

OHIO MECHANIC'S LIEN LAW
Reviewed Thru 2012

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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.

In Ohio, this means you will be writing down dates for at least four documents: a) Request for a Copy of a Notice of Commencement; b) Notice of Furnishing; c) Affidavit for Mechanic's Lien; and d) Lawsuit to Foreclose 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 and doing it at the last moment, as opposed to doing it early.

NOTICE OF COMMENCEMENT

The classic problem that has plagued construction projects throughout the country is the frustration to owners and general contractors who receive mechanic's liens from persons or firm they did not know existed. Obviously, if you do not know who a sub-subcontractor or a materialman to a sub is, not to mention how much they are charging, it is hard to protect yourself. On the other hand, those persons have every right to file a lien because they directly contributed to the value of the improvement. Each state has attempted to solve this problem differently. Ohio does it by requiring the owner to record and post at the job site a Notice of Commencement which is chock full of all the information a potential lien claimant needs to notify everyone of their existence and the possibility they might file a lien. Thus, the Notice of Commencement has such information as the full description of the property; the name and address of the owner, the owner's designee (if different); and the name and address of the general contractor, lender, and surety company.

In exchange, subcontractors and suppliers must then notify the owner, and usually the general contractor, of their existence through a Notice of Furnishing.

**Who serves
the Notice:**

The owner or agent. General contractors may also file the Notice of Commencement if the owner does not do so within 10 days of the start of the project. Alternatively, the general may record the notice if the owner does not do so within 3 days of receiving a written request to file the notice.

**On What Kinds
of Projects can
the Notice of
Commencement
be Filed Upon?:**

On any construction project except home improvement or oil/gas development projects. Further, some utility companies can at least partially exempt themselves from this requirement.

**Can the Notice
be Amended?:**

Only one Notice of Commencement is required. However, the owner must record an Amended Notice if the original general contractor is replaced or if there are new lenders or surety companies. The amendment relates back to the date the original notice was filed and subs/suppliers do not have to give another Notice of Furnishing as a result of the amendment.

When?:

Before any work or material is provided to the job site.

**How the Notice
is Served:**

The Notice of Commencement must be filed with the Recorder's Office. But, subcontractors and suppliers really get their notice after it is posted on the job site. And, the owners are required to give copies to each contractor or supplier with whom they have a direct contract. So, if you are a general contractor, or even a sub with a direct contract with the owner, you will get a copy. Owners are also required, within 10 days of request from a subcontractor, supplier, or laborer, to send out a copy of the notice.

If you have a direct contract with the owner, you will get a copy of this notice. In turn, if you receive a written request by a subcontractor or supplier, you are required to send a copy of the notice within 10 days.

PRELIEN NOTICE

This state requires a Notice be sent out before the mechanic's lien is filed/recorded. The basic information on this Notice is as follows:

Name of Notice: Notice of Furnishing.

**Who Must Use
this Notice:**

All 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.

The Notice of Furnishing is **not required** in the following instances:

1. Residential/home improvement construction, which is defined as single or double family dwellings. This applies whether or not a Notice of Commencement has been filed.
2. Laborers are not required to serve the Notice.
3. On commercial projects, if a Notice of Commencement has not been filed and served.

The Notice **is required** in these cases:

1. Commercial projects when a Notice of Commencement has been filed and served.
2. Residential subdivisions, condo projects, or multi-unit residential of three or more structures if a Notice of commencement has been filed and served.

When:

See **Time Deadlines** table. Within 21 days after the date on which the subcontractor or supplier first furnishes labor or materials to the site. The notice can be served later, but any lien will cover only the unpaid services within 21 days of service and everything in the future after service.

As mentioned, there is no obligation to serve the Notice of Furnishing unless or until the owner files the Notice of Commencement. If the Notice of Commencement is filed late, the 21-day deadline does not begin to run until the actual filing of that Notice of Commencement. And, if the owner fails to send a copy of the Notice of Commencement within 10 days after a written request from a subcontractor/supplier, the Notice of Furnishing need not be sent out until 21 days after receipt of the Notice of Commencement.

If you are uncertain or have not received the information contained in the Notice of Commencement, it is always a good idea to request a copy from the owner by giving ten day's written notice. By statute, the owner must give you a copy of the notice within 10 days. Note that the request is sent to the owner, not the general contractor.

An example of how technical courts can be in construing mechanic's lien statutes, is the recent case of Halsey, Inc v. Robert J. Isabel (2010—Ohio—2052). A supplier's Notice of Furnishing was held invalid, forfeiting their life right to a lien, because it was mailed one day before furnishing the materials. The absurdity of such a ruling is beyond belief, but it does confirm the need to follow these rules strictly by the letter. Make sure you serve the Notice after first furnishing.

How to Serve:

Serve by certified mail, return receipt requested. There are also other ways of serving, including personal service through a process server, service through the sheriff's office, etc., but certified mail is the simplest. If you have a contract with the prime contractor, you need only serve the owner. If you do not have a contract with the prime contractor, you must serve the general contractor and the owner.

Form and Content:

The Notice must be in writing. State law pre-determines its content and you must include certain mandatory language. Because of this, by far the best approach is to use a standard form so you do not leave out the required information. To have this form prepared now online, see the list of forms at the end of this section.

Verified or Notarized?:

A **verified** notice simply means you sign it and are representing the contents are true and accurate. A **notarized** notice is signed

in front of a Notary Public or other official. The notice need not be **notarized** or **verified**.

Who is Served:

Unlike mechanics' liens (to be discussed later), which are very strict as to who is to be served, prelien notices have much more relaxed requirements. You are to serve the owner or the "designee". The "designee" who might, for example, be an architect, will certainly be described in the Notice of Commencement so you will know who it is. If there is more than one owner, you can merely serve the first owner listed.

MECHANICS' LIENS

Who is Entitled to a Lien:

A mechanic's lien is primarily for general contractors, subcontractors, laborers, as well as material/equipment suppliers. But it also covers construction managers (if they have a direct contract with the owner, they are considered "general contractors" for purposes of liens). It also covers companies that supply gasoline, lubricating oil, petroleum products, powder, dynamite, blasting supplies, tools, equipment, or machinery.

As to material suppliers, most states require the material to be actually consumed or incorporated into the structure. However, Ohio is much more liberal and there is a conclusive presumption that if the material is delivered to the job site, a lien applies, even if it is not actually used or consumed in the construction, and it does not make any difference if the materials came from out of state or were delivered by someone else other than the supplier, such as a trucking company.

But Ohio draws the line and prevents a lien if a supplier supplies material to another supplier as opposed to a subcontractor. On the other hand, material supplied to a subcontractor would qualify. For example, if a lumber mill sends material to a cabinet shop who both furnishes the cabinets and installs them, the lien will apply because the cabinet shop is performing work as a subcontractor. But if the cabinet shop simply supplied the cabinets and the general contractor's crew installed them, the lumber mill would have no lien rights.

When to File/ Record:

See **Time Deadlines** table. The mechanic's lien is titled, "Affidavit of Lien", and the same form is used by general contractors, subs, and suppliers. All these persons have the same amount of time to

record the lien. The time deadlines depend upon the type of project as follows:

- A. Within 60 days of the date the claimant last furnished labor or materials, as to a one- or two-family dwelling or a residential condominium unit. For subs and suppliers, it would be the last day on which your company furnished the labor and materials. As to general contractors, since they have a contract to perform the entire contract, it would be the last day on which any of the trades working under them furnished any labor or materials.
- B. Within 120 days of the last furnishing labor or materials to an oil or gas well project.
- C. Within 75 days of the date of the last furnishing of labor or materials on any commercial or industrial project.

As far as subdivisions, Ohio is very liberal and if you have contract covering two or more units, the time starts ticking on the last day of work on any of the projects.

If the project is abandoned or ceases active operations, the time period temporarily stops to give the lien claimant a reasonable time to figure out whether the project will start again. But remember, you should quickly file your lien once it becomes evident it is the owner's or general contractor's intention to start work again.

In calculating the time, exclude the day on which the last work or material was furnished and then count the 60, 75, or 120 days. If the last day falls on a Saturday, Sunday, or legal holiday, you get until the next business day.

But how does one determine the last day of furnishing labor or materials? Specifically, how do punch list and warranty items affect the time? The Ohio courts have given us the following guidelines:

- A. If the last amount of work is trivial in comparison to the overall contract, some courts say it extends the time and others that it does not. An example would be installing soap dispensers in the men's room in a ten-story office building. They may be part of the contract, but they are rather trivial. There is no definitive ruling as to this factor.

- B. If the owner requests the additional work, even though trivial, many cases allow the time to be extended.
- C. “Warranty or call-back” work pursuant to a punch list, namely, re-doing what you have already installed, will probably not extend the time. There are number of cases that say the repair or replacement of defective work will not extend the period. However, if you are not finished with the project and are in the process of making repairs or replacements, this may extend the time period. For example, assuming the interior painting is done followed by installation of the hardwood floors and carpet. During that process, there are some nicks and scrapes which are touched up. These are normal repairs in order to produce a finished project and would probably extend the time. However, if one installed a door knob to a garage door improperly, causing it to be loose and inoperative, replacing it would be warranty work, not extending the time. And, you cannot simply go back to the project and install some “freebies” that are outside the contract in order to extend the time.

If you are supplying materials, you can lump together all of them in one lien with the time beginning to run as of the last delivery. If you are a supplier shipping the materials, the period starts when the materials are placed in the hands of the shipper.

***Where to
File/Record:***

The County Recorder for the county where the project is located.

How to Serve:

Serve the lien on the owner, all part-owners, or tenants who entered into a contract for the work, or their designee described in the Notice of Commencement within 30 days of recording. The common method is to send the original lien to the Recorder’s Office and at the same time, send by certified mail, return receipt requested, to the owners and tenants. If you do not have a good address, one can post the lien on the job site between the 31st and 41st days following recording the mechanic’s lien. But, you have to use some due diligence first before giving up and claiming you do not know the address.

Ohio is very strict in requiring that all the owners or tenants be served, including part- or co-owners and spouses. When I doubt,

serve everyone. This is because the lien is only good against the persons being served. If you only serve one co-owner, the lien will not be valid for all interests in the property.

***Amount of
Lien:***

Primarily for unpaid labor, material, and equipment supplied. Also includes interest if the lien claimant, whether as a contractor or supplier, that has a direct contract with the owner.

Under previous law, if a material supplier supplied material to the site on an ongoing basis to different contractors under different contracts, only one mechanic's lien could be filed. As of 2007 this was changed to allow the supplier to file multiple liens if the materials are sold to more than one contractor or subcontractor.

***Property
Subject to
the Lien:***

A mechanic's lien applies only to private projects. No lien is allowed in public projects against government property. In tenant improvement work, the lien only applies to the interest of the tenant, since the lien only attaches to the interest of the contracting party.

***Contents of
the Mechanic's
Lien Form:***

Ohio is very strict in how the mechanic's lien form is filled out. Some of the more important requirements are as follows:

- A. The amount. Obviously, you must insert the true amount. However, the lien is not invalidated if the court later determines it is a lesser amount (based upon defenses or set-offs at trial) if it was not filed in bad faith. Although an itemized breakdown is not required, the better practice is to include a short accounting, including the amount of the contract, adjustments, change orders, and partial payments to date. Partial payments or set-offs should be separately stated or indicate no partial payments have been made.
- B. Property Description. Obviously, failing to describe the property at all will invalidate the lien. Ohio is a bit more liberal in this area, allowing you to put either the legal description, common street address, or even the

physical characteristics. Most problems arise with new construction when a common street address has not yet assigned. The physical characteristics could possibly be something like: "At the intersection of Main and Elm Streets, Anytime, USA", but I would not take the chance in being that vague. The best practice is use the description that is in the Notice of Commencement.

- C. Owner's Name. This is one of the strictest requirements. You must list all owners, part owners, co-owners, and tenants who entered into the contract for the work. If you leave someone off, the lien will not go against that person's interest. Making matters worse, you have to accurately describe the nature of the owner's interest, whether as long-term tenant, fee-simple owner, etc. Courts have even said that a false description of the lien claimant's corporate status will invalidate the lien.
- D. Who Signs? Ohio is somewhat liberal in this regard, allowing either the claimant, agent who has knowledge of the facts, or even the claimant's attorney to sign. An office manager or supervisor would qualify.
- E. Amendments. If you file your lien and later find out that there is incorrect information after receiving the Notice of Commencement, by all means file an amended lien. You have plenty of time, as much as 6 years.

***Furnishing
Information:***

Upon request, the general should furnish others with information about the owner so the required notices and lien can be filled out properly.

***Verified or
Notarized?:***

A ***verified*** notice simply means you sign it and are representing the contents are true and accurate. A ***notarized*** notice is signed in front of a Notary Public or other official. A ***notarized*** and ***verified*** notice is required in this state.

**What if the
Certified Mail
is Returned?:**

If the addressee refuses to sign for the certified mail, it is nevertheless considered served as of the date on which it was mailed. To be safe, you should also send a copy by regular mail, since it does not need to be signed to be received.

**Joint
Checks:**

The owner, general, and subcontractors have the option of making payment to subcontractors and suppliers directly or through joint checks, assuming those persons have served Notices of Furnishing. On the other hand, it is probably not a good idea to do so unless there is some substantial delinquency or reason to believe payment will not filter through. After the payment is made, it will be a deduction on the next progress draw payable to that subcontractor or supplier. The point is, you do not have to have a contractual provisions to do this, it is state law.

**Notice of
Commencement:**

As stated above, if the owner or general contractor files a Notice of Commencement, this means that on commercial projects the subcontractors and suppliers are required to serve the Notice of Furnishing. But, the service of the Notice of Commencement has always been voluntary. Specifically, under previous law, residential homeowners were exempt from filing that Notice. In 2007, the law was changed, such that a residential homeowner **may** file the Notice of Commencement when the construction lender requires it. Frankly, most homeowners will file that Notice if they are requested to do so.

The good news is that from a subcontractor or supplier standpoint, it doesn't make any difference on residential property whether the Notice has been filed because there is no requirement whatsoever to serve the Notice of Furnishing on such residential property.

The law also changed in 2007 in the sense that the Notice of Commencement will expire six years after its filing.

Lien Releases: Be careful if you have filed a mechanic's lien and later receive full payment. If you receive a notice to release the lien and do not do so within 30 days, the penalties are quite severe as of 2007. You are liable for all damages arising from the failure to release the lien, including court costs and attorneys' fees in any subsequent litigation.

Priorities: In the law of Mechanic's liens, there is always a battle brewing between the construction lender and the contractors who are enforcing their lien. The question is: if the property is foreclosed, who gets the first shot at receiving the proceeds? If the construction mortgage has been recorded before the Notice of Commencement, the bank will win. But what if the mortgage and the Notice of Commencement are filed the same day? As of 2007, to no one's surprise, the mortgage will be considered recorded first.

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 6 years of the recording of the mechanic's lien. However, this almost never happens because if a general or owner makes a written demand upon you to start suit within 60 days, you must do so or lose your lien.

Where to File: In the county where the property is located.

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.

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 that if you are not comfortable about your own facts, then 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.