

When payment becomes a sticky issue

As the recession drags on, knowledge of construction lien law is now more important than ever



CONSTRUCTIVE ADVICE

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Editor's note: This is the first part of a two-part series. The second part will appear in the Sept. 18 edition of the Daily Journal of Commerce.

One of the impacts of this recession on the design and construction industry is that payment issues are arising on development projects of all types and sizes. As a result, knowledge of construction lien law is more important than ever for claimants and those defending against claims. This two-part column will address the basics of Oregon construction lien law as well as "traps for the unwary" related to lien claims.

Part I: Lien law basics – Before filing a claim of lien

Oregon Revised Statutes section 87.001, et seq. provides for the "construction lien" to secure payment to those providing labor, design professional services, materials and rental equipment on construction projects. Although Oregon's statutes codified lien legislation, a working understanding also requires knowledge of Oregon's lien case law.

Private projects only. Construction liens secure payment only on privately owned projects. For projects that are partly public and partly private, lien rights apply to the privately owned portion.

Lower-tier claimants have lien rights even if the owner has paid. Oregon is a "direct lien" state, meaning that a subconsultant, subcontractor or supplier having no contract with the owner can assert a lien even if the prime designer or prime contractor for which the claimant worked has been paid.

Connection of lien claimant to owner. Lien claimants are limited to those who have a contractual or other principal-agency connection to the property owner.

Tenant improvement and similar work. A lien of a claimant performing for a tenant or contract-for-deed purchaser generally attaches to the interests of the landlord or contract-for-deed seller unless the latter, within three days after learning of the construction, posts on the property a Notice of Nonresponsibility. However, under certain circumstances when the tenant improvements will benefit the landlord at the end of the lease term, a Notice of Nonresponsibility will not shield the landlord from the lien.

Work on condominium property. Oregon statutes include special language for lien claims on condominium property. Before a condominium declaration is recorded, lien rights on a condominium project are as on any other residential or commercial project. After the condominium declaration is recorded, a claimant work-

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ing on specific condominium units has separate liens on those units and on the parts of common elements appertaining to those units. A claimant working on common elements has separate liens on all units owning the common elements and on the common elements themselves.

Attachment of lien to improvement versus land. A lien for services or work on an improvement generally attaches to the improvement together with such land as the court determines is required for the use and occupancy of the improvement. A lien for services or work on the site, such as surveying, clearing or demolition, generally attaches only to the land. This distinction can be critical in determining the value and priority of a lien compared to mortgage or trust deed interests.

Date of attachment of lien; effect of transfer of title. The date a construction lien attaches to the improvement or land generally is the date the overall construction on the project commenced. As such, any person obtaining an interest in property following the commencement of construction generally takes that interest subject to any liens related to the construction. The date the lien attaches can determine the priority of a lien compared to mortgage or trust deed interests.

Claimant licensing. Contractors and subcontractors must be licensed (and endorsed for the type of construction involved) by the Construction Contractors Board at the time of bidding, offering to perform and performing their work to have lien rights. Architects and engineers must be registered and otherwise authorized to perform their services by their respective state boards of examiners to have lien rights.

Pre-lien notices: residential projects. Certain pre-lien notices generally must be given on residential projects (buildings occupied by the owner comprising four or fewer residential units) for a claimant to have lien rights. An Information Notice to Owner usually must be given by a lien claimant under contract with the residential owner when the contract is signed. Other claimants must give a Notice of Right to a Lien to the residential owner and, to fully protect their rights, must do so within eight business days after commencing performance.

Pre-lien notices: commercial projects. On commercial (non-residential) projects, only material suppliers, and perhaps design professionals, must give the Notice of Right to a Lien to

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the owner. To fully protect their lien rights, suppliers must give the notice within eight business days after commencing performance.

Pre-lien notices: condominium projects. If the claimant's performance is on one or more condominium units, the pre-lien notice requirements are the same as on residential or commercial projects. If the claimant's performance is on the common elements, the pre-lien notice requirements are uncertain. One approach is to send a Notice of Right to a Lien to each unit owner. A second approach is to give an Information Notice to Owner to each unit owner. A third approach is to give an Information Notice to Owner to the condominium association. Consultation with legal counsel is recommended.

Pre-lien notices: enhancing priority of lien. Even if a claimant doesn't need to give a pre-lien notice in order to file a valid lien, most lien claimants – whether performing on a residential, commercial or condominium project – should give a pre-lien notice to lenders with interests in the property in order to protect the priority of the lien versus the lenders' mortgage or trust deed interests.

Owner required to send pre-lien notices to prime contractor. Within 10 days after receipt of a Notice of Right to a Lien, an owner of a commercial project must send to its prime contractor a copy of the notice. Failure of the owner to do so results in the prime contractor being released from indemnifying the owner from liens of claimants performing the prime contractor's work. This owner obligation can be waived by agreement.

Claimant required to provide information upon mortgagee's demand. Within 15 business days after receiving a demand from a mortgagee that received a Notice of Right to a Lien, the claimant must provide a list of the materials to be delivered to the site and the value thereof. Failure to do so results in the claimant losing the right to recover attorneys' fees and related costs in a subsequent lien foreclosure action.

Part two of lien law basics will look at filing and foreclosing a lien.

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