

## Can investing in your own construction company lead to criminal charges against you? One Colorado court recently said "Yes"

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As most in the construction business already know (or should know), when a contractor receives funds on a construction project - whether from new home sales, a lender, or almost any other source - Colorado law requires the contractor to hold those funds "in trust" to pay its subcontractors, laborers, and suppliers. This is commonly known as the Mechanic's Lien Trust Fund Statute, C.R.S. § 38-22-127. And until the contractor pays those people in full, using the funds for any other purpose violates the statute and exposes the contractor to monetary penalties and, potentially, to civil and criminal theft charges as well. What is more, incorporating the business does not guaranty protection against personal liability for violating the statute. Owners and co-owners who control the company's finances and decisions may be personally liable and subject to the same civil and criminal consequences.

So what happens if times get tight and the owner of a construction business invests his or her own money just to "keep the lights on" and pay some basic operating costs? Under the Colorado Court of Appeals' current interpretation of the Trust Fund Statute, even such a voluntary investment in one's own business may violate the statute and subject the owner to civil and criminal liability. At particular risk are those contractors working on a project-by-project basis or who form a company for a single project, because any funds given to the company are presumed to be "trust" funds for subcontractors on that project and, therefore, cannot be used for any other purpose.

The Colorado Supreme Court is currently reviewing the issue. However, it is unlikely to reach a decision before the end of 2012. Until it does, Colorado courts are bound to follow the Court of Appeals' current interpretation and thus contractors should seek legal advice before investing in or re-capitalizing their own construction business operations. The Colorado Court of Appeals decision is *AC Excavating, Inc., v. Yale*, Case No. 09CA2184.