

March 22, 2005

### Finally, A Decision on Telecom Build-Outs

Five years ago the tech stock bubble burst. Among the many areas affected was the telecommunications industry. High tech telecommunications companies had real estate developers salivating with their increasing appetite for newer and larger facilities. So the developers naturally went out, acquired more land and created shells for the telecommunications tenants and their suppliers to build-out. When the collapse came, the telecommunications tenants abandoned their leases, leaving owners with premises containing improvements of questionable value and tradespeople with lien claims for unpaid labor, material and equipment.

As companies went out of business and investors lost money, legal questions rose like weeds. Because technology and the law do not move at the same pace, aside from an opinion in California on a preliminary procedural motion, there were until recently no published precedents that directly addressed whether the furnishing of telecommunications hotels was lienable activity. In January, however, the Illinois Appellate Court, in *Communications Contractors v. Madison Two Associates* discussed the installation of fiber-optic communications cable and conduit. The legal question was whether the cable and conduit supplied by the plaintiff was a “permanent fixture” and therefore lienable or a “trade fixture” and therefore not lienable. The Court held that the material constituted a trade fixture and the supplier lost.

The decision focused on the intent of the principal parties, essentially the owner and the licensor of the telecommunications equipment, the means by which the materials were attached to the premises and whether the items installed were necessary for a particular purpose of the building.

Like many leases between owners and tenants, the license stated that the cable and conduit was removable at the owner’s discretion at the end of its term. The Court found, therefore, that the relevant parties (which did not include the supplier) did not intend the improvements to be permanent. The Court also found that the conduit was attached to walls in a way that would allow for easy removal without material damage to the premises. Finally, the Court observed that the cable was not used by any other tenant.

While it invoked an old formula for distinguishing between non-liable trade fixtures and liable permanent fixtures, the decision appears to be the first substantive state appellate opinion on telecommunications build-outs. Apparently, no one argued and the Court did not consider the impact of the 2002 National Electrical Code. That code would seem to buttress the Court's opinion as it calls for the removal of abandoned cabling in commercial office buildings.

The case demonstrates once again that new legal wine can be poured from old bottles, that the distinction between trade fixtures and permanent fixtures still lives. Suppliers beware. Owners and tenants too.

Questions regarding this decision should be addressed to Roger Price at (312) 781-8640 or [rprice@seyfarth.com](mailto:rprice@seyfarth.com) or the Construction Attorney with whom you normally work.



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