OREGON MECHANICS' LIEN LAW
With Changes Made in 2010

Section Contents—Pre-lien Notice(s)

Section Contents—Mechanic's Lien

Section Contents—Lawsuit to Foreclose Lien

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 Oregon, this means you will be writing down dates for at least three documents: a) Notice of Filing Claim of Lien and Notice of Intent to Foreclose; b) Claim of Construction Lien; and c) lawsuit to foreclose the Claim of Construction 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.

PRELIEN NOTICE

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

Name of Notice: Notice of Right to a Lien.

Who Must Use this Notice: This prelien notice is only required on residential projects. If the project is commercial, light commercial, or industrial, no such prelien notice is required by any claimant. The prelien notice is required on residential projects for 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.

"Residential" is defined as new construction or improving existing residences, together with adjacent areas and appurtenant structures, such as driveways, pools, terraces, patios, fences, porches, garages, basements, and related structures.

On commercial projects as of 2006, the only persons who are required to serve the prelien notice are material and equipment suppliers who have a contract with either the general or a subcontractor. If such suppliers deal directly with the owner, the notice is not required. As a result, subcontractors who supply both labor and materials are not required to serve this prelien notice on commercial projects.

When: See **Time Deadlines** table. It can be given at any time during the progress of the construction. There is no set time limit and it can be served at any time. However, it is prudent to serve early—your future lien rights include unpaid labor and materials furnished within 8 days of servicing the notice. The longer you wait, the less you can claim in that later lien. For example, assume you have worked and have been unpaid for the entire months of March and April. You serve your pre-lien on May 1st. You can only include, in a later filed lien, the unpaid period (8 days before serving the notice) of April 23 through April 30.

How to Serve: Serve by certified mail, return receipt requested.

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 lien claimant, or anyone in his or her office, can simply sign the notice and it need not be ***verified*** or ***notarized***. Note how this is different from the Claim of Construction Lien which must be notarized.

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 trucking companies that transport materials, trustees of an employee benefit plan (union fringe benefits), design professionals, such as an architect, landscape architect, land surveyor, or registered engineer, a draftsman who prepares plans, drawings, or specifications, persons who supervise the construction, landscaping or preparation thereof, and even persons who improve and/or repair the equipment that is used for improving the property. For a design professional to be entitled to a mechanic's lien (architects, engineers, and land surveyors), on a residential project, there must be a direct contract with the homeowner. For example, if an architect has a contract with the general contractor only, that design professional would not be entitled to a mechanic's lien.

For this reason, a design professional should strive to have their contracts made directly with the owner of residential property. As to non-residential property, including commercial and industrial, the same rule would not apply.

Unlike other states, in which the list of possible claimants covers almost any person or entity who aides in the construction, only the person specifically described in this section are entitled to liens, and no others.

Notice to Owner:

After filing your lien, you must give the owner notice of the filing and attach a copy of the lien. You then have 120 days to file a lawsuit to foreclose that lien. In turn, you must give the owner a "warning shot" before filing the lawsuit—ten days before bringing suit you must give notice of your intent to bring that lawsuit. The customary and recommended practice is to combine these two notices into one form. The form on this site does just that and is titled: "Notice of Filing a Claim of Lien and Notice of Intent to Foreclose". That eliminates the need to calendar twice and perform two deliveries. It also prevents one from forgetting to send out the second notice. The failure to deliver the Notice of Intent to Foreclose does not mean you lose your lien rights, but you cannot recover later in the lawsuit your court costs and attorney's fees, which can be substantial. And, giving the owner notice of your intent to being a lawsuit does not mean you have to run out and file the action shortly after giving that notice. You have 120 days after filing your lien to bring the lawsuit and the notice must be given

to foreclose ten days before filing the lawsuit. So, serving the dual notice satisfies both requirements and gives you ample time to negotiate or secure payment.

When to File/ Record:

See **Time Deadlines** table. As seen in that Table, the 75 days in which to file a mechanic's lien is not extended for "trivial" additional construction. In other words, if there are very small items that still need to be done, this does not extend the time limit. Also, the time will not be extended for "call back" or "warranty" punch list items in which you are simply re-doing labor/materials already furnished.

Where to File/Record:

Record the Claim of Construction Lien with a recording officer for the county in which the improvement is situated. Recording officers have a special "Construction Lien Book" in which the liens are placed and become a matter of public record. The statues do not require the recording (only service) of the "Notice of Filing a Lien and Notice of Intent to Foreclose."

How to Serve:

Filing the lien is one thing—you also have to serve the owner. This is done with the form titled: "Notice of Filing a Claim of Lien and Notice of Intent to Foreclose". There is somewhat of a grey area on how to serve. Oregon statute 87.018 states that such notice is "delivered" to the owner and then states this can be done by either 1) personally serving the owner by hand or 2) mailing by certified mail. Under 1), you would normally give it to a process server for personal service (costs about $50). As to the Notice of Intent to Foreclose, Statute 87.057 mentions only "delivery" (which would presumably mean certified mail as in 87.018). As to the Notice of Filing Claim of Lien, Statute 87.039 allows "mailing". But some attorney's think it requires personal delivery. So, to be safe, consider personal service. It also has more potency—getting served might confer a degree of seriousness and may help your negotiations for payment. In any event, after filing your lien, mail the dual "Notice of Filing a Claim of Lien and Notice of Intent to Foreclose" within 20 days.

Amount of Lien:

Primarily for unpaid labor, material, and equipment supplied. The amount of the lien must be the dollar owed after deducting all credits and offsets. To be safe, it is a good idea to include a "mini-accounting" in the Claim of Construction Lien which has the contract price, less credits and offsets, and then the balance on the contract. However, merely a statement of the balance without this accounting is legally valid.

Oregon is very strict in including only the correct amount owed. The entire lien becomes unenforceable and void if the amount includes "non-lienable charges". This would include amounts other than the balance under the contract or change orders such as breach of contract damages. For example, a claimant could not put in the lien amount anything that represented lost profits on the project. Since it is hard to argue that including such amounts was unintentional, the courts will be prone to void the entire lien. However, putting down the wrong amount unintentionally and without culpable negligence does not void the lien. If you made an innocent accounting error or put in more than what you eventually get at trial, after the court determines various defenses, your lien would still be valid. This is especially true if the over-stated amount does not prejudice the rights of the owner.

The general contractor is not required to deduct from his or her lien amount the figures owed to subcontractors and suppliers, whether or not those persons have filed additional liens. So, for example, if the general has a lien of $50,000 which consists of $30,000 owed to subs and suppliers, there is no need to file a lien for only $20,000. The court will "net out" the various amounts so there will not be double recovery at trial.

But, what about including "impact damages" in the lien? This would refer to extended overhead, acceleration costs, overtime, and other matters that the contractor has incurred because of a breach of contract by the owner. Oregon does not allow any of such breach of contract damages to be included in the lien. You can, however, receive those as damages directly against the person with whom you have a contract which can be claimed in the same lawsuit, but it is separate from the cause of action for foreclosure of the mechanic's lien.

The rules are different between a general contractor and subs/suppliers. A general contractor can enforce the lien for the balance under the contract, whether or not it represents the reasonable value of labor and materials. However, subs and suppliers can only get a lien for the reasonable value of their labor, materials, or services furnished, and they have the burden of showing this. However, the claimants are aided by Oregon's rebuttable presumption that the actual cost of the labor and materials conferred on the job are considered "reasonable".

As seen in the **TIME DEADLINES TABLE**, one can file a mechanic's lien only if a prelien has been sent out and the amount in the construction lien covers the unpaid labor and materials performed eight days before and everything after the filing of that prelien notice. As you can see, if you file your prelien notice late, this can cut into the amount of your lien. For example, assume the project starts on January 1, 2004. Services

are for three months, with the last work done on March 31st. Assume the preliminary notice does not go out until March 1st, and you are unpaid for your services from February 1, 2004 through March 31, 2004. Your lien can only include the month of March (periods after filing the notice) and the eight prior days in February (the eight days prior to filing the notice). This means you would be able to file a lien for the unpaid services performed from February 18, 2004 through the present. Note that weekends and holidays are excluded in computing the eight previous days. For material suppliers, therefore, the prelien notice must be delivered no later than eight days after the first delivery of materials to the site.

A subcontractor or supplier does not have their lien diminished by the fact that the general has breached it's contract with the owner. That person has an independent lien right, and any damages for breach of contract by the general will not be deducted from the amount in that lien.

Property Subject to the Lien:

A mechanic's lien applies only to private projects. No lien is allowed in public projects against government property. Liens can also be against the tenant's interest in a lease, as well as condominiums. Further, the lien applies not only to the actual improvements, but the land surrounding the improvements which is necessary for the "convenient use and occupation of the improvement". An example would be a parking lot, bridge, or roadway on the adjacent land which is necessary to use and enjoy the improvements.

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 ***verified*** and ***notarized*** lien is required.

Priorities:

All lien claimants have the same priority amongst themselves. In other words, it does not make any difference whether you are the first or the last to perform services. For example, someone performing grading work at the beginning of the project has the same priority as someone installing carpeting at the end. If the proceeds of a foreclosure sale are insufficient to pay everyone, the claimants share pro rata.

A mechanic's lien is ahead and superior to any mortgages, judgments, or encumbrances which are recorded after the first construction services are performed. Thus, if construction starts with grading and trenching for

foundations on June 1st, and the homeowner takes out a mortgage on June 10th, that mortgage is inferior to or behind any later recorded mechanics' liens. This means that if there is not enough proceeds after foreclosure of the mechanic's lien, that other mortgage holder would receive nothing. For this reason, Oregon has the rule of "first in time, first in right" which means that the persons who record mortgages or encumbrances first have priority. However, as described above, the priority of mechanic's lien claimants starts from the first day of work on the project which is, in essence, considered the date of recording the lien for purposes of priority.

Mortgages are therefore inferior to a mechanic's lien if they are recorded after commencing construction. But there is one exception. For new residential construction (as opposed to repairs, improvements, or add-ons) a mechanic's lien has priority over all mortgages and construction lending, even if they are recorded before commencement of the work. This super priority is to give protection to the contractors who are responsible for improving the value of the property in the first instance.

Completion Notice: The owner, construction lender, general contractor, or their agents can record and post a Completion Notice after the general contractor has substantially performed the contract. The notice is required to be posted in a conspicuous place at the site and within five days of such posting, recorded in the county in which the project is located. Such a Completion Notice is recorded in same "Construction Lien Book" where the county recorder records the lien. After the Completion Notice is both posted and recorded, everyone, including generals, subs, and suppliers, have 75 days thereafter to record their liens.

But what if the project has simply been abandoned and not completed? If the project is abandoned for 75 days, it is considered "completed" and the lien claimants would all have 75 further days in which to record their liens. Or, the owner or agent is not required to wait the 75 days and can immediately record and post a Notice of Abandonment such that everyone would have 75 days thereafter to file their liens.

Condos: A mechanic's lien may be filed for condominium work. For condominiums and s subdivisions, you should consult local legal counsel for more details.

Lien Release Bond: A mechanic's lien may be released and "bonded off" the property by posting a surety bond or cash deposit of at least 150% of the amount of

the lien claim or $1,000, whichever is greater. This is to cover the amount of the lien and the costs and attorney's fees to enforce it. The bond is recorded with the recorder in the county in which the property is located.

After filing the bond or cash deposit, the owner or representative must give lien claimants a "Notice of Filing of Release of Lien Bond" no later than twenty days after the filing or deposit. An affidavit proving this must be filed with the recorder which shows that the lien claimants have received that notice. Thereafter, lien claimants may dispute the amount of the bond, within ten days of receiving the notice, by filing a petition with the court.

Residential Notice:

All general contractors must give residential homeowners a special notice titled, "Information Notice to Owner About Construction Liens" if the contract is $2,000 or more. As to builders who are constructing new residential property, the notice must be given to the homeowners within 75 days by certified mail after completion of the project. If you have a direct contract with the residential owner, it should be included in your home improvement contract. Both the general contractor and the owner sign the form. Failure to provide this notice is severe: The general contractor will not be able to file a lien and could be suspended and/or fined by the Construction Contractors Board. To get the form, go to the web site of www.oregon.gov/CCB>Contractors Forms>Residential Contractor Notices and forms>Information Notice to Owner About Construction Liens.

If the contract is initially less than $2,000 but is later increased, the general contractor must give the Notice within five days of knowing the price has been increased. An example would be executing an additional change order (Oregon Revised Statutes Section 87.093(4)).

Demand for Further Info:

A bank or other person that loans money and has recorded a mortgage and who receives a prelien notice may demand that the material/equipment supplier furnish a list of materials supplied and the amounts due. If not done within 15 days of receiving such a request, that supplier will lose it's priority over the mortgage holder.

The owner can also demand detailed information. After receiving a prelien notice, an owner may make a written demand on a general, sub, or supplier to furnish a list of materials, equipment, labor, and services supplied, together with a percentage of the contract completed and the

charges to the date of the demand. The lien claimant must answer this request and deliver to the owner within 15 days after receipt. If not done, the lien claimant will lose the right to receive attorney's fees and costs if he or she prevails later in the foreclosure action. Remember, this demand can be made on a general contractor, subcontractor, or supplier.

Licensed Status:

A general or subcontractor cannot file a mechanic's lien unless they are registered with the Construction Contractors Board at the time of either bidding or entering into the contract. Further, the contractor must be continuously licensed during the performance of the work.

If you are a general contractor, beware of entering into contracts with unlicensed subcontractors. If you do, the work related to their services cannot be liened.

The same rule applies if you are a subcontractor and part of your work is through another subcontractor who is unlicensed. Further, an unlicensed subcontractor cannot place a lien on residential property.

Stay of Lien—Foreclosure Proceedings:

A common problem on construction projects is the owner paying the general contractor who, for whatever reason, does not make payments to subcontractors or suppliers. Although there could very well be legitimate reasons for not doing so, the Oregon statutes have a special provision if this occurs. The owner may bring a complaint with the Construction Contractors Board and halt any lawsuit to foreclose the lien in the meantime. But this stay of the proceedings can only be done if the owner has paid the contractor for the work upon which the mechanic's lien is being claimed, either by the general or subs/suppliers. This is usually combined with some other violation of the Board requirements. The lawsuit stays on ice until after the Construction Contractors Board makes it's determination and then the lawsuit can continue.

Special Requirements For New Residential Construction:

If you are a general contractor or developer who owns record title to residential property and you sell it to a homeowner, there are special

requirements. This applies if you are a home builder or developer and own the property, as opposed to being a general contractor on property owned by another. Therefore, this applies to spec homes, condos, and subdivisions, not custom homes or remodeling projects. More specifically, it applies to the following situations:

1) The residence is completed within three months of sale to the homeowner. If it is sold after the three month period, these rules do not apply.
2) The project consists of four or less dwelling in units.
3) A sales price of $50,000 or more.

If you are in this category, you must do one of the following:

1) Pay out of your own pocket title insurance covering potential subcontractor and supplier liens.
2) Hold in escrow at least 25% of the purchase price (that is a lot!). This is usually released if there are no mechanic's liens filed within 75 days of completion.
4) Receive final waivers from all subs and suppliers on the project.
5) Alternatively, simply sell the property only after 75 days have elapsed from completion.
6) Receive a signed waiver from the purchaser entitled: "Residential Purchaser Waiver of Mechanic's Lien Protections."

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: 120 days after the claim of construction lien is filed or 120 days after the expiration of an extended payment agreement that must be stated in the mechanic's lien form itself.

Where to File: In the circuit court of the county in which the property is located.

Attorney's Fees: The successful party in a lien foreclosure action gets their costs and attorney's fees.

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 l*awyers* do. Try to settle for the best price you can get and move on.