WISCONSIN MECHANIC'S LIEN LAW
2018-2019

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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 Wisconsin you will be writing down dates for at least five documents: a) Notice to Owner of Lien Rights by Prime Contractor; b) Subcontractor Identification Notice; c) Notice of Intention to File Lien; d) Mechanic's Lien; and e) 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 and doing it at the last moment, as opposed to doing it early.

WISCONSIN PRELIEN NOTICE

Wisconsin requires Notices be sent out before the mechanic's lien is filed/recorded. For simplicity, this notice will be referred to as a "Prelien Notice". There are 3 kinds of notices to be served prior to filing a mechanic's lien. They are broken down into the following categories:

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PRIME CONTRACTOR'S PRELIEN NOTICE

Name of Notice: Notice to Owner of Lien Rights by Prime Contractor

Who Must Use this Notice: All contractors who have a direct contract with the owner. Most commonly, this would be the prime contractor.

When: See **Wisconsin Time Deadlines** table.

How to Serve: Two copies of the notice must be served on the owner. The recommended method is to include the notice in your contract so it is "served" upon the owner at the time you deliver the contract documents. If you do not do this, or if you have a verbal contract, you must serve the notice within 10 days after first furnishing labor and materials on the site.

New Wisconsin legislation in 2006 has now defined how to serve pre-lien notices and the mechanic's lien itself. Service can be made by any of the following means:

1) personal service (handing a copy) either by yourself or through a process server—too expensive and a bit too dramatic (not recommenced),

2) certified mail—the recommended manner,

3) registered mail, or

4) overnight delivery if the person signs for it (UPS, Fed X, etc.)

Previously, notices had to be served by a registered and not certified mail. And worst yet, many attorneys felt obliged to subpoena the actual records of the U.S. Postmaster to verify the registered mail was actually received under the "best evidence" rule.

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*** notice is all that is required in this state.

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Late Notice: If the prime contractor fails to give this notice, or gives it late, you still may be able to file a mechanic's lien. However, you must 1) pay all the obligations to your subcontractors and suppliers within 6 months of the time they last performed services, and 2) this assumes the time for subs to provide their Subcontractors Identification Notices has lapsed and no lien claimant has given such notice (and therefore no lien rights). If all this applies, you can still record your mechanic's lien (779.02 (2) c).

SUBCONTRACTOR AND SUPPLIER PRELIEN NOTICE

Name of Notice: Subcontractor Identification Notice.

Who Must File this Notice: Do not be misled by the name of the notice. Although it appears to apply only to subcontractors, it applies to material and equipment suppliers as well.

Before the 2006 legislation, subcontractors and suppliers on smaller commercial properties were required to serve the notice. The definition of a smaller commercial project was one that was less than "10,000 total usable square feet of floor space". This caused nothing but problems amongst claimants and their attorneys. Did that mean one had two excluded driveways, landscaping, retaining walls, utilities (sewer, gas, water, cable), elevators, and stairwells? Did it mean that you are only measuring the interior room spaces?

Charitably, the Wisconsin legislature in 2006 removed this requirement. Now, any commercial project, regardless of its size, does not require the sub or supplier to serve this pre-lien notice.

Presently, the notice is only required for residential construction of one to four units. Specifically, the notice is **not required** for any of these projects:

A. You are a laborer as opposed to a subcontractor.

B. The job encompasses work on a residential subdivision or condo project of 5 units or more family units.

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C. **Any commercial project**, regardless of size.

D. General contractors or subs that have a direct contract with the owner on a residential or commercial project.

When: See **Time Deadlines** table.

How to Serve: You must serve 2 signed copies of the notice on the owner or the owner's agent. This can now be done by certified mail (see above for methods of service).

It is sufficient if you send the notice certified mail to the last known mailing address of the owner. If you do this, service is still considered complete, even if the person does not sign for it.

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*** notice is all that is required in this state.

Late Notice: If the Wisconsin notice is served late (more than 60 days after the initial furnishing of labor and materials), your mechanic's lien will only be for the unpaid labor and materials you furnished **after** giving the late notice.

NOTICE OF INTENT TO FILE A CLAIM OF LIEN (ALL PERSONS, INCLUDING GENERAL CONTRACTORS, SUBCONTRACTORS AND SUPPLIERS)

Name of Notice: Prime Contractor Notice of Intention to File Claim for Lien and Subcontractor Notice of Intention to File Claim for Lien

Who Must File this Notice: Everyone who plans to file a Wisconsin mechanic's lien must first file this notice. This means that all persons, including general contractors, subcontractors, and suppliers are required to serve the notice. Do not be misled by the notice titled, "Subcontractor Notice of Intention to File Claim for Lien". It applies to both subcontractors and suppliers who do not have a direct contract with the owner.

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When: See **Wisconsin Time Deadlines** table.

How to Serve: One copy is served on the owner, certified mail, return receipt requested (which is the recommended manner). The same discussion, as far as service in the preceding section on pre-lien notices for subcontractors and suppliers, applies.

Although not required, it is recommended that a copy be served on the construction lender, and for subcontractors and suppliers, on the prime contractor as well.

WISCONSIN MECHANICS' LIENS

Who is Entitled to a Lien: New legislation in 2006 now broadly defines the persons who are entitled to a mechanic's lien, including general contractors, subcontractors, laborers, as well as material/equipment suppliers. But it also covers architects, engineers, construction managers, and surveyors, as long as there is some visible construction started. In other words, an architect would not receive a lien if the project never begins.

There is also a broad definition of the materials that are subject to a lien. This includes materials, supplies, tools, fixtures, equipment, machinery, vehicles, as well as fuel and energy (Wisconsin Statute 779.01(2)). Recent additions also allow plans and specifications to be included in the work that is entitled to a lien.

But what if fuel, energy, or tools, for example, are not actually incorporated into the improvement but are "used up" in the construction process? Because of the broader definition of **"used or consumed"** found in 779.01(3), they would also be the basis of a lien.

One of the most significant changes in the 2006 legislation is in the entitlement to a lien for **repairing or remodeling.** Previous law required one to show there had been a permanent improvement to the project, such as adding to a structure or new construction. In other words, if you added a family room to a residence you would be covered but if you replaced the roof it would not. Now one can merely replace or repair existing components.

But what about service contracts? For example, maintaining or servicing an air conditioning system but not replacing it?

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Although on not entirely certain, it appears this would be sufficient for a lien under 779.01(3) which refers to " any work, labored, service . . . "etc.

When to File/ Record: See **Time Deadlines** table.

Performing "call back" work does not extend the lien period. In other words, if you go back to the project and repair or replace what you have already put in, this will not extend the time. The same rule applies to warranty work. However, as long as you are still working on the requirements of the contract, the lien period will not begin to run.

Where to File/Record: Filed with the clerk of the court in the county where the project is located.

How to Serve: Under previous Wisconsin law, there is no requirement to serve the notice on anyone, other than filing it with the court. However, many attorneys recommended that you send a copy to the owner and construction lender, and for a subcontractor or supplier, on the prime contractor as well.

Under the new 2006 legislation, the owner only is required to be served with a copy of the lien within 30 days of its filing by certified mail. This is a mandatory requirement, so please mark it on your calendar. Even better, so you do not forget, simply send it out the same day you have filed it with the clerk.

A Wisconsin mechanic's lien must include an attached copy of the Prime Contractor Notice of Intention to File Claim for Lien/ Subcontractor Notice of Intention to File Claim for Lien and a Prime Contractor Notice of Lien Rights. For subcontractors and suppliers, you should also attach a copy of the previously-served Subcontractor's Identification Notice. It is also a good idea to attach a copy of the "green card" received after sending the notices by registered mail.

Amount of Lien: Primarily for unpaid labor, material, and equipment supplied. All lien rights are independent of each other. This means there is always the danger the owner may pay twice. For example, a subcontractor can file a mechanic's lien even though the owner has paid the general contractor and it has not filtered down to

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that subcontractor. The prime contractor can claim a lien for the amounts owed to subcontractors, even if they have failed to give the proper notice. In addition, a subcontractor can file a mechanic's lien regardless of the prime contractor's lien rights.

Property Subject to the Lien: A Wisconsin mechanic's lien applies only to private projects. No lien is allowed in public projects against government property. Projects owned by non-profit organizations, such as churches, are also subject to a lien.

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?: The lien can be signed by the lien claimant or it's attorney/agent, but it need not be verified or notarized.

Lien Release Bond: An owner can release a mechanic's lien by filing with the court clerk in the county in which the project is located a surety bond by two or more surety companies. The other alternative is for the owner to make a cash deposit into court for at least 125% of the lien amount. The good news is that you are required to be notified of the surety bond or deposit.

Miscellaneous Issues:

No-Lien Contracts:

This is a contract that has a provision stating a general contractor subcontractor may never file a lien in the future, even if work is done and payment is not made! For obvious reasons, such contracts would be against common sense and public policy and so under section 779.135(1) they are void. If such a provision is inserted in your contract, it will not be enforceable.

But Wisconsin goes even further for your protection under (779.03(1)). What if you are a subcontractor and the contract with the owner and general contractor specifies there can be no supplier or subcontractor liens on the project? Because you are

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not a party to this contract and because it also offends public policy, such contracts are also void and the subcontractor or supplier is nevertheless entitled to file a lien for nonpayment.

Exception: If the general contractor furnishes a payment bond, such "no-lien" provisions are enforceable (779.03(2)). This is because the bond allows claims for unpaid services by the subcontractors and suppliers.

Lien Waivers:

As is commonly known, before a general contractor, subcontractor, or supplier receives a progress or final payment, it is typical to sign a lien waiver. That waives any lien rights in the future to the extent of the payment received.

The real question is the format of the lien waiver. In some states the waiver applies even if you do not receive payment, for example if the check given does not have sufficient funds. You basically sign these waivers on a hope and a prayer that you will receive sufficient funds. If you don't get paid, you are basically stuck because third parties have relied on the statements in the waiver.

Wisconsin has a simple solution to this problem under Section 779.05. By law, you can refuse to sign such a waiver unless it is conditioned on receiving full payment. But if you do sign one that unconditionally waives lien rights regardless of payment, you are stuck—no lien can be filed. Your choice. It is basically "buyer beware".

The only good news is if you do sign such an unconditional waiver, under Section 779.05, you waive lien rights but not your contractual right to sue the person you have a contract with (under breach of contract).

The bottom line: you can refuse to sign such unconditional waivers and instead insist on signing a "conditional" waiver. One conditioned on receiving good funds and only waiving lien rights covered under the specific progress draw and the specific description of the work done to that point.

Pay-If-Paid Clauses:

Watch out for these. This is a clause in a subcontract that basically says: "If we don't get paid by the owner, you won't be

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paid." Because it is 100% based upon payment coming from the owner, it is entirely possible you will not be paid, even you performed the work in good faith and the general has a contract agreeing to pay you! Most courts who have addressed the issue find it draconian and void as against public policy. This is especially the case if the owner is not paying because of a dispute with the general contractor of which you have no control. Under Section 779.135 (3), such provisions are void.

Pay-When-Paid:

This is a more reasonable variant of the above. A clause that says to the subcontractor: "We will pay you when we get paid from the owner." In turn, courts have usually interpreted this as enforceable, finding the general contractor obligated to pay within a reasonable time, even if there has been delay in receiving payment from the owner.

These clauses are enforceable in Wisconsin under the same Wisconsin section 779.135 (3).

Amending Your Lien:

Since it is so important to have everything right on your Wisconsin mechanic's lien, including the information provided, you are allowed to amend the lien as many times as you wish as long as it is within the time parameters. In other words, if you find out you failed to include the required information, you can always take care of this technical defect by amending and re-filing the lien.

Trust Fund:

Any monies paid to a contractor or subcontractor are to be held in trust for the sole purpose of paying all claims for labor and materials. If this is not done, it is considered and is punishable as a crime. If the contractor is a corporation or LLC, it is also considered a theft by the officers, directors, or other corporate agents. And, if these misappropriated monies are received as a salary, dividend, loan repayment, or otherwise, any shareholder or officer that is not personally involved in the wrongful act will still be liable civilly to re-pay lost amounts. Further, if someone brings a civil action in court, they will be entitled to treble (3 times) damages as well as the reasonable costs of investigation and litigation, as long as they establish criminal intent.

The only exception is the withholding of monies if there is a bona fide dispute.

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Remember that this statute applies to general contractors and subcontractors. So, if you're a subcontractor and have received payments from the general, you're also duty bound to make payments solely to your Sub-Subcontractors and suppliers on the very job in controversy, and not payments for other purposes or other jobs.

What if There Are Other More Claims Than Money Held?:

If the prime contractor takes out a payment bond, it is to pay for the unpaid claims of subcontractors and suppliers. But what if there are more claims that money's held? For example, assume there is $60,000 retained but $80,000 worth of claims (six people each with $10,000 in unpaid invoices)? If so, everyone is paid an equal proportional share. In this case all six claimants would receive $10,000. This applies to both public and private projects (779.036(4)(a)).

WISCONSIN LAWSUIT TO FORECLOSE LIEN

Introduction: Your Wisconsin 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 2 years after filing the mechanic's lien.

Where to File: In the county in which the lien is filed.

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.

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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

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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.

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