

# Juggling Hammers: Bankruptcy Issues and the Mechanic's Lien Trust Fund Statute

by Andrew D. Johnson and Lars H. Fuller

*Violating the Mechanic's Lien Trust Fund Statute carries significant consequences, including liability for treble damages and attorney fees, as well as a debt that likely is nondischargeable in bankruptcy. Recent decisions clarify contractors' obligations under the statute, including when contractors will be liable and for how much.*

Many business owners struggle in this economy to keep their businesses alive. They juggle mounting debt and shrinking revenues by stretching bills and paying the creditors who complain the loudest. Many business owners who personally guaranteed their business debts learn that those debts cannot be paid without the business revenue. So, they keep juggling, thinking they can keep the business alive until the economy turns around. When contractors bet on future revenue to pay current bills, they must be right or face serious consequences.

Contractors risk significant liability to unpaid suppliers, subcontractors, and property owners for triple the unpaid amounts, plus attorney fees, costs, and interest. Contractors must first pay material suppliers and subcontractors before applying any payments received on a project to general operating costs, including their own compensation. Failing to do so violates Colorado's Mechanic's Lien Trust Fund Statute (Trust Fund Statute).<sup>1</sup> Potentially worse from the contractor's perspective is that the debt will not be dischargeable in bankruptcy and the contractor may even face criminal charges.

In 2002, when Michael E. Romero (now U.S. Bankruptcy Judge) published "The Mechanic's Lien Trust Fund Statute: An Underused Tool in Civil Litigation and Bankruptcy Cases,"<sup>2</sup> he noted that most Trust Fund Statute case law at that time arose from criminal cases in state courts. Since 2002, the majority of cases addressing the Trust Fund Statute have come from the U.S. Bankruptcy Court for the District of Colorado; bankruptcy judges have

been inundated with various issues from debtor-builders seeking to discharge liabilities to Trust Fund Statute creditors fighting to preserve their claims.

Recent decisions address: (1) who can bring Trust Fund Statute claims, including cases with no subcontractors with lien rights; (2) that a pre-violation waiver of a trust fund claim is enforceable in some circumstances; (3) when treble damages are available; (4) the intent required for treble damages; and (5) when a violation will result in a nondischargeable debt. This article examines some of these recent decisions.

## Overview of the Trust Fund Statute

The Trust Fund Statute requires contractors to hold funds received on a project in trust for the payment of subcontractors and material suppliers. It provides:

All funds disbursed to any contractor or subcontractor under any building, construction, or remodeling contract or on any construction project shall be held in trust for the payment of the subcontractors, laborer or material suppliers, or laborers who have furnished laborers, materials, services, or labor, who have a lien, or may have a lien, against the property, or who claim, or may claim, against a principal and surety under the provisions of this article and for which such disbursement was made.<sup>3</sup>

The basic elements to create the trust are: (1) a contractor or subcontractor (2) who receives funds (3) under a construction contract or construction project.

### Coordinating Editor

James W. Bain of Benjamin, Bain & Howard, L.L.C., Greenwood Village—(303) 290-6600, jamesbain@bbhlegal.com



### About the Authors

Andrew D. Johnson is an associate at Onsager, Staelin & Guyerson, LLC—(303) 512-1123, ajohnson@osglaw.com. His practice focuses on commercial bankruptcy, creditors' rights, and commercial litigation. Lars H. Fuller is counsel at Baker & Hostetler, LLP—(303) 764-4114, lfuller@bakerlaw.com. He focuses his practice on advising entities and investors in all types of transactions and restructurings related to troubled company situations.

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## Payments Covered by the Trust

The scope of the Trust Fund Statute is contained in the eighty-one word first sentence of CRS § 38-22-127(1). Although it identifies the beneficiaries and the trustee of the trust, it does not clarify what portion of the payments received for a construction project are subject to the trust.

The Trust Fund Statute begins with the broadly worded phrase that “all funds disbursed to any contractor” are encompassed by the trust, but the sentence ends with the qualifying language “and for which such disbursement was made.” The qualifying language may imply that when a property owner pays a contractor, the contractor receives the money in trust for payment of subcontractors and suppliers to the extent the payment was disbursed for these services or supplies. The cases that have considered the scope of the trust hold that it effectively covers all payments to the contractor.<sup>4</sup>

The issue was illustrated in *Flooring Design Associates, Inc. v. Novick*,<sup>5</sup> where a builder–seller contracted with a homebuyer to build a house on vacant land owned by the builder–seller. An unpaid subcontractor sued the builder under the Trust Fund Statute.<sup>6</sup> The builder advanced a variety of arguments to overcome the Trust Fund Statute, all of which were rejected by the Colorado Court of Appeals.<sup>7</sup>

The builder argued that funds paid to the builder by its construction lender at closing of the sale were not “disbursements” that would be covered by the trust, because they were not made by a “disburser” as defined in CRS § 38-22-126.<sup>8</sup> The court disagreed, reasoning that a disbursement as used in the Trust Fund Statute could come from a source other than a disburser.<sup>9</sup>

The builder also argued that the Trust Fund Statute required the payor to intend the disbursement be held in trust.<sup>10</sup> The court again rejected the argument, finding that a trust beneficiary need not know “that the disburser of funds specifically intended that a trust be created.”<sup>11</sup> In addition, the court clarified that the officer of the corporate builder who made the financial decisions and controlled the finances was personally liable for that debt.<sup>12</sup> The court found that using the trust funds for other corporate obligations violated the trust for which the principal was personally liable.<sup>13</sup>

In *In re Siegfried*,<sup>14</sup> a builder–seller constructed a house on land it owned, but failed to pay all subcontractors at the closing. The Tenth Circuit even more forcefully rejected the builder’s arguments that the portion of the sale price attributable to the land, rather than the structure, was not subject to the trust.<sup>15</sup> The Tenth Circuit reiterated that a contractor’s payment of other necessary expenses was no defense.<sup>16</sup> The court further rejected the argument that funds received by a builder and disbursed before subcontractors began work were not subject to the trust.<sup>17</sup> The court stated:

Nothing in the Colorado lien statute suggests that a contractor is entitled to carve out a privileged portion of the trust fund for its own expenses, to the detriment of subcontractors; rather, the contractor is responsible for paying the subcontractors and meeting its own expenses from the funds disbursed.<sup>18</sup>

The Tenth Circuit went on to say that the clause, “for which such disbursement was made,” refers to the construction project, and that it is not necessary to show any funds were intended for any particular recipient.<sup>19</sup> The contractor in *Siegfried* argued that money spent on general operating expenses was a proper application of trust funds.<sup>20</sup> The Tenth Circuit disagreed, saying:

In the absence of a showing that *all* the trust funds were used to pay subcontractors or to satisfy the owner’s obligations on the

project . . . the insufficiency of the funds to meet the contractor’s expenses is not a defense.<sup>21</sup>

The court reasoned that if the funds paid for a construction project must be intended to pay a subcontractor, an owner and lender could circumvent the trust by privately agreeing that certain subcontractors would not get paid.<sup>22</sup> Consequently, on any project where a subcontractor is unpaid, to avoid a Trust Fund Statute violation, contractors must pay all money received on the project to subcontractors before using the money for any other purpose.

## Waiver

Whether any life remains in the argument to limit the trust to anything less than all funds received by a contractor–builder after *Novick* and *Siegfried* seems remote. Nevertheless, a more direct approach to limiting liability may be available: the express waiver. In *In re Village Homes of Colorado*,<sup>23</sup> a bankruptcy judge upheld a waiver of rights by subcontractors under the Trust Fund Statute. There, the subcontract contained waivers of all rights under the Trust Fund Statute.<sup>24</sup> The issue before the bankruptcy court was whether any Trust Fund Statute beneficiaries had an interest in the funds in debtor’s bank account containing loan advances.<sup>25</sup> The court determined the subcontractors’ waiver was enforceable so that the subcontractors had no right to the funds.<sup>26</sup>

The broad application of the Trust Fund Statute to all payments received by a contractor requires a contractor to exercise extreme care in accounting for project funds in difficult financial times. An express waiver of the Trust Fund Statute would be a powerful tool for contractors. Whether courts will recognize express waivers of the Trust Fund Statute as a defense to claims by owners or in other contexts remains to be seen.

## Beneficiaries of the Trust Fund Statute

The original purpose of the Trust Fund Statute was to ensure that laborers and material suppliers are paid for their contributions to the improvement of property and to protect homeowners, laborers, and providers of construction materials from dishonest or profligate contractors.<sup>27</sup> However, the statutory language does not refer to dishonesty, misleading statements, or fraud. Consequently, even an honest contractor who bets on the future and pays other business expenses instead of subcontractors or suppliers on the project for which the funds were disbursed violates the trust. Decisions have reinforced this principle by clarifying who is a beneficiary of the trust.

**Subcontractors and material suppliers.** The Trust Fund Statute expressly protects subcontractors and material suppliers “who have a lien, or may have a lien” on the property.<sup>28</sup> Generally, to be entitled to a mechanic’s lien, a person must provide work or materials that enhance the value of real property. Almost all work on a project qualifies, including architectural plans, creating custom parts for use on the project, and even some offsite work intended to benefit the property, such as sidewalks or access driveways not on the property.<sup>29</sup> Accordingly, almost all subcontractors and material suppliers can bring Trust Fund Statute claims. There are two exceptions to the general requirement to pay subcontractors: (1) if the contractor has a good faith belief that the work is subject to a setoff; and (2) if the contractor has a performance or payment bond.<sup>30</sup>

Until 2007, it was unclear whether a subcontractor or material supplier was required to have perfected a mechanic’s lien or have

the ability to do so to assert a claim for a Trust Fund Statute violation. In *In re Regan*,<sup>31</sup> on a certified question from the Tenth Circuit, the Colorado Supreme Court considered whether a material supplier held a Trust Fund Statute claim if it never attempted to enforce its mechanic's lien rights and the time to do so had expired. The Court interpreted the Trust Fund Statute's protection for persons "who may have a lien" to not require a perfected lien against the property.<sup>32</sup> Accordingly, a contractor is not protected from a claim merely because a subcontractor does not enforce its lien rights.<sup>33</sup>

**Owners.** To enforce the broad, remedial purpose of the statute, courts have held that owners are also beneficiaries of the Trust Fund Statute and can bring Trust Fund Statute claims.<sup>34</sup> Arguably, the scope of the Trust Fund Statute is broader for owners than for subcontractors, because an owner is not required to show that a subcontractor who performed work did not get paid.<sup>35</sup> Owners have a claim under the Trust Fund Statute against contractors who accept payment but do not perform the work on the project.<sup>36</sup> In *Siegfried*, the Tenth Circuit rejected a contractor's argument that a contractor who received funds for a project at its outset and squandered them before the subcontractors began their work would have no trust responsibilities with regard to the dissipated funds.<sup>37</sup>

Thus, an owner need not show the existence of an unpaid subcontractor who performed lienable work;<sup>38</sup> rather, the Trust Fund Statute places the burden on the contractor to show a proper application of trust funds on the project.<sup>39</sup>

### *Personal Liability*

Contractors may be uncomfortable to learn about the Trust Fund Statute after a dispute arises; they will be shocked to learn about personal liability for violating the Trust Fund Statute even though they have been operating through an entity. Even if the actual contractor is an entity, the persons "who have controlled the finances and actually engaged in conduct constituting the statutory breach of trust" are jointly liable for the Trust Fund Statute violation.<sup>40</sup> In *Flooring Design*, the Colorado Court of Appeals found that a corporate officer's control of the financial decisions regarding how trust funds were spent made him personally liable.<sup>41</sup> Similarly, the bankruptcy court in *Siegfried* found a principal personally liable based on his control of the corporation's finances, a finding not challenged on appeal.<sup>42</sup> Importantly, there is no requirement that the principal receive any personal benefit from the misapplied funds.<sup>43</sup> Thus, even without applying an alter ego analysis, courts consistently find that principals and corporate officers who direct the use of trust funds to non-trust-fund recipients are personally liable.

### **Bankruptcy Issues and Damages**

Perhaps the most serious consequence of a Trust Fund Statute violation is that the resulting debt is not dischargeable by bankruptcy. Among the debts a bankruptcy does not discharge are debts for theft and debts obtained by fraud or defalcation while acting in a fiduciary capacity.<sup>44</sup> Prior to the 2005 amendments to the Bankruptcy Code, an individual Chapter 11 or Chapter 13 debtor could

discharge those debts in a plan of reorganization; now, under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, those debts are nondischargeable in Chapters 7, 11, and 13 for individual debtors.<sup>45</sup> Defalcation in this context means a failure to properly account for funds.<sup>46</sup> The Tenth Circuit recently confirmed that a failure to account for or properly apply Trust Fund Statute payments is a defalcation and the resulting debt is nondischargeable.<sup>47</sup>

As a practical matter, Trust Fund Statute claims often start in state court as part of a larger construction and/or mechanic's lien dispute. When a judgment creditor attempts to collect, the judgment debtor may seek bankruptcy protection. At that point, the bankruptcy court will be asked to determine whether the debt is dischargeable.<sup>48</sup> Counsel should be aware of the effect that issue preclusion of any previous proceeding will have on the nondischargeability determination.<sup>49</sup>

### *The Amount of the Nondischargeable Debt*

There are two reasons the debt that ultimately may be nondischargeable can greatly exceed the amount a contractor may have improperly applied. First, the debt will include all funds the contractor cannot affirmatively demonstrate were properly applied under the Trust Fund Statute, not just the funds the owner or subcontractor can show were improperly applied.<sup>50</sup> This is because a contractor must separately account for the funds it receives on each project.<sup>51</sup> Accordingly, a failure to account for proper expenditures constitutes a violation of the Trust Fund Statute.<sup>52</sup> Second, treble damages and attorney fees, if awarded, also are nondischargeable.

**Good records are essential.** For contractors, the common practice of having a single bank account from which funds for all projects are deposited and withdrawn may be a dangerous recipe for liability, though the Trust Fund Statute expressly allows it.<sup>53</sup> Properly documenting the work performed or materials supplied is especially important for contractors who work with a material supplier on multiple projects to ensure the proper account is credited with payment, rather than simply crediting the oldest account.<sup>54</sup> Similarly, a subcontractor's failure to show work or materials were done on a specific project can prevent the debt for that work or materials from being included in the trust.<sup>55</sup> When a contractor has multiple projects and works with a supplier or subcontractor on multiple projects, the Trust Fund Statute further requires that

the contractor designate the account or job that should be credited with the funds.<sup>56</sup>

**Debt is broadly construed.** The Bankruptcy Code prevents certain debts from being discharged in bankruptcy, including "any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."<sup>57</sup> In *Cohen v. De la Cruz*,<sup>58</sup> the U.S. Supreme Court held that "debt" in the context of 11 U.S.C. § 523(a) includes penalties, such as treble damages and attorney fees, that the debtor owes arising from the conduct. The Trust Fund Statute provides that "[a]ny person who violates the provisions of subsections (1) and (2) of this section commits theft, as defined in section 18-4-401, C.R.S. (Theft Statute)."<sup>59</sup> The Theft Statute also provides for attorney fees and treble damages.<sup>60</sup> Consequently, for a Trust Fund Statute violation, the debt that is not dischargeable also may include treble damages and attorney fees awarded for a Trust Fund Statute violation.

### *The Award of Attorney Fees and Treble Damages*

Although the Trust Fund Statute provides that a violation amounts to theft,<sup>61</sup> to prove a criminal violation of the Trust Fund Statute, the prosecution must prove theft beyond a reasonable doubt.<sup>62</sup> Nevertheless, a criminal conviction is not necessary to trigger treble damages and attorney fees available under the Theft Statute.<sup>63</sup> Even for the purpose of establishing theft in a civil case for entitlement to treble damages and attorney fees under CRS § 18-4-405, most courts have not treated a violation of the Trust Fund Statute as *per se* theft.<sup>64</sup> Instead, courts require the plaintiff to prove each element of civil theft under the lesser preponderance standard—rather than under the higher beyond a reasonable doubt standard—before awarding treble damages and attorney fees under CRS § 18-4-405.<sup>65</sup> The element that is not necessary to show a violation of the Trust Fund Statute, but is required to establish treble damages and attorney fees, is a showing of intent.

### *Intent Required Under CRS § 18-4-401*

Intent can be proved four ways under the civil Theft Statute. Two recent cases applying the Trust Fund Statute suggest the facts needed to satisfy this element may be present in nearly every Trust Fund Statute case.

In *In re Helmke*,<sup>66</sup> the bankruptcy court applied the intent standard articulated in *People v. Anderson*, which is met if a person "knowingly uses the property in such manner as to deprive the other person permanently of the use or benefit of the property." Applying the intent requirement to the specific funds paid to defendants, the bankruptcy court determined that:

[w]hen Defendants spent those funds for purposes other than payment for supplies and labor on the projects involved, as they admittedly did, they took property which they held in trust for Plaintiff and used it in a manner that could have no other consequence than to deprive Plaintiff of the use and benefit of *those funds*.<sup>67</sup>

Thus, to the extent a plaintiff can demonstrate that a builder used trust funds for non-trust-fund expenses, the plaintiff will have demonstrated the necessary intent to receive treble damages and attorney fees. As a result, U.S. Bankruptcy Court Judge A. Bruce Campbell determined that the defendants' subjective mental intent to repay could not overcome the consequence of knowingly applying the specific funds subject to the trust in a manner inconsistent

with the trust that showed it was “practically certain” to deprive the owner of the property.<sup>68</sup>

In *In re Gamboa*,<sup>69</sup> U.S. Bankruptcy Court Judge Elizabeth E. Brown applied the standard articulated in *Helmke* and considered whether the debtor’s intent to save his business was relevant to the intent for theft required under CRS § 18-4-401. Just as in *Helmke*, Judge Brown determined that the trust applied to the specific funds given to the contractor.<sup>70</sup> Judge Brown also stated:

In determining whether a debtor’s knowing use of trust funds was “practically certain” to deprive the beneficiary of the funds, the issue is not whether the debtor had, or reasonably expected to have, other funds available to replenish the trust.<sup>71</sup>

In *Gamboa*, the plaintiffs supplied materials to the debtor for many houses in a subdivision.<sup>72</sup> Plaintiffs delivered materials to many projects in a single delivery, but the invoice noted the address of only the first house on the delivery route.<sup>73</sup> Ultimately, the court found that the plaintiffs did not establish civil theft, because they failed to prove the amount of funds the debtor received on a specific project for which plaintiffs provided materials and the debtor’s payments to plaintiffs for the same.<sup>74</sup>

In contrast to the intent standard applied in *Gamboa* and *Helmke*, Judge Sidney B. Brooks of the U.S. Bankruptcy Court has applied the intent standard differently. In *In re Dorland*,<sup>75</sup> Judge Brooks parsed the intent requirement into two elements: (1) an intent to deprive; and (2) to do so permanently. Judge Brooks declined to award treble damages and attorney fees because

[t]he evidence before this Court demonstrates that Defendant Varholdt was managing a failing business and scrambling to survive. The Court concludes that the evidence presented demonstrates that Defendant Varholdt was desperate, not criminal.<sup>76</sup> Thus, an award of attorney fees and treble damages for cases in which a contractor runs out of money on a project likely depends on the intent standard used.

### *Whether Attorneys Fees and Treble Damages are Discretionary*

Several courts have considered whether the attorney fees and treble damages available under CRS § 18-4-405 are mandatory or discretionary once a claimant proves theft under CRS § 18-4-401. The relevant language is found at CRS § 18-4-405, which provides:

[an] owner *may* recover two hundred dollars or three times the amount of the actual damages sustained by him, whichever is greater, and may also recover costs of the action and reasonable attorney fees.<sup>77</sup>

Because the statute does not use the word “shall,” defendants have argued an award of attorney fees and treble damages is discretionary.

In *In re Krupka*,<sup>78</sup> Judge Howard R. Tallman, Chief Judge of the U.S. Bankruptcy Court for the District of Colorado, took the view that CRS § 18-4-405 did not give a court discretion to award attorney fees in considering a debtor’s eligibility to file a Chapter

13 petition. Judge Tallman considered whether a claim for attorney fees should be categorized as contingent if the claimant proved its claim for theft under CRS § 18-4-405 and determined the claim for attorney fees under CRS § 18-4-405 was not discretionary and, therefore, not contingent.<sup>79</sup>

In *In re Salazar*,<sup>80</sup> Judge Tallman addressed his prior decision by reiterating he “did not interpret the language of CRS § 18-4-405 as giving the trial court discretion on the question of whether to award treble damages or not.” Nonetheless, he noted the unique circumstances of the case in which he was determining a debtor’s eligibility for Chapter 13.

In contrast, in *Dorland*, Judge Brooks determined the award of attorney fees under CRS § 18-4-405 was not mandatory.<sup>81</sup> Judge Brooks found that one of the defendants violated the Public Works Contractors’ Trust Fund Statute at CRS § 38-26-109(2), which, like the Trust Fund Statute, provides that a “person who violates the provisions of subsections (1) and (2) of this section commits theft within the meaning of section 18-4-401.”<sup>82</sup> In *Dorland*, Judge Brooks distinguished *Krupka* and *Salazar* by noting that, although Judge Tallman did not award attorney fees and treble damages, the issue in both cases was the value of the claim, which determined eligibility to file bankruptcy under Chapter 13.<sup>83</sup> In *Dorland*, Judge Brooks then analyzed the language and purpose of CRS § 18-4-405 to determine that the trier of fact “is not without discretion” to award attorney fees and treble damages, but ultimately held that plaintiffs failed to prove the requisite intent for theft under CRS § 18-4-401.<sup>84</sup>

After *Dorland* was decided, U.S. District Court Judge Walker D. Miller followed the *Krupka* analysis and held CRS § 18-4-405 does not invest a court with discretion to withhold attorney fees and treble damages if the plaintiff proves theft.<sup>85</sup> Judge Miller noted the general assembly provided no guidance for exercising discretion.<sup>86</sup> Despite making that determination, the court held there was insufficient evidence to conclude a violation of the Trust Fund Statute had occurred in the case.<sup>87</sup>

## Conclusion

Serious consequences flow from violating the Trust Fund Statute. Recent cases have clarified the scope of the Trust Fund Statute and what is required to access the remedies. In the current economic climate, contractors may face an increasing number of Trust Fund Statute claims. Their attorneys must be prepared to consider the implications of a bankruptcy in resolving those issues.

## Notes

1. CRS § 38-2-127.
2. Romero, “The Mechanic’s Lien Trust Fund Statute: An Underused Tool in Civil Litigation and Bankruptcy Cases,” 31 *The Colorado Lawyer* 8 (Aug. 2002).
3. CRS § 38-22-127(1).
4. See *Flooring Design Assocs., Inc. v. Novick*, 923 P.2d 216, 220 (Colo. App. 1996); *ASCI Read-Mix v. Gamboa (In re Gamboa)*, 400 B.R. 784, 789 (Bankr.D.Colo. 2008); *J.M. Magnum v. Siegfried (In re Siegfried)*, 5 Fed.Appx. 856 (10th Cir. 2001) (subsequently published in *In re Regan*, 477 F.3d 1209, 1211 (10th Cir. 2007)); *AC Excavating v. Yale*, 09CA2184, 2010 WL 3432219 (Colo.App. Sept. 2, 2010) (holding the Trust Fund Statute applied to a “survival loan” made to the contractor limited liability company by its member).
5. *Flooring Design Assocs.*, *supra* note 4 at 220.
6. *Id.*
7. *Id.* at 221.
8. *Id.* at 218.
9. *Id.* at 218-19.
10. *Id.* at 220.
11. *Id.*
12. *Id.* at 221.
13. *Id.*
14. *Siegfried*, *supra* note 4.
15. *Id.* at 861.
16. *Id.*
17. *Id.* at 860.
18. *Id.* at 861.
19. *Id.* See also *AC Excavating*, *supra* note 4.
20. *Id.*
21. *Id.* (emphasis in original).
22. *Id.*
23. *In re Village Homes of Colorado, Inc.*, 405 B.R. 479 (Bankr.D.Colo. 2009).
24. *Id.* at 481-82.
25. *Id.* at 482.
26. *Id.* at 484-85.
27. See *In re Regan*, 151 P.3d at 1285-86 (Colo. 2007) (“In fact, the primary concern of the legislature, at the time the Trust Fund Statute was passed, was the protection of property owners against unscrupulous contractors.”); *Stetson Ridge Assocs., Ltd. v. Walker (In re Walker)*, 325 B.R. 598, 602 (D.Colo. 2005), quoting *Flooring Design Assocs.*, *supra* note 4.
28. CRS § 38-22-127(1).
29. See, Greenwald and Gilbert, *Colorado Liens and Claims Handbook* § 2.1. (4th ed., CBA-CLE, 2006). See also Krendl and Krendl, 1C *Colo. Methods of Practice* § 48 (5th ed., Thomson West, 2008).
30. CRS § 38-22-127(2).
31. *Regan*, *supra* note 27.
32. *Id.* at 1286.
33. *Id.* at 1289.
34. See *Walker*, *supra* note 27 at 603-04; *Regan*, *supra* note 27 at 1285-86; *Syfrett v. Pullen*, 209 P.3d 1167, 1171 (Colo.App. 2008). The Trust Fund Statute applies to subcontractors in large projects with multiple-tier contractors if the subcontractor in turn fails to pay its subcontractors or material suppliers. See *Bemas Construction, Inc. v. Dorland (In re Dorland)*, 374 B.R. 765 (Bankr.D.Colo. 2007).

35. *Siegfried*, *supra* note 4 (recognizing that Colorado law holds that the “trust is imposed to protect subcontractors who perform work until the construction project (and the purpose of the trust) has been completed”). See *People v. Collie*, 682 P.2d 1208, 1210 (Colo.App. 1983) (a person committed criminal theft by acting as a contractor who solicited residential remodeling jobs from five homeowners and collected deposits from each, but performed no work on the projects. Though the homeowners demanded performance or return of their deposits, the contractor performed no work. The Colorado Court of Appeals determined the contractor was guilty of theft. In doing so, the court said the purpose of the Trust Fund Statute is to “protect homeowners, laborers, and materialmen from dishonest or profligate contractors by requiring all contractors to hold in trust their customers’ advance payments received if any independent laborers or materialmen will be necessary to complete a particular job”).

36. *Siegfried*, *supra* note 4 at 860; *Collie*, *supra* note 35 at 1210.

37. *Siegfried*, *supra* note 4 at 860.

38. *But see In re Anderson*, 09-CV-02372 (D.Colo. Sept. 27, 2010) *affirming In re Anderson*, 08-1552 (Bankr.D.Colo. Sept. 23, 2009) (holding homeowner’s damages limited to the lesser of the unpaid lienable work or the unaccounted for payments to the contractor).

39. CRS § 38-22-127(4); *Gamboa*, *supra* note 4 at 787 (analyzing the requirement in subsection (4) of the Trust Fund Statute to separately account for projects as placing the burden of proof on the contractor).

40. See *Flooring Design Assocs.*, *supra* note 4 at 220; *Walker*, *supra* note 27 at 603-04. See also *Regan*, *supra* note 27 at 1286.

41. *Flooring Design Assocs.*, *supra* note 4 at 221.

42. *Siegfried*, *supra* note 4 at 859-60.

43. See *Alexander Co. v. Packard*, 754 P.2d 780, 782 (Colo.App. 1988).

44. 11 U.S.C. § 523(a)(4).

45. See 11 U.S.C. §§ 523(a) (“[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt”), 1328(a)(2), and 1141(d)(2).

46. *Regan*, *supra* note 4 at 1211.

47. *Id.*

48. See *In re Sutherland-Minor*, 345 B.R. 348, 353 (Bankr.D.Colo. 2006); *In re Wallace*, 840 F.2d 762, 764 (10th Cir. 1998).

49. See, e.g., *Bebo Constr. Co. v. Mattox & O’Brien, P.C.*, 990 P.2d 78, 85 (Colo. 1999). See Lambert, “Taking a Default Judgment to the Bankruptcy Court,” 27 *The Colorado Lawyer* 10 (Oct. 1998) (thorough discussion of whether default judgments are entitled to preclusive effect).

50. See, e.g., *Siegfried*, *supra* note 4. *But see Anderson*, *supra* note 38.

51. CRS § 38-22-127(2).

52. See *id.*; *Walker*, *supra* note 27; *Gamboa*, *supra* note 4 at 789.

53. CRS § 38-22-127(4).

54. *Gamboa*, *supra* note 4 at 789 (finding a Trust Fund Statute violation for allowing a supplier who delivered goods to multiple projects over time to credit payments to the oldest account, rather than the specific project for the funds at issue).

55. See, e.g., *id.*

56. *Id.*

57. 11 U.S.C. § 523(a)(4).

58. *Cohen v. De la Cruz*, 523 U.S. 213, 223 (1998).

59. CRS § 38-22-127(5).

60. CRS § 18-4-405.

61. *Id.*

62. *People v. Mendro*, 731 P.2d 704, 706 (Colo. 1987).

63. *Itin v. Unger*, 17 P.3d 129, 132-36 (Colo. 2000).

64. The Colorado Supreme Court has not considered whether a Trust Fund Statute violation is *per se* civil theft. See *In re Barnes*, 377 B.R. 289, 301 (Bankr.D.Colo. 2007). Most courts follow the Colorado Supreme Court’s reasoning from *Itin*, *supra* note 63. *But see Parker Excavating, Inc. v.*

*Parker*, CV-07-1600, 2010 WL 1258034 at \*2 (D.Colo. March 24, 2010). In analyzing whether a violation under the Public Works Contractors’ Trust Fund Statute, which has the same relevant language, was a *per se* violation, a bankruptcy court stated:

By simple operation of CRS § 38-26-109(4), it would appear that a person who violates the provisions of the Public Works Contractors’ Trust Fund Statute commits “theft” within the meaning of CRS § 18-4-401. But, such interpretation would seem inconsistent and discordant when considering *Itin* and the language of the statutory scheme set forth in CRS §§ 18-4-401 *et seq.*

*Barnes* at 301.

65. See, e.g., *Marvel Concrete, Inc. v. Helmke (In re Helmke)*, 398 B.R. 38 (Bankr.D.Colo. 2008); *Gamboa*, *supra* note 4 at 789; *Bemas Construction, Inc. v. Dorland (In re Dorland)*, 374 B.R. 765 (Bankr.D.Colo. 2007); *Barnes*, *supra* note 64 at 301.

66. *Helmke*, *supra* note 65 at 40, quoting *People v. Anderson*, 773 P.2d 542, 545 (Colo. 1989). The Colorado Court of Appeals quoted this excerpt as authority for its holding that a contractor committed civil theft by spending the funds disbursed to it for other purposes in *Weize Co., LLC v. Colorado Regional Const., Inc.*, 09CA1369, 2010 WL 2306413 at \*6 (Colo.App. June 10, 2010).

67. *Helmke*, *supra* note 66 at 40-41.

68. *Id.* at 41. In making the determination about “practical certainty,” the bankruptcy court in *Barnes* considered the following:

It is unclear from the Colorado cases just how much “knowledge” a contractor must have of the existence of the suppliers’ interest in the trust funds in order to be guilty of criminal theft. In *People v. Mendro*, the court held that it was not necessary for the contractor to be aware of the specific provisions of the Trust Fund Statute in order to be guilty of theft. 731 P.2d 704, 707 (Colo. 1987). In *People v. Anderson*, it is implied that a contractor’s knowledge that there are unpaid bills from suppliers on a construction project may be sufficient. 773 P.2d 542, 543-44 (Colo. App. 1989). It is not necessary to determine this issue at this time in light of the Court’s finding that the Plaintiffs have not established the absence of a genuine issue of fact on one of the other elements of criminal theft.

*Barnes*, *supra* note 64 at 301.

69. *Gamboa*, *supra* note 4 at 789.

70. *Id.*

71. *Id.* at 794.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Dorland*, *supra* note 34.

76. *Id.*

77. CRS § 18-4-405 (emphasis added).

78. *In re Krupka*, 317 B.R. 432, 439 (Bankr.D.Colo. 2004). See *Parker Excavating*, *supra* note 64 at \*3 (following the analysis in *Krupka*).

79. *Krupka*, *supra* note 78 at 439-40.

80. *In re Salazar*, 348 B.R. 559, 572 (Bankr.D.Colo. 2006).

81. *Dorland*, *supra* note 34.

82. CRS § 38-26-109(4). Subsection (1) of the Public Works Contractors’ Trust Fund Statute is materially the same as subsection (1) of the Trust Fund Statute. Compare CRS § 38-26-109(1), with CRS § 38-22-127(1).

83. *Dorland*, *supra* note 34 at 779.

84. *Id.*

85. See *McCarty v. Powell (In re Powell)*, 07-CV-02000, 2008 WL 4489179 at \*4 (D.Colo. Sept. 30, 2008).

86. *Id.*

87. *Id.* ■

