

SUMMARY OF MECHANICS' LIEN LAW
FOR
CALIFORNIA

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General Notes

Be Careful: The courts consider a mechanic's lien to be a privilege and not a right. You receive its benefits only if you **strictly adhere** to the state law requirements. Bottom line: miss a deadline by one day and you have lost it. Unlike other areas of the law where you can argue equities, find technical exceptions, and lawful excuses, there is no forgiveness here. In this case, knowledge is not only power, it's a necessity.

This means you will be calendaring dates for three documents: a) Pre-Lien Notice; b) Mechanic's Lien; and c) lawsuit to foreclose the mechanic's lien. Write down all the deadlines in your calendar. Use a highlighter or red pen. If you have a staff, use a "fail safe" system by doubling up and putting it in their calendar also. This reminds you twice. The first calendar entry should be two weeks before the due date as a preliminary reminder.

On the second calendar entry, do a white lie to yourself. Put the due date as one week before it is actually due as insurance in case you get busy or need legal advice.

Time is money. You will waste a lot of valuable time running around at the last moment, as opposed to doing it early.

PRELIEN NOTICE

California requires a Notice be sent out before the mechanic's lien is recorded. For simplicity, this notice will be referred to as the "Notice". The basic information on this Notice is as follows:

Name of Notice: California Preliminary 20-Day Notice

**Who Must Use
this Notice:**

All general contractors, subcontractors, laborers, and material/equipment suppliers who **do not** have a direct contract with the owner or the owner's agent. For example, a general contractor with a direct verbal or written contract with the owner who acts as the prime is not required to give the Notice.

Technically, subcontractors and material/equipment suppliers who have a direct contract with the owner are considered an "original contractor" under the statute and need not serve the Notice. However, as a practical matter, it is recommended that all subs and suppliers, regardless of whether they have direct contract with the owner, serve the Notice. This is because you are still required to serve it on the construction lender. If you have to send a Notice to the lender, you might as well send it to everyone.

And then there are the gray areas that will only give you grief. What if you have a direct contract instead with the owner's agent, including that person's architect, engineer, property manager, or broker? What if the owner has a contract with a general and you are simply doing a side job directly with the owner? What if you are paid directly by the owner but take directions from the general contractor? Don't take any chances – if you are a sub or supplier, serve the Notice on the owner, the general contractor, and construction lender.

No Notice is required if you are performing labor for wages only. If you are performing labor but not for wages (for example, a lump sum contract or T&M/cost plus), you must serve the Notice. For example, a company that supplies a backhoe and an operator under a lump sum contract price is not supplying labor for wages.

It is grounds for discipline with the Contractors State License Board if you do not serve the Notice on contracts exceeding \$400. However, it would be rare if discipline were imposed for this reason only.

Because of the confusion in this area, the following examples may be helpful:

- A) A licensed general does framing work only (no other services) through a contract with the prime contractor who has contracted to do the whole project. A Notice is required.
- B) The owner acts as his/her own general or owner/developer and signs separate contracts with various subcontractors and generals. Since everyone has a direct contract with the owner, whether licensed as a general or subcontractor, no Notice is required.
- C) A licensed general has a contract with another general (who acts as the prime) to perform specialty plumbing and HVAC work. A Notice is required.
- D) A licensed general, does all the work on the project as the prime contractor, but has a contract only with the architect and engineer and not the owner. A Notice is required. Be careful if you have a contract directly with the owner's agent, such as a project manager or architect. Although one could argue that you have a contract with the owner because it is through his/her agent, this is a gray area and to be safe you should serve the Notice.
- E) Either a general or subcontractor has a direct contract with XYZ company, but it is not entirely certain whether this is a general partnership, limited partnership, corporation, or otherwise. There is even more confusion as to whether or not this company, which might be a corporation, is also a managing general partner of another larger entity who actually owns the property. If there are any doubts, always serve the Notice on all applicable entities or persons.

F) A licensed subcontractor has a direct contract with the owner. The owner is acting as an owner-builder and there is no prime contractor on the job. The Notice is required but it is only served on the construction lender, if any.

G) Your contracts with the “owner” are through an individual who holds himself/herself out as the owner. But you also suspect he/she is merely the agent or officer of another company who actually holds title. Find out the name of that company and serve the notice at the company’s address, to the attention of the individual, and not the individual’s personal address.

Are there any instances in which a general must serve a 20-Day? There may be in the area of tenant improvement. No such notice is required when the general has a contract directly with the owner. If your contract is with the tenant instead, one theory is that since there is no contract with the owner, you must give the notice. For this reason, a prudent general will usually serve such a notice.

But there is an exception to this exception. If the owner fails to post and record a Notice of Non-Responsibility, he/she is deemed to have directed the work of improvement and the tenant would then be acting as his/her agent—the contract could then be considered to be between the owner and the general. In other words, if you tell someone to improve your land, you can hardly complain if there is a lien against it for non-payment. The Courts in this case do not require serving the 20-Day and a lien can be against the owner’s interest.

On the other hand, if the owner does post the Notice of Non-Responsibility, you are telling the world you are not responsible, have no relationship with the general, and are unwilling to pay for the work. That would mean a lien should not be against your property for non-payment. Somewhat confusing, isn’t it?

Certainly, if you see a Notice of Non-Responsibility posted (thankfully it must be posted at the beginning of the job), you should serve the 20-Day. If you do not see the Notice of Non-Responsibility posted, you can take the risk and not serve, but what if it was torn down or some other unforeseen circumstance? Do you want to take the risk? Be safe and serve both the owner and the tenant.

When:

Serve within 20 days of your first furnishing labor or materials to the site. Remember, this is 20 days of the start of your work, and not the work of others. So, if you are performing landscaping at the end of the job, your time starts when you begin, not when others have started their work at the beginning. Preparatory work off-site does not start the time running. But any work at the site, including demo, would start the time. If you are a supplier and are securing or fabricating the materials, the time would

start when the materials are delivered. If you are a supply house and a contractor picks up the material at your store, to be safe, and assume the time starts on that date (most supply houses serve only if the contractor has a substantial order, the job is identified, and is a regular customer).

Remember, that unlike a mechanic's lien, there is no such thing as a "too early" Notice. So you do not forget, it is recommended that you serve immediately after your contract or order has been accepted.

You do not lose entirely if the Notice is served late. If the notice is served beyond the time period above, you still get a lien for all unpaid work 20 days before service and everything after the date of service. For example, assume you begin work March 1st and have completed your contract by June 30th. You end up being unpaid for the entire months of May and June. The Notice is served on June 1st. In a later filed lien, you can make a claim for the period May 12th forward—you lose the right to recovery for the period May 1st through the 11th.

Who to Serve: If you have a contract with the general, serve the general, owner, and construction lender, if any. If you are a sub or supplier who has a contract directly with the owner, you need only serve the lender.

How to Serve: Certified mail, return receipt requested within 20 days of the date on which you first furnished labor or materials. Service is considered complete on the date of mailing, not the date signed or received by the addressee.

Example: Your work starts March 1st. The notice is postmarked March 20th but is not signed by the recipient until March 25th. Your notice is valid.

Serve it on the owner, general contractor, and construction lender at their last known addresses. (Owners and general contractors can be served either at their residence or business address.)

What if the certified mail comes back unsigned? The California statutes do not address this issue and there is no case directly on point as relates to 20-day notices. You should be all right if you keep the returned and unaccepted envelope and fill out the proof of service form that is printed out for you along with the Notice.

List both the husband and wife as owners in the Notice. If you do not have both names, you can describe them as "Mr. and Mrs. David Smith". Only one envelope need be sent out for both the husband and the wife.

As to tenant improvement work (assuming you have a contract directly with the tenant), the law is somewhat vague as to whether you are required to serve both the tenant and the owner. The problem is getting the name and address of the owner because this information is not required to be furnished to you by the tenant and that person can sometimes be reluctant to do so. For this reason, most contractors doing TI work serve the tenant and not the owner. However, to be safe, contact the Customer Service Department of a local title company (who can furnish the information to you very inexpensively) and serve the owner as well. It also does not hurt to serve the property manager.

***Verified or
Notarized?:***

You need only sign the Notice and there is no requirement of verification or notarization. Anyone in your office can sign it, as well as your lien processing service. Recording is not required. Although almost no one does this, there is an old provision in the California Code that says if you record, the recorder is required to send written notice with 5 days of the recording of a Notice of Completion. This tells you exactly when to serve the mechanic's lien. This is now "dead letter" because Civil Code Section 3097 now requires the owner to serve notice, within 10 days, of the fact that a Notice of Completion has been recorded, to anyone who has timely served a 20-Day Notice. However, it is expected there will be times when the owner either does not know of this provision or ignores it, and if that is the case, the time does not start running to file the lien until you receive notice.

***How Many Times
Must the Notice
be Served?:***

It need only be served once, even if your contract increases later because of adjustments or change orders. However, if you have two or more contracts on the same project, you must serve one for each contract. For example, this would apply if you are a supplier that has two or more contracts with different subcontractors. But what if your contract price increases dramatically? Do you have to serve a second Notice? There is one case in California involving an initial Notice for \$10,000 followed by a mechanic's lien for \$159,000. The court said this was too much of a change and a second Notice should have been sent. Unless you are involved in such an unusual case, one Notice will suffice.

But what about subdivisions? The law is not entirely clear, but it appears you need only serve one Notice if you have one overall contract. For example, if you are an electrical subcontractor who has one contract with the general for 25 subdivision units, you would serve one Notice.

But if you had separate contracts for each unit, it might be wise to serve a Notice for each contract/unit.

What about Condos? A condo complex holds title either as one large parcel with a single parcel number or each unit having its own parcel number. If the former, only one Notice would seem to be required, whether or not you had separate contracts. As to the latter, the same rules would seem to apply as in subdivisions.

**Information on
Owner and
Construction
Lender:**

The Notice must be served on the general contractor, owner, and construction lender which means there is sometimes difficulty in getting the names and addresses of the last two. You cannot just throw up your hands and write in “unknown” – you must use reasonable due diligence to find out before you throw in the towel. So, how do you find out this information? Many times it is right under your nose as it is provided by the general contractor at the time you enter into your agreement. Alternatively, you can use the form provided on this site titled, “Request for Preliminary Lien Information (To General)” and send out this request to the general as soon as your contract is signed. If this does not work, try the following sources:

- A) Construction lenders usually advertise by posting a job sign such as “Construction financing provided by Acme Bank”. Building permits are required to include this information, but many times it is omitted and not enforced.
- B) The general contractor must make available the name and address of the construction lender to any requesting sub or supplier under California Civil Code §3097(m).
- C) The owner is required by Civil Code §3097(n) to furnish subs and suppliers with the name and address of the construction lender if the owner has received your Notice. Use the form on this site titled: “Request for Preliminary Lien Info (To Owner)”.
- D) The general’s contract with an owner (except residential home improvement contracts or swimming pool contracts) must include the name and address of the lender under Civil Code §3097(m).
- E) The county recorder’s office must list the name and address of the lender under the category “Construction Trust Deeds”.

F) The Customer Service Department of title companies will give you (either free or for a small charge) the name and address of the owner if you supply the street address.

G) Civil Code §3097(m) requires that in every contract between the general contractor and a subcontractor, as well as between a subcontractor and a sub-subcontractor, there must be included the name and address of the owner, original contractor, and any construction lender. This is by far the best source of information. If this information is missing, the general contractor and/or subcontractor should be told that this is a mandatory requirement under the California Civil Code.

***Pre-Lien Notice
Contents:***

Make sure you use the standard Notice form on this site. Although material suppliers can use their invoices, they must include certain required language. In filling out the form, bear in mind the following:

A) You need only include a general description of your work. Unlike some states, you are not required to put in detailed information such as start or finish dates, how payments are going to be made, or the details of the labor, material, or equipment. An acceptable statement would be: "Rough and finish plumbing services, including fixtures, for a residential remodel".

B) The address of the job site does not require a legal description, but you should at least have the street address, and if it is a commercial project, subdivision, or condominium project, the name of the company or building. Examples would be: "Patrick and Joan Smith residence at 123 Main Street, Anytown, California"; "Apex Condominiums located at 2255 Shamrock Avenue, Anytown, California"; "The Shoe Emporium Outlet Store at 3672 Stone Lane, Anytown, California". For new construction, without an address, state the best description you have, such as: "Acme Gift Store in ABC Shopping Center, corner of Main and Broadway, Anytown, California". Or, better yet, call a title company.

C) You need only put in the initial amount of your contract, bid, proposal, or estimate. For T&M or cost-plus contracts, you may wish to have a statement such as: "T&M Agreement, \$75 for journeymen, \$50 for laborers, plus 20% profit and overhead".

D) The Notice has a space for unpaid laborers or trust fund fringe benefits. Under Civil Code §3097(c)(6), a subcontractor (not a supplier) needs to fill-out this information only if you have failed to pay wages to a laborer(s) or union trust fund fringe benefits. If you send the Notice out at the beginning of the job (as is usually the case) when you are not behind on any of these payments, there is no mandatory or technical reason to fill out this portion of the form. "Wages" is not defined, but

would probably be interpreted to mean hourly compensation to an employee, as opposed to compensation to an independent contractor.

However, if you are later delinquent (after serving the initial Notice) in the payment of wages or fringe benefits, this could be interpreted as requiring the sending out of an amended Notice. Further, Civil Code §3097(k) states that if you are delinquent in paying wages or fringe benefits, you must give written notice to: (1) those laborers; (2) their union bargaining representative, if any; and (3) the construction lender. That written notice requires you to furnish the following information:

- (1) The name of the owner and contractor;
- (2) A general description of the job site;
- (3) The name and address of any union trust fund to which employer payments are due;
- (4) The number of straight time and overtime hours on each job on which you are delinquent;
- (5) The past amount due and owing.

Most people do not fill out this portion of the Notice if they are not delinquent. They simply worry about notification if and when they are behind in their payments. Other persons, to be safe, include this information on the Notice. This way they are not prone to forget it later. You can make your own decision as to which option you wish to exercise.

MECHANICS' LIENS

What in the world is a mechanic's lien?:

Construction professionals certainly know, but it is a mystery to the public at large. No, it is not the lien for an automobile mechanic. Such mechanics' liens have ancient roots, at least as far back as Roman times in which construction lenders would receive a lien not only on the land, but the edifice built. Mechanics' liens did not exist under English common law and are decidedly American in origin. They were meant to give contractors a preference over other creditors so that our nation could sustain the type of growth and building that it envisioned. The first enactment was by the State of Maryland in 1791 which was for the express purpose of helping build the capital city of Washington, DC. They were also enforced in old maritime law for the labor and materials in the improvement of a vessel.

The fact that most people don't know what it is can actually cause some difficulties for contractors. When an owner finds out a lien has been placed on their property, their reaction can very well be surprise which, in turn, spawns anger. It is, therefore, a good idea for a prime contractor to generally explain the situation to their owners. After all, you can end the discussion by saying that the lien arises only if there has not been proper payment on the project.

The lien acts like a mortgage or deed of trust since it is a recorded claim against the property itself. It acts like a cloud or "hook" on title. For this reason, it is a very powerful device. It has the effect of preventing the owner from selling or refinancing the property. In those cases, they have to take care of the lien before this is accomplished.

Unlike a preliminary notice, which is a warning that a lien may be filed in the future, a mechanic's lien is for services rendered and unpaid.

***How is the
lien different from
collecting on other
kinds of contracts?:***

Believe it or not, you are special. When your friend in the computer industry sells an expensive system to an owner who does not pay, they have to go through the almost endless ordeal of bringing a lawsuit, waiting for trial, and finally getting a judgment before a lien attaches to the person's home. In the meantime, they have no security for their debt. Although in some cases a prejudgment writ of attachment lien may apply or someone can file a lis pendens if the lawsuit specifically relates to the right to possession or title to real property, these two devices are expensive and usually require an attorney.

You get special rights because of the nature of construction. The person who buys the computer system and bounces a check unreasonably gets the right to enjoy the system without paying for it. But when this happens to a contractor, the owner not only gets the benefit of the improvements, but the **increased value** to the property. The contractor cannot "take back" their improvements as easily as the computer store owner can through repossession. The construction materials are already incorporated into the project and, many times, it would cause material damage if removed. Finally, the legislatures in our various states wanted plenty of building to help the economy and there had to be adequate incentives for the contractor.

Who is entitled to a lien?:

The legislature has kept the doors wide open for you on this one. Generally, it is any person or entity who contributes labor, equipment, or materials that is used, consumed, or incorporated into the construction project. In other words, something you can actually see: An improvement to the property. This includes general contractors, subcontractors, material suppliers, and lessors of equipment. But it also covers design professionals, including architects, engineers, and land surveyors. This also includes machinists; trucking companies (transporting materials to the job); house movers; labor pool companies providing labor services; landscaping services; grading, leveling, and filling; demolition; drilling test holes; and off-site street and utility work. This rules out building permit expeditors, construction payroll services, construction software providers, real estate brokers, and others who do not furnish services or materials which are consumed in the construction.

But what about fringe benefit payments (health, welfare, vacation, retirement, etc.) provided to unions pursuant to a collective bargaining contract? If this is unpaid, can they record a lien? In 1991 a federal case said no. In 1999, the California legislature (Civil Code §3111) restored this right to file a mechanic's lien.

Some states allow a mechanic's lien only if you are in one of the limited "tiers" on the job. If you are too far down the line, you are considered remote and cannot file a lien. For example, some states will not allow a "sub-sub-subcontractor" to file a lien. California has no such law. You could foreseeably be a fifth tier subcontractor and still have a lien entitlement.

As seen in the next section, a material/equipment supplier who has a contract with another such supplier does not get a lien. But if one of those suppliers is actually considered a "subcontractor", the lien would be allowed. For example, an equipment supplier is considered a "subcontractor" if that person decides independently how work is to be done and does not merely take direction from the site foreman. An example of such a "subcontractor" would be an equipment supplier who furnishes grading equipment and operators, but either interprets the plans and specifications himself or otherwise decides how the work is to be done independent of direction from the foreman. If that is the case, someone supplying the equipment to that company would be entitled to a lien because it is not a "supplier to supplier" scenario.

Who is Not Entitled to a Lien:

The following persons, entities, or circumstances do not give rise to the right of filing a mechanic's lien:

1. Soil preparation work before landscaping services, such as disking.

2. Gardening maintenance after installation of the plant material, such as watering, mowing lawns, etc.
3. Companies that sell equipment to a contractor, for example, selling a compressor to be used on the job. On the other hand, if the company leases that equipment, they are entitled to a lien.
4. Temporary fencing, "Port-a-potties", temporary power pole companies, lunch wagons, and cooking services for employees on the site.
5. An equipment supplier who rents to another equipment supplier or lessor. For example, if a company specializes in supplying new and renovated backhoes, and leases one to Acme Company who, in turn, takes all their direction from the job superintendent and merely lends out the equipment, the original equipment supplier will not get a lien.
6. A material supplier who supplies to another material supplier. The exception is if the materials are furnished to a supplier who is considered under California law to be a "subcontractor" as to the job. This includes suppliers who have: (a) specially fabricated an item just for this job; or (b) provided some labor at the site for installation of the material. Merely supplying material that is the "stock in trade" or regular inventory of the second supplier will not be enough.

Example: "A" Company is a lumber mill which manufactures trusses. They are sold to "B" Lumberyard as a regular shipment and not special ordered. "B" Lumberyard keeps the material as a regular part of its inventory and sells it to a framing subcontractor. "B" Company can claim a lien but not "A" Company.

Example: "A" Company is a lumber mill and specially fabricates a large laminated beam for the project on special order from "B" Lumberyard. Both "A" and "B" can claim a lien.

Example: "A" factory supplies preconstructed windows to "B" window subcontractor. "B" has a crew that performs labor to install them at a residence. Even though the material was not custom ordered, it would allow both "A" and "B" to claim a lien because "B" is considered a subcontractor.

7. A general cannot claim a lien for the value of the work "subbed" out to an unlicensed subcontractor. Thus, if the subcontractor's portion of the overall contract is 30%, the general can only file a lien for 70% of the balance due under the contract. But the

reverse is not the case. Suppliers or licensed subcontractors receive a lien even if they have a contract with an unlicensed general or subcontractor. The law was meant to protect the persons performing labor and materials that are licensed.

8. Generals and subs must be licensed at all times during the job. If not, you cannot record a mechanic's lien or bring a foreclosure lawsuit, even if the owner knows and fraudulently sets you up. And believe me, it would not be the first time, especially as to sophisticated owners. The law says that the risk in such situations falls upon the unlicensed contractor. But what if the license lapses for only a 3-week period while you are on vacation or because of some highly technical reason such as being late in submitting your license bond information? The courts will allow you to file a lien if there is "substantial compliance". But why take the risk? You never know how a court will rule on this and there is a predilection against people that are unlicensed.

But it gets worse. As of January of 2000, the California Business and Professions Code §7031(b) allows an owner to sue to recover back ALL monies paid to an unlicensed contractor, even if the owner knew of the unlicensed status and sought to benefit by it! Is there a need to say more?

9. Supplying tires on rented equipment.
10. Although hand tools are treated as expendibles by industry standards and accounting principles, no case yet has allowed them to be part of a lien. Thus, if you use up picks, shovels, and hammers on a job, you may not be able to claim this part in your lien. The courts are somewhat schizophrenic on this issue because there are cases allowing oil for threads on pipe joints, paste for soldering, and lumber for concrete forming to be part of a lien.

Special Issues as to Material Suppliers:

As with most states, material suppliers must prove that the material was used or consumed in the actual improvement. There is no presumption of such consumption merely because you can show material was delivered to the job site. Obviously this helps, but it is not determinative.

Material suppliers usually in their invoice or delivery tags have a general description of the project. But they should be more detailed. Instead of saying, "Jones residence", it should read, "Edward Jones residence at 123 Main Street, Anytown, California".

These same suppliers are good at making sure someone signs for the material when delivered, but the forms do not always say WHERE it is delivered. It will not do you any good if it is delivered to the contractor's yard. Include a statement to the effect: "Received by _____, title: _____, for _____ contractor on _____ (date) at the site known as _____."

When to Record:

See **Time Deadline** table.

You should also consider the following:

- A. When is a project complete? Because the time in which to record begins after the project is completed, you can imagine how heavily litigated the definition of "completed" has been by the courts. This is especially the case since many contractors file late and stand to lose all lien rights, depending upon that definition. You can do two things – either file early and forget about reading further in this section, or read further and attempt to master these rules that even attorneys are sometimes vague about.

Unlike other states, California is liberal in favor of the contractor in extending the date of completion. A job is not complete until everything, down to the last detail, as required by the plans, specifications, shop drawings, materials list, or contract, is completed. One could finish an entire ten-story office building and go back only to install soap dispensers in the Men's Room and still extend the period, as long as this was part of the original contract. In one case, the installation of \$193.50 worth of electrical work on an overall job priced at \$13,500 was enough to extend the time. But there is some uncertainty because the old California statute excluded "trivial imperfections", and this is not mentioned in the new statute. On the other hand, there are still the old cases on the book interpreting the previous statute. This means that one could argue that the soap dispenser example was trivial and should be excluded for purposes of the completion.

It is the author's opinion that the courts will extend the time for trivial work under the contract if it helps the contractor in preventing the permanent cutting off of the person's lien rights. Are you now thoroughly confused?

“Completion” is also defined as:

1. The owner occupies the property (even for a couple of days) with the cessation of labor. The time starts running even if work begins a week or so later.

or

2. There is 60 days of continuous cessation of work and the owner did not file a Notice of Completion or Notice of Cessation. The building is considered “complete” after the 60-day period which means everyone, including the general, subs, and suppliers, get 150 days after the first day of cessation of labor begins to file their lien.

Example: On a large commercial project, even though there is still work to be done, work stops on April 1st. This could either be because of the owner running out of money, the general abandoning the project, or termination of the contractor. In any event, the cessation lasts for 60 continuous days through May 30th. After tacking on another 90 days, we get to August 28th, which is the last day to record the lien. Now do you believe me when I say record early? Who has the time to remember these rules?

3. The owner records a Notice of Completion or Cessation. The Notice of Cessation can only be recorded if there has been a continuous cessation of labor at the site for 30 days before the recording. It must literally be 30 days of continuous cessation of work. If the work stops and then starts again, the time does not begin to run.

In California, there is no extension of the completion date for warranty or “call-back” work (repair or replacement of work you have already installed, i.e., going back and replacing a defective lock). But what about punch lists? If they merely repair or replace what you have already installed, it will not extend the time. However, if part of the punch list includes items that were under the contract but were not completed, it will extend the period.

All these rules are very important in determining: (1) when the time starts ticking for the recording of a claimant’s lien; or (2) whether or not the owner properly recorded a Notice

of Completion. If the Notice of Completion is recorded too early (the work has not yet been completed) or too late (must be recorded within 10 days of the completion of the project), it is considered null and void and everyone, whether the general, suppliers, or subcontractors get the same 90-day period to record a lien after the actual completion.

The architect's certificate or the "final" from the Building Inspection Department are not considered completion.

- B. Counting the time. Assume, for example, you have 90 days after completion to record the lien. Remember it is not 3 months but 90 calendar days. Exclude the first day and include the last day. Include all calendar days, including weekends and holidays, unless the last day falls on a weekend or holiday. In that case, you get the next business day. Watch out for months that have 31 days because it may mean you have a shorter time period.

Example: Completion on June 1st. The last day is not September 1st because that would mean you were counting months instead of days.

Example: Completion on June 1st. You forget the fact that two of the months have 31 days. The lien is not due on September 1st but, instead, on August 30th.

Example: Completion on June 2nd. The 90th day is a weekend. You get the next business day or September 2nd.

- C. Off-Site Work. This includes streets, sidewalks, sanitary sewer, utilities, and related work. The time to file the lien runs from the completion of that preliminary work, not the later completion of the overall project. And, completion is not until the public entity accepts it. It is not determined when the owner records a Notice of Completion. If the public entity never accepts the project, the time never runs out.
- D. Can You Record Too Early? Unlike a prelien notice, a mechanic's lien can be recorded too early and therefore be invalid. Generals cannot record a mechanic's lien until they are substantially finished with the entire and overall project. Subs and suppliers, on the other hand, can record their mechanic's lien when their portion of the work is substantially completed, even though the overall job is still

incomplete. In determining “substantial completion”, you can ignore the punch list. In other words, you can record the mechanic’s lien even though you are in the process of doing the punch list.

If you record a premature mechanic’s lien, you can always re-record and save your rights, as long as you are doing so within the overall time deadlines. (For example, within 90 days of overall completion).

If you are a supplier that has a direct contract with the owner, you are in the same role as a subcontractor and, therefore, have 30 days to record your lien after the recording of a Notice of Completion or Cessation or 90 days after completion if there is no such recording.

- E. The owner is required to serve a copy of the Notice of Completion on the general and subs. Under Civil Code 3259.5, effective January 2004, the owner is required to serve the general, subs, and suppliers, either registered, certified, or regular mail, with a certificate of mailing, that a Notice of Completion/Cessation has been recorded, with the recording date. Such a rule applies to subs and suppliers only if you have properly and timely sent out a preliminary 20—day notice. This must be in writing and sent by the owner within 10 days of recording the Notice of Completion. This does not apply to residential homeowners. If sent to you on time, you get the usual time period to record a lien (60 days for generals and 30 days for subs/suppliers). If it is not sent out in time or not at all, there is a penalty to the owner—all persons, whether generals, subs, or suppliers, now get 90 days from the recording of the Notice to record their liens. The lesson to be learned: do not count on this extra time—assume the Notice of Completion has been recorded and file your lien quickly (within 60 days for a general and 30 days for a sub or supplier) after the project is completed. What if you were sent this notice by the owner and misplaced it or are too busy—play it safe.

What do I do if I am not Exactly Certain if the Time Limits Have Expired?:

When in doubt, record. The problem is you do not always know when the project has been completed, although as a factual issue, you can sometimes come very close to that date. Since it is the last day on which anyone worked on the project, asking around and making some telephone calls can usually get you fairly close to that date. For this

reason, painters, landscapers, fencing contractors, appliance suppliers, and other persons at the end of a job are the best source of this information.

Should I File my Lien Anyway, Even if I am Late in the Hopes of Being Paid?:

As a general proposition, if you know for sure that your lien rights have expired, you should not record the lien. You are simply setting yourself up for a possible action for slander of title and/or the assessment of attorney's fees from the owner. Remember, owners nowadays are sophisticated and they know these time technicalities. Before payment, their lawyers are directed to scour the file to make sure all the formalities were taken care of before payment is made.

However, there are exceptions. Assume you are required to file a pre-lien notice within a certain period of time before the mechanic's lien. You do not remember if it was served on time. If you have a reasonable doubt, go ahead and file the mechanic's lien before it expires and hopefully you can get a copy of the prelien at a later date.

The rule is simple. If you are nearing the end of the project and have not been paid, **FILE OR RECORD IT RIGHT AWAY**. Believe me, if you are late, opposing counsel will let you know and you can always release the mechanic's lien.

Does the Lien Stay on Record Indefinitely?:

No. Judgment liens can be an encumbrance against real property for long periods of time, especially if the judgment is renewed. Mortgages and/or deeds of trust are in the same category and could literally stay on the property forever, unless satisfied or re-conveyed. Mechanics' liens are a totally different breed. Because they are such a powerful cloud on title, the courts will not let them sit there for an appreciable period of time. Within a short time frame you will be required to bring a lawsuit. If you do not, the lien is no longer effective as a matter of record.

This does not mean that the lien disappears. It will still be in the records of the Recorder's Office, although it becomes automatically null and void if not foreclosed upon under Civil Code §3144. In other words, the courts hand you a powerful right, but you must enforce it very quickly.

Where to Record:

In the recorder's office in the county in which the project is located. A list of all county recorders with their address and telephone number can be found in the Forms tab of this module. Do not file the lien with the court. The mechanic's lien form, as well as other forms on this module that require recording, will automatically print out a cover letter to the

recorder's office to facilitate mailing or hand-carrying the lien. If you are running up against the time limit, have it hand delivered to the recorder's office to be safe. Anyone can make the trip to the recorder's office and if all of your staff is busy, there are numerous process serving and messenger services in your area (look in the Yellow Pages under "Messenger Service" or "Process Serving") who would be happy to pick it up, record it, and bring back a recorded copy usually for a price of approximately \$40 to \$50.

How to Serve:

The California Civil Code requires the lien to be recorded in the county recorder's office but there is no stated requirement of service. On the other hand, the recorders' offices, under the Government Code, have their own rules and either you or the Recorder must mail out a copy of the lien to the owner and general contractor whose names and address appear in the lien form. It is recommended that you, as opposed to the Recorder, mail copies of the lien by regular mail to the general contractor and owner and use the Proof of Service which is printed out with the lien. This saves you approximately \$3.00 which is charged by the Recorder if they do it. Mailing is a potent device and in many cases you are either paid or get the attention of the necessary parties to create a dialog early on as to payment. It is good to exhaust these avenues before you have to go to the time and expense of filing a lawsuit. Obviously, if no one knows you filed the lien, there will be no such dialog.

Pursuant to the California Government Code, the Recorder is required to send copies of the lien to the owner and general contractor within 10 days of recording. The same Code section requires the mailing to be made by either you or the Recorder by certified mail, return receipt requested. However, the same Government Code section states that if there is a failure to send out the notice, it does not affect the validity of the lien. Probably for this reason, most people simply send it out by regular mail, and therefore, that is all that is suggested to be done.

Amount of Lien:

Primarily for unpaid labor, material, and equipment supplied. California Civil Code §3123(a) states the amount of the lien is to be your contract price or the reasonable value of labor and materials, whichever is less. This does not necessarily mean the court will scrutinize your lump sum contract, take it apart as to your actual costs, and then make it's own determination as to reasonable profit and overhead. It would be a rare event if a court would ever do that. The limitation of the reasonable value usually only applies if you have not finished your contract. Thus, if you have a \$100,000 contract and are only 80% done, the court would make the computation of 80% or \$80,000 as the reasonable value.

Owners and general contractors in many cases, claim there is defective or untimely work subject to a back charge. You have the right to dispute

it and have it determined later in court. You do not have to make deductions on your lien and can ask for the full value, subject to this being determined by the judge at a later date. In the event you get less at trial than was stated in your lien, you are not penalized, as long as you did not record a willfully false mechanic's lien. On the other hand, if there is an obvious deduction which should be made, either because there has been a reduction in the scope of work or you have clearly admitted that there should be a particular back charge, by all means take it out, because this will surely have to be done anyway at the time of trial or settlement.

Include change orders, whether or not they are in writing or whether or not they have been signed. In other words, you may include verbal change orders that you were directed to perform and which have not been paid. There had been some confusion as to including verbal change orders prior to 1999. However, in the case of Basic Modular Facilities, Inc. v. Ehsanipour (1999) 70 Cal.App.4th 1480, the court held that verbal change orders could be included in the mechanic's lien amount.

Include monies that are owed to others, including subcontractors and suppliers. This is not considered "doubling up". Thus, if you are a subcontractor with a \$10,000 outstanding bill and \$5,000 consists of monies you owe to a supply house and another subcontractor under your contract, you can include the whole \$10,000. Also include amounts you owe subcontractors and suppliers, even though they have filed their own mechanics' liens. At the request of the owner, the court will reduce your lien as to the amount of these other liens.

Unfortunately, you are not allowed to include attorney's fees in your lien, even though you have a contract provision allowing for them. You can, however, ask for attorney's fees in a breach of contract action in your lawsuit to foreclose the lien. For example, if you are a general with an attorney's fee provision in your contract with the owner, you can get a personal judgment against the owner for damages and attorney's fees, but you cannot foreclose against the property for those fees. Similarly, if you are a subcontractor that has an attorney's fee provision in your contract, you cannot foreclose the fees against the owner's interest, but you can get them personally against the general contractor in a breach of contract suit.

Even if you do not have a finance charge in your contract, you can get "prejudgment interest" at 10% per annum (not compounded). If you have sent a written billing, you get the interest from and after the date of the bill (unless your contract provides that payment is not to be made for 30 days after billing or some other period). If you have not submitted a

written bill, you get prejudgment interest from and after the date of recording your lien. The interest continues up until the time you are paid.

If your contract has a finance charge (for example, 2% per month), you can get this, but you cannot receive the finance charge plus the prejudgment interest. In other words, you cannot double up. To get a finance charge, you must have a written contract with the other person. Merely stamping a finance charge on an invoice is not sufficient unless that person actually signs the invoice and acknowledges those terms.

For some time there has been a controversy in California as to whether a mechanic's lien may include "impact claims". These consequential damages include such items as extended overhead, delay damages, disruption damages, acceleration, as well as other indirect claims. For example, these could stem from multiple changes caused by the architect, owner, or general; incomplete or vague plans/specifications; stopping and starting work caused by others; unforeseen site conditions; termination/replacement of the general contractor or architect; bad scheduling; and other breach of contract damages.

California Civil Code §3123(b) now allows these damages to be included in the lien as part of the breach of contract, but only for the actual labor and materials incurred. Although there is very little case law on the subject and a great deal of speculation, you will probably be entitled to receive them for: (1) extended overhead; (2) additional hours on the job and in the shop; (3) increased costs of labor and materials; (4) the cost of mobilizing and re-mobilizing; (5) revising drawings and submittals; (6) ordering and re-ordering; (7) increased supervisory costs; and (8) the reasonable profit and overhead upon such additional costs. But, in the last analysis, you must show that actual labor and materials were incurred for the specific job.

Example: Because of vague and incomplete drawings, as well as multiple changes by the owner, you are required to re-do and re-submit a number of shop drawings. You have time cards and material invoices showing the additional hours, extra costs of materials, and drafting time required. Because this related to actual labor and materials incurred, you will probably be successful in including this amount in the lien.

Example: Because of a delay in the job (you did not cause this), the project is extended for another six months and you are delayed in receiving the last progress draws and retention. You have another large job that you had just been awarded and counted on this money as the capital to perform that job. You had to bow out of that other job and have suffered lost future profits.

Although you could sue the person with whom you had the contract and possibly win (these are difficult claims), you cannot claim this in your mechanic's lien because it does not relate to actual labor and materials incurred on this specific job. Nor, would you be able to recover the injury to your business itself, increased finance charges from vendors or interest on lines of credit you secured.

In some states, there are strict statutes preventing an owner from paying twice for the same work. Subcontractors and suppliers are only allowed to file a lien for the unpaid amount on the contract between the owner and the general. If the general has already been paid in full, even though the money does not filter through to the subcontractors, the subcontractors are forbidden from filing their liens. California is different. An owner can be required to pay twice if they do not take the required steps, including joint checks, builder's control agreements, or lien waivers upon each payment. The only exception is if the owner records the contract and procures a surety bond. This rarely occurs on private jobs, but if it has been done, an owner does not have to pay twice and need only pay the amount of the contract.

**Property Subject
to the Lien:**

A mechanic's lien applies only to private not public projects. The lien goes against the building and as much of the land surrounding as is convenient for use and occupation of the improvement.

Example: A supermarket is constructed in a shopping center. No lien would be allowed against the service station in that shopping center because this is not required for the convenient use and occupation of the supermarket.

Example: A bridge is constructed over a small creek which services a residence. The lien would apply not only to the land adjacent to the creek but upon the house site itself because the bridge is necessary for the use of the house.

To record a traditional mechanic's lien (as opposed to a site improvement lien or a design professional lien), some visible and actual work must be started. Wood survey stakes are not enough. However, metal monuments on boundary corners are considered sufficient, as well as rough grading.

If you perform tenant improvement work and your contract is solely with the tenant, your lien attaches to the structure "down to the surface of the ground", but excludes the ground itself which is owned by the landlord.

If the landlord knows of the work of improvement for the tenant and fails, within 10 days of that knowledge, to post and record a Notice of Non-Responsibility, the landlord's interest in the "dirt" and building is also subject to the lien. However, if the landlord does not know of the improvements or if he or she does, and there is a proper posting and recording of a Notice of Non-Responsibility, the landlord's interest will be free of the lien. As you may imagine, there can be a great factual controversy as to when a landlord does or does not know about the improvements.

Assuming your lien is only against the tenant's interest, you may foreclose against both the lease and the leasehold improvements. It would be a rare case in which a lease had much of a value, since it is more of an obligation than a benefit. Anyone purchasing it at a foreclosure sale would then have to take occupancy and begin paying rent and common area maintenance charges. However, theoretically, if it was a good lease and it could be re-rented to someone else for a profit, it may have a value, although such items are rarely foreclosed upon.

More predominant is the foreclosure against the "trade fixtures". If, for example, you construct a kitchen for a restaurant, you can foreclose against that equipment and the purchaser at the foreclosure sale will have a limited period of time to remove those items.

As mentioned above, an owner can defeat a lien if there is the posting and recording of a Notice of Non-Responsibility 10 days after notice of the construction. Keep your eyes peeled because they are required to be posted in a "conspicuous place" at the premises and many times they are torn down or damaged during construction. Make a note in your job diary as to when this occurs. If you keep good records and there is no notation of the posting, the landlord may have blown it and it is a powerful device in proving the lien should go against the landlord's interest which, in turn, helps in settling your case.

Off-site work, including streets, curbs and gutters, sanitary sewer, and utilities cannot be a lien against the street area itself because this is public property. However, there may be a lien against the adjacent property. If you are doing work adjacent to and for the benefit of a subdivision, the lien can be against the entire tract of land, although it is subject to a proportional share as to each lot.

It is common knowledge that a lien cannot be placed on public property, but this is California and you know things are not as simple legally as they appear. What about improvements on public land secured by private financing? Assuming that low-income housing is built on county land, but the funding comes primarily from a private, non-profit

corporation. To be safe, file both a public stop notice and a mechanic's lien. If you are wrong, let someone tell you and you will be happy to release the lien after they prove with certainty that it is solely and completely a public project.

**Verified or
Notarized?:**

A **verified** document simply means you sign it and are representing the contents are true and accurate. A **notarized** document is signed in front of a Notary Public. A **verified** lien is all that is required in this state. A mechanic's lien does not have to be **notarized** before recording.

Priorities:

A. Between Lien Claimants. All contractors and suppliers who have mechanics' liens have the same priority amongst themselves if multiple liens are foreclosed against the same property. Each person's lien attaches as of the date of commencement of the project (when the first person does work). For this reason, it makes no difference who files their lien first, since everyone is treated equally. This is because every mechanic's lien fictitiously relates back to the date on which the project started. Thus, a painter's work at the end of the project relates back to the work done at the beginning of the project by the demolition contractor. If the property is sold upon foreclosure and there are multiple liens, the lienholders share proportionally and "pro-rata".

Example: Assume there are four liens on the property, for the amounts of \$25,000, \$15,000, \$10,000, and \$17,000, amounting to a total of \$67,000. Also assume that the net proceeds upon foreclosure sale are \$100,000. Each person will compute their pro-rata share accordingly. The person with the \$25,000 lien would receive: $25/67 = .373 \times \$100,000 = \$37,300.00$.

Remember that a "site improvement lien" (such as grading and demolition) under a separate contract has priority over the liens for the construction of the building.

Also, do not be confused by a "design professional lien" applicable to architects, engineers, and surveyors. They are allowed a special lien at the beginning of the project if the building permit has been issued but no actual construction has commenced. However, after the work begins, this lien disappears and must be replaced by recording a regular mechanic's lien, just like a contractor or subcontractor, in which case the design professional would have the same priority as the contractor or subcontractor.

B. Construction lenders and new owners. A mechanic's lien takes priority over the construction trust deed if the lender records even one day after commencement of the project. That is why construction lenders typically drive by the work site to verify work has not begun before they loan the money. If a deed of trust is recorded before the

start of the construction, which is usually the case, such lender would have priority. This means that if it is a first deed of trust, for example, and is foreclosed, it will “wipe out” all the mechanics’ liens by operation of law and if there are not any proceeds after satisfying the lender, you get nothing. “Commencement” is defined as actual and visible work conducted on the property. In other words, what would cause a reasonable person to believe that work had started.

If the owner (for example, a developer) sells property after work commences, that new buyer will take subject to a later-filed mechanic’s lien.

Example: A spec home developer starts construction in February. The construction is completed in September of that same year at which time the property is sold to a new home buyer. Two months later a mechanic’s lien is recorded on the property. The homeowners take subject to that lien, even though they purchased before it was recorded because the lien relates back to the first date of commencement which was before they bought the property.

C. What happens to the lien if the property is later sold? Remember that the lien is like a hook which attaches to the property. This means it follows the property and encumbers it as to new owners. Assuming you have accomplished all the required prerequisites, the lien will “run with the land” to successors-in-interest and those new owners will have to acknowledge your lien for the exact same amount. If merely selling the property were to extinguish a lien, everyone would transfer it to their brother-in-law or spouse, eliminate the lien, and then re-transfer it back to themselves. Obviously, the law is not that nonsensical.

D. Can the owner(s) refinance the property after the lien is recorded? Generally no, without paying you off. Let us assume that the owner has a first deed of trust followed by your lien next in priority. They could simply secure refinancing through a new second mortgage or deed of trust without paying you off. However, that instrument would actually be in third position and your equity in the property would not be diminished. Unless you are dealing with a private lender, most institutions would be reluctant to do that.

On the other hand, if there is a complete refinance of the property, the first as well as your lien would have to be taken care of before the new lender would be willing to close escrow and loan the money.

E. Is my lien wiped out upon foreclosure? In many cases, yes. If there is a recorded deed of trust before work is commenced, that encumbrance has priority. When it is foreclosed, it wipes

out everybody in a junior position, including lienholders. The new owner, after receiving record title, takes free and clear of your lien. This leaves you with the sole remedy of suing the general contractor (if you are a sub) or a subcontractor (if you are a sub-sub or a material supplier to a sub).

So, in summary, even if the lien was recorded before the foreclosure, it will be wiped out if the deed of trust was recorded before commencing the work.

There are complications (surprise!) if the new owner of the property at foreclosure knew, ratified, or consented to the work being done. Assume that Mr. A owns property and has a contract with Contractor C to do termite work so that an escrow can close for the sale to a third party. Well before the work starts, a first deed of trust was on the property. Unfortunately, soon after the work was done, that lender starts foreclosure proceedings and the prospective sale to the third party dies. Shortly before the foreclosure, Mr. B, in the business of buying foreclosed properties, visits the site, talks with the contractor, and is fully cognizant of the work being done. The property is then foreclosed and Mr. B takes the property over asserting it is free of the lien, even though he saves money with not having to do the termite work after foreclosure. One might argue under the general equitable principles of unjust enrichment, the knowing acceptance of these benefits requires Mr. B to pay Contractor C.

On the other hand, if there are enough proceeds on the foreclosure sale of the first deed of trust after paying that lender, those monies are paid to the lien holders or a junior mortgage, in order of priority. This means that if the lien holders are in second priority position and there is excess money, everyone will share pro-rata at that point. It is only after all the liens on the property have been paid off that the owner receives any of these proceeds upon sale.

Notice of Completion:

A **Notice of Completion** is a document recorded by the owner or agent that announces the construction project has been completed. Although not required in California, it is nevertheless frequently done to shorten the time liens can be recorded. It has the effect of speeding up the process or “closing out” the project in the sense of paying off the construction loan or selling the property free of liens. As such, it can be a dangerous device for a person wishing to file a lien. Once recorded, a general contractor has 60 days and a subcontractor or supplier 30 days to file his or her lien, as opposed to the usual 90-day period. The avowed purpose of the Notice of Completion or Cessation is to cut off the time period for filing a mechanic’s lien.

Subdivisions:

Assuming you have one contract for an entire subdivision, you only need to record one mechanic's lien for the entire subdivision, but your lien must reasonably apportion the unpaid amount as to the individual lots based upon the value of labor and materials conferred on each lot. The courts are liberal, and in most cases you can simply divide the total unpaid amount by the number of lots. For example, if you are owed \$100,000 on 10 separate lots, simply allocate \$10,000 to each lot. You do not have to go to the time and expense of examining time cards and material invoices and come up with exactly how much was devoted to each lot, as long as you are making this allocation reasonably. If you are unreasonable in your allocation, the court will penalize you and put you in second position behind the rest of the lien claimants.

Example: You are owed \$100,000 for 10 lots. Nine of the lots will take a while to sell, but one lot is in escrow and will be sold soon. Because you could really use the money for your business, you decide to arbitrarily place \$60,000 against the lot in escrow. Because this is unreasonable, the court will penalize you.

But, as a practical matter, most people record separate liens for the separate units. This is because each unit has its own completion date and/or Notice of Completion recorded on it. The time starts running as to each separate unit and not the subdivision as a whole. If there are 30 units, do not wait until the last one is finished to record. The time will run as to each unit so that if Unit Number One is finished in the beginning and sold, the time runs as of that date. To prevent having to send a separate lien in a separate envelope to the Recorder 30 different times, most people send out their mechanics' liens in "batches", making absolutely certain that they do not miss the time limitations. Thus, in our example of 30 lots, assume they are in three 10-unit phases. If the 10 units in the first phase are finished generally within a one-month or so period, you can send out all your mechanic's liens for that phase.

If you have two or more separate contracts with a subdivision developer or general contractor (rare), you need separate liens for each separate contract. Thus, in the example above with the 30 units in three phases, assuming you had a contract for each phase, you would not be able to file a single lien, but you would have to file at least three liens—one for each ten unit phase. However, because of the discussion above, it may not make any difference because it is a good idea to have separate liens for each unit even if you have one contract.

For these reasons, it is recommended you use the "Mechanic's Lien (Standard).pdf" for subdivision liens, found on this site. Record it for each individual unit after you have reasonably allocated your overall,

unpaid contract amount.

Condos:

A condominium project, even though it has separate units, is considered by the courts as being one large piece of property. Unlike a subdivision, the time starts running to record your lien when the entire project is finished, not each separate unit.

You only need to record one lien for the entire project. Simply put down the entire amount you are owed. You are not required to allocate the amount to each individual unit, and therefore, this is not recommended. Do not place the entire unpaid amount on any one unit.

The Lien should describe the common street address (usually the main office of the condo project) and it is recommended you use the legal description as well. This can be secured through a title or escrow company (call customer service and they can run it for you for little or no charge). Try to at least include the Assessor's Parcel number (give the County Assessor's Office the common street address and they can give you the APN).

It is not necessary to include in the Lien a description of each individual unit. Especially as to larger complexes, owners are buying and selling units all the time and if you record mention of a specific unit, you are liable to be called frequently by the association or an owner's attorney demanding that the lien for the unit be released. And how do you determine which unit to include if work is done to the common areas? Those units near the area improved? To all units since they indirectly benefit? And how in the world can you allocate your lump sum contract to individual units for common area work?

Usually, when each unit is sold and/or refinanced, that unit pays off their share pro-rata.

This assumes you are either involved in the new construction of the condo project, renovating it, or working on the common areas. If you have a contract specifically with one unit owner, doing work to that specific unit only, you would obviously file a lien only for that unit and not the project as a whole.

**Tenant
Improvement
Work and
Notice of Non-
Responsibility:**

If you do tenant improvement work, expect to see posted at the job site a Notice of Non-Responsibility. This Notice is prepared primarily by the owner or property manager, but there are times in which the owner asks the general to do so. If properly done, it means any

ultimate mechanic's lien will be against the tenant's interest only and not the landlord's. It is the owner's way of saying: "I did not authorize or agree to pay for this work. If anyone is unpaid, do not expect to get a lien against my property."

To be effective, it must be signed and verified by the owner or agent, posted (at a conspicuous place on the premises), and recorded within 10 days of the owner's first getting knowledge of the work. If not so posted and recorded, or if done too late, unpaid general's or subs can file a lien against the owner's and tenant's interest. This carries with it strict time requirements and if you miss it by one day, you are out of luck. As you might imagine, there is considerable litigation over when the owner first got wind of the work. And whether knowledge of one's agent (for example a real estate agent or property manager) will be imputed to the owner.

So what if it is done properly and the mechanic's lien is only against the interest of the tenant? What good does that do you? The lien would be foreclosing against such property as 1) trade fixtures, 2) the tenant's assets (bank accounts, receivables, tools, equipment, autos, etc.), 3) and the value of the lease (assuming its market value is greater than the rent payments—a rarity).

Even if the Notice of Non-Responsibility was properly posted and recorded, the owner is still liable for a lien if the work was ordered or directed by the owner. This happens in only rare cases, including these examples: 1) the owner owns vacant land and wants to put up a convenience store. He/she directs the tenant to build it in exchange for a long term lease, or 2) ABC Co. owns the land and directs CDE Co. to develop it (hire the architect, general etc.). CDE Co. hires the general. The work is therefore being done at the direction of the owner, ABC Co.

If you do tenant improvement work in a newly-construction shopping center, the time starts running for each tenant's space as it is finished, and not the whole shopping center. It is similar to a subdivision.

Payment Bonds on Private Job:

We are all familiar with payments bonds on government projects, but what about a private job? They are much less common, especially because of their expense. However, most people forget that with subdivision work, the city or county may require a payment bond. This is many times overlooked. The payment bond is specifically for subcontractors and suppliers and a direct lawsuit can be brought against the surety company which is a very good way of getting paid.

**Lien Release
Bond:**

A mechanic's lien can be released by the owner by posting a surety bond for 1½ times the amount of the lien. This is actually a good thing for the contractor because it is like buying an insurance policy in your name. You continue prosecution of your lawsuit to foreclose (after naming the surety company) to judgment, and at the end of the process, you can turn to the bonding company for immediate payment. These companies rarely appeal the judgment and are usually quite fastidious in trying to cut down costs and attorney's fees. Once they pay, they go directly against the owner or contractor who took out the bond under the indemnity provisions. It is even better than foreclosing on the property because you have a guarantee of payment.

**"Pay-if-Paid
Clauses":**

It is common for contractors to include in their agreements with subcontractors a provision in language similar to the following: "It shall be an absolute condition precedent to the obligation to pay subcontractor, the receipt of monies from the owner. Unless and until paid by the owner, no money shall be due or payable to the subcontractor." In 1997, the California Supreme Court held these clauses void. It would also appear that clauses holding back the 10% retention from subcontractors until 36 days after the recording of a Notice of Completion would also be void. This would have the effect of forfeiting a person's lien rights first, and then, and only then, having a right to payment (but the lien has to be filed within 30 days of recording the Notice of Completion). It is now an open question as to whether other provisions, including giving a general contractor a certain period of time before having to pay the subcontractor, are valid, and we will simply have to wait for direction from the courts.

**Prompt Payment
Statute:**

California has various statutes requiring the prompt payment to a general contractor, subcontractor, or supplier. As to retention, the owner is required, within 45 days after completion, to pay the retention to the contractor. For purposes of this statute, a Certificate of Occupancy is "completion". Within 10 days of receipt, the general contractor must pay all of the subs their portion of the retention, unless there is bona fide dispute between a general and a subcontractor as to the amount owed. But the general may not withhold more than 150% of the disputed amount. For example, if the general claims back charges to repair of \$2,000, there cannot be a withholding of more than \$3,000 from the retention. If payment is not made within the 10-day period, the general can be assessed 2% per month as a finance charge in lieu of interest, plus reasonable attorney's fees.

As to progress draws, the general must be paid by the owner within 30 days of an invoice or demand for payment, unless there is a good-faith dispute. Again, there cannot be withheld more than 150% of the disputed amount. Failure to so pay will subject the owner to a 2% per month penalty as well as reasonable attorney's fees.

***Mechanic's Lien
Contents:***

The standard forms on this module provide all the information you need to properly fill out the lien. In so doing, bear in mind that you need only insert the name of the owner or "reputed owner". If you are told, for example, that the husband is the sole owner, it is okay if the wife is not named, as long as you are reasonably relying upon the information given to you by others. However, you must name the wife in your lawsuit to foreclose.

In California, there is no requirement of providing a legal description – a common street address is sufficient.

Lien Waivers:

There is a major difference between a lien waiver and a lien release. The latter applies only if you have recorded a mechanic's lien and are later paid. You are required to record a lien release showing the lien has been discharged and satisfied.

Lien waivers, on the other hand, are signed before you record your mechanic's lien. To the extent of a payment, whether a progress draw or final payment, they release your **lien rights** that you may have in the future. In other words, it prevents you from later filing a mechanic's lien for the amount you have waived.

There are four forms of lien waivers. You **MUST** use the standard forms. They are mandated by the California statute. If you do not use a standard form, the lien waiver will be invalid and will not waive any lien or stop notice rights. The types of statutory lien waivers are as follows:

1. Conditional Waiver and Release Upon Progress Payment
2. Unconditional Waiver and Release Upon Progress Payment
3. Conditional Waiver and Release Upon Final Payment
4. Unconditional Waiver and Release Upon Final Payment

The way they work is quite simple. When you receive your first progress draw, you will sign and return Form No. 1. It says you are waiving your lien rights to the extent of the payment if and when the payment clears the bank. When the next progress draw is due the following month, you would have cashed the previous check by then and you will sign Form No. 2 as to the first payment. You will then sign another Form No. 1 for the second payment. You then repeat the process all the way to the end. At the end of the project, you will sign Form No. 3, also conditioned

upon the check clearing the bank. Once it clears, you then sign Form No. 4.

Whatever you do, do not sign these forms unless you receive a check for the correct amount. You do not have to insist upon a cashier's check because the conditional waivers are contingent upon the monies clearing the bank. **NEVER** believe someone when they try to convince you that the owner or general contractor requires an unconditional progress or final payment waiver before releasing monies and paying you. Simply refuse to sign such a form and direct them to the statute. And, **NEVER** hold off recording your lien because someone tells you they can get you paid sooner if you do not record such a form. This is a prescription for fraud.

LAWSUIT TO FORECLOSE LIEN

Introduction: Your lien is not valid forever. Because it directly affects the owner's title, it has a limited shelf life and must be enforced within a short period of time. That enforcement is done by filing a lawsuit to foreclose. Just like the time deadlines for a Pre-Lien or Mechanic's Lien, the courts strictly construe these time limits which are called statutes of limitation. Again, if you are literally one day late, the lien is ineffectual.

When: Within 90 calendar days (not 3 months) of recording your mechanic's lien. Do not count the first day, but count the last day, unless it falls on a weekend or holiday, at which time you have the next business day to bring your lawsuit.

If you fail to file the lawsuit within 90 days of recording the lien, all is not lost. If the project has just recently been completed after your original lien has expired, you can record another lien, as long as it is within the required time period. In other words, just because one lien has expired, another will not, if it is still recorded within the overall time period. The only exception is if the court has ordered a previous lien taken off the property, there is some authority that you cannot re-record the lien and then bring the lawsuit.

Where to File: In the superior court of the county in which the project is located. Unfortunately, you cannot foreclose a lien in Small Claims Court (jurisdiction up to \$5,000). File in the superior court, unlimited jurisdiction, if your claim is above \$25,000. If it is below \$25,000, file in the superior court, limited jurisdiction, both in the same county.

Arbitration: Many construction contracts state that all disputes will be decided by binding arbitration, as opposed to a court proceeding by judge or jury. In fact, it has long been a tradition to do so in the construction industry.

Arbitration is usually quicker and less costly, especially because it cuts down on expensive discovery. The decision is final and binding, with no right to appeal. You lose your right for a jury trial, but few contractors want that in the first place. You usually pick an experienced construction attorney or retired judge to hear the case in their conference room. It is just like a court proceeding with the same general rules of evidence, but more informal.

On the other hand, you can only foreclose your lien through a court proceeding, not arbitration. So, how do you keep your arbitration rights and at the same time preserve your lien rights? Simple. You bring a lawsuit to protect the lien and then immediately request the court to stay the court proceedings. When arbitration is done, you go back to court and turn the arbitration award into a judgment.

Breach of Contract:

If you have failed to perfect your mechanic's lien, you can always sue the party with whom you have a contract personally. This means that the general can sue the owner personally and the subcontractor can do the same against a general contractor. When a judgment is entered, this will be a lien against their property which is similar to a mechanic's lien, so all is not lost. So, the general has a cause of action for breach of contract personally against the owner as well as the owner's property in the foreclosure of a mechanic's lien. A subcontractor has a personal action against the general, but only a right to foreclose on the property against the owner and can never hold the owner personally liable.

What if I Hear or Receive Notice of Bankruptcy?:

A. Owner's Bankruptcy. If you are a general or sub/supplier, and either hear or receive notice of the filing of a bankruptcy by the owner, what should you do? Section 362 of the Bankruptcy Code places an automatic stay at the commencement of filing as to any collection actions, especially lawsuits. This also means you cannot take any steps to collect, including hiring an attorney, writing demand letters, attaching property, or the like. However, you are allowed to record a mechanic's lien to protect your time limits. But, you cannot bring a lawsuit to foreclose the lien in state court. If you have recorded your lien, you will be considered a secured creditor and have preference over unsecured creditors when it comes for distribution. But do not get your hopes up because there is rarely any money paid in bankruptcy to a lien claimant. You will receive a blank Proof of Claim from the bankruptcy court, and you should fill this out and send it in to the bankruptcy clerk.

If the bankruptcy is completed and the owner gets a final discharge of debts, you are pretty much out of luck. But, if the owner decides to drop or voluntarily dismiss the bankruptcy on their own accord, you will then

be able to start or complete your foreclosure proceedings. You do not have to worry about the time limits in bringing a foreclosure action because it is “tolled” or frozen during the pendency of the bankruptcy. So, if you had two months left on the time to file a lawsuit when the bankruptcy was commenced, after dropping the bankruptcy, your time will start where it left off under that two-month period. You can also start your foreclosure action if the bankruptcy court or trustee dismisses the bankruptcy proceedings against the owner. In many cases, this applies if the owner has acted in bad faith, abused the bankruptcy process, or filed false statement in his or her bankruptcy schedules.

Even with the owner’s bankruptcy, you can immediately sue the general contractor (or the subcontractor if you have a contract with that person) for breach of contract in state court. Since the general contractor has not filed bankruptcy, nothing prevents you from doing this, even though the owner’s bankruptcy is pending. You have two years on an oral and four years on a written contract to sue the general contractor or subcontractor.

B. General Contractor’s Bankruptcy. If the general contractor files bankruptcy (or a subcontractor if you have a contract with that person), you are precluded from bringing a lawsuit for breach of contract and can only file a proof of claim and hope to get some monies in the proceeding. The general rule is that you would be free to sue the owner in state court on the foreclosure of a mechanic’s lien. But, unfortunately, there are some exceptions. Some federal circuits state you cannot foreclose the lien against the owner’s property while the bankruptcy with the general contractor is pending. This is based on the theory that the mechanic’s lien depends on how much is actually owed from the general contractor, and that will not be determined until the bankruptcy is concluded. Not all courts uphold this view, but be careful of this exception. You will definitely need competent bankruptcy counsel to help you. Go ahead and sue the owner to foreclose the lien and wait for them to bring up this defense.

C. Special Problems if the Tenant Files Bankruptcy. There are even more complications if your contract is with a tenant. Assume you perform major remodeling services to the kitchen of a hospital. Your contract is with the long-term tenant and not the owner. The tenant fails to pay you and then files bankruptcy. You submit your Proof of Claim in the bankruptcy proceeding, but also start a state court action to foreclose the mechanic’s lien against the owner. The owner goes to state court and requests the judge to hold off until the bankruptcy is determined. Unfortunately, there is some law to this effect and you should also be careful in this area of the law. Again, seek competent bankruptcy counsel and go ahead and file your foreclosure action and wait for them to bring up this defense.

***If I Don't File My Lien
Or Lawsuit on Time,
Can't My Lawyer
Argue the Equities
or Come Up with
Some Kind of
Technicality?***

Nice try! Mechanics' lien laws are very picky – you are either in the box or not. They are strictly construed by the courts and they show no forgiveness. We are all aware of equitable principles of fairness that apply throughout the law. And, how could we forget the numerous technicalities that an inventive lawyer could come up with. It won't work in these cases. A subcontractor attempting to go against an owner after an invalid lien under esoteric theories of common counts, quantum merit, unjust enrichment, promissory estoppel, constructive trust, and equitable liens have, for the most part, fallen on deaf ears.

Extensions:

What if you are in the process of negotiating with the owner or general contractor and need more time to bring your lawsuit? Many times neither party wants to bring the lawsuit because of the time and expense. On the other hand, you can risk losing your mechanic's lien if the lawsuit is not brought within 90 days of recording the lien.

California Civil Code §3144 allows you to extend up to one year the time period in which you can bring a lawsuit. The only rub is that the owner (or general contractor as the agent) is the only one who can record the extension. You cannot do it yourself without their permission. And, you can only record the extension if the 90-day period has not expired for your foreclosing the lien.

Need a Lawyer?

In this country, every individual has the statutory right to represent themselves. This means they can prepare all necessary papers, appear at hearings, and actually try the case. In so doing, the court considers you to be acting either in "*pro se*" or "*pro per*". Before making this decision, consider the following factors:

1. You are a professional and thoroughly know the ins and outs of not only the construction industry but of the project itself. The best lawyer on his or her best day will probably not know more than 50% of what you know.
2. How is your public speaking abilities? If you are uncomfortable speaking to a group, you will even more uncomfortable in court or arbitration. You could be the "sharpest wit in town" but may not be able to present your arguments. Remember, appearing uncomfortable is perceived as having deficiencies in your case. People usually think if you are not comfortable about your own facts, they must not be that strong.

3. If the other side has a lawyer, you might want to think twice about representing yourself. You will certainly know the facts quite well, but you may be blindsided by legal technicalities.

4. You may also want to think twice if this is a really nasty and emotional case. In other words, if the other side is going for “blood”. Having a lawyer can shelter you from this emotional trauma. No matter how strong you are, lawsuits are taxing not only on your time, but on your physical and emotional energies.

5. If you have a good case in which you have complied with technicalities and performed good work, you are essentially engaging in a collection action. These actions are typically very simple because there are few defenses or defects alleged by the other side. It makes it easier for you to represent yourself because it is more a question of when and how much they will pay as opposed to whether you will win at all.

6. If you have a binding arbitration provision, you may consider representing yourself. These proceedings are much more informal and the arbitrator tends to give you more leeway. There are also fewer rules and not they are usually not quite as strict.

7. You could consider representing yourself but get advice along the way from a lawyer. It is much cheaper that way. On the other hand, the lawyer cannot watch over every move and you might slip up. Many times lawyers can also help you with preparing the forms, simply putting your name on the pleading. You can also bring in your lawyer at the end to actually try the case.

8. Judges and courts do not give legal advice. They only help you with what forms to use. However, clerks can be invaluable in steering you in the right direction as far as where to file, time limitations, the nature of the form or pleading, etc. But, remember when it comes right down to the ultimate advice, they cannot help you.

9. Judges usually treat you the same as an attorney which means they expect strict compliance with the rules. Although some judges give you more slack, don't count on it.

10. The biggest dilemma is whether you should hire an attorney for a smaller case, typically in the \$5,000 to \$10,000 range. You have to watch this because you may eat up that amount in attorney's fees. *You* never make money on lawsuits, only lawyers do. Try to settle for the best price you can get and move on.