechanic's lien laws, the owner will be able to construct improvements on real estate at a given contract price. 53 AM. JUR. 2D *Mechanic's Liens* § 6 (1970 & Supp. 1988); see Comment, *Mechanic's Liens- Judgement Priority- Rights Under Unexecuted Mechanic's Lien Judgement Prior to Executed General Judgement*, 14 RUTGERS L. REV. 813, 814 (1960) (noting that mechanic's lien statutes protect property owner against paying twice for same work).

34. See AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE Document B141, Article 1 (1987 ed.) [hereinafter AIA Document B141] (discussing design professional's responsibilities); SWEET, *supra* note 7, at 86 (discussing services that design professional provides for improving real property).

35. See Rohlifing, *An Architect's Perspective*, 79 L. LIBR. J. 499, 499 (1987) (discussing scope of design professional's services).

36. AIA Document B141, *supra* note 34, Article 2 at paras. 2.1-2.6; see HAPKE, DESIGN AND CONSTRUCTION CONTRACTS, REPRESENTING THE OWNER 3 (1987) (summarizing AIA's delineation of design professional's basic services).

sional works closely with the owner and prepares rough design documents.³⁷ During the second phase, the design development phase, the design professional refines the schematic design to include the size and character of the architectural, structural, mechanical, and electrical systems that the owner wishes to incorporate into the project.³⁸ The third phase of the design professional's work is the construction documents phase.³⁹ During the construction documents phase, the design professional prepares detailed plans and specifications that the construction contractors follow in constructing improvements to real property.⁴⁰ During the fourth phase, the bidding and negotiation phase, the design professional assists the owner in selecting a construction contractor by assisting the owner in administering a competitive bidding process⁴¹ or in preparing and awarding contracts for construction.⁴² The fifth and final phase of the design professional's services is the construction phase, during which the design professional acts as the owner's representative in administering the construction project.⁴³ Accordingly, throughout the process of constructing improvements to real property, the design professional provides technical expertise and assumes professional

37. AIA Document B141, *supra* note 34, at para. 2.2. In the schematic design phase, the design professional reviews the program that the owner furnished and reaches a mutual understanding with the owner concerning the project requirements. *Id.* at subpara. 2.2.1. Additionally, the design professional reviews with the owner alternative approaches to the construction design and computes a preliminary estimate of construction costs. *Id.* at subparas. 2.2.3, 2.2.5.

38. *Id.* at subpara. 2.3.1. During the design development phase, the design professional also advises the owner of any cost adjustments to the preliminary construction cost estimate. *Id.* at subpara. 2.3.

39. *Id.* at para. 2.4.

40. *Id.* at subpara. 2.4.1. In the construction documents phase, the design professional assists the owner in preparing bidding information, bidding forms, conditions of contract, and the form of agreement between the owner and the construction contractor. *Id.* at subpara. 2.4.2. In addition, the design professional makes necessary adjustments to the preliminary cost estimates to prepare a close approximation of the construction cost. *Id.* at subpara. 2.4.3.

41. *Id.* at subpara. 2.5.1; see 2 AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE 2.7:1 (1988) (noting that during the competitive bidding process, construction contractors provide owner with estimates of how each contractor will construct owner's improvement, how long construction will take, and how much construction will cost).

42. AIA Document B141, *supra* note 34, at para. 2.5. The bidding or negotiation phase commences after the owner approves the design professional's construction documents. *Id.* at subpara. 2.5.1. The design professional concludes the bidding or negotiation phase when the property owner awards the construction contract to a general contractor. See HAPKE, *supra* note 36, at 4 (discussing bidding or negotiation phase).

43. AIA Document B141, *supra* note 34, at para. 2.6. In representing the owner during the construction phase, the design professional conducts numerous administrative tasks. *Id.* at subpara. 2.6.4. For example, the design professional generally makes frequent construction site visits, acts as a liaison between the owner and the contractor, reviews and certifies the contractor's requests for payments, reviews and takes appropriate action on contractor's submittals, prepares change orders and construction change directives, and conducts site inspections to determine the date of completion. *Id.* at subparas. 2.6.1-2.6.19; see HAPKE, *supra* note 36, at 4-7 (discussing role of design professional in construction documents phase).

responsibility as creator, coordinator, and communicator of the project design.⁴⁴

III. CONFLICTING APPROACHES AMONG THE STATES IN GRANTING MECHANIC'S LIEN RIGHTS TO DESIGN PROFESSIONALS

Although the design professional plays a vital role in the process of constructing improvements to real property, states have conflicting approaches to determining whether a design professional may obtain a mechanic's lien to secure payment for design services that the design professional has rendered in improving real property.⁴⁵ Under the common law, a design professional does not have mechanic's lien rights.⁴⁶ The majority of states, however, have mechanic's lien statutes that allow design professionals to obtain mechanic's liens.⁴⁷ Currently thirty-one states have mechanic's lien statutes that expressly provide design professionals with a right to a mechanic's lien.⁴⁸ States that expressly provide the design professional with a

44. See *supra* notes 35-43 and accompanying text (discussing services that design professional provides during construction of improvements to real property).

45. See *ROTH, supra* note 8, at 17 (discussing mechanic's lien statutes of each state with respect to design professionals); Annotation, *Architect's Services as within Mechanic's Lien Statute*, 28 A.L.R.3d 1014, 1019 (1969 & Supp. 1988) (discussing four classes of mechanic's lien statutes). The ALR divides state mechanic's lien statutes into four groups. *Id.* The first group includes statutes that provide a mechanic's lien for work done or labor performed in construction. *Id.* The second group includes those statutes which name the mechanic's lienor specifically as a design professional. *Id.* The third group includes the mechanic's lien statutes that name the mechanic's lienor generally as a person who furnishes labor in construction. *Id.* Finally, the fourth group of mechanic's lien statutes name mechanic's lienors as mechanics, laborers, and others who perform construction labor. *Id.*; see *infra* notes 48, 57 (surveying state mechanic's lien statutes).

46. See *J.J. Henry Co. v. United States*, 411 F.2d 1246, 1253 (Ct. Cl. 1969) (noting that design professionals do not have mechanic's lien rights under common law).

47. See *infra* note 48 (surveying state mechanic's lien statutes that specifically grant mechanic's lien rights to design professionals).

48. See ALASKA STAT. § 34.35.050 (1985) (providing mechanic's lien rights to persons who perform services under contract with owner for preparing plans, surveys, or architectural or engineering plans or drawings); ARK. STAT. ANN. § 51-601 (1947) (providing mechanic's lien rights to engineers or surveyors who perform engineering or surveying work on building); CAL. CIV. CODE § 3110 (West 1947) (providing mechanic's lien rights to architects, registered engineers, and licensed surveyors who contribute to improvement of real property); COLO. REV. STAT. § 38-22-101 (1973) (entitling architects, engineers, draftsmen and artisans to mechanic's lien rights for their work in furnishing plans, specifications, or superintendence); DEL. CODE ANN. tit. 25, § 2702 (1975) (entitling architects to mechanic's lien rights for services that architect performs); FLA. STAT. ANN. § 713.03 (West 1988) (providing mechanic's lien rights to architects, landscape architects, engineers, or land surveyors); GA. CODE ANN. § 44-14-361 (1981 & Supp. 1988) (providing mechanic's lien rights to registered architects, land surveyors, and professional engineers); HAW. REV. STAT. § 507-42 (1985) (providing mechanic's lien rights for professional services rendered in furnishing plans or supervising improvement); IDAHO CODE § 45-501 (1977) (granting mechanic's lien rights to professional engineers and licensed surveyors); ILL. ANN. STAT. ch. 82, para. 1 (Smith-Hurd 1987) (providing mechanic's lien rights to architects, structural engineers, professional engineers, and land surveyors); IND. CODE ANN. § 32-8-25-1 (Burns Supp. 1988) (providing mechanic's lien rights to registered

right of lien generally grant the design professional lien rights to secure payment for the design professional's services in preparing plans and specifications regardless of whether the design professional provides on-site supervision.⁴⁹ New York's mechanic's lien statute, for example, grants mechanic's lien rights to a "contractor . . . who performs labor . . . for the improvement of real property."⁵⁰ The New York statute defines the term "improvement" to include a design professional's plans and specifications that the design professional prepares or uses in connection with a construction project.⁵¹ Accordingly, under New York's mechanic's lien statute, design professionals may file for mechanic's liens to secure payment for the design professional's services in preparing plans and specifications

professional engineers, registered land surveyors, and to registered architects); KY. REV. STAT. ANN. § 376.075 (Baldwin Supp. 1988) (providing mechanic's lien rights to licensed engineers and land surveyors who perform professional services); LA. REV. STAT. ANN. § 9:4801(5) (West Supp. 1988) (granting mechanic's lien rights to registered or certified surveyors or engineers, or licensed architects); ME. REV. STAT. ANN. tit. 10, § 3251 (1980) (entitling architects and engineers to mechanic's lien rights); MICH. COMP. LAWS ANN. § 570.1107 (West Supp. 1988) (providing mechanic's lien rights for surveying, engineering, and architectural planning); MINN. STAT. ANN. § 514.01 (West Supp. 1989) (granting mechanic's lien rights to persons who perform engineering or land surveying services); MISS. CODE ANN. § 85-7-131 (Supp. 1988) (entitling architects, engineers, and surveyors to mechanic's lien rights); MO. ANN. STAT. § 429.015 (Vernon Supp. 1989) (granting mechanic's lien rights to registered architects, registered professional engineers, and to registered land surveyors); MONT. CODE ANN. § 71-3-523 (1987) (granting mechanic's lien rights to persons who prepare plans, surveys, or architectural or engineering plans or drawings); NEB. REV. STAT. § 52-130 (1984) (same); NEV. REV. STAT. § 108.222 (1987) (entitling architects and engineers to mechanic's lien rights); N.Y. LIEN LAW §§ 2, 3 (McKinney Supp. 1989) (providing mechanic's lien rights to architects, engineers, and surveyors); N.C. GEN. STAT. § 44A-8 (1984) (granting mechanic's lien rights to persons who perform professional design or surveying services); OR. REV. STAT. § 87.010 (1987) (providing mechanic's lien rights to landscape architects, land surveyors, and registered engineers); PA. CONS. STAT. ANN. § 1201 (Purdon 1965) (granting mechanic's lien rights to architects and engineers who, in addition to preparing plans and specifications, also supervise construction); R.I. GEN. LAWS § 34-28-1, 7 (1984) (providing mechanic's lien rights to architects and engineers); TENN. CODE ANN. § 66-11-102(c)(1) (Supp. 1988) (providing mechanic's lien rights to architects and engineers); UTAH CODE ANN. § 38-1-3 (1988) (granting mechanic's lien rights to licensed architects and engineers who furnish plans, specifications, superintendence, or other similar professional services); WASH. REV. CODE ANN. § 60.04.010 (Supp. 1989) (granting mechanic's lien rights to persons who survey, prepare plans and specifications, or who perform any other engineering work to improve real property); WISC. STAT. ANN. § 779.01 (West 1981 & Supp. 1988) (entitling architects, professional engineers, and surveyors to mechanic's lien rights); WYO. STAT. §§ 29-2-101, 29-1-101 (1981) (permitting architects, professional engineers, and surveyors to obtain mechanic's liens).

49. See, e.g., ALASKA STAT. § 34.35.050 (1985) (providing mechanic's lien rights to persons who perform services under contract with owner for preparing plans, surveys, or architectural or engineering plans or drawings); MONT. CODE ANN. § 71-3-523 (1987) (granting mechanic's lien rights to persons who prepare plans, surveys, or architectural or engineering plans or drawings); UTAH CODE ANN. § 38-1-3 (1988) (granting mechanic's lien rights to licensed architects and engineers who furnish plans, specifications, superintendence, or other similar professional services).

50. N.Y. LIEN LAW § 3 (McKinney Supp. 1989).

51. *Id.* § 2.

regardless of whether the design professional provides on-site supervision.⁵²

Although the majority of state mechanic's lien statutes specifically grant design professionals an unrestricted right to a mechanic's lien, Pennsylvania's mechanic's lien statute restricts design professional's mechanic's lien rights to design professionals that supervise construction in addition to preparing plans and specifications.⁵³ In applying Pennsylvania's mechanic's lien statute, the Pennsylvania courts have held that a design professional cannot obtain a mechanic's lien unless the design professional proves that the design professional provided substantial supervisory services at the job site.⁵⁴ For example, in denying a mechanic's lien to a design professional, the Superior Court of Pennsylvania reasoned that the design professional's visits to the construction site prior to building, attendance at a zoning board meeting, and participation in a post construction tour of the construction site did not constitute supervision necessary for obtaining a mechanic's lien against the project owner's property.⁵⁵ Pennsylvania's mechanic's lien statute, therefore, is an exception to the general statutory approach of granting a design professional mechanic's lien rights solely for design services.⁵⁶

52. *Id.*; see WALKER, WALKER & RHODENBURG, LEGAL PITFALLS IN ARCHITECTURE, ENGINEERING AND BUILDING CONSTRUCTION 206 (1979) (noting that under New York's mechanic's lien statute, design professionals have mechanic's lien rights regardless of whether design professionals supervise construction). In interpreting New York's mechanic's lien statutes, the New York Court of Appeals has held that a design professional does not have a right to a mechanic's lien unless the design professional's drawings are sufficiently formal to be within the meaning of the term "plans" as the term is used in the building trade. See *Bralus Corp. v. Berger*, 307 N.Y. 626, 628, 120 N.E.2d 829, 830 (1954) (interpreting New York's mechanic's lien statute). The Court of Appeals noted that, under New York's mechanic's lien statute, the design professional's drawings must be more than mere rough sketches to constitute "plans" within the meaning of the term as the term is used in New York's mechanic's lien statute. *Id.* The court, however, concluded that a design professional was entitled to a mechanic's lien for drawings that the design professional prepared to assist the owner in deciding whether the owner desired to construct a building in accordance with the drawings. *Id.* at 629, 120 N.E.2d at 830.

53. PA. CONS. STAT. ANN. § 1201 (Purdon 1965). The Pennsylvania mechanic's lien statute grants mechanic's lien rights to architects who, in addition to preparing plans and specifications, superintend or supervise the "erection, construction, alteration or repair" of an improvement. *Id.*

54. See, e.g., *Stafford v. Boland*, 306 Pa. Super. 475, 480, 452 A.2d 824, 826 (1982) (denying right of lien to design professional whose activities did not constitute management of building construction); *Alan Porter Lee, Inc. v. Du-Rite Products Co.*, 366 Pa. 548, 554, 79 A.2d 218, 221 (1951) (holding that design professional was not entitled to mechanic's lien rights because design professional's services in inspecting construction site to see if construction conformed to plans and specifications did not constitute supervision); *Hoekstra v. Hopkins*, 87 Pa. Super. 15, 18 (1915) (granting design professional mechanic's lien rights for design services only because design services were incidental to and enhanced design professional's supervisory services).

55. *Stafford v. Boland*, 306 Pa. Super. 475, 480, 452 A.2d 824, 826 (1982). The Superior Court of Pennsylvania concluded that the design professional's oral agreement to observe construction was not dispositive that the design professional supervised construction. *Id.*

56. See *supra* note 48 (surveying state mechanic's lien statutes).

In contrast to states that have mechanic's lien statutes that specifically grant design professionals the right to obtain a mechanic's lien, nineteen states have generally worded mechanic's lien statutes that do not specifically grant mechanic's lien rights to design professionals.⁵⁷ These statutes grant mechanic's lien rights to "every person," "any person," or "others" who perform labor in the construction of a building.⁵⁸ Courts interpreting these generally worded mechanic's lien statutes have adopted conflicting approaches to determining whether a design professional has a statutory right to obtain a mechanic's lien.⁵⁹ Some state courts flexibly have interpreted generally-worded mechanic's lien statutes by holding that a design profes-

57. See ALA. CODE § 35-11-210 (1975) (providing mechanic's lien rights to every mechanic, person, firm or corporation who performs work on building); ARIZ. REV. STAT. ANN. § 33-981 (1974) (granting mechanic's lien rights to every person who performs labor on building); CONN. GEN. STAT. ANN. § 49-33(a) (West 1978 & Supp. 1989) (granting mechanic's lien rights to any person who has a claim for services rendered); D.C. CODE ANN. § 38-101 (1981) (entitling contractor to mechanic's lien rights for his work in erecting or improving building); IOWA CODE ANN. § 572.2 (West 1950) (providing mechanic's lien rights to every person who furnishes labor for any building or land improvement); KAN. STAT. ANN. § 60-1101 (1983) (granting mechanic's lien rights to every person who furnishes labor for improvement of real property); MD. REAL PROPERTY CODE ANN. § 9-102 (1988) (providing that every building erected or repaired is subject to mechanic's lien); MASS. GEN. LAWS ANN. ch. 254, § 1 (West 1988) (granting mechanic's lien rights to person to whom a debt is due for labor that person performed in erecting or repairing building); N.H. REV. STAT. ANN. § 447:2 (1983) (providing mechanic's lien rights to any person who performs labor in erecting or repairing building); N.J. STAT. ANN. § 2A:44-66 (West 1987) (entitling any person to mechanic's lien rights for performing labor in erecting building); N.M. STAT. ANN. § 48-2-2 (1978) (granting mechanic's lien rights to every person who performs labor in construction or repair of building); N.D. CENT. CODE § 35-27-02 (1987) (providing mechanic's lien rights to any person who improves real estate); OHIO REV. CODE ANN. § 1311.02 (Baldwin 1988) (granting mechanic's lien rights to every person who does work on building); OKLA. STAT. ANN. tit. 42, § 141 (West Supp. 1989) (granting mechanic's lien rights to any person who performs labor in erecting or repairing building); S.C. CODE ANN. § 29-5-10 (Law. Co-op. 1988) (providing mechanic's lien rights to any person to whom a debt is due for labor that person performed in erecting or repairing building); S.D. CODIFIED LAWS ANN. § 44-9-1 (1983) (granting mechanic's lien rights to whoever performs labor in improving property); TEX. PROP. CODE ANN. § 53.021 (Vernon 1986) (granting mechanic's lien rights to lumber dealer, artisan, laborer, mechanic, or subcontractor who performs labor for construction or repair of building or improvement); VT. STAT. ANN. tit. 9, § 1921 (Supp. 1988) (providing mechanic's lien rights to person who furnishes labor in erecting or repairing improvement on real property); VA. CODE ANN. § 43-3 (1986) (granting mechanic's lien rights to all persons who perform labor for construction of building); W. VA. CODE § 38-2-1 (1985) (granting mechanic's lien rights to every person, firm or corporation who erects or builds building or structure). See generally 5 AM. JUR. 2D *Architects* 683 (1970 & Supp. 1988) (discussing different state mechanic's lien statutes).

58. See *supra* note 57 (surveying generally worded mechanic's lien statutes); *supra* note 45 (discussing what parties are entitled to mechanic's lien rights under various state mechanic's lien statutes).

59. See 5 AM. JUR. 2D *Architects* 683 (1970 & Supp. 1988) (discussing state court interpretations of generally worded mechanic's lien statutes with respect to design professionals); Annotation, *Architect's Services as within Mechanic's Lien Statute*, 28 A.L.R.3D 1014, 1014 (1969 & Supp. 1988) (discussing state's conflicting approaches to determining whether design professional has right of lien); see also *infra* notes 60-68 and accompanying text (same).

sional may obtain a mechanic's lien for the design professional's services in preparing plans and specifications.⁶⁰ The Supreme Court of New Mexico, for example, has held that if a design professional furnishes plans that the builder actually uses in construction, the design professional has a right of lien regardless of whether the design professional supervised the construction.⁶¹ Noting that New Mexico's mechanic's lien statute grants mechanic's lien rights to every person that performs labor upon a building or structure, the Supreme Court of New Mexico has held that the design professional's services constitute labor within the meaning of New Mexico's mechanic's lien statute.⁶² Therefore, by granting the design professional mechanic's lien rights regardless of construction supervision, New Mexico's courts have adopted a flexible approach in interpreting New Mexico's generally-worded mechanic's lien statute.⁶³

60. See *Freeman v. Rinaker*, 185 Ill. 172, 175, 56 N.E. 1055, 1057 (1900) (holding that architects have mechanic's lien rights for drawing plans and specifications and for their services in superintending construction); *Morris J. Liebergott & Assocs. v. Investment Building Corp.*, 249 Md. 584, _____, 241 A.2d 138, 141 (1968) (holding that design professionals have mechanic's lien rights for design services regardless of whether design professional supervises construction); *Gaastra, Gladding & Johnson v. Bishop's Lodge Co.*, 35 N.M. 396, _____, 299 P. 347, 350 (1931) (granting design professional mechanic's lien rights where builder uses design professional's plans in construction); *Bralus Corp. v. Berger*, 307 N.Y. 626, 627, 120 N.E.2d 829, 830 (1954) (noting that architect is entitled to mechanic's lien for preliminary architectural plans); *Field & Slocomb v. Consolidated Mineral Water Co.*, 25 R.I. 319, _____, 55 A. 757, 758 (1903) (entitling architect to mechanic's lien for drawing plans and supervising construction and noting that architect's plans contributed to building as much as supervision).

61. *Gaastra, Gladding & Johnson v. Bishop's Lodge Co.*, 35 N.M. 396, _____, 299 P. 347, 350 (1931). In *Gaastra, Gladding & Johnson* the design professional filed for a mechanic's lien to recover payment for design services under a contract that called upon the owners to pay the design professional 3.5% of the total cost of the building. *Id.* at _____, 299 P. at 347. Noting that the design professional plays an important role in building operations, the Supreme Court of New Mexico held that the design professional had mechanic's lien rights for design services. *Id.* at _____, 299 P. at 348-350; *accord Johnson v. McLure*, 10 N.M. 506, _____, 62 P. 983, 984 (1900) (entitling design professional to mechanic's lien rights both for design services and for superintending construction).

62. *Gaastra*, 35 N.M. at _____, 299 P. at 350. New Mexico's mechanic's lien statute is generally-worded and grants mechanic's lien rights to every person who performs labor upon a building or structure. N.M. STAT. ANN. § 48-2-2 (1978).

63. *Gaastra*, at _____, 299 P. at 350. Similar to the New Mexico courts' interpretation of a generally-worded mechanic's lien statute, other courts have held that a design professional's design services constitute labor within the meaning of mechanic's lien statutes and that the design professional has lien rights even if the builder never constructs the planned improvements. See, e.g., *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, _____, 560 P.2d 457, 461 (1977) (holding that design professional has lien rights for design services even if owner does not subsequently erect improvements); *James Stewart & Assocs. v. Naredel of Colo.*, 39 Colo. App. 552, _____, 571 P.2d 738, 740 (1977) (same); *O'Hara v. Architects Hartung and Ass'n*, 163 Ind. App. 661, _____, 326 N.E.2d 283, 287 (1975) (holding that services of design professional constitute improvement of real estate, and therefore design professional has mechanic's lien rights for preparing plans and specifications even if developer never constructs planned improvements). *But see McDonald v. Filice*, 252 Cal. App. 2d 613, _____, 60 Cal. Rptr. 832, 837 (1967) (denying design professional mechanic's lien rights because worker failed to commence improvements to land); *Kenneth D. Collins Agency v. Hagenott*, 211 Mont. 303,

In contrast to New Mexico courts' flexible approach to interpreting generally-worded mechanic's lien statutes, some courts have adopted a restrictive approach to interpreting a generally-worded mechanic's lien statute by limiting the design professional's mechanic's lien rights to cases where the design professional provides supervisory services at the construction site.⁶⁴ For example, in permitting a design professional to obtain a mechanic's lien for the design professional's supervisory services, the Supreme Judicial Court of Massachusetts denied the design professional mechanic's lien rights for the design professional's services in preparing working plans and specifications.⁶⁵ The court explained that the design professional

_____, 684 P.2d 487, 490 (1984) (holding that design professional has no mechanic's lien rights if builders do not construct tangible improvement); *Goebel v. National Exchangors, Inc.*, 88 Wis. 2d 596, 610-611, 277 N.W.2d 755, 764 (1979) (concluding that design professional has no mechanic's lien rights prior to visible construction). Similarly, a few state mechanic's lien statutes also provide mechanic's lien rights to the design professional even if the builder has not commenced construction. *See* ALASKA STAT. § 34.35.050 (1985) (granting mechanic's lien rights to design professional for preparing plans and specifications whether or not owner actually implements plans on property); FLA. STAT. ANN. § 713.03(2) (West 1988) (providing that where design professional contracts directly with owner, design professional has mechanic's lien rights regardless of whether owner actually improves real property). *But see* S.C. CODE ANN. § 29-5-10 (Law. Co-op. Supp. 1985) (providing mechanic's lien rights to persons to whom a debt is due for labor actually used in the erection or repair of a building).

64. *See, e.g., Mitchell v. Packard*, 168 Mass. 467, _____, 47 N.E. 113, 114 (1897) (entitling architect to mechanic's lien for supervisory services but refusing to grant lien for architect's work in preparing plans and specifications); *Alan Porter, Inc. v. Du-Rite Products Co.*, 366 Pa. 548, 551-552, 79 A.2d 218, 221 (1951) (holding that design professional's design services are lienable only if design professional also supervises construction); *Lancaster v. McKenzie*, 439 S.W.2d 728, 729 (Tex. Civ. App. 1965) (requiring supervision by design professional before granting mechanic's lien rights). Additionally, some jurisdictions allow the design professional to obtain a mechanic's lien only if the builder actually uses the design professional's plans for the construction project. *See, e.g., McDonald v. Filice*, 252 Cal. App. 2d 613, _____, 60 Cal. Rptr. 832, 837 (1967) (holding that design professional does not have mechanic's lien rights if builder has not commenced construction on building); *Haines, Jones, Farrell, White, Gima Architects, Ltd. v. Maalaea Land Corp.*, 62 Haw. 13, _____, 608 P.2d 405, 408 (1980) (holding that design professional does not have mechanic's lien rights if builder has not constructed visible improvements); *Goebel v. National Exchangors, Inc.*, 88 Wis. 2d 596, 612-13, 277 N.W.2d 755, 763 (1979) (holding that design professional does not have mechanic's lien rights if builder has not commenced construction on building). Furthermore, some states deny mechanic's lien rights to the design professional even if the design professional prepared plans and specifications and supervised the construction. *See Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, _____, 603 P.2d 513, 534 (1979) (holding that Arizona mechanic's lien law does not apply to design professional); *Robert V. Clapp Co. v. Fox*, 124 Ohio St. 331, _____, 178 N.E. 586, 589-590 (1931) (holding that architect's services are not lienable under lump sum contract).

65. *Mitchell v. Packard*, 168 Mass. 467, _____, 47 N.E. 113, 115 (1897). In *Mitchell* a design professional contracted with the owner to perform design services and to supervise construction. *Id.* at _____, 47 N.E. at 113. After work commenced on the project, the owner suspended the project for lack of funds. *Id.* The design professional sought a mechanic's lien to secure payment for his services in preparing plans and specifications and in supervising construction. *Id.* at _____, 47 N.E. at 114; *see also Libby v. Tidden*, 192 Mass. 175, _____, 78 N.E. 313, 320 (1906) (holding that no lien exists for design professional's preparation of

is not entitled to a mechanic's lien for services in preparing plans and specifications because the design professional's plans often are merely tentative plans and because builders may not actually build in accordance with the plans.⁶⁶ Moreover, the Supreme Judicial Court of Massachusetts reasoned that Massachusetts legislators restricted mechanic's lien protection to persons that provide manual labor, not activities that are primarily mental in nature.⁶⁷ The Massachusetts courts, therefore, have adopted a restrictive approach that limits the design professional's mechanic's lien rights to cases where the design professional supervises construction.⁶⁸

States that require substantial on-site supervision of construction before entitling the design professional to mechanic's lien rights do not adequately protect the security interests of the design professional whose professional duties often do not include substantial supervision.⁶⁹ The design professional specializes in providing design services and often does not have the expertise to provide guidance in selecting safe and practical methods of construction.⁷⁰ The AIA contract forms, for example, do not require the design professional to conduct extensive or continuous construction site inspections.⁷¹ Rather,

plans and specifications). In *Libby* the Supreme Judicial Court of Massachusetts noted that if the design professional agrees to prepare plans and specifications as well as to supervise construction in one lump sum contract, the design professional does not have a mechanic's lien even for his supervisory services. *Id.* The *Libby* court further concluded that where the design professional enters into an entire contract, if there is no lien for one part of a contract, there can be no lien for any part of the contract. *Id.* Reasoning that it would be too difficult to allocate a lump sum contract between the lienable supervisory portion of the contract and the nonlienable design portion of the contract, the *Libby* court denied a mechanic's lien for a design professional's supervisory services because the design professional also prepared plans and specifications. *Id.*

66. *Mitchell*, 168 Mass. at _____, 47 N.E. at 115. The *Mitchell* court held that a design professional's work is not labor that the design professional performs for use in the erection of a structure. *Id.*

67. *Id.* at _____, 47 N.E. at 114. Failing to specifically mention design professionals, the Massachusetts' mechanic's lien statute grants mechanic's liens to "(a) person to whom a debt is due for personal labor performed in the erection, alteration, repair or removal of a building or structure on land." MASS. GEN. LAWS ANN. ch. 254, § 1 (West 1988); see WALKER, WALKER & RHODENBURG, *supra* note 52, at 206 (discussing Massachusetts approach to granting mechanic's liens to design professionals).

68. See *Mitchell*, 168 Mass. at _____, 47 N.E. at 114 (restricting design professional's mechanic's lien rights).

69. ROTH, *supra* note 8, at 11-14.

70. See AMERICAN BAR ASSOCIATION, ISSUES IN CONSTRUCTION LAW: NEW PERSPECTIVES ON LIABILITY AND CONTRACTS 137, 143-144 (1988) [hereinafter ISSUES IN CONSTRUCTION LAW] (noting that design professional specializes in design theory and practice, not construction methods and safety regulations); Carey, *Assessing Liability of Architects and Engineers for Construction Supervision*, 1979 INS. L.J. 167, 167 (noting that design professionals generally are not trained to supervise construction); Note, *Architectural Malpractice: A Contract Based Approach*, 92 HARV. L. REV. 1075, 1097 (1979) (noting that design professionals may lack training and competence to supervise construction).

71. AIA Document B141, *supra* note 34, at par. 2.6.5. The AIA's contract forms limit the design professional's observational duties to visiting the construction site at appropriate intervals to make sure that contractors generally are performing work in accordance with the contract documents. *Id.*

the AIA contract forms require only that the design professional make "observations" at the site to guard the owner against construction deficiencies.⁷² Additionally, in explaining the contractual limitation of the design professional's duties to make observations at the site, the AIA contract form commentary notes that design professionals do not have the power or responsibility to supervise employees of the contractor.⁷³ Accordingly, because construction supervision generally is outside the scope of the design professional's duties, states should not condition a design professional's right to a mechanic's lien on the design professional's performance of substantial on-site supervision.⁷⁴

In addition to requiring the design professional to perform services that traditionally are outside the scope of the design professional's duties, state mechanic's lien statutes that require design professionals to provide on-site supervision expose the design professional to liability for claims for delay and extra cost.⁷⁵ Typically, more than one safe and practical method of construction exists, and a design professional's extensive supervisory services may result in a conflict with contractors that disagree with the design professional's recommended methods of construction.⁷⁶ In identifying the proper duties of design professionals, the AIA contract forms state that the design professional shall not have control over the methods and techniques of construction.⁷⁷ The AIA contract forms explain that construction methods solely are the contractor's responsibility under the construction contract.⁷⁸

72. *Id.* In describing the construction phase of the design professional's services, the AIA notes that the language of a design professional's contract deliberately relieves the design professional of responsibility for continuous construction site inspections. 2 AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE 2.8:8 (1987); see *supra* note 43 and accompanying text (discussing construction phase of design professional's professional services).

73. 4 AMERICAN INSTITUTE OF ARCHITECTS, THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE B141 Commentary, par. 2.6.5 (1987) [hereinafter AIA B141 Commentary]. The AIA B141 Commentary notes that design professional's do not have the power to direct construction activities as implied in the term "supervise." *Id.*

74. See *supra* notes 69-73 and accompanying text (criticizing mechanic's lien statutes that limit mechanic's liens to design professionals that provide on-site supervision); *infra* notes 75-86 (same).

75. See ROTH, *supra* note 8, at 12 (noting that if design professional takes control over construction process, design professional would be subject to contractor's claims for delay and extra cost); *infra* notes 76-79 and accompanying text (explaining that construction supervision exposes design professional to delay and extra cost claims).

76. See ISSUES IN CONSTRUCTION LAW, *supra* note 70, at 144 (discussing problems that result when design professional supervises construction); see also *Wetteland v. Reyna Constr. Co.*, 42 Misc. 2d 981, 999, 249 N.Y.S.2d 593, 601 (Sup. Ct. 1963) (noting that joint responsibility between general contractor and design professional for inspection and maintenance of equipment may cause confusion and impede construction), *aff'd*, 23 A.D.2d 822, 258 N.Y.S.2d 817 (1965).

77. AIA Document B141, *supra* note 34, at para. 2.6.6. The AIA contract forms state that the design professional shall not control or be responsible for construction means, methods, techniques, or safety precautions. *Id.*

78. *Id.* In maintaining that the general contractor has sole responsibility to select

Consequently, if the design professional interferes with the contractor's responsibilities in selecting proper construction methods, the contractor may have a claim against the design professional for the delays and extra costs that result from the design professional's selected methods of construction.⁷⁹

Finally, mechanic's lien statutes that require design professionals to provide on-site supervision expose the design professional to liability for accidents that occur at the construction site.⁸⁰ In maintaining that supervisory services are outside the scope of the design professional's services, the AIA commentary notes that the use of the term "supervise" in describing the design professional's services may expose design professionals to liability for accidents that occur at the construction site.⁸¹ For example, noting that the design professional contractually was responsible for "general supervision and direction of work," the Illinois Supreme Court has held a design professional liable for the death of a worker who was killed when a gymnasium roof collapsed.⁸² The court explained that the design professional's supervisory responsibilities required the design professional to stop the general contractor from performing work in an unsafe manner.⁸³ Moreover, recognizing that on-site supervision exposes design professionals to liability for construction accidents, legal counsel for design professionals generally avoid assigning supervisory duties to design professionals when drafting construction contracts.⁸⁴ Therefore, states that require design profes-

construction methods, the contract forms state that the design professional shall not be responsible for the contractor's failure to comply with the contract documents. *Id.*

79. See *ISSUES IN CONSTRUCTION LAW*, *supra* note 70, at 136-137 (noting that if design professional interferes with contractor's duties, contractor may have cause of action against design professional for damages including delay, additional labor, or material costs); Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?*, 28 *EMORY L.J.* 291, 322 (1979) (noting that design professional's intervention in contractor's responsibilities will cause administrative confusion and contractor claims against owner and design professional); Note, *supra* note 70, at 1097 (noting that if design professional intrudes on contractor's decisionmaking responsibilities, design professional may be subject to suit by contractor).

80. See *ROTH*, *supra* note 8, at 12-13 (noting possibility of liability exposure for design professional who supervises construction).

81. AIA B141 Commentary, *supra* note 73, at para. 2.6.5.

82. *Miller v. DeWitt*, 37 Ill. 2d 273, 286-287, 226 N.E.2d 630, 642 (1967). In *Miller v. DeWitt*, the design professional's contract required the design professional to provide "general supervision" in enlarging a gymnasium. *Id.* at 282, 226 N.E.2d at 635. During construction, the gymnasium roof collapsed and injured workers. *Id.* at 279, 226 N.E.2d at 633. The Illinois Supreme Court held that the design professional was liable for the worker's injuries. *Id.* at 292, 226 N.E.2d at 639; see also *Welch v. Grant Dev. Co., Inc.*, 120 Misc. 2d 493, 501, 466 N.Y.S.2d 112, 116-117 (1983) (holding design professional liable for failing to report construction safety violations); Sweet, *supra* note 79, at 297-318 (discussing cases that have addressed design professional's construction site duties); see generally *ISSUES IN CONSTRUCTION LAW*, *supra* note 70, at 137 (1988) (discussing design professional's possible liability for construction accidents).

83. *Miller*, 37 Ill. 2d at 286, 226 N.E.2d at 639.

84. See *ISSUES IN CONSTRUCTION LAW*, *supra* note 70, at 137 (noting that term supervision is forbidden term in agreements between design professionals and owners); Note, *supra* note 70, at 1097 (explaining that design professionals avoid supervisory duties in construction contracts).

sionals to conduct on-site construction supervision may put the design professional in a predicament between claiming on-site supervision for lien purposes, or denying on-site supervision to avoid exposure to construction liability.⁸⁵ Accordingly, to allow design professionals to provide only their traditional design services and to protect design professionals from liability for construction delays and construction related injuries, states should enact mechanic's lien statutes that allow design professionals to obtain mechanic's lien rights regardless of whether the design professionals provide on-site construction supervision.⁸⁶

IV. CONFLICTING APPROACHES AMONG THE STATES IN GRANTING MECHANIC'S LIEN PRIORITY RIGHTS TO DESIGN PROFESSIONALS

States that currently extend mechanic's lien rights to design professionals differ in their approaches to determining when a design professional's mechanic's lien attaches during the construction process.⁸⁷ The date on which the design professional's mechanic's lien attaches is important to the design professional because the design professional often competes with other claimants, such as mortgagees, purchasers, and judgment lien creditors for priority in taking from the proceeds of a foreclosure sale of the lien property.⁸⁸ Large construction projects usually require construction financing, and the construction lender⁸⁹ generally takes a first deed of trust on the real property.⁹⁰ The design professional's mechanic's lien takes priority over other claimants with a security interest in real property if the mechanic's lien attaches before the other claimants record their security interests in the project.⁹¹ Because claimants with a security interest in real estate take from the proceeds of a foreclosure sale in their order of priority, the design professional is more likely to secure payment for his services if the design professional's lien attaches early in the construction process.⁹²

85. ROTH, *supra* note 8, at 13.

86. See *supra* notes 69-85 and accompanying text (criticizing state mechanic's lien statutes that require design professional to perform on-site supervision to obtain right of lien).

87. See Comment, *supra* note 4, at 152 (discussing state mechanic's lien attachment provisions); *infra* notes 93-153 and accompanying text (reporting and analyzing states' conflicting approaches to determining date design professional's mechanics's lien attaches).

88. See Dugan, *Mechanic's Liens For Improvements on Real Property*, 25 S.D.L. REV. 238, 255 (1980) (discussing priority rights between mechanic's lienors and other encumbrancers).

89. GOLDSTEIN, *REAL ESTATE TRANSACTIONS* 631-32 (2d ed. 1988) (noting that construction lender is usually commercial bank that makes short term loans to finance construction project). The construction lender advances construction funds periodically over the course of the construction project, and the lender secures the loan with a first lien mortgage on the property. *Id.*; see generally Walsh, *A Practical Guide to Mortgage Loan Commitments*, 8 REAL EST. L. J. 195 (1980) (discussing construction lending).

90. See Gutierrez, *Commencement of Works of Improvement: This Could Be The Start Of Something Big*, 17 LINCOLN L. REV. 215, 217 (1987) (discussing financing of construction projects).

91. *Id.*

92. See Hinkel, *Lien Claimants and Real Estate Lenders - The Struggle For Priority*, 16

Seeking to balance the interests of numerous parties that become creditors during the process of constructing improvements to real property, state legislatures have adopted different approaches to determining the date on which the design professional's mechanic's lien rights attach.⁹³ Most states provide that a design professional's mechanic's lien attaches prior to the date on which the design professional records a claim of lien.⁹⁴ After the design professional's lien attaches in these states, the design professional merely has a right to a mechanic's lien for priority purposes that remains inchoate until the design professional perfects the lien by recording a claim of lien in the proper office.⁹⁵ Moreover, the majority of mechanic's lien statutes provide that all liens on a parcel of property relate back to the date on which the mechanic's liens attach.⁹⁶ Among states which provide

GA. ST. BAR J. 187, 187 (1980) (noting importance of being first in priority race between competing security interests). As a condition of making a loan to finance the construction of improvements to real property, a construction lender generally requires superior encumbrancers to subordinate their rights to the lender's deed of trust. *Id.* In many construction projects, the real estate securing the construction loan is unimproved and, therefore, the amount of indebtedness exceeds the value of the real property. *Id.* Accordingly, parties that perfect their security interests in the real property after the construction lender records his deed of trust may never be compensated because the construction lender often will receive the entire proceeds of a foreclosure sale. *Id.*

93. See 53 AM. JUR. 2D *Mechanic's Liens* 797-800 (1970 & Supp. 1988) (discussing state mechanic's lien attachment provisions); Scholl, *supra* note 24, at 405-406 (same).

94. See *infra* notes 97, 149 (discussing state mechanic's lien statutes that allow mechanic's liens to attach prior to date claimant files for lien). In contrast to states that allow mechanic's liens to attach prior to the date on which the design professional records a claim of lien, several state legislatures have enacted mechanic's lien statutes which provide that a design professional's mechanic's lien rights do not attach until the design professional actually files for the lien in accordance with the state's mechanic's lien statute. See ARK. STAT. ANN. § 51-642 (Supp. 1985) (providing that design professional's mechanic's lien does not attach until design professional files lien claim with circuit court and recorder in county where property is located); FLA. STAT. ANN. § 713.07(1) (1988) (providing that design professional's mechanic's lien rights do not attach until time that design professional records lien); GA. CODE ANN. § 44-14-361.1(a)(2) (Supp. 1986) (entitling design professional to mechanic's lien if design professional files his claim of lien in office of clerk of superior court of county where property is located); MONT. CODE ANN. § 71-3-535(5) (1987) (stating that design professionals mechanic's lien attaches when design professional files for lien); N.H. REV. STAT. ANN. § 447:10 (1983) (providing that mechanic's lien claimant may secure his lien by attachment of property); S.C. CODE ANN. § 29-5-70, -90 (Law. Co-op. 1976 & Supp. 1988) (providing that lien claimant's mechanic's lien is not enforceable against other encumbrancers who record before lien claimant files notice in office of register of county in which property is located). In addition, Maine and Maryland have mechanic's lien statutes that authorize the courts to determine when mechanic's liens attach for priority purposes. See ME. REV. STAT. ANN. tit. 10, § 3257 (Supp. 1988) (providing court with power to determine questions of priority); MD. REAL PROPERTY CODE ANN. § 9-106 (1988) (providing that court, after reviewing pleadings, determines whether lien should attach).

95. See 53 AM. JUR. 2D *Mechanic's Liens* 769 (1970 & Supp. 1988) (discussing mechanic's lien attachment provisions).

96. EPSTEIN & LANDERS, *DEBTORS AND CREDITORS, CASES AND MATERIALS* 314 (2d ed. 1982). See, e.g., COLO. REV. STAT. § 38-22-101 (1973) (providing that all liens relate back to and take effect on date of commencement of work on structure); HAW. REV. STAT. § 507-46

that mechanic's liens may attach prior to the date of filing, the majority of state mechanic's lien statutes provide that mechanic's liens attach on the date of commencement of work on the improvement to the lien property.⁹⁷

(1985) (providing that mechanic's liens relate back to and take effect on date workers commence visible work on project); IND. CODE ANN. § 32-8-3-5 (West 1971) (providing that liens relate back to date that mechanic or other person began to perform labor).

97. See ALA. CODE § 35-11-211 (1975) (providing that mechanic's liens have priority over other liens, mortgages, and encumbrances that claimants create after work on building has commenced); ALASKA STAT. § 34.35.060 (1985) (providing that lien of individual actually performing labor upon building is preferred to prior encumbrance upon property); ARIZ. REV. STAT. ANN. § 33-981 (1974) (providing that mechanic's liens are preferred to other liens, mortgages, or other encumbrances that attach after mechanic's lien claimant commences labor); CAL. CIVIL CODE § 3134 (West 1974) (same); COLO. REV. STAT. § 38-22-101 (1973) (providing that all liens relate back to and take effect on date of commencement of work on structure); CONN. GEN. STAT. ANN. § 49-33(b) (West 1978 & Supp. 1989) (providing that mechanic's lien takes precedence over other encumbrances originating after commencement of services); DEL. CODE ANN. tit. 25, § 2702 (1975) (providing that mechanic's lien is preferred to all judgments, mortgages, deeds of trust, liens, and encumbrances that attach after commencement of work upon building); D.C. CODE ANN. § 38-109 (1981) (same); HAW. REV. STAT. § 507-46 (1985) (providing that mechanic's liens relate back to and take effect on date workers commence visible work on project); IDAHO CODE § 45-501 (1977) (preferring design professional's mechanic's lien over other claims that attach after design professional commences professional services); IND. CODE ANN. § 32-8-3-5 (West 1971) (providing that liens relate back to date that mechanic or other person began to perform labor); IOWA CODE ANN. § 572.2 (West 1950) (providing that mechanic's liens are not preferred to liens of record that attach prior to date workers commence original work on project); KAN. STAT. ANN. § 60-1101 (1983) (preferring mechanic's liens to all other liens or encumbrances that attach subsequent to commencement of furnishing labor or material at site of property that is subject to lien); MICH. COMP. LAWS ANN. § 570.1119(4) (West Supp. 1988) (providing that construction liens do not take priority over mortgage, lien encumbrance or other interest that claimant recorded before first physical improvement to real property); MO. ANN. STAT. § 429.060 (Vernon 1952) (preferring mechanic's lien to other encumbrances that attach after workers commence building or improvement); NEV. REV. STAT. § 108.225 (1987) (preferring mechanic's liens to other liens, mortgages, or encumbrances that attach after worker commenced work or furnished materials for structure); N.M. STAT. ANN. § 48-2-5 (1978) (same); N.C. GEN. STAT. § 44A-10 (1984) (providing that mechanic's liens relate back to time that person claiming lien first furnished labor on improvement); OHIO REV. CODE ANN. §1311.13 (Baldwin 1988) (preferring mechanic's liens to all other titles, liens or encumbrances that claimant records after workers commence construction on improvement to real property); OKLA. STAT. ANN. tit. 42, § 141 (West Supp. 1989) (preferring mechanic's liens to all other liens or encumbrances that attach after workers commence building); OR. REV. STAT. §§ 87.005, .025 (1987) (providing that mechanic's liens are preferred to any lien, mortgage or other encumbrance that attaches at time of first actual preparation or construction on site that notifies interested persons that construction has begun); PA. CONS. STAT. ANN. § 1508 (Purdon 1965) (providing that mechanic's liens related to erection or construction of improvement have priority from date of visible commencement of work and mechanic's liens related to alteration or repair of improvement have priority from date lien claimant files lien claim); TENN. CODE ANN. § 66-11-102(c)(1) (Supp. 1988) (providing that mechanic's liens relate to and take effect from time workers commence visible construction operations and that mechanic's lien is subordinate to mortgagee's lien unless mechanic's lienor gives mortgagee written notice of his mechanic's lien before mortgagee records his lien); UTAH CODE ANN. § 38-1-5 (1988) (providing that mechanic's liens take effect and have priority over any lien, mortgage or other encumbrance from time workers commence work on structure); VT. STAT. ANN. tit. 9, § 1923 (Supp. 1988) (providing that, subject to certain exceptions for

California's mechanic's lien statute, for example, provides that the lien claimant's mechanic's lien takes priority over any encumbrance that attaches after the "commencement of work on the structure or improvement."⁹⁸ Because construction may commence before the design professional files for a mechanic's lien, California's mechanic's lien statute provides the design professional with the right to obtain a mechanic's lien prior to the date on which the design professional records his claim for a mechanic's lien.⁹⁹

States that have mechanic's lien statutes which provide that a design professional's mechanic's lien attaches on the date of commencement of work have adopted different approaches to defining the term "commencement of work."¹⁰⁰ A minority of states have mechanic's lien statutes that define the term "commencement of work."¹⁰¹ For example, Wisconsin's mechanic's lien statute provides that mechanic's liens take priority over other encumbrances that originate after the visible commencement of improvements.¹⁰² The Wisconsin statute explains that visible commencement

mortgagees, mechanic's lien claimant must file in clerk's office mechanic's lien claim that charges real estate with mechanic's lien from time of visible commencement of work); VA. CODE ANN. § 43-21 (1986) (providing that no lien or encumbrance upon land that claimant created after worker commenced labor shall operate on land, building or structure until lien in favor of person doing work has been satisfied); WASH. REV. CODE ANN. § 60.04.050 (Supp. 1989) (preferring mechanic's liens to other liens, mortgages, or encumbrances that attach after workers commence labor on improvement); W. VA. CODE § 38-2-17 (1985) (providing that mechanic's lien attaches and takes priority on date worker begins to furnish labor); WISC. STAT. ANN. § 779.01(4) (West 1981 & Supp. 1988) (providing that design professionals have same priority rights as other construction lien claimants and construction liens take priority from date of visible commencement of project); WYO. STAT. § 29-1-305(5) (1981) (granting priority to liens that claimant perfects prior to date worker commences construction). See generally Comment, *supra* note 4, at 152 (discussing date design professional's lien attaches in different jurisdictions).

98. CAL. CIVIL CODE § 3134 (West 1974).

99. *Id.*; see Gutierrez, *supra* note 90, at 219 (discussing California's commencement of work requirement).

100. See Annotation, *What Constitutes "Commencement of Building or Improvement" for purposes of Determining Accrual of Mechanic's Lien*, 1 A.L.R. 3D 822 (1965 & Supp. 1988) (discussing state court determinations of what constitutes commencement of work); *infra* notes 108-153 and accompanying text (reporting and analyzing states conflicting approaches to defining term commencement of work).

101. See, e.g., HAW. REV. STAT. § 507-46 (1985) (providing that mechanic's liens relate back to and take effect on date workers commence visible work on project); MICH. COMP. LAWS ANN. § 570.1119(4) (West Supp. 1988) (providing that construction liens do not take priority over mortgage, lien encumbrance or other interest that claimant recorded before first physical improvement to real property); OR. REV. STAT. § 87.005 (1987) (defining commencement of improvement as first actual preparation or construction on site that notifies interested persons that construction has begun). See generally *Williams & Works, Inc. v. Springfield Corp.*, 408 Mich. 752, 750-754, 293 N.W.2d 304, 311-314 (1980) (discussing judicial and statutory interpretations of commencement of work).

102. WIS. STAT. ANN. § 779.01(4) (West 1981 & Supp. 1988). In addition to providing that mechanic's liens attach upon visible commencement of improvements, the Wisconsin mechanic's lien statute provides that the construction lien takes priority over unrecorded mortgages of which the construction contractor does not have knowledge. *Id.*

occurs when a builder begins substantial excavation for the foundations or footings of the construction project.¹⁰³ Additionally, the Wisconsin statute states that lien claimants that provide design services shall have only the same priority rights that the statute grants to other lien claimants.¹⁰⁴ The commentary to Wisconsin's mechanic's lien statute explains that the visible commencement requirement eliminates the construction lender's fears that liens for prior surveying or site preparation will take priority over the lender's mortgage.¹⁰⁵ Accordingly, Wisconsin does not define commencement of work to include commencement of design services.¹⁰⁶

In contrast to Wisconsin's statutory definition of commencement of work, Idaho's mechanic's lien statute provides that the claimant's mechanic's lien takes priority over any lien, mortgage, or encumbrance that attaches subsequent to the date on which "professional services were commenced to be furnished."¹⁰⁷ The Idaho statute does not specifically define professional services, but the statute expressly grants lien rights to design professionals that perform design services, supervision, or any other professional services.¹⁰⁸ Accordingly, Idaho's mechanic's lien statute allows the design professional's mechanic's lien to attach early in the construction process.¹⁰⁹ By defining the term commencement of work statutorily, mechanic's lien statutes in states such as Wisconsin and Idaho expressly have determined whether the term commencement of work includes a design professional's services.¹¹⁰

In contrast to the minority of states that have mechanic's lien statutes that define the term "commencement of work," the majority of states have mechanic's lien statutes that do not define the term "commencement of work."¹¹¹ In these states courts conflict on whether a design professional's work in preparing plans and specifications constitutes commencement of work.¹¹² The majority of courts strictly have interpreted the term "com-

103. *Id.*

104. *Id.*

105. WIS. STAT. ANN. § 779.01(4) (West 1981 & Supp. 1988) (legislative council note).

106. *See Williams & Works, Inc. v. Springfield Corp.*, 408 Mich. 732, 752, 293 N.W.2d 304, 313-314 (1980) (discussing Wisconsin's mechanic's lien statute).

107. IDAHO CODE § 45-506 (1977).

108. *Id.* § 45-501. Idaho's mechanic's lien statute grants mechanic's lien rights to "every professional engineer or licensed surveyor under contract who prepares or furnishes designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on site observation or supervision, or who renders any other professional service whatsoever. . . ." *Id.*

109. *Id.* § 45-506.

110. *See supra* note 101 (citing states that have mechanic's lien statutes that define term "commencement of work" statutorily).

111. *See, e.g.,* ALA. CODE § 35-11-211 (1975) (providing that mechanic's liens have priority over other liens, mortgages, and encumbrances that claimants create after work on building has commenced); IND. CODE ANN. § 32-8-3-5 (West 1971) (providing that liens relate back to date that mechanic or other person began to perform labor); WYO. STAT. § 29-1-305(5) (1981) (granting priority to liens that claimant perfects prior to date worker commences construction).

112. *See* Annotation, *What Constitutes "Commencement of Building or Improvement" for purposes of Determining Accrual of Mechanic's Lien*, 1 A.L.R. 3d 836 (1965 & Supp.

mencement of work” to require visible improvements to the lien property.¹¹³ For example, in *Walker v. Lytton Savings and Loan Association of Northern California*¹¹⁴ the Supreme Court of California considered whether a design professional’s off-site architectural services that the design professional rendered before the beginning of actual construction constituted commencement of building under California’s mechanic’s lien statute.¹¹⁵ In *Walker* the plaintiff architects (Walker) contracted with the owners in May 1963 to provide architectural services for the construction of an apartment complex on the owner’s property.¹¹⁶ Walker immediately commenced work under the contract, and by August 1964 Walker had completed the working plans and specifications for the construction of the apartment complex.¹¹⁷ To finance the construction of the apartment complex, the owners commenced negotiations with Lytton Savings and Loan Association (Lytton) in August 1964.¹¹⁸ The owners submitted Walker’s plans and specifications to Lytton for approval, and in December 1964, Lytton granted the owners a construction loan in consideration of a promissory note and a deed of trust on the owners’ real property.¹¹⁹ Lytton recorded the deed of trust in December

1988) (discussing courts’ interpretations of commencement of work requirement); *infra* notes 113-147 and accompanying text (discussing courts’ conflicting approaches to defining term commencement of work).

113. *See, e.g.*, *Walker v. Lytton Savings and Loan Ass’n of No. Cal.*, 84 Cal. Rptr. 521, 524, 465 P.2d 497, 502 (1970) (delaying attachment of design professional’s mechanic’s lien until visible commencement of construction); *M.E. Kraft Excavating & Grading Co. v. Barac Constr. Co.*, 279 Minn. 278, —, 156 N.W.2d 748, 752 (1968) (holding that architect’s mechanic’s lien does not attach until actual beginning of improvement on ground); *Aladdin Heating Corp. v. Trustees of the Central States, Southeast & Southwest Pension Fund*, 93 Nev. 257, —, 563 P.2d 82, 84 (1977) (holding that design professional’s architectural services, soil testing, and survey work did not constitute on-site construction necessary for design professional to establish lien priority). In interpreting the term “commencement of work” to require manifest, visible improvements, some state courts have held that onlookers must be able to recognize readily that someone is constructing a building. *See, e.g.*, *Rupp v. Earl H. Cline & Sons, Inc.*, 230 Md. 573, —, 188 A.2d 146, 149 (1963) (requiring manifest commencement of work that everyone can recognize as commencement of building); *H.B. Deal Construction Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940, 951 (Mo. 1967) (applying “first spade rule,” which allows liens to accrue when onlookers can see commencement of construction upon the ground); *Wayne Bldg. & Loan Co. v. Yarborough*, 11 Ohio St. 2d 195, 202, 228 N.E.2d 841, 857 (1967) (holding that mechanic’s liens are effective when construction is reasonably apparent).

114. 84 Cal. Rptr. 521, 465 P.2d 497 (1970).

115. *Walker v. Lytton Savings and Loan Association of Northern California*, 84 Cal. Rptr. 521, 465 P.2d 497 (1970).

116. *Id.* at 522, 465 P.2d at 498. The owners in *Walker* entered into an oral contract with Walker for architectural services. *Id.* Under the oral contract, Walker was required to provide architectural services for the construction of a forty-two unit apartment building and a sixty-seven unit apartment building. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* In addition to providing Lytton with Walker’s plans and specifications, the owner in *Walker* provided Lytton with information concerning the manner of payment and the amount of fees that the owner had paid to Walker. *Id.* Moreover, in December 1964 Walker

1964, and builders subsequently began to construct the apartment complex in March 1965.¹²⁰ In November 1965 the owners notified Walker to cease providing architectural and supervisory services, and Walker subsequently recorded a claim of mechanic's lien against the owners' real property in December 1965.¹²¹ After Lytton obtained the owner's property in a trustees' sale conducted under the deed of trust, Walker brought suit against Lytton to foreclose Walker's mechanic's lien.¹²² Reasoning that Walker's services constituted commencement of work for purposes of priority under California's mechanic's lien statute, the trial court held that Walker's security interest under Walker's mechanic's lien was superior to Lytton's security interest under Lytton's deed of trust.¹²³

On appeal the Supreme Court of California considered whether Walker's design services constituted commencement of work under California's mechanic's lien statute.¹²⁴ The *Walker* court initially noted that an architect's plans do not have a structural character and often merely serve to assist the owner in determining whether to build.¹²⁵ Additionally, the *Walker* court noted that if the court held in favor of Walker, construction lenders would be unwilling to assume the risk of lending.¹²⁶ The court explained that construction lenders that inspect an owner's property prior to lending money to the owner and after the design professional provides design services would

provided Lytton with information concerning the estimated cost of the project. *Id.* In making an appraisal for the construction loan, Lytton relied on the information that Walker supplied to Lytton. *Id.* On December 15, 1964 the owners executed a promissory note to Lytton for \$1,609,000. *Id.*

120. *Id.* at 523, 465 P.2d at 499. The trial court in *Walker* determined that builders had not commenced work on the project by the date that Lytton recorded the deed of trust. *Id.*

121. *Id.* Walker filed a claim for a mechanic's lien to recover unpaid fees of \$19,500 plus interest for architectural and supervisory services. *Id.* Before Walker stopped providing architectural and design services, builders had graded and excavated the construction site and had constructed a fence on the premises. *Id.*

122. *Id.* At a foreclosure sale conducted under Lytton's deed of trust, Lytton purchased the owner's property as beneficiary of the deed of trust in February 1966. *Id.* Walker filed suit in March 1966 to foreclose Walker's mechanic's lien. *Id.* Lytton, however, asserted that its mortgage interests were superior to Walker's mechanic's lien interests because Lytton had recorded its mortgage before the actual commencement of construction. *Id.*

123. *Id.*

124. *Id.* at 524, 465 P.2d at 500. In considering whether design services constituted commencement of work under California's mechanic's lien statute, the Supreme Court of California noted that California's mechanic's lien statute did not define commencement of work. *Id.* The statute at issue in *Walker*, similar to California's present mechanic's lien statute, provided that mechanic's liens take priority over encumbrances that attach after builders commence work on the improvement. CAL. CIVIL CODE § 1181.1 (West 1969); see *supra* note 98 and accompanying text (citing present California mechanic's lien statute).

125. *Walker*, 84 Cal. Rptr. at 526, 465 P.2d at 502. In noting that the design professional's services in preparing plans and specifications do not constitute a "building operation," the *Walker* court explained that owners often contract with design professionals merely in anticipation of construction. *Id.*; accord *Tracey Price Assocs. v. Hebard*, 266 Cal. App. 2d 778, —, 72 Cal. Rptr. 600, 604 (1968) (holding that architect's work does not constitute commencement of work).

126. *Walker*, 84 Cal. Rptr. at 526-527, 465 P.2d at 502-503.

see no visible signs of construction and thus have no way of knowing if liens had attached to the property.¹²⁷ In addressing Walker's contention that Lytton, prior to filing Lytton's deed of trust, had actual notice that Walker was providing architectural services for the project, the court concluded that only the legislature should change the statutory priority rules.¹²⁸ Noting that legislatures design priority rules for the benefit of construction lenders as well as mechanic's lien claimants, the *Walker* court held that under California's mechanic's lien statute, commencement of work for purposes of priority required actual, visible work that notifies interested persons that construction has begun.¹²⁹ Accordingly, the court reversed the trial court's holding and ruled in favor of the defendant Lytton.¹³⁰

In contrast to the *Walker* court's determination that the term "commencement of work" requires actual, visible work that notifies persons that construction has begun, the Colorado Supreme Court in *Bankers Trust Company v. El Paso Pre-Cast Co.*¹³¹ determined that the term "commencement of work" allows a design professional's mechanic's lien to attach prior to visible commencement of work at the construction site.¹³² The *Bankers Trust* court considered whether a design professional's mechanic's lien rights related back to the date of commencement of the design professional's work on the plans and specifications.¹³³ In *Bankers Trust* the Breaks Land Corporation (BLC) hired Steven Jacobs and Associates (Jacobs), an architectural firm, in June 1972 to provide design services for the construction of an apartment complex.¹³⁴ BLC also hired Lovejoy & Williams, Inc. (Williams), an engineering firm, to perform engineering work for the construction project.¹³⁵ To finance the project, BLC obtained a construction loan from Bankers Trust Company of New York (Bankers Trust).¹³⁶ Bankers Trust secured the loan with a deed of trust on BLC's property and subsequently recorded the deed of trust on November 20, 1972.¹³⁷ After

127. *Id.* The *Walker* court noted that if all liens that result from a construction project related back to the date of the design professionals commencement of nonvisible design services, it would be nearly impossible for owners to obtain construction loans because lenders would be unwilling to assume the risk of lending. *Id.*

128. *Id.* at 527, 465 P.2d at 503. The *Walker* court noted that, if a construction lender takes a deed of trust with knowledge that the owner plans to construct improvements to the property, such knowledge cannot constitute waiver or estoppel. *Id.* at 525, 465 P.2d at 501.

129. *Id.* at 526, 465 P.2d at 500. The *Walker* court concluded that mechanic's liens do not attach until workers commence construction by doing visible work on the property or until materialmen deliver construction materials to the property. *Id.*

130. *Id.* at 527, 465 P.2d at 503.

131. 192 Colo. 468, 560 P.2d 457 (1977).

132. *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977).

133. *Id.* at —, 560 P.2d at 460.

134. *Id.* at —, 560 P.2d at 459. Jacobs contracted orally with BLC to prepare preliminary plans and drawings for the construction project. *Id.*

135. *Id.*

136. *Id.* To obtain financing for the construction project, BLC submitted Jacob's plans to Bankers Trust for approval. *Id.*

137. *Id.*

Bankers Trust had distributed \$1.27 million to BLC for the construction of the apartment complex, BLC defaulted on its payments to Bankers Trust.¹³⁸ Accordingly, Bankers Trust bought the property at a public foreclosure sale, and Jacobs and Williams sued Bankers Trust to foreclose on their mechanic's liens.¹³⁹ The trial court concluded that the date on which Jacobs and Williams commenced design work established the priority date for all mechanic's liens on the project.¹⁴⁰ Noting that Jacobs and Williams commenced design work before Bankers Trust recorded its deed of trust, the trial court held that all valid lien claimants had priority over Bankers Trust's deed of trust.¹⁴¹ Maintaining that design work does not constitute commencement of work that establishes the priority of mechanic's liens, Bankers Trust appealed the trial court's decision to the Colorado Supreme Court.¹⁴²

On appeal the Colorado Supreme Court considered whether Colorado's mechanic's lien statute permits design professional's mechanic's lien rights to attach when the design professional commences work on the project.¹⁴³ The court initially noted that, under Colorado's mechanic's lien statute, the commencement of work for mechanic's lien priority purposes means commencement of lienable work.¹⁴⁴ The court explained that because the design professional's services are lienable under Colorado's mechanic's lien statute, Jacobs' and Williams' design services constituted the commencement of work on the project.¹⁴⁵ Maintaining that courts should construe mechanics lien laws liberally in favor of lien claimants, the Colorado Supreme Court affirmed the trial court's determination that Jacobs and Williams' commencement of work established the priority date for all mechanic's liens on the project.¹⁴⁶ Thus, the Supreme Court of California's holding in *Walker*

138. *Id.*

139. *Id.* After foreclosing its deed of trust through the public trustee, Bankers Trust bought the property from the public trustee at a public foreclosure sale in May 1974. *Id.* El Paso Pre-Cast Company, a materials supplier for the project, sued to foreclose its mechanic's lien against the property in February 1974. *Id.* Numerous lien claimants, including Jacobs and Williams, intervened in El Paso's suit to foreclose on their mechanic's liens. *Id.* Bankers Trust, however, claimed a first lien under its deed of trust. *Id.* Additionally, Bankers Trust challenged the constitutionality of the mechanic's lien statute. *Id.*

140. *Id.* at ____, 560 P.2d at 460. The trial court rejected Bankers Trust's challenge to the constitutionality of Colorado's mechanic's lien statute. *Id.*

141. *Id.*

142. *Id.* Bankers Trust contended that its deed of trust had priority over all mechanic's liens on the property. *Id.*

143. *Id.*

144. *Id.* at ____, 560 P.2d at 461; see COLO. REV. STAT. § 38-22-101 (1973) (providing that mechanic's liens take effect on date of commencement of work on structure).

145. COLO. REV. STAT. § 38-22-101 (1973). Colorado's mechanic's lien statute provides mechanic's lien rights to architects, engineers, and draftsmen for their work in furnishing plans, specifications, or superintendence. *Id.*

146. *Bankers Trust*, 84 Cal. Rptr. at ____, 560 P.2d at 461. In holding that the design professional's commencement of work established the priority date for all mechanic's liens on the project, the Colorado Supreme Court noted that all liens on real estate relate back to the date that the first contractor commenced work under contract with the owner. *Id.*, citing *Park Lane v. Fisher*; see *Park Lane v. Fisher*, 5 P.2d 577, 579 (Colo. 1931) (holding that architect's mechanic's lien related back to commencement of architect's design services).

and the Colorado Supreme Court's holding in *Bankers Trust* illustrate the wide discretion that courts have employed in interpreting many mechanic's liens statutes that do not specifically define the term "commencement of work."¹⁴⁷

In contrast to states that have mechanic's lien statutes that allow mechanic's liens to attach on the date of commencement of work on the improvement to the real property, some states have mechanic's lien statutes that use a recording system to determine when a design professional's mechanic's lien attaches.¹⁴⁸ The majority of these states have recording systems which provide that mechanic's liens attach on the date the lien claimant records his original contract for the improvement.¹⁴⁹ For example, Rhode Island's mechanic's lien statute provides that a design professional may attach his lien for work that the design professional performs prior to the actual and visible commencement of construction by sending a notice of intention to do work to the record owner of the lienable property and by filing a copy of the notice of intention in the land records office in the city or town in which the property is located.¹⁵⁰ The Rhode Island statute

147. See *supra* notes 114-146 and accompanying text (reporting courts' holdings in *Walker* and *Bankers Trust*).

148. See *infra* note 149 (discussing state mechanic's lien statutes that use recording system).

149. See ILL. ANN. STAT. ch. 82, para. 1 (Smith-Hurd 1987) (providing that mechanic's liens attach on date lien claimant records his contract); KY. REV. STAT. ANN. § 376.010(2) (Baldwin Supp. 1988) (providing that mechanic's liens shall not take priority until lien claimant files in office of county clerk statement showing that lien claimant has furnished or expects to furnish labor); LA. REV. STAT. ANN. § 9.4820 (West 1983 & Supp. 1988) (providing that liens are effective against third persons from date lien claimant files notice of contract or date work begins, though not including date design professional begins rendering services); MASS. GEN. LAWS ANN. ch. 254, § 3 (West 1988) (providing that rights of creditor shall not prevail against claim of lienor if lienor previously has filed notice of contract); MINN. STAT. ANN. § 514.05 (West Supp. 1989) (providing that mechanic's lien attaches on date claimant files statement of nature of contract, or on date workers other than design professional begin visible improvement on ground); MISS. CODE ANN. § 85-7-131 (Supp. 1988) (allowing lien to take effect over encumbrancers or purchasers without notice of lien from date lien claimant brings suit to enforce lien or from date lien claimant filed contract); NEB. REV. STAT. § 52-145(5) (1984) (entitling lien claimant to priority from date lien claimant records notice of commencement); N.J. STAT. ANN. § 2A:44-71 (West 1987) (providing that no one has lien rights prior to date lien claimant files a mechanic's notice of intention in office of proper county clerk); N.Y. LIEN LAW § 13 (McKinney Supp. 1989) (granting lien claimant priority over conveyance, mortgage, or other claim that claimant does not record at time lien claimant files notice of lien); N.D. CENT. CODE § 35-27-02 (1987) (providing that mechanic's lien attaches when lien claimant files notice of intention to claim lien); R.I. GEN. LAWS § 34-28-4 (1984) (providing that design professional's mechanic's lien attaches when design professional files notice of intention); S.D. CODIFIED LAWS ANN. § 44-9-8 (1983) (providing that against purchaser, mortgagee, or encumbrancer, mechanic's lien attaches on date worker begins actual and visible improvement on ground, but mechanic's lien claimant may file statement of nature of contract that will constitute notice of contract); TEX. PROP. CODE ANN. § 53.124 (Vernon 1986) (providing that time mechanic's lien attaches is earlier of date workers commence visible improvements or date claimant files affidavit stating that claimant has entered into contract with owner).

150. R.I. GEN. LAWS §§ 34-28-7, -4 (1984). Section 34-28-7 of Rhode Island's mechanic's

also provides that the mechanic's liens of other construction contractors, rather than relating back to the date on which the design professional recorded a notice of intention to do work, attach for purposes of priority against construction lenders on the date that the contractor files a notice of intention.¹⁵¹ Rhode Island's statute requires that the notice of intention include the name of the owner, a description of the land that the design professional contracts to improve, and a description of the nature of the work that the design professional will provide to the owner.¹⁵² Accordingly, because a design professional most likely will record his contract before workers commence construction at the job-site, Rhode Island's recording system allows the design professional's mechanic's lien to attach prior to the date on which builders commence construction.¹⁵³

State legislatures have enacted mechanic's lien statutes that use the commencement of work rule or the recording system to determine the date on which the design professional's mechanic's lien attaches.¹⁵⁴ To protect all parties with a security interest in land including construction lenders and design professionals, state legislatures must balance the interests of the numerous parties that become creditors during the process of constructing improvements to real property.¹⁵⁵ In particular, state legislatures must balance the design professional's interest in securing payment for design services and the construction lender's interest in identifying parties that may prevent the construction lender from obtaining a first lien on the property.¹⁵⁶

lien statute provides that the design professional's mechanic's lien for work that the design professional performs prior to actual and visible construction shall be valid and enforceable if the design professional files a notice of intention. *Id.* at § 34-28-7. Section 34-28-4 sets forth the requirements of filing a notice of intention. *Id.* at § 34-28-4. Pursuant to section 34-28-5, the town clerk records the notice of intention to do work for a fee of \$8.00. *Id.* at § 34-28-5 (Supp. 1988).

151. *Id.* at § 34-28-25(2). The Rhode Island mechanic's lien statute separates mechanic's liens that are senior to any mortgage, attachment, lease, claim or recorded title from mechanic's liens that are junior to such claims. *Id.* at § 34-28-5(3). Between valid mechanic's liens, the Rhode Island statute requires equal distribution of the proceeds of a foreclosure sale. *Id.* at § 34-28-25(1).

152. *Id.* at § 34-28-4. Rhode Island's mechanic's lien statute provides that the notice of intention must include the name and address of the persons for whom the claimant performed work or will perform work, or to whom the claimant has furnished materials or will furnish materials. *Id.*

153. See ROTH, *supra* note 8, at 6 (noting that Rhode Island's mechanic's lien statute specifically addresses design professionals nonvisible work). See generally Farone v. Farone, 413 A.2d 90, 91 (R.I. 1980) (discussing notice of intention provision of Rhode Island's mechanic's lien statute).

154. See *supra* notes 94, 97, 149 and accompanying text (citing state mechanic's lien attachment provisions).

155. See GOLDSTEIN, *supra* note 89, at 673 (noting that legislatures should amend mechanic's lien statutes to protect both design professionals and construction lenders); Tracey Price Assocs. v. Hebard, 266 Cal. App. 2d 778, —, 72 Cal. Rptr. 600, 608 (1968) (noting that legislatures designed mechanic's lien priority provisions to protect mechanic's lien claimants and other parties that take security interest in land).

156. See Walker v. Lytton Savings and Loan Assoc. of N. Cal., 84 Cal. Rptr. 521, 525-

States that have mechanic's lien statutes which provide that design professional's mechanic's lien rights attach upon the date of visible commencement of work do not balance the interests of the numerous parties that claim a security interest in land.¹⁵⁷ For example, the *Walker* court's interpretation of the term "commencement of work" in California's mechanic's lien statute fails to balance the interests of all parties that claim an interest in land.¹⁵⁸ In *Walker* the Supreme Court of California held that the design professional's mechanic's lien does not attach until builders visibly commence improvements.¹⁵⁹ The court's requirement of visible commencement of improvements does not protect the interest of the design professional whose unique services generally begin prior to actual commencement of construction and produce no visible changes at the construction site.¹⁶⁰ Because the design professional's work produces no visible changes at the construction site, the visible commencement requirement delays the date of attachment for the design professional's mechanic's lien until the date on which other workers begin visible construction at the project site.¹⁶¹ Accordingly, under the *Walker* court's visible commencement requirement, the design professional's mechanic's lien does not achieve priority over construction lenders whose security interests may attach prior to visible construction.¹⁶² Because the owner's indebtedness often exceeds the value of the real property, the design professional may never be compensated for his services because the construction lender often will receive the entire proceeds of the foreclosure sale.¹⁶³ By forcing design professionals to await visible construction to attach their mechanic's liens, the visible commencement rule fails to protect the design professional's interest in recovering payment for the services that the design professional rendered to the owner.¹⁶⁴

In contrast, in interpreting Colorado's mechanic's lien statute, the Colorado Supreme Court in *Bankers Trust* protected the security interest of design professionals but failed to protect adequately the interests of

526, 465 P.2d 497, 501-502 (1970) (noting that legislatures design priority rules for benefit of construction lenders and mechanic's lienors); see also *supra* note 92 (explaining construction lenders' interest in securing first lien on property).

157. See GOLDSTEIN, *supra* note 89, at 672-673 (noting that visible commencement of work rule does not protect design professionals).

158. See *Walker*, 84 Cal. Rptr. at 526, 465 P.2d at 502 (interpreting term "commencement of work" to require visible improvements).

159. *Id.*

160. See ROTN, *supra* note 8, at 7 (noting that visible commencement of work rule creates problems for design professional whose work begins before visible construction commences).

161. *Id.*

162. See *Walker*, 84 Cal. Rptr. at 526, 465 P.2d at 502 (holding design professional's mechanic's lien rights are inferior to construction lender's security interest that construction lender records before visible commencement of work).

163. See *supra* note 92 (discussing construction lending).

164. ROTN, *supra* note 8, at 7; see *supra* notes 157-163 and accompanying text (explaining that visible commencement rule fails to protect design professional's interest in securing payment for services rendered).

construction lenders.¹⁶⁵ In *Bankers Trust* the court held that a design professional's commencement of design services establishes the priority date for all mechanic's liens that eventuate from a construction project.¹⁶⁶ By allowing the design professional to obtain priority from the date the design professional began to provide off-site services, the holding in *Bankers Trust* protects the design professional's interest in securing payment for design services against other encumbrancers.¹⁶⁷ Additionally, because a construction lender's review and approval of project plans and specifications provide the lender with actual knowledge that the design professional has furnished design services, the *Bankers Trust* holding is not inherently unfair to construction lenders who cannot observe design services at the project site.¹⁶⁸ Upon learning of the design professional's work, construction lenders can protect themselves by disbursing loan funds directly to the design professional or by requiring the design professional to sign lien waivers for the money that the owner owes to the design professional.¹⁶⁹ Accordingly, the design professional will be guaranteed payment for his past services, and the construction lender will not have to compete with the design professional for proceeds of a foreclosure sale.¹⁷⁰

The *Bankers Trust* holding, however, fails adequately to protect the construction lender because the court in *Bankers Trust* held that all valid liens that builders, subcontractors, and materialmen claim against the encumbered property relate back to the date of commencement of the design professional's nonvisible design services.¹⁷¹ Because the construction lender's security interest also will be subordinate to the liens of future unknown construction contractors, the construction lender will be unable to evaluate the likelihood of obtaining a first lien on the property.¹⁷² Accordingly, the

165. See *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977) (holding that design professional's commencement of work establishes priority date for all mechanic's liens on project); *infra* notes 166-173 and accompanying text (analyzing *Bankers Trust* holding); see also *Murray v. Chulak*, 250 Ga. 765, 769, 300 S.E.2d 493, 497 (1983) (noting that architect's mechanic's lien rights attach when architect first began work on project); *Park Lane Properties v. Fisher*, 89 Colo. 591, _____, 5 P.2d 577, 579 (1931) (concluding that architect's mechanic's lien rights relate back to date that architect commences design services).

166. *Bankers Trust*, 192 Colo. at _____, 560 P.2d at 457.

167. *Id.*

168. See *Walker*, 84 Cal. Rptr. at 527, 465 P.2d at 503 (noting that construction lenders use design professional's plans and specifications to determine nature and detail of owner's planned improvements before approving construction loans). See generally *Walsh*, *supra* note 89 (discussing financing of construction projects).

169. See *Starke & Sears, Subdivision Financing*, 28 ROCKY MT. L. REV. 549, 557 (1956) (discussing construction financing); see also *Dugan*, *supra* note 88, at 242, 265 (discussing direct disbursement and lien waivers).

170. GOLDSTEIN, *supra* note 89, at 673; *supra* notes 165-169 and accompanying text (analyzing court's holding in *Bankers Trust*).

171. *Bankers Trust*, 192 Colo. at _____, 560 P.2d at 457.

172. See *Walker*, 84 Cal. Rptr. at 526-527, 465 P.2d at 502-503 (noting that if all construction liens relate back to date of commencement of design professional's design services,

Colorado Supreme Court's holding in *Bankers Trust* adequately protects the interests of design professionals but does not adequately protect the interests of construction lenders.¹⁷³

In contrast to mechanic's lien statutes that adopt the commencement of work rule to determine when a design professional's mechanic's lien attaches, Rhode Island's mechanic's lien statute, which adopts a recording system, balances the interests of all parties that claim a security interest in land.¹⁷⁴ To ensure that construction lenders have notice that potential mechanic's liens may have attached to real property, Rhode Island's mechanic's lien statute allows the design professional's mechanic's liens to attach only when the design professional files a notice of intention to do work.¹⁷⁵ Rhode Island's mechanic's lien statute, by requiring the lien claimant to record a notice of intention to do work, guarantees construction lenders constructive notice that potential liens have attached.¹⁷⁶ Additionally, by providing that the mechanic's liens of all construction contractors do not relate back to the date on which the design professional commences design services, Rhode Island's mechanic's lien statute adequately protects the construction lender's interest in obtaining a first lien on the property.¹⁷⁷ Accordingly, under Rhode Island's recording system, construction lenders are able to evaluate the likelihood of recovering payment if the construction project fails.¹⁷⁸ In addition to protecting the interests of construction lenders, Rhode Island's recording system, recognizing that the design professional's work is not visible at the construction site, allows the design professional's mechanic's lien to attach upon commencement of nonvisible design work.¹⁷⁹

construction lenders would be unwilling to assume risk of lending). *But see* GOLDSTEIN, *supra* note 89, at 673 (noting that construction lender can protect himself against future mechanic's and materialmen who provide services after construction lender records his loan and whose security interests relate back to design professional's commencement of work by monitoring well structured loan disbursement program to assure that liens of other construction contractors do not arise).

173. *See generally* Williams & Works, Inc. v. Springfield Corp., 408 Mich. 732, 751-752, 293 N.W.2d 304, 313 (Mich. 1980) (noting that holding in *Bankers Trust* does not adequately protect interest of construction lenders).

174. R.I. GEN. LAWS §§ 34-28-7, -4 (1984); *see supra* notes 156-159 and accompanying text (discussing Rhode Island's mechanic's lien statute).

175. R.I. GEN. LAWS §§ 34-28-7, -4 (1984).

176. *Id.*; *see Note, Notice of Commencement and Completion: A Recommendation for the Minnesota Mechanic's Lien Statute*, 13 WM. MITCHELL L. REV. 193, 209 (1987) (noting that notice of commencement guarantees notice to third parties that liens have attached and eliminates problem of hidden liens).

177. R.I. GEN. LAWS § 34-28-7 (1984); *see* Stone, *Mechanic's Liens in Iowa*, 30 DRAKE L. REV. 39, 105 (1980-81) (noting that allowing all mechanic's liens to relate back to date of commencement of first work on project burdens owner's efforts to obtain financing because potential lenders would be uncertain as to value of potential mechanic's lien claims).

178. *See* Urban & Miles, *Mechanic's Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 WAKE FOREST L. REV. 283, 322 (1976) (noting that recorded notice of commencement is most desirable method from standpoint of mortgagees for establishing priority).

179. R.I. GEN. LAWS § 34-28-7 (1984). *See generally* GOLDSTEIN, *supra* note 89, at 672-

Therefore, Rhode Island's mechanic's lien statute, although requiring the design professional to take an extra procedural step, uses a recording system to benefit both design professionals and construction lenders.¹⁸⁰

CONCLUSION

State legislatures have enacted mechanic's lien statutes to encourage high quality construction by providing construction contractors who improve real property with a security interest in real estate.¹⁸¹ Currently, states differ in their statutory and judicial approaches to granting mechanic's lien rights to design professionals.¹⁸² Because the design professional's services are central to the process of constructing improvements to real property, states should specifically grant mechanic's lien rights to design professionals.¹⁸³ Additionally, because construction supervision is generally beyond the scope of the design professional's duties and can expose design professionals to liability for delay, extra cost or construction safety, states should grant mechanic's lien rights to design professionals regardless of whether the design professional provides on-site supervision.¹⁸⁴

In granting mechanic's lien rights to design professionals, state legislatures should adopt attachment rules that adequately balance the interests of all parties that obtain a security interest in land.¹⁸⁵ Currently, states that have adopted the visible commencement of work rule do not protect the interests of the design professional whose work generally begins prior to construction and produces no visible changes at the construction site.¹⁸⁶

73 (noting that recording provisions for determining priority of mechanic's liens protect design professionals and do not impose additional burdens on construction lenders).

180. See GOLDSTEIN, *supra* note 89, at 672-73 (noting that recording provisions protect design professionals and do not impose additional burdens on construction lenders); *supra* notes 174-179 and accompanying text (maintaining that Rhode Island's mechanic's lien statute adequately protects interests of design professionals and construction lenders). *But see* Youngblood, *Coping with Texas Mechanic's Liens: A Lender's Guide to Priorities*, 12 ST. MARY'S L.J. 889, 891 (1981) (presenting argument that recording systems do not benefit construction contractors). In reviewing a state mechanic's lien statute that employs a recording system to determine priority of liens, one commentator notes that most contractors view the expense and inconvenience of recording their contracts to be cost prohibitive. *Id.* at 891. Rhode Island's mechanic's lien statute, however, requires that the design professional pay only \$8.00 to file a notice of intention to do work. R.I. GEN. LAWS § 34-28-5 (1984).

181. See *supra* notes 24-33 and accompanying text (discussing purpose of mechanic's lien statutes).

182. See *supra* notes 45-68 and accompanying text (discussing conflicting state approaches to granting mechanic's lien rights to design professionals).

183. See *supra* notes 34-44 and accompanying text (discussing design professional's services).

184. See *supra* notes 69-86 and accompanying text (discussing reasons that states should not require design professional to supervise construction before granting design professional mechanic's lien rights).

185. See *supra* notes 154-156 and accompanying text (discussing mechanic's lien attachment provisions).

186. See *supra* notes 101-106, 114-130, 157-164 and accompanying text (discussing visible commencement of work rule).

Those states that allow mechanic's liens to attach when the design professional commences design services protect design professionals but do not adequately protect the construction lender's interest in obtaining priority over other construction contractors.¹⁸⁷ To effectively balance the interests of all parties who become creditors during the construction process, states should enact statutes that allow the design professional's mechanic's lien to attach when the design professional files a notice of commencement or a notice of intention to do work.¹⁸⁸ The notice of commencement allows third parties to rely on the record in determining lien priority and allows the design professional's mechanic's lien to attach upon the commencement of design services.¹⁸⁹ Accordingly, by adopting a notice of commencement rule for determining when a design professional's mechanic's lien rights attach, state legislatures can protect all parties with a security interest in real estate, including construction lenders and design professionals.¹⁹⁰

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187. *See supra* notes 107-109, 131-147, 165-173 and accompanying text (discussing commencement of design services rule).

188. *See supra* notes 148-153 and accompanying text (discussing notice of intention).

189. *See supra* notes 174-180 and accompanying text (discussing advantages of notice of intention provisions).

190. *Id.*

