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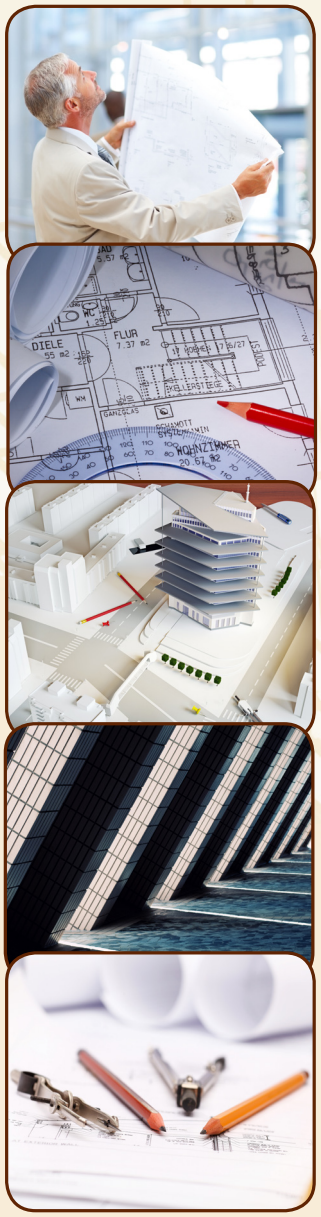

The Construction Lien in Washington

A Legal Analysis for the Construction Industry

2015 EDITION

CONSTRUCTION AND DESIGN

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FOREWORD

For two decades, the standard analytic treatises on construction liens in Washington have been Brian A. Blum's *Mechanics' and Construction Liens in Alaska, Oregon and Washington*, and Michael F. Keyes' *Construction Lien Practice and Procedure Manual for the State of Washington*. Both books continue to repay study, but their latest editions appeared in the mid-1990s. Since then, statutory changes and significant opinions from the Washington courts have created a need for a new summary of lien law. Unfortunately, Professor Blum's academic interests have changed and Mr. Keyes is no longer alive. The authors felt that the solid work of Blum and Keyes would provide a good foundation for a new lien treatise that would reflect legal developments since those works appeared.

With Professor Blum's gracious permission, the authors relied heavily on his work in preparing this book. The authors also consulted Mr. Keyes' treatise, Professor Marjorie Dick Rombauer's outline of lien law in 27 *Washington Practice* § 4.53 *et seq*., and the *Lien and Bond Claims Handbook* prepared by the legal affairs committee of the AGC. Although it relies heavily on these authorities, the current book is new both in organization and in its use of recent case law.

Before presenting this treatise to the public, the authors submitted it for review and comment by three leaders of the construction bar in Washington: John P. Ahlers of Ahlers & Cressman in Seattle, Robert H. Crick of the Robert Crick Law Firm in Spokane, and Kerry C. Lawrence of Schlemlein, Goetz, Fick & Scruggs in Kennewick. This geographically diverse panel of experts provided very helpful comments and their participation is gratefully acknowledged.

We are publishing this treatise electronically both to make it widely available and to allow for periodic updates without the confusion of replacement pages or pocket parts. If any reader finds material errors or omissions in the work, he or she is welcome to contact the authors, who will make needed corrections.

Construction law is a rewarding field practiced by a large number of good lawyers in the state. The authors hope that those lawyers will find this treatise helpful in their work.

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CONSTRUCTION LIENS IN WASHINGTON
Chapter One
—Introduction—

1. Key Terms. The following terms will be used with the following meanings:

"**Claim of lien**" refers to a written assertion of lien rights for work on a specific project. A claim of lien must be recorded to be effective.

"**Common law agent**" means a person authorized to act for another, as determined by the common law of agency.

"**Construction agent**" means a person authorized to subject another's property to a construction lien, as determined by the lien statute. The term is defined in RCW 60.04.011(1) and RCW 60.04.041.

"**Construction lien**" refers to a security interest arising from construction work (furnishing labor, professional services, materials or equipment) to improve private property. Although the Washington statute is entitled "Mechanics' and Materialmen's Liens," the term "construction lien" better reflects the broad range of activities that give rise to liens.[1]

"**Lien claimant**" refers to a person or an entity asserting a construction lien. In an effort to promote clarity, the lien claimant will be referred to in the female gender and other persons with competing interests will be referred to in the male gender.

"**Lien foreclosure**" refers to actions a lien claimant may take in a court action to obtain a judgment on a debt and enforce a construction lien as a means of collecting that debt. The term reflects an analogy to the foreclosure of a mortgage.

"**Lien statute**" means Chapter 60.04 RCW.

"**Lienable work**" refers to the type of work that can give rise to a lien.

"**Liened property**" refers to an interest in real property subject to a claim of lien.

"**Perfecting**" a lien means taking actions to develop inchoate lien rights into an enforceable lien, such as giving pre-claim notice (if required), recording a claim of lien and commencing a foreclosure action.

"**Pre-claim notice**" refers to actions a lien claimant must (or may) take in order to maintain her lien rights before recording a claim of lien.

"**Recording**" means filing in the real estate records of a county auditor.

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[1] The term "mechanic" formerly meant a person who performed manual labor; now it usually means a person who repairs machinery. In either case, the term suggests, incorrectly, that most lien claimants are individuals. Most claimants today are business entities providing labor, professional services, materials or equipment.

"**Stop notice**" refers to a remedy that may be available to a lien claimant if the project owner is borrowing construction funds, as explained in Chapter Seven.

Additional important terms are defined in the lien statute (RCW 60.04.011) and will be discussed as the corresponding portions of the statute are analyzed.

2. The History and Purpose of Construction Lien Statutes.

The construction lien is an American invention, created by statute in the late 18th century.[2] Thomas Jefferson promoted the first lien statute in Maryland in 1791 to encourage construction work in the new national capital. The State of Washington enacted a lien statute shortly after statehood, based on earlier territorial laws. The lien statute has been amended over the years; the last substantial amendment became effective in 1992.

Construction lien statutes are intended to encourage the construction industry by protecting persons providing labor, professional services, materials or equipment from the risk of nonpayment. This protection takes the form of a security interest in the property improved. The security interest arises by operation of the statute and does not require the property owner's consent.

By protecting persons and entities that provide labor, professional services, materials and equipment, the construction lien statutes inevitably affect other persons and entities that have interests in the improved property; those others may have had no role in ordering the improvement. The law attempts to strike a balance between the lien claimant and other interested parties. Much of the complexity of construction lien law arises from this quest for balance.

3. The Construction and Interpretation of Construction Lien Statutes.

Construction liens were unknown at common law, so the rule that "statutes in derogation of common law will be strictly construed" applies.[3] This rule may be used by a court to justify refusing to extend lien rights to dubious or marginal cases.[4] However, when enacting RCW 60.04, the legislature provided that most sections should be "liberally construed to provide security for all parties intended to be protected by their provisions."[5] The two rules need to be considered together: the lien statute should be construed strictly when determining whether lienable work has been done and whether proper notice has been given—that is,

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[2] *See generally*, *A Treatise on the Law of Mechanic's Liens on Real and Personal Property*, Samuel L. Phillips, 1883; *A Short History of the Mechanic Lien*, Scott Wolfe, Jr., http://www.zlien.com/blog/a-short-history-of-the-mechanic-lien/.

[3] *See, e.g., Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 77, 150 P.2d 55 (1944).

[4] *See, e.g., Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972) (no lien right for contractor who carried away a demolished structure).

[5] *See* RCW 60.04.900. No reported case has discussed whether provisions protective of owners or lenders should be liberally construed.

whether lien rights have arisen at all—and then the statute should be construed liberally to protect persons who fall within its protection.[6]

4. An Outline of Construction Lien Law in Washington.

Construction lien rights arise when a person or an entity begins to provide labor, professional services, materials or equipment ("lienable work") to improve privately owned real property at the instance (directly or through an agent) of the property owner. Lien rights, initially inchoate, attach to the improvement and (usually) to the property being improved. These subjects are discussed in Chapter Two, "The Elements of a Construction Lien."

To develop inchoate lien rights into an enforceable lien, the lien claimant must perfect the lien by taking certain actions. The first step (for some claimants) is to submit a pre-claim notice of lien rights. The notice requirement varies depending on the kind of project and on the proximity of relationship between the lien claimant and the property owner. Certain parties may be required to give notices even if no lien is claimed. These subjects are discussed in Chapter Three, "Pre-Claim Notices."

The next step in perfecting a lien is to record a written claim of lien in the public property records of the county where the project is located. This subject is discussed in Chapter Four, "Recording a Construction Lien Claim."

The final step in perfecting a lien is a civil action to foreclose the lien. This action resolves the validity of the underlying claim, the validity of the lien and the relative priority of the lien with respect to other property interests. If the claimant is successful, the court may order the liened property to be sold. Some parties may have a right to redeem the property from the sale. These subjects are discussed in Chapter Five, "Foreclosing a Construction Lien Claim."

Property owners and other interested parties have various potential defenses and other actions they can take in response to lien claims, including a summary proceeding to challenge a lien claim that is believed to be frivolous or clearly excessive. These subjects are discussed in Chapter Six, "Defending a Construction Lien Claim."

This book also contains a chapter describing another lien-like remedy applicable to private projects. This is Chapter Seven, "The Stop Notice."

The final chapter covers statutes protecting persons providing labor, materials and equipment on public projects, where normal liens are not allowed. This is Chapter Eight, "Lien-Like Remedies on Public Projects."

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[6] *See, e.g., Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 696-97, 261 P.3d 109 (2011).

Lien law is complex and it interacts with contract law, agency law, tort law, bankruptcy law and principles of equity. The application of the law to each fact-specific case is obviously beyond the scope of this book. The authors hope enough has been said both to lay down the general principles of lien law and to indicate at least some of the places where different kinds of legal considerations may apply. Legal advice is recommended when applying the principles stated in this book.

Please note that the analysis in this book is believed to be accurate on the publication date and may become inaccurate if the law is changed after publication by statutory amendment or by court decision. Care should always be taken to confirm the current form of the statute and the latest case authorities. Readers will note that some of the cases cited in this book were decided under earlier versions of the statute. The authors believe that the principles expressed are still good law in Washington, but there is always a risk that revised statutory language may lead a court to change what was formerly settled law.

Readers should also be aware that, although all 50 states have lien laws in one form or another, those laws vary substantially from one state to the next. Principles of Washington law may not apply in other jurisdictions.

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CONSTRUCTION LIENS IN WASHINGTON
Chapter Two
—The Elements of a Construction Lien—

1. Introduction.

RCW 60.04.021 provides that "any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner." Four distinct elements of a construction lien can be distinguished: (1) the claimant has furnished labor, professional services, materials or equipment; (2) for improvement of real property; (3) at a contract price; and (4) at the instance of the owner or owner's agent.[1] These and other matters are discussed below, in particular:

Section 2: Furnishing labor, professional services, materials and equipment.

Section 3: The improvement of real property.

Section 4: The contract price.

Section 5: Work authorized by the owner.

Section 6: Contractor registration.

Section 7: Property interests subject to construction liens.

As noted earlier, Washington courts require strict compliance with the lien statute when deciding whether a particular claimant is entitled to lien rights.[2] We will see that principle at work in the following sections.

2. Furnishing Labor, Professional Services, Materials and Equipment.

The lien statute defines "furnishing labor, professional services, materials, or equipment" broadly as "the performance of any labor or professional services, the contribution owed to any employee benefit plan on account of any labor, the provision of any supplies or materials, and the renting, leasing, or otherwise supplying of equipment for the improvement of real property."[3] Although the definition is broad, there are limits. Moreover, it may be important to determine whether particular work counts as labor or professional

[1] *Colorado Structures, Inc. v. Blue Mountain Plaza LLC*, 159 Wn. App. 654, 662, 246 P.3d 835 (2011).

[2] See Chapter One, Section 3.

[3] RCW 60.04.011(4). The reference to employee benefit plans evidently means that if a person performs lienable labor, then her employee benefit plan also has a lien for any unpaid contributions arising from that labor. *See also* RCW 60.04.011(7), which defines "labor" to include "amounts due and owed to any employee benefit plan on account of . . . labor performed." However, see footnote 15 below and the accompanying text.

services or the supply of materials or equipment because the classification may impact not only the priority of a lien,[4] but also the need to give a pre-claim notice.[5]

a. Labor.

"Labor" is defined to include "exertion of the powers of body or mind performed at the site for compensation."[6] Individuals performing manual labor at a project site ("mechanics" in the old sense) are clearly included. Individual liens are uncommon today. Most claimants are business entities. If a business entity provides labor, it may be entitled to a labor lien.[7]

A laborer (individual) is often the employee of a contractor or subcontractor, but the statute does not require this. Under RCW 60.04.021, "any person" providing labor is entitled to lien rights. This presumably includes employees of a contractor, employees of the owner, and independent contractors of either.

Generally, labor must occur at the project site and it must contribute directly to the physical improvement being constructed. It has been held that the cost of field foremen and payroll taxes may be included as costs of "labor" for purposes of the lien statute.[8] By contrast, a company that offered "temporary labor services" in the form of writing paychecks for laborers, but exercised no onsite supervision, was held not to have a labor lien.[9] Management and coordination services do not constitute "labor" if the services are performed away from the improved property.[10]

Sometimes, lienable work appears to cover more than one category. In that case, the most dominant category may be applied or it may be appropriate to allocate the work among different categories. The following cases may be illustrative, though none involved construction liens; all involved the somewhat different provisions of the public bond and retainage statutes.

- *Campbell Crane & Rigging Serv., Inc. v. Dynamic Int'l AK, Inc.*, 145 Wn. App. 718, 186 P.3d 1193 (2008). Campbell was hired to supply and operate cranes on a construction site. The Court

[4] *See* RCW 60.04.181, discussed in Chapter Five, Section 6.

[5] *See* RCW 60.04.031, discussed in Chapter Three, Section 2.

[6] RCW 60.04.011(7).

[7] *See Powell v. Nolan*, 27 Wash. 318, 341-42, 67 P. 712 (1902).

[8] *See Willett v. Davis*, 30 Wn.2d 622, 629-30, 635, 193 P.2d 321 (1948) (the court relied on the fact that the challenged items were within the agreed "contract price" and therefore within the scope of the lien).

[9] *See Better Financial Solutions, Inc. v. Transtech Electric, Inc.*, 112 Wn. App. 697, 51 P.3d 108 (2002) (construing the public project retainage lien statute).

[10] *See Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 454-55, 266 P.3d 881 (2011) (offsite construction management was not labor); *Pacific Industries, Inc. v. Singh*, 120 Wn. App. 1, 7-8, 86 P.3d 778 (2003) (offsite property development work was not labor).

of Appeals held that Campbell's work was fundamentally to provide crane-lifting services, a form of labor for purposes of the public project bond and retainage statutes. The fact that the work required specialized tools (cranes) did not prevent it from being labor. Campbell's invoices did not distinguish between a price for crane rental and a price for crane operation; the two went together.

- *National Concrete Cutting, Inc. v. Northwest GM Contractors, Inc.*, 107 Wn. App. 657, 27 P.3d 1239 (2001). The reasoning and outcome were similar to those of *Campbell Crane, supra*, except that the claimant provided concrete cutting and coring services rather than crane services.

- *LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 107 P.3d 721 (2005). The HVAC subcontractor, Tyko, allocated its contract price between materials and labor. The Supreme Court respected Tyko's allocation and upheld the labor portion of Tyko's lien but invalidated the remainder for lack of pre-claim notice under the public project bond and retainage statutes.

Although the definition of "labor" requires it to occur "at the site," the definition of "improvement" permits lienable work to be done in a "street or road in front of or adjoining" the property being improved.[11] Thus labor performed in a right of way adjacent to a property development may create a lien on the individual lots if it contributes to the improvements made on the lots.[12]

The issue of offsite labor has also arisen where materials have been assembled, prefabricated or prepared prior to transportation to and incorporation into the improvement. In other states, courts have allowed labor liens for work on materials that can fairly be regarded as offsite construction. One early Washington case seems to have favored this approach in dicta.[13] However, a later case holds that it is "well-established that labor performed upon material before delivery is not lienable as a labor lien," even if materials have been specially fabricated for a particular project.[14]

Labor performed in the transportation of materials is generally treated as part of the cost of the material, as discussed below. If transport is provided by someone other than the material supplier, an argument could be

[11] RCW 60.04.011(5)(a).

[12] *See Associated Sand & Gravel Co. v. Di Pietro*, 8 Wn. App. 938, 509 P.2d 1020 (1973) (work on streets and sewers created lien on individual lots); *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 685 P.2d 1062 (1984) (work on sidewalks created lien on individual lots); *Northlake Concrete Products, Inc. v. Wylie*, 34 Wn. App. 810, 663 P.2d 1380 (1983) (construction of side sewer under public street created a lien on the private property benefited).

[13] *See Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 137 P. 342 (1913). The holding of the case was that the lien was ineffective because the claimants had not acted at the instance of the property owner or the owner's agent. The dicta was that "in order to have a lien for labor, it is not necessary that the labor be performed on the premises where the improvements are actually made" if the lien claimant works directly for the owner or general contractor. *See* 77 Wash. at 73-74 (holding) and at 76 (dicta).

[14] *See R.H. Freitag Manf. Co. v. Boeing Airplane Co.*, 55 Wn.2d 334, 339, 347 P.2d 1074 (1959).

made that the transport should be lienable as labor. However, this argument would have to contend with the statutory definition of "labor" as occurring "at the site" and with the very limited exceptions to this definition permitted in the Washington cases. Alternatively, a transporter could be a subcontractor (if not working for the material supplier).

The definition of "furnishing labor" includes "the contribution owed to any employee benefit plan on account of any labor." Thus, the statute appears to give employee benefit plans a right to pursue a labor lien to collect unpaid contributions.[15]

b. Professional Services.

"Professional services" are defined to include "surveying, establishing or making the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property."[16] The definition appears to be limited to the work of architects, engineers and surveyors, all of whom are required to be licensed under Washington law. There is no requirement that professional services must be performed at the project site for a lien to arise. In fact, the lien statute contemplates that professional services may be performed in such a way that an examination of the project site will fail to detect them.[17]

It has been held that construction management is not a professional service because it is not listed in the statutory definition.[18] Another basis for the same conclusion would be that construction managers are not required to be licensed.

Under earlier versions of the statute, some professionals were given no lien rights unless the planned improvement was actually built. The current statute changes this rule. "Improvement" is defined to include the provision of professional services "in preparation for" construction.[19] The pre-claim notice statute contemplates that lien rights for professional services may arise even though no improvement has been commenced.[20] Although dicta in one recent case supports the older rule,[21] the dicta conflicts with the statute

[15] *See W.G. Clark Constr. Co. v. Pac. NW Reg'l Council of Carpenters*, 180 Wn.2d 54, 322 P.3d 1207 (2014) (overruling prior authority, holding that ERISA does not prevent employee benefit plans from pursuing state lien claims).

[16] RCW 60.04.011(13).

[17] *See* RCW 60.04.031(5); *see also Zervas Gp. Architects, P.S. v. Bay-View Tower, LLC*, 61 Wn. App. 322, 254 P.3d 895 (2011) (enforcing lien for offsite architectural services).

[18] *See Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 455, 266 P.3d 881 (2011).

[19] RCW 60.04.011(5)(c).

[20] *See* RCW 60.04.031(5), which talks about professional services giving lien rights "where no improvement . . . has been commenced."

and with another case where it was acknowledged that a surveying firm could acquire lien rights even though no planned improvements were ever built.[22]

c. Materials.

Materials are not defined in the lien statute. "Furnishing . . . materials" is defined to include "the provision of any supplies or materials . . . for the improvement of real property." Earlier versions of the statute contained narrower language and a number of cases discussed whether claimants had liens for "materials." The current statute has broader language, but no reported case has clarified the meaning. The following considerations are offered as a guide:

- Materials provided by the claimant and actually incorporated into a physical improvement to real property should remain lienable.[23]

- Materials provided by the claimant and delivered to the jobsite for incorporation into a physical improvement should remain lienable, even if work stops before they are incorporated; it does not matter whether the claimant personally delivers the materials.[24]

- Things sent to a project that are intended to remain personal property and not be physically incorporated into the improvement are not lienable. Whether materials have been delivered for incorporation into the improvement is determined by the intent of the parties.[25]

- The cost of transporting materials to the project site is properly considered part of the material cost, not a separate labor item.[26]

- Although the statute now refers to "supplies or materials" and not just "materials," it does not follow that consumables like gasoline or small tools, which are used on the job but are not

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[21] *See DBM Consulting Engineers, Inc. v. United States Fidelity & Guaranty Co.*, 142 Wn. App. 35, 41, 170 P.3d 592 (2007). The holding of the case was that DBM had lost its lien rights by failing to obtain a judgment on the validity of its lien. The dicta was, "RCW 60.04.021 requires that professional services must result in an improvement to the property in order to give rise to a lien."

[22] *See McAndrews Group, Ltd. v. Ehmke*, 121 Wn. App. 759, 90 P.3d 1123 (2004). The Court of Appeals held that the claimant's surveying work gave rise to lien rights even though no improvements were constructed (and the survey was not itself an improvement). The question on remand was the priority of the claimant's lien rights relative to a later deed of trust.

[23] *See Standard Lumber Co. v. Fields*, 29 Wn.2d 327, 342, 187 P.2d 283 (1947).

[24] *See Standard Lumber Co., supra*, at 343-44; *see also Portland Elec. & Plumbing Co. v. Dobler*, 36 Wn. App. 114, 117-18, 672 P.2d 103 (1983) (it is "well settled" in Washington that materials are lienable if "delivered upon the site for incorporation into [a] building").

[25] *See Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 78-9, 150 P.2d 55 (1944).

[26] *See Stimson Mill Co. v. Feigenson Eng. Co.*, 100 Wash. 172, 175, 170 P. 573 (1918) (citing *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 P. 803 (1915)).

incorporated into the real estate, are lienable materials.[27] However, one old case held that concrete forms that were used and then removed as waste were lienable materials.[28]

- An old federal case (applying Washington law) has held that materials specially fabricated for a particular project and offered for delivery to the owner are also lienable, even if the owner chooses not to have them delivered.[29]

- A person who provides materials and does no work at the site is a material supplier, not a laborer or contractor, even if that person expends labor offsite to fabricate, prepare or deliver the materials.[30]

- A person who provides materials and labor at the site and who allocates the contract price between these as separate items may have separate liens for materials and for labor.[31]

- A person who supplies materials to another material supplier has no lien for materials.[32]

d. Equipment.

Equipment is not defined in the lien statute. "Furnishing . . . equipment" includes "the renting, leasing, or otherwise supplying of equipment for the improvement of real property."[33] It appears that "equipment" is intended to mean tools (like bulldozers and cranes) that are used during construction but not physically incorporated into the improvement. Equipment that is incorporated into the improvement (*e.g.*, HVAC

[27] No case holds this directly, but see *National Concrete Cutting, Inc. v. Northwest GM Contractors, Inc.*, 107 Wn. App. 657, 661, 27 P.3d 1239 (2001) ("materials" for purposes of pre-claim notice under RCW 60.04.031 include only "materials, supplies or provisions intended to be used on the job which enter into and form a part of the finished product"). Note that some tools may be lienable as "equipment" as discussed below.

[28] *See Stimson Mill Co. v. Feigenson Eng. Co.*, 100 Wash. 172, 175-76, 170 P. 573 (1918) (holding that concrete forms, falsework and the like, if they lack commercial value at the conclusion of the project, are lienable materials). If similar items are provided that continue to have commercial value at the conclusion of the project, it might be best to analyze them as equipment rather than materials. Small tools are commonly invoiced through a "field overhead" markup on other costs, which may relieve a lien claimant from having to characterize small tools as labor, materials or equipment.

[29] *See Haskell v. McClintic-Marshall Co.*, 289 F. 405, 412-13 (9th Cir. 1923).

[30] *See R. H. Freitag Manf. Corp. v. Boeing Airplane Co.*, 55 Wn.2d 334, 339, 347 P.2d 1074 (1959) (labor performed upon material before delivery is not lienable as a labor lien); *cf. Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 722-26, 741 P.2d 58 (1987) (discussing the distinction between materialmen and subcontractors).

[31] *See LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 107 P.3d 721 (2005) (Tyko's claim was analyzed as separate labor and material liens).

[32] *See Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 729-31, 741 P.2d 58 (1987) (discussing the private lien statute to elucidate the public retainage statute).

[33] RCW 60.04.011(4).

equipment) counts as "materials" under this classification. Equipment that remains on the project but does not become a fixture (*e.g.*, washing machines, dryers and dishwashers) is not lienable.[34]

We have seen that, for purposes of the lien statute, labor is (generally) limited to work "at the site" and materials are (generally) limited to things delivered at the site. Professional services are not so limited; they can occur away from the project site. What about equipment? Although no published Washington case addresses this question directly, the likely answer is that only equipment working at the site of the improvement is lienable. If equipment is used (*e.g.*) to prepare a staging yard on different property, that activity contributes only indirectly to improving the project property. If equipment is used offsite to prepare materials for incorporation into the project (*e.g.*, casting concrete beams), we have already seen that labor performed to prepare materials offsite is not lienable.[35] The same reasoning would support the conclusion that equipment used to prepare materials offsite is not lienable. There is one limited exception: because the definition of "improvement" permits lienable work to be done in a "street or road in front of or adjoining" the property being improved,[36] it would make sense that equipment used in a right of way adjacent to a property development may create a lien on the individual lots if it contributes to the improvements made on the lots.

We have seen that, when equipment and equipment operators are furnished together, the work may be analyzed as labor.[37] A different outcome is possible under a contract that clearly separates equipment rental from operator labor.[38]

3. The Improvement of Real Property.

For lien rights to arise, the claimant's work (labor, professional services, materials or equipment) must be "for the improvement of real property."[39] This concept has been touched on above (*e.g.*, in the requirement that materials must be delivered for physical incorporation into the real estate).

Washington cases have historically invoked "strict construction" to limit lien rights to activities that clearly satisfy the definition of "improvement." This made sense when "improvement" meant a building or another physical structure.[40] Since the 1992 amendments, however, the statute allows liens for activities that do not

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[34] *See Emerald City Elec. & Lighting, Inc. v. Jensen Elec., Inc.*, 68 Wn. App. 734, 740, 846 P.2d 559 (1993).

[35] See footnote 14 above.

[36] RCW 60.04.011(5)(a).

[37] See the three bulleted cases in the section on labor, above.

[38] *See LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 107 P.3d 721 (2005) (Tyko's claim was analyzed as separate labor and material liens).

[39] RCW 60.04.021.

[40] *See, e.g., Dean v. McFarland*, 81 Wn.2d 215, 500 P.2d 1244 (1972) (statute required that work be done to construct a "building" or another structure, so claimant had no lien for carrying away debris from a demolished building).

result in a physical structure, such as demolishing, clearing, grading, planting trees and providing professional services.[41] Nevertheless, Washington courts have continued to apply "strict construction." The following cases are illustrative.

- *TPST Soil Recyclers of Wash., Inc. v. W.F. Anderson Constr., Inc.*[42] TPST was hired to haul away and dispose of contaminated soil.[43] TPST claimed a lien. The Court of Appeals reviewed cases from other jurisdictions and then concluded that TPST's work did not constitute a physical "improvement" to the property. The reasoning was questionable (since the statute no longer seems to require a physical improvement), but the outcome was probably correct because TPST provided little or no labor at the project site.

- *Henefin Constr., LLC v. Keystone Constructors, G.W., Inc.*[44] The court held that work to remove wet soil and replace it with new material was an improvement to the property. In that case, disposal of the soil was incidental to other work on the site.

- *Pacific Indus., Inc. v. Singh.*[45] It was held that performing development services such as acquiring permits and negotiating contracts for work to be done did not constitute "improvements" because they were only indirectly connected with the actual work of physically altering the property. The court also held that development services were not "labor" because they were performed offsite.

- *McAndrews Group, Ltd. v. Ehmke.*[46] The court discussed RCW 60.04.031(5), which provides that a lien claimant providing professional services "where no improvement . . . has been commenced" may file a pre-claim notice. The court held that this provision applied because the claimant's work, setting survey stakes and control points, did not constitute an improvement to the property because it did not fit into the list of examples in RCW 60.04.011(5) (constructing, altering, repairing, remodeling, etc.). The surveyor did have a lien, presumably on the underlying land, because no improvement had been built.

[41] RCW 60.04.011(5).

[42] 91 Wn. App. 297, 957 P.2d 265 (1998).

[43] TPST apparently performed no work at the project site other than picking up the soil for disposal.

[44] 136 Wn. App. 268, 275, 145 P.3d 402 (2006).

[45] 120 Wn. App. 1, 9, 86 P.3d 778 (2003).

[46] 121 Wn. App. 759, 90 P.3d 1123 (2004).

- *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC.*[47] The court, relying in part on *McAndrews*, held that digging test pits to find the groundwater level was not an improvement to the property because the pits were not part of anything permanently affixed to the property.[48]

The foregoing cases reflect the continuing importance of the idea that an "improvement" to property must be a permanent structure of some kind. While the current statute permits lien rights to arise in the absence of any permanent structure, Washington courts are likely to construe those exceptions to the general rule narrowly.

In general, Washington law requires materials for which a lien is sought to have become a fixture, permanently annexed to the improved property.[49] The fact that the person ordering the work intends to remove those materials at a later date is not dispositive of whether they have become a fixture for purposes of the lien statute.[50]

A distinction between improvement and maintenance is likely to have continued vitality under the current statute. In *Howe v. Myers*[51] and *Michaud v. Burbank Co.*,[52] liens were not allowed for cultivating agricultural lands, even though the work may have resulted in a higher value for the land. In both cases the court noted that cultivation was not in the same class of activities as the improvements listed in the statute. The *Howe* court noted that some cases in other states had allowed liens for planting trees or vines,[53] but pointed out that those cases involved "a connected and completed operation," while maintenance work was indefinite in scope and duration.[54] Allowing a lien for maintenance work that could occur sporadically over

[47] 159 Wn. App. 654, 246 P.3d 835 (2011).

[48] The lien was also defective because the claimant had not performed the test pit work under contract with anyone, and because the person the claimant was dealing with was not the owner of the property. The claimant might have characterized her efforts as professional services, but she had failed to give timely notice under RCW 60.04.031(5).

[49] *See Christensen Group, Inc. v. Puget Sound Power and Light Co.*, 44 Wn. App. 778, 781, 723 P.2d 504 (1986) (citing *Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 150 P.2d 55 (1944)). *Westinghouse* held it was enough for a material supplier to show that materials were delivered in good faith for the purpose of becoming fixtures. *See id.*, 21 Wn.2d at 80. The holding of *Harbor Millwork, Inc. v. Achttien*, 6 Wn. App. 808, 496 P.2d 978 (1972), that items can be lienable even if not permanently annexed to real property, is hard to reconcile with *Westinghouse*.

[50] *See Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 210 P.3d 308 (2009) (ice arena improvements were lienable fixtures for purposes of the lien statute, even though designated as personal property in the underlying lease).

[51] 94 Wash. 563, 162 P. 1000 (1917).

[52] 114 Wash. 205, 194 P. 985 (1921).

[53] The planting of trees and vines is now expressly included in the definition of "improvement" in RCW 60.04.011(5)(b).

[54] *Id.* at 565.

a long period of time with no clear endpoint would "seriously affect the stability of real estate titles, and result in endless confusion."[55]

The improvement/maintenance distinction applies outside the agricultural context, as illustrated in a case from another jurisdiction cited in *TPST Soil Recyclers of Wash., Inc., supra.* In *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, a Kansas case, the claimant removed hazardous waste contained in tanks used by an industrial company. The court held that this work did not improve the property. Instead, removing waste was a maintenance activity because the land owner continually generated similar waste from its ongoing operations.[56] A Washington court would probably reach the same conclusion.[57]

The paradigmatic case of an improvement is the construction of a building on vacant property. The farther the facts depart from this paradigm, the more questionable the lien rights become. A lien is more likely if the work is of a kind listed in the statute or if the work is an integral part of a plan to construct a physical improvement on the land.

4. The Contract Price.

The measure of a lien is the "contract price" for the lienable work.[58] The contract price is defined as "the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor."[59]

The contract price for a claimant working for a contractor is determined by the claimant's contract, without the need for any consent by the owner. The owner need not even be aware that the claimant has been hired.[60] It follows from this that, even if the owner has a defense to payment under the prime contract, this defense does not defeat the lien of a person working for the contractor.[61]

For example, in *Henefin Constr., LLC v. Keystone Constr., G.W., Inc.*,[62] the contractor had increased the lien claimant's subcontract amount without the owner's approval. The owner objected to the lien because it was

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[55] *Id.* at 566.

[56] 910 P.2d 839, 846 (Kan. 1996). *See also Inter-Rail Systems, Inc. v. Ravi Corp.*, 900 N.E.2d 407 (Ill. App. 2008) (removal and disposal of waste-filled drums was not a lienable improvement because it was "not shown to be part of an overall plan to improve rather than simply maintain the property").

[57] See Chapter Four, footnote 12 and accompanying text.

[58] RCW 60.04.021.

[59] RCW 60.04.011(2).

[60] But see Chapter Three, Section 2, regarding pre-claim notices.

[61] *See Kean v. Thomas B. Watson Co.*, 149 Wn. 424, 431, 271 P. 73 (1928).

[62] 136 Wn. App. 268, 145 P.3d 402 (2006).

based on an agreement to which the owner was not a party. The court held that, once it was established that the contractor was the owner's construction agent, it followed that the claimant had a lien for its contract price, which was a matter of agreement between the contractor and the claimant; the owner's consent was not necessary.[63] This was the case even though the prime contract prohibited any increases to subcontracts without the owner's approval. The court noted that this might give rise to a claim of breach by the owner against the prime, but it did not affect the "contract price" measure of the lien claim.[64]

One consequence of the "contract price" language is that the lien claimant must actually have a contract to perform the work for which a lien is claimed.[65]

In the case of lump sum construction contracts, the determination of the initial "contract price" should be straightforward, though there can be disputes about the percentage of work completed, claims for additional work, offsets for defective work and the like.[66] In the case of contracts where compensation is based on actual time and materials expended, again the determination of the price should be straightforward, although there may be disputes about whether the work performed has been adequately documented. In some cases, construction contracts will call for "equitable adjustments" to the contract price, for example in case of changes to the work caused by circumstances beyond the contractor's control. In such cases, the court may need to determine an equitable adjustment, as it would in a nonlien case. The statute contemplates that if the claimant's contract does not set a price for her work, then the proper measure is the "customary and reasonable charge" for that work.[67]

5. Work Authorized by the Owner.

A person performing lienable work to improve real property can claim a lien on the improvement, but only to the extent her work was "furnished at the instance of the owner, or the construction agent of the owner."[68] The term "owner" is not defined in the statute, suggesting that the ordinary meaning of the term is intended. Of course, more than one person can own an interest in real property. The lien law accommodates this possibility.

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[63] *See* 136 Wn. App. at 274, 275-76.

[64] *Id*. 136 Wn. App. at 276.

[65] *See Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 664, 246 P.3d 835 (2011).

[66] Construction contracts commonly include provisions for recognizing and pricing changes to the work, including increased payment for added work and decreased payment for deleted or defective work. In determining the "contract price," a court in a lien case should take these provisions into account, just as it would in a nonlien case. In addition, the court in a lien case has equitable power to fashion an appropriate remedy.

[67] RCW 60.04.011(2); *see Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 320 P.3d 130 (2014) (lien permitted for work in excess of original scope, payable in *quantum meruit*).

[68] RCW 60.04.021.

The simplest case is this: X owns a parcel of land and personally hires Y to build a house on that parcel. In that situation, Y has a lien on the house and probably on the underlying land as well.[69] But at least two kinds of complexity can arise. First, the owner may not personally hire Y; this is discussed in the remainder of this section. Second, the owner may have only a limited interest in the improvement or the underlying property; this is discussed in Section 7 below.

a. Work Authorized by Owner's (Common Law) Agent.

The statute contemplates that work may be authorized by the owner's "agent."[70] "Agent" is not defined, so presumably the ordinary meaning is intended. The common law of agency is outside the scope of this book, but clearly common law agents have the power to bind their principals under the lien law.[71] After all, owners who are business entities cannot act except through agents. Whether or not someone has an express common law agency relationship may be disputed as a matter of fact, but it does not present any distinctive issues under the lien law.

Lien law does contain some distinctive rules about implied agency. For example, if a lease or an executory real estate sales contract requires the lessee or vendee to improve the property, the lessee or vendee will be deemed implied agents of the owner and any work done will support a lien upon the interest of the lessor or vendor.[72] However, a lien will attach "only if the lessee or vendee has an obligation under the contract, rather than a privilege, to make improvements."[73] In other words, by requiring that improvements be made, the owner grants an implied (common law) agency that is recognized by the lien law.

One consequence of implied (common law) agency is that if a lease (or sales agreement) requires the lessee (or vendee) to make certain improvements on the leased property, then not only does the lessee (or vendee) subject the property to a lien for the work done, but he also subjects the owner, as principal, to personal liability.[74] However, the implied agency is limited by the scope of work required by the lease.[75]

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[69] *See* RCW 60.04.051 (the parcel of land that is improved is subject to the lien to the extent of the owner's interest).

[70] RCW 60.04.021.

[71] *CKP, Inc. v. GRS Construction*, 63 Wn. App. 601, 608, 821 P.2d 63 (1991) (based on unusual facts, the court found that the general contractor was the common law agent of the property owner).

[72] *See Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984) (citing cases).

[73] *Id.*

[74] *See Markley v. General Fire Equip. Co.*, 17 Wn. App. 480, 485-86, 563 P.2d 1316 (1977) (a lease case).

[75] *See Christensen Group, Inc. v. Puget Sound Power and Light Co.*, 44 Wn. App. 778, 784, 723 P.2d 504 (1986) (question of fact whether lease required construction of bank vault; if it did then vault supplier had a lien).

The limits of the implied (common law) agency doctrine were explored in *Hewson Constr., Inc. v. Reintree Corp.*[76] A developer hired a contractor to build sidewalks for a subdivision. When the developer failed to pay for the work, the contractor sought to impose a lien on the individual lots in the subdivision, arguing that the developer had an obligation to install the sidewalks because it had promised the lot purchasers that the sidewalks would be built. The contractor argued that the lot owners were, in effect, the developer's principals. The court was not persuaded, pointing out that the lot owners did not create the developer's obligation to build sidewalks; that obligation was a condition of the original plat approval. Although the lot owners knew the sidewalks were being built and the sidewalks in fact enhanced that value of their lots, these facts did not make the developer into their implied agent for purposes of the lien statute.

b. Work Authorized by Owner's Construction Agent.

Even if the owner and its common law (express or implied) agents do not order any work, a lien may arise from work at the instance of the owner's "construction agent."[77] A construction agent is defined as "any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, or other person having charge of any improvement to real property, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter."[78] A person meeting this definition can trigger lien rights, even if the usual criteria for common law agency are absent. The lien rights triggered by a construction agent are limited to the owner's property; the owner is not subjected to personal liability.[79]

On a typical project, the owner first hires an architect to provide a design. The architect may hire one or more subconsultants for portions of the design (*e.g.*, a structural engineer), and those subconsultants may in turn hire sub-subconsultants (lower tier subconsultants). Once the design is completed, the owner hires a general contractor to build the project. The general contractor may hire one or more subcontractors for particular kinds of work (*e.g.*, earthwork), and those subcontractors may in turn hire sub-subcontractors (lower tier subcontractors). In this scenario, all designers at every tier and all contractors at every tier are deemed construction agents of the owner for purposes of the lien statute. Anyone who performs work on the project at the instance of one of these "construction agents" will be entitled to lien rights. The claimant's relationship with the owner of the property may be indirect, but it is sufficient if the person with whom the claimant contracted was in the chain of statutory construction agents. For example, in *Henefin Constr., LLC v. Keystone Constr., G.W., Inc.*,[80] the property owner hired a general contractor, Keystone, to build a

[76] See footnote 72.

[77] RCW 60.04.021.

[78] RCW 60.04.011(1). A "construction agent" is a legal fiction that extends lien rights to claimants not in contractual privity with the owner or its common law agents.

[79] *See Blossom Provine Lumber Co. v. Schumacher*, 147 Wash. 369, 371, 266 P. 167 (1928) (construing similar language in former statute).

[80] 136 Wn. App. 268, 145 P.3d 402 (2006).

restaurant. Keystone in turn hired Henefin to perform earthwork. Keystone was a licensed contractor that the owner had placed in charge of the project, so the court had no trouble in concluding that Keystone was the owner's construction agent.[81]

The statute says that construction agents must be persons "having charge of an improvement," but it appears that this requirement is easily satisfied. As noted above, Henefin had lien rights even though it was "in charge of" only part of the work. Presumably, any design professional or contractor, at any tier, can be a construction agent if it fits into a hierarchy that begins with a lead designer or prime contractor who is given charge of the work by the owner.

The definition of "construction agent" potentially includes multiple design professionals and contractors, but it does not include any material suppliers or equipment suppliers. These have not traditionally been deemed agents of the owner for lien purposes and nothing in the current statute changes this. Thus, a material supplier working for a construction agent (*e.g.*, a subcontractor) may have a lien, but someone working for the material supplier, either an individual laborer or a lower tier material supplier, has no lien rights because her work was not performed at the instance of a construction agent.[82]

The statute says that contractors and subcontractors can be construction agents only if they are "registered or licensed."[83] Thus a person who works at the instance of a contractor or subcontractor should ensure that the contractor or subcontractor is currently registered. On projects costing more than $5,000, the lien statute requires the prime contractor to post a notice that includes information about its registration; this can be helpful for persons who contract directly with the prime.[84] Potential lien claimants can check the status of a contractor's or subcontractor's registration online at the Washington State Department of Labor and Industries website.

Relevant registration/licensing statutes include RCW 18.27.020 (registration of contractors), RCW 19.28.041 (licensure of electrical contractors), RCW 18.104.030 (licensure of water well contractors), RCW 18.106.020 (certification of plumbers), RCW 18.160.040 (licensure of fire sprinkler contractors), and RCW 18.270.020 (certification of fire sprinkler fitters).[85] Persons working for contractors and subcontractors may rely upon a certificate of registration covering at least part of the period when the work is to be done, and the claimant's

[81] 136 Wn. App. at 274.

[82] *See Neary v. Puget Sound Eng. Co.*, 114 Wash. 1, 6-8, 194 P. 830 (1921) (individual employees had no lien); *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 729, 741 P.2d 58 (1987) (lower tier material supplier had no lien).

[83] *See* RCW 60.04.011(1) and .041.

[84] *See* RCW 60.04.230.

[85] RCW 60.04.041 lists some of these.

lien rights will not be lost if the registration is suspended or revoked without her knowledge.[86] In addition, a claimant's lien rights are not affected by the absence, suspension or revocation of a registration with respect to any contractor or subcontractor with which she is not in immediate contractual privity.[87] So, a claimant need check only the person with whom she has contracted—not everyone else up the chain.

It has been held that a contractor in "substantial compliance" with the registration act can effectively serve as a construction agent for purposes of the lien statute.[88] This continues to be the rule in Washington, though the contractor registration statute now defines what counts as substantial compliance.[89]

The foregoing registration/licensure requirement applies only to "contractors and subcontractors." There is no requirement that architects, engineers or "other person[s] having charge" of a project be licensed in order to be able to serve as construction agents, though architects and engineers are generally required to be licensed. It would appear that a construction manager could fit the definition of construction agent, but no reported Washington case has decided the question.

6. Contractor Registration.

The main contractor registration requirements are found in RCW Chapter 18.27. The registration requirement applies to persons, firms, corporations and other entities who or which, in pursuit of an independent business, undertake or offer to undertake any of a variety of activities relating to improvements to real property.[90] We have seen one effect of the contractor registration law: an unregistered contractor is not (normally) a construction agent able to subject the project property to liens of third parties.[91] This section examines another aspect of the registration law: an unregistered contractor may not maintain an action for compensation for its work or for breach of contract without alleging and proving that it was properly registered at the time it entered into the contract that forms the basis of its claim.[92] If an unregistered contractor has no right to pursue a debt arising from her work, it follows that she has no right to enforce that debt through a lien claim.

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[86] *Id.*

[87] *Id.*

[88] *See Expert Drywall, Inc. v. Brain*, 17 Wn. App. 529, 540-42, 564 P.2d 803 (1977).

[89] *See* RCW 18.27.080.

[90] *See* RCW 18.27.010. This section is not a full discussion of the contractor registration statutes. It focuses on the interplay between registration requirements and lien rights.

[91] See Section 5 above.

[92] RCW 18.27.080. Failure to register does not make a construction contract void, but it creates a defense that can be waived if not asserted. *See Davidson v. Hensen*, 135 Wn.2d 112, 1336-37, 954 P.2d 1327 (1998). Substantial compliance is permitted, but only to the extent defined in the statute.

There are a number of exceptions from the contractor registration requirements. Of interest in the context of construction liens is the exception for persons who furnish materials, supplies or equipment without fabricating them into the work of a contractor—in other words, a material or an equipment supplier.[93]

One case has suggested that a material supplier who does limited installation work can both escape the contractor registration requirement (on the ground that her materials were not "fabricated into" the structure) and still pursue a lien claim (on the ground that her materials were somehow annexed to the real property).[94] This case is hard to reconcile with the rule that, to be lienable, materials must become fixtures or be delivered in good faith for the purpose of becoming fixtures.[95]

Although the contractor registration statute states a very broad prohibition of actions by unregistered contractors, the Washington Supreme Court has construed the statute not to apply when one contractor sues another.[96] However, even if the registration statute does not prevent an unregistered subcontractor from seeking payment from the prime contractor, it is doubtful that such a subcontractor could pursue lien rights against the owner. A lien claim would appear to fall outside the recognized "contractor vs. contractor" exemption, though no reported Washington case has decided this question.

7. Property Interests Subject to Construction Liens.

A construction lien applies in the first instance to "the improvement" on which the lien claimant is working.[97] In most cases, the lien extends also to the real estate underlying the improvement, to the extent of the interest of the person at whose instance, either directly or through an agent, the work is done.[98]

In the simplest case, a property owner orders a structure to be built on his land. Persons working for the owner have a lien on the structure and on the "lot, tract, or parcel of land which is improved."[99] The court is

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[93] *See* RCW 18.27.090(8); *see also Harbor Millwork, Inc. v. Achttien*, 6 Wn. App. 808, 811-14, 496 P.2d 978 (1972) (claimant manufactured millwork for installation by others, so no contractor registration was required and claimant was entitled to pursue a lien).

[94] *See Harbor Millwork, Inc. v. Achttien*, *supra*, 6 Wn. App. at 815-16.

[95] *See Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 150 P.2d 55 (1944).

[96] *See Frank v. Fischer*, 108 Wn.2d 468, 472, 739 P.2d 1145 (1987) (purpose of statute is to protect the public, not to protect contractors from each other).

[97] RCW 60.04.021. Question: If a carpenter, electrician and a laborer help to build a house, do their liens attach to the whole house or only to those parts of the house that they built? The statute does not clearly answer this question, though the fact that every lien typically extends to the entire underlying real estate, along with the practical difficulty of determining what part of an improvement has been built by a particular claimant, would seem to favor the first answer.

[98] RCW 60.04.051.

[99] *Id.*

given discretion to determine how much land should be subject to the lien, though following the statutory language it is usual to subject the entire lot or tract, as defined in relevant title records, to the lien.[100]

Complexities can arise if the lien claimant works on more than one lot or tract. The statute provides that if work is done on more than one property at the instance of the same person(s), then the lien claimant "shall" designate in her lien claim the amount due on each piece of property; otherwise, the lien is subordinated to other lien claims that do focus on particular properties.[101] This can pose a problem for a supplier of materials, who may not know which materials were used to build on which lot in a subdivision. The material supplier can perhaps protect herself by delivering materials to the various lots separately.

There is a special rule for condominiums: after the declaration has been filed, any liens that arise are against each unit individually.[102] The statute is not very clear, but it appears that a lien for work upon multiple units can be allocated according to the work done, if that is recorded separately, or according to the relative shares of the affected units. If a lien claim is recorded and then a condominium declaration is filed, it has been held that the blanket lien automatically converts to a set of "proportional liens" on the various units.[103]

Complexities can also arise if the person ordering the work does not hold all rights in the real estate. Of course, if the person ordering the work (either directly or through an agent) has no interest at all in the property, then no lien can arise.[104] If the person ordering the work has a limited interest, then the lien attaches to that limited interest.[105] For example, a tenant-in-common may order work that creates a lien on his or her undivided interest in a parcel of land.[106] Work done for a person who has purchased land at a sheriff's sale creates a lien only on the purchaser's limited rights.[107]

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[100] *See Standard Lumber Co. v. Fields*, 29 Wn.2d 327, 349-50, 187 P.2d 283 (1947) (lien for construction of farm buildings attached to 160-acre parcel); *Keane v. Thomas B. Watson Co.*, 149 Wash. 424, 429, 271 P. 73 (1928) (lien of well digger attached to 17-acre parcel); *cf. Caine-Grimshaw Co. v. White*, 136 Wash. 98, 101, 238 P. 980 (1925) (lien attached to three contiguous lots that constituted a "single home premises").

[101] RCW 60.04.131.

[102] RCW 64.32.070. The statute also allows individual owners to release their units from the lien by paying a proportion of the lien claim.

[103] *See Rainier Pacific Supply, Inc. v. Gray*, 30 Wn. App. 340, 343-44, 633 P.2d 1355 (1981). The court noted that the analysis could be different if the lien claimant worked on a phased project or had separate contracts for different parts of the project.

[104] *See Olson Engineering, Inc. v. KeyBank*, 171 Wn. App. 57, 75-76, 286 P.3d 390 (2012) (work for prospective purchaser did not give rise to a lien until the purchase closed); *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 196, 653 P.2d 1331 (1982) (work performed for construction manager who had sold the property and was not the owner's agent did not give rise to a lien).

[105] *See Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 210 P.3d 308 (2009) (lien attached to the improvements but not to the underlying public land); *Bremerton Concrete Prod. Co. v. Miller*, 49 Wn. App. 806, 745 P.2d 1338 (1987) (lien attached to tidelands leasehold and contiguous upland property).

[106] *In re Clallam County*, 130 Wn.2d 142, 148-49, 922 P.2d 73 (1996).

[107] *See W. T. Watts, Inc. v. Sherrer*, 89 Wn.2d 245, 248-49, 571 P.2d 203 (1977).

The extent to which a lien affects property is fact specific, depending upon who ordered the work and what property interest(s) that person possessed.

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CONSTRUCTION LIENS IN WASHINGTON
Chapter Three
—Pre-Claim Notices—

1. Introduction.

Although "inchoate" lien rights arise as soon as lienable work begins, steps must be taken to keep those rights in existence, to "perfect" the lien. One of these may be the submission of a pre-claim notice. Certain claimants must submit pre-claim notices or else their lien rights are lost. Independently of the lien statute, the contractor registration statute requires certain notices to customers, which, if not given, can affect lien rights. Both the lien statute and the contractor registration statute require notices whether or not a lien is sought. These matters are discussed below, as follows:

Section 2: Pre-claim notices under the lien statute.

Section 3: Notices to customers under the contractor registration statute.

Section 4: Notices independent of lien claims.

2. Pre-Claim Notices Under the Lien Statute.

The general rule is that "every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien."[1] The following issues are covered in the subsections below:

a. Who must give a pre-claim notice.

b. To whom the pre-claim notice is given.

c. When the pre-claim notice is given.

d. The content of the pre-claim notice.

e. Notice regarding professional services.

a. Who Must Give a Pre-Claim Notice.

Although subsection (1) of the statute states a very broad rule ("every person" shall give notice), subsection (2) exempts the following persons from the pre-claim notice requirement:

[1] RCW 60.04.031(1). Note that persons providing only labor are not included in the requirement.

- Persons who contract directly with the property owner, either directly or through the owner's common law agent.[2] In the case of work on an owner-occupied single-family residence, this exemption applies only to persons who contract directly with the "owner-occupier."[3]

- Persons whose claim is solely for labor.[4]

- Subcontractors who contract directly with the prime contractor.[5] These are sometimes called "first tier subcontractors." Note that first tier material or equipment suppliers are not exempted. This exemption also does not apply in the case of work on an owner-occupied single-family residence.[6]

In summary, on commercial projects, pre-claim notices must be given by material or equipment suppliers who do not contract directly with the owner and by subcontractors who do not contract directly with the prime contractor. The notice requirement is more strict in the case of owner-occupied single-family residences. Claimants who provide only labor do not need to give pre-claim notices on commercial or residential projects. However, if a claimant provides labor and materials together (*e.g.*, by installing concrete sidewalks), it is prudent to give a pre-claim notice unless another exemption applies.[7]

b. To Whom the Pre-Claim Notice Is Given.

The pre-claim notice must be given to the "owner or reputed owner." The term "owner" is not defined in the statute, so the ordinary meaning of the term is presumed. If the record owner of land orders a building to be constructed, that person is the "owner" under this statute. But the situation can be more complex if the person ordering the work owns less than the fee (*e.g.*, a leasehold), or if a person holds himself out as an owner when he is not, or if there are multiple owners.

The clear intent of the statute is to protect property owners from the risk of paying twice for the same work, once to the contractor and again to a lien claimant. However, the interests of property owners must be balanced against the interests of potential lien claimants who may have only limited information about the

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[2] RCW 60.04.031(2)(a). The exemption is not triggered by a "construction agent."

[3] RCW 60.04.031(3)(a). "Owner-occupied" is not very helpfully defined in RCW 60.04.011(9).

[4] RCW 60.04.031(2)(b). Business entities providing labor are exempt as well as individual laborers. *See Pacific Erectors, Inc. v. Gall Landau Young Constr. Co.*, 62 Wn. App. 158, 170, 813 P.2d 1243 (1991).

[5] RCW 60.04.031(2)(c).

[6] RCW 60.04.031(3)(b).

[7] *See LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 741, 107 P.3d 721 (2005). An HVAC contractor lost its lien claim based on the supply of materials because of lack of preclaim notice, but retained its lien claim for separately invoiced labor, for which no preclaim notice was required. This was a public contract under RCW 39.08, but the result should be the same under RCW 60.04.

ownership of property they are working on. To protect lien claimants, the statute permits notice to the "owner or reputed owner," which does not appear to hold lien claimants to a high degree of diligence.[8]

On projects costing more than $5,000, the prime contractor is required to post a notice identifying the property and the property owner.[9] On any project with a building permit, the same information should be retained by the permitting authority and set forth on the posted permit.[10] On any project, the prime contractor is required to provide the same information to any subcontractor or supplier upon request.[11] Thus it should not be hard to determine at least a "reputed owner," which should be sufficient for purposes of the pre-claim notice.

If the prime contractor has posted its own contact information, then pre-claim notice should be copied to the prime contractor, unless the claimant has contracted directly with the prime.[12]

To be effective, pre-claim notices must be given in one of the following ways:

- Certified or registered mail (which generates a delivery receipt).
- Personal service with either a receipt signed by the addressee or an affidavit of service.[13]

Although the intent of the statute is to give actual notice, it has been held that actual notice is not enough if the statutory requirements are not met.[14] However, it may be possible to show that an owner, by making positive assurances of payment to a subcontractor, is estopped to claim lack of pre-claim notice.[15]

The statute says that notice is effective upon delivery or upon proper mailing.[16]

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[8] *Cf. Mutual Savings & Loan Assn. v. Johnson*, 153 Wash. 41, 47, 279 P. 108 (1929) (construing prior statute). *See also* RCW 60.04.091, which permits a claim of lien to name the "owner or reputed owner." By contrast, a person initiating a lien foreclosure lawsuit must serve the "owner" within a limited time, and this requirement is strictly enforced. *See* RCW 60.04.141 and Chapter Five, Section 3.

[9] RCW 60.04.230(1). See Section 4 below.

[10] RCW 19.27.095.

[11] RCW 60.04.261.

[12] RCW 60.04.031(1).

[13] RCW 60.04.031(1)(a, b).

[14] *See Johnson's Wholesale Plumbing, Inc. v. Holloway*, 17 Wn. App. 449, 451, 563 P.2d 1294 (1977); *Johnson v. Heirgood*, 72 Wash. 120, 123-24, 129 P. 909 (1913).

[15] *See Robinson Tile & Marble Co. v. Samuels*, 147 Wash. 445, 446-47, 266 P. 701 (1928).

[16] RCW 60.04.031(1). Mailing to an incorrect address is not effective notice. *CHG Intern., Inc. v. Platt Elec. Supply, Inc.*, 23 Wn. App. 425, 427, 597 P.2d 412 (1979).

c. When the Pre-Claim Notice Is Given.

The statute allows notice to be given at any time, but on commercial projects the notice only protects the right to claim a lien for work performed or materials or equipment supplied after the date 60 days before notice is effective.[17] In other words, notice given within 60 days of starting work will preserve the lien right for all the work done. Later notice will preserve lien rights for part of the work only. This may not be a problem if the claimant is paid for the early portions of her work. If a claimant releases lien rights with respect to early paid work on the project and then asserts a lien claim for later unpaid work, her claim will relate back, for priority purposes, to the date the work began.[18]

The rule for new construction of a single-family residence is more strict: the notice can be given at any time but it protects the right to claim a lien only for work performed or materials or equipment supplied after the date 10 days before notice is effective. The rule for work on an occupied single-family residence is stricter still: the notice can be given at any time but it protects lien rights only to the extent of amounts the owner-occupier has not yet paid the prime contractor when the notice is received. "Received" in this context is defined to mean actual receipt by personal service or mailing, or constructive receipt three days after proper mailing by registered or certified mail, excluding Saturdays, Sundays and legal holidays.[19]

d. The Content of the Pre-Claim Notice.

RCW 60.04.031 includes a form of pre-claim notice. At least a 10-point font must be used. The first part of the form in the statute is a bit obscure. Here is an example of how it looks when filled in [the words in square brackets are explanatory]:

> To: Smith & Jones, Inc. [the property owner]
>
> Date: April 1, 2014 [date the notice is delivered or mailed]
>
> Re: Property at 123 Main Street, Everett, Washington [a more general description is also acceptable, *e.g.*, "Units 2, 3 and 5 of new residential development at First and Main, Everett, WA"]
>
> From: Eager Supply Corp. [the lien claimant]
>
> AT THE REQUEST OF: Capable Builders [the construction agent that has hired the lien claimant]

[17] RCW 60.04.031(1).

[18] *See A.A.R. Testing Lab., Inc. v. New Hope Baptist Church*, 112 Wn. App. 442, 50 P.3d 650 (2002).

[19] RCW 60.04.031(3)(b).

The statutory form also includes paragraphs appropriate to work on an occupied single-family residence and for other projects. The correct paragraphs should be used on each project.

A pre-claim notice must be "substantially" in the statutory form, so it is prudent to use the form, with appropriate upper and lower case letters exactly as given though, as illustrated above, the layout of the information on the page may vary. Because copying the statutory form is not a trivial task, it would be helpful to have a pre-claim notice form ready for use, with only the specific project information needing to be filled in.

e. Notice Regarding Professional Services.

Providers of professional services are subject to the normal rule of pre-claim notice to the property owner as stated above. However, an additional public notice is advisable if the professional's work is not visible from an inspection of the property. That notice is described at the end of RCW 60.04.031, after the general pre-claim notice form.[20] A professional may record in the real property records of the county where the project is located a "notice of furnishing professional services." A sample notice is provided in the statute. Again, the first part of the statutory form is a bit obscure; here is an example of how it looks when filled in:

> That on the first day of April, 2014, Reputable Architects began providing professional services upon or for the improvement of real property legally described as follows:

Because this notice is recorded, an accurate legal description of the property must be included. The purpose of this publicly recorded notice is to preserve the professional's lien priority over others who might otherwise acquire interests in the property without notice of the lien.[21]

3. Notices to Customers Under the Contractor Registration Statute.

The contractor registration statute requires "any contractor" performing certain defined work (generally of limited scope) to provide a disclosure statement to its "customer."[22] The requirement does not apply to public contracts or to contractors who contract with other contractors.[23] The point of this statute for our purposes is that contractors failing to comply with the requirement may not bring or maintain any lien claim.[24]

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[20] Professional services are defined in RCW 60.04.011(13).

[21] See Chapter Five, Section 6, relating to lien priorities.

[22] RCW 18.27.114(1).

[23] RCW 18.27.114(5).

[24] RCW 18.27.114(4).

The statute provides a form of disclosure statement, which is self-explanatory and must be substantially followed. Note that the form contains a place for the customer to acknowledge receipt of the disclosure in writing. Contractors should check the Department of Labor and Industries website for possible updates to the required disclosure form.

Every contractor who submits a disclosure statement pursuant to the contractor registration statute should also submit additional information prepared by the Department of Labor and Industries.[25] It might be prudent for a contractor to include all the required "notice to customer" information in its form contract.

4. Notices Independent of Lien Claims.

The lien statute contains additional notice requirements that are not directly related to the perfection of a lien but should be noted. The first is this: on any project costing more than $5,000, the prime contractor shall post a notice containing information about the property, the owner and the prime contractor's own contact information.[26] Posting a building permit containing the required information constitutes compliance with this requirement.[27] Failure to post this information does not affect the prime contractor's lien, but it may lead to civil penalties.[28]

A second requirement is that the prime contractor on any project shall "immediately" provide the information normally contained on a building permit to any subcontractor, supplier or provider of professional services as soon as the prime contractor becomes aware of their involvement on the project.[29] The prime contractor's lien rights do not depend on this, but failure to provide the information may provoke the Department of Labor and Industries to adverse action.

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[25] RCW 60.04.255(2). Failure to comply with this statute does not appear to affect lien rights.

[26] RCW 60.04.230(1).

[27] RCW 60.04.230(2).

[28] RCW 60.04.230(3). Failure to provide the required information may also relieve a subcontractor from sending a copy of her pre-claim notice to the general contractor. *See* RCW 60.03.031(1).

[29] RCW 60.04.261.

CONSTRUCTION LIENS IN WASHINGTON
Chapter Four
—Recording a Construction Lien Claim—

1. Introduction.

Previous chapters have described the elements of a construction lien and the initial steps that some claimants must take to perfect their lien rights. This chapter addresses a requirement that all claimants must satisfy: recording a claim of lien. The following sections cover the following topics:

Section 2: Where and how to file a claim of lien.

Section 3: When to file and serve a claim of lien.

Section 4: The form and content of a claim of lien.

Section 5: Amending and releasing a claim of lien.

Section 6: Lien release bonds.

In determining whether a claim of lien has been properly recorded, courts apply a mixture of "strict construction" and "lenient construction" rules, as explained further below.

2. Where and How to File a Claim of Lien.

Any person seeking to assert lien rights on a private project must file for recording, in the county where the subject property is located, a notice of claim of lien not later than 90 days after the claimant has ceased to perform work.[1] If the property lies in two counties, it would be safest to file in both counties because the purpose of the filing is to give notice to others with actual or potential interests in the same property.

Filing "in the county" means filing in the real estate records maintained by the county auditor. The auditor is charged with recording the notice of claim of lien in the same manner as deeds and other instruments of title are recorded, for which the auditor may charge a recording fee.[2] The usual way to accomplish this is to send a messenger to the auditor's office with the original lien claim and a copy. The auditor normally accepts the original for filing and stamps the copy as proof of filing. Auditors' practices may vary, however, and it may be safest to consult with the auditor's office ahead of time to identify the most efficient way to file the claim, pay the recording fee, and get written proof of filing. Some counties accept lien claims for recording by electronic means.

[1] RCW 60.04.091.

[2] RCW 60.04.111.

3. When to File and Serve a Claim of Lien.

The notice of claim of lien must be filed not later than 90 days after the claimant has ceased to "furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due."[3] It has been held that this deadline is strictly enforced,[4] though elements of leniency figure in the calculation.

The filing period is 90 full days.[5] If the last day of the 90-day filing period falls on a Saturday, Sunday or legal holiday, then the period is extended to the next business day.[6] Before the time expires, the claimant must "file for recording," *i.e.,* deliver the claim document to the auditor. The date on which the auditor actually records the document should not matter. However, if the auditor rejects the notice because of a format error, a new filing will be required and must itself be timely. For this reason, it may be risky to wait to the 90th day to record a lien claim.

The lien claim filing period begins to run when the lien claimant ceases to furnish labor, professional services, materials or equipment either personally (in the case of an individual claimant) or through the efforts of others, who may be employees, subcontractors, suppliers or material suppliers. In other words, if contractor X hires subcontractor Y to perform a portion of X's contracted work, the efforts of Y count when determining the date on which X ceased to provide labor, professional services, materials or equipment.

The date triggering the 90-day period is easy to determine if the claimant works continuously and then leaves the project when the work is completed. But on some projects the claimant may complete the bulk of the work and then return days or weeks later to complete minor items. Or the claimant may return to the job months or even years later to perform warranty work. Or the owner may suspend the work for a period of time and then terminate it. The following principles may be helpful in addressing the many possible fact patterns:

- If the claimant provided lienable work, the lien claim filing statute will be liberally construed to protect her.[7]
- If work is done or materials furnished at the request of the owner or owner's construction agent to complete the original contract or to remedy some defect in the work that prevents final acceptance, then the time for filing runs from that last work.[8]

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[3] RCW 60.04.091.

[4] *See Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 867, 251 P.3d 293 (2011).

[5] *See Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 697, 74 P. 1001 (1904).

[6] RCW 1.12.040.

[7] *See Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 697, 261 P.3d 109 (2011).

- Work done or materials furnished under a new and independent contract, entered into after the original contract is completed, cannot be tacked on to the original contract to expand the time for filing a claim of lien under the original contract.[9]

- However, if a lien claimant furnishes material or labor to a contractor who has two separate contracts with the owner for the same project, the lien claimant need not give two separate notices of lien claim unless she has actual or constructive knowledge that she is working under two separate contracts.[10]

- Work performed for the sole purpose of prolonging or renewing the right to file a claim of lien is not counted in determining the time for filing.[11]

- Work performed after a contract has been completed in response to a warranty claim should not extend the time for filing a claim of lien.[12]

- By statute, if work is performed on separate residential units then the time for filing claims of lien against each unit commences to run when work is completed on that unit.[13]

Following these principles, it has been held that even a small amount of remedial work or "punch list" some days or weeks after most of the work has been completed will extend the time for filing a claim of lien.[14] If work is performed under a single contract, it does not matter that the contract has been amended to include additional work.[15] Washington courts have sometimes found that work was performed solely to extend the

(continuing)

[8] *See Kirk v. Rohan*, 29 Wn.2d 432, 436-37, 187 P.2d 607 (1947). The request of the owner may be made in the original contract and need not be specific to the final work performed. *See Diversified Wood Recycling, Inc.*, 161 Wn. App. 859, 870, 251 P.3d 293 (2011) (contractor's removal of stumps and slash was a part of the underlying contract; no explicit request for those services on that day was necessary to extend the 90-day timeframe for the contractor to file a lien); *cf. Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 62 P.3d 548 (2003) (claimant left trailer on the jobsite in case suspended work would resume; trailer was not onsite at request of owner and did not constitute "equipment furnished" that would extend the time to file a lien claim).

[9] *See Kirk v. Rohan, supra*, 29 Wn.2d at 436.

[10] *See Trane Co. v. Brown-Johnston, Inc.*, 48 Wn. App. 511, 515, 739 P.2d 737 (1987).

[11] *See Kirk v. Rohan, supra*, 29 Wn.2d at 436-37.

[12] *See Wells v. Scott*, 75 Wn.2d 922, 454 P.2d 378 (1969) (warranty work, though required by original agreement, did not extend time to file claim of lien for original construction); *Brown v. Mychel Co.*, 186 Wash. 97, 56 P.2d 1020 (1936) (same). An alternative basis for this conclusion may be that warranty/maintenance work does not count as an "improvement" to real property. See Chapter Two, Section 3.

[13] RCW 60.04.101.

[14] *See Kirk v. Rohan, supra* (claimant corrected flooding problem two months after garage was built); *Friis v. Brown*, 37 Wn.2d 457, 224 P.2d 330 (1950) (claimant started furnace three months after furnace had been installed); *American Sheet Metal Works, Inc. v. Haynes*, 67 Wn.2d 153, 407 P.2d 429 (1965) (claimant installed controls several weeks after elevator had been installed).

[15] *See Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 308 P.3d 791 (2013) (five amendments were all part of a single engineering contract).

filing period, but only where the evidence was clear.[16] Washington courts have also been lenient in finding that if a claimant works under two separate contracts with the same party on the same project, the two contracts may be considered as one in determining the deadline for filing lien claims.[17]

After filing a lien claim, the claimant "shall" provide a copy of the claim to the "owner or reputed owner" by certified or registered mail or by personal service within 14 days of the time the claim of lien is filed for recording.[18] The standard for identifying the "owner or reputed owner" is not strict; in fact, the statute gives the option of stating that the owner is unknown.

Failure to provide a copy of the claim to the "owner or reputed owner" does not render the lien claim invalid, but it results in a forfeiture of the claimant's right to attorneys' fees and costs against the owner in a lien foreclosure action.[19] This can be a significant disadvantage in a contested lien case. If the claimant copies her claim to someone who is the "reputed" but not the real owner, the right to fees is not lost.[20] What happens if the claimant copies no one with her claim because she does not know who the owner is? No published Washington case has ruled on this question, but the statutory language suggests that the right to fees would be lost. Given that the property owner's address will be posted on nearly every project,[21] a lien claimant should have little trouble identifying at least the "reputed owner."

4. The Form and Content of a Claim of Lien.

The statute provides a form of lien claim and states that a claim of lien "substantially in the following form shall be sufficient."[22] It has been held that use of this form is in fact sufficient compliance with the statute,

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[16] *See Swensson v. Carlton*, 17 Wn.2d 396, 135 P.2d 450 (1943) (claimant admitted that he performed work for the purpose of extending the deadline); *Petro Paint Manf. Corp. v. Taylor*, 147 Wash. 158, 265 P. 155 (1928) (material delivery was insignificant and not actually used in construction; the person ordering the materials admitted that his purpose was to obtain further time to pay the claimant).

[17] In *Powell v. Kier*, 44 Wn.2d 174, 265 P.2d 1059 (1954), the claimant was hired to install mechanical plumbing equipment on the ground floor of a building. The building plan was changed to include a second floor and claimant was hired to install more plumbing equipment. The court held that both parts of the work should be considered together for the purpose of computing the deadline for filing a claim of lien. *But cf. Anderson v. Taylor*, 55 Wn.2d 215, 347 P.2d 536 (1959). In that case, the claimant worked first for the contractor and then, after contractor defaulted, under a second contract directly for the owner. The court held that work under the second contract did not extend the time for filing a lien claim under the first contract. *See also King Equip. Co. v. R.N.&L Corp.*, 1 Wn. App. 487, 462 P.2d 973 (1969) (second rental agreement, for a different piece of equipment, did not extend the time to file a claim of lien based on the first rental agreement).

[18] RCW 60.04.091(2).

[19] *Id.*

[20] *See Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 251 P.3d 293 (2011) (affirming award of fees under lien statute despite allegation that foreclosure action named only the reputed owner).

[21] RCW 60.04.230.

[22] RCW 60.04.091(2).

even though the form arguably conflicts with the requirement, stated in the same statute, that lien claims be "acknowledged."[23]

The statutory form requires information identifying the claimant, the person indebted to the claimant (*i.e.*, the person who ordered the claimant's work, who might be different from the owner of the underlying property), the property (which can be identified by any means "reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien"), and the dates when work was performed. The work dates are important because they determine whether the lien claim filing is timely and, if it is, the date on which the lien is deemed to attach to the property for priority purposes.

The lien claim form requires the claimant to state "the principal amount for which the lien is claimed." This is the amount due to the claimant on the day the lien claim is filed. The statute does not suggest that any detailed statement is required; the total due should be sufficient. The principal amount may be amended as additional sums become due.[24] Anticipated fees and interest should not be included in the lien claim, though they may be subsequently awarded.

The lien statute elsewhere provides that, if a claim of lien is recorded against two separate pieces of property owned by the same person(s) who contracted for the work for which a lien is claimed, then the notice of lien claim should designate the amount due on each piece of property, otherwise the lien is subordinated to other liens that do attach to the parcels individually.[25] For example, if a contractor contracts directly with the owner(s) for work on two adjoining parcels of property, she should allocate her lien claim between the two parcels. By contrast, a subcontractor who has not contracted directly with the owner(s) should not be subject to this requirement. This makes sense, because the subcontractor may not know the owner or the legal description of the property, as reflected in the loose requirements of the lien notice form.

5. Amending and Releasing a Claim of Lien.

There are many reasons why a lien claimant may want to amend her claim notice form. She may discover more accurate information about the property owner or the property description. She may want to amend the amount due because of partial payment or because of continuing work. She may conclude that other information on the form was not accurate.

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[23] *See Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 692-98, 261 P.3d 109 (2011). The *Williams* court held that, once a lien claimant shows that she performed lienable work, the requirements of RCW 60.04.091 will be liberally construed to protect her.

[24] See Section 5 below.

[25] RCW 60.04.131.

Lien claimants are free to file a new lien claim notice or to amend an existing notice within the 90-day period following the end of their work, even if more than eight months have passed since an earlier notice was filed.[26]

After the 90-day period has run, there is authority that a lien claim may still be amended, but not to cure invalidity, where invalidity means the failure to substantially comply with the filing statute.[27] However, what counts as invalidity needs to be assessed in light of the rule that substantial compliance with the lien claim notice statute is sufficient.[28] It appears that omitting a mandated part of the lien notice (*e.g.*, name of the claimant, identification of the property, claimant's signature, or claimant's sworn statement) will render a lien claim invalid, but other omissions or errors that do not substantially depart from the statutory requirements will not.[29]

Once a timely lien foreclosure lawsuit has been filed, the statute provides that lien claims may be amended in the same way that pleadings may be amended.[30] An important consideration is whether the amendment will adversely affect third parties.[31]

Lien rights may be released, in whole or in part, at any time after they have arisen.[32] If the debt underlying a lien is paid, the claimant should promptly execute and deliver a lien release to the payor.[33] The payor may recover fees and damages if the release is unjustifiably delayed.[34] The statute does not provide a form of

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[26] *See Geo Exchange Systems, LLC v. Cam*, 115 Wn. App. 625, 632-33, 65 P.3d 11 (2003).

[27] *See Lumberman's of Washington, Inc. v. Barnhardt*, 89 Wn. App. 283, 289-91 (1997) (claimant admitted it failed to substantially comply; court held that resulting invalidity could not be cured by amendment after 90-day period had expired).

[28] *See Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 696-97, 261 P.3d 109 (2011) (overruling *Lumberman's* on the issue of substantial compliance).

[29] *See Williams, supra*, 172 Wn.2d at 697-98 (distinguishing *Lumberman's* on the facts but not disapproving its result). Some limitation on a claimant's ability to amend a defective lien seems required to enforce the statement in RCW 60.04.091(2) that the 90-day period is a "period of limitation."

[30] RCW 60.04.091(2); cf. Superior Court Civil Rules 15. *See also Bremerton Conc. Prod. Co. v. Miller*, 49 Wn. App. 806, 812, 745 P.2d 1338 (1987) (trial court properly allowed amendment to add additional property to lien claim).

[31] *See Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983) (claimant was allowed to amend lien claim to expand property description; claimant agreed to subordinate its lien to third-party interests in the previously unlisted parcels); *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 610, 821 P.2d 63 (1991) (third parties were not prejudiced by amended lien because original claim of lien included notice that the amount claimed could increase upon further calculation); *Lumber Mart Co. v. Buchanan*, 69 Wn.2d 658, 419 P.2d 1002 (1966) (trial court's grant of lien amendment disapproved because interests of third parties were not resolved).

[32] For more on release and waiver of lien rights, see Chapter Six, Section 4.

[33] It is common for lien claimants to themselves record a release upon payment, but the statute requires only delivery of a signed release to the payor, apparently with the expectation that the payor will record it.

[34] RCW 60.04.071.

release. A release should refer to the lien claim by recording number and date so that a search of title records will discover it.

The lien claimant should consider providing a partial release if a substantial payment is received. If the original lien claim is for $30,000 and $15,000 is paid, the claimant may be vulnerable to the charge that her lien claim, which is twice the amount now claimed to be due, is clearly excessive in amount.[35]

6. Lien Release Bonds.

When a lien claim has been recorded against real property, Washington law permits a bond to be recorded that frees the property from the encumbrance of the lien. The lien security then shifts from the property to the bond.[36]

Nearly anyone with an interest in the encumbered real property may record a lien release bond: the owner, a contractor, a subcontractor, a lender, or another lien claimant who disputes the correctness or validity of the claim of lien. The bond may be recorded before or after a lawsuit is commenced to foreclose the lien.

The surety must be authorized to issue surety bonds in the State of Washington, and it must be listed by the federal department of the treasury as authorized to issue bonds on federal projects in amounts at least equal to the lien release bond.

The bond must identify the lien claim. It may do so by attaching a copy of the lien claim or by referring to the lien recording number; a less formal reference may be acceptable but may also give rise to a dispute.[37] The bond must also identify the encumbered property. If the lien claim is attached, it will contain a description of the property. If the lien claim is not attached, the bond should copy the property description in the lien claim.

The bond needs to state clearly that its purpose is to secure the lien claim. The statute suggests that the following language will be sufficient:

> The condition of this Bond shall be to guarantee payment of any judgment upon the Claim of Lien identified above in favor of the lien claimant entered in any action to recover the amount claimed in the Claim of Lien, or on the claim asserted in the Claim of Lien.

The bond amount should be calculated as follows:

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[35] See Chapter Six, Section 5, on challenges to "clearly excessive" lien claims.

[36] RCW 60.04.161; *DBM Consulting Eng'rs, Inc. v. U.S. Fid. & Guar. Co.*, 142 Wn. App. 35, 42, 170 P.3d 592 (2007) (bond "releases the property from the lien, but the lien is then secured by the bond").

[37] *See Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993). Although former RCW 60.04.115 applied to this case, the court noted that the result would be the same under RCW 60.04.161.

> If the lien claim is $10,000 or less, the bond amount must be "equal to" $5,000 or twice the lien claim, whichever is greater.
>
> If the lien claim is more than $10,000, the bond amount must be "equal to or greater than" 1.5 times the lien claim.[38]

If there are multiple lien claimants, a party may record multiple bonds. Each bond may apply to only one lien claimant, though a single bond may cover multiple lien claims asserted by the same claimant, in which case the bond amount should be calculated using the sum of the lien claims. A party may choose to record bonds with respect to some, but not all, of the lien claims on a particular property. The bond must be recorded in the same place that the claim of lien was recorded.

When a proper lien release bond is recorded, the real property described in the claim of lien is automatically released from the encumbrance of the lien and from any action based on the lien claim. The lien claimant has no right to object to a bond that meets the statutory requirements. She may continue to pursue her claim, but that claim can no longer affect the real property.

Even after a lien release bond has been recorded, the eight-month deadline stated in RCW 60.04.141 remains in effect. If no lawsuit is commenced within eight months after the lien claim is recorded then the surety is discharged from liability under the bond.

Even after a lien release bond has been recorded, issues of lien priority may continue to be relevant. For example, a construction lender may record a bond and still argue that its deed of trust is prior to the interest of the lien claimant. If the value of the property is insufficient to satisfy both the lender and the lien claimant and if the deed of trust is prior to the lien claim, the lien claimant takes nothing from the bond, just as she would have taken nothing in a contested lien foreclosure suit.[39]

If issues of lien priority are resolved in connection with a claim against a lien release bond, the prevailing party should be entitled to an award of fees under RCW 60.04.181.[40]

The statute does not preclude the parties from agreeing on other ways to secure lien claims and release real property from the encumbrance of a lien. But such other methods must arise from agreement, not from operation of the statute.

Recording a bond (or taking similar measures by agreement) can benefit both the lien claimant and others with interests in the property. The lien claimant who proves her claim has access to an asset (the bond)

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[38] If the lien claim is $10,000 or less, there is no good reason to reject a bond that is greater than the statutory minimum. Probably the drafters simply wished to avoid using the word "greater" twice in the first clause.

[39] *See Olson Engineering, Inc. v. KeyBank, NA*, 171 Wn. App. 57, 286 P.3d 390 (2012).

[40] Fees were awarded in *Olson Engineering, supra.*

without any need for a sale or threatened sale of real property. Others with interests in the property can remove the lien encumbrance, which may be of value if the property is to be sold or refinanced.

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CONSTRUCTION LIENS IN WASHINGTON
Chapter Five
—Foreclosing a Construction Lien Claim—

1. Introduction.

"Foreclosing" a construction lien means pursuing a civil action that, if successful, leads to a judgment on the underlying contract and a decree ordering the sale of property affected by the lien to satisfy that judgment. It is analogous to what happens when a mortgagee sells the mortgaged property to satisfy an unpaid loan.

A lien foreclosure action must be timely commenced and consideration must be given to persons with competing interests in the property. Arbitration can be used to resolve many of the issues in a foreclosure action. These and other matters are discussed below; in particular:

Section 2: Where, when and how to commence a foreclosure action.

Section 3: Serving the foreclosure action on the owner.

Section 4: Parties to be included in a foreclosure action.

Section 5: The allegations in a foreclosure complaint.

Section 6: Lien priority issues in a foreclosure action.

Section 7: Relief available in a foreclosure action.

Section 8: Redemption of property after a foreclosure sale.

Section 9: Using arbitration in a foreclosure action.

Foreclosure lawsuits, like other civil suits, are subject to court rules of procedure. This chapter concentrates on issues peculiar to foreclosure. Questions of pleading and practice that are governed by general civil rules (for example, discovery) are not discussed below.

2. Where, When and How to Commence a Foreclosure Action.

A foreclosure action must be filed "in the superior court in the county where the subject property is located."[1] If liened property is located in two counties, it may be possible to foreclose in either county.[2] In the absence of clear statutory direction, it would be safest to file foreclosure actions in both counties and seek to consolidate them. Care should be taken to coordinate forum selection clauses in construction and design

[1] RCW 60.04.141; *see also* RCW 4.12.010(1) (actions challenging title to property must be brought in the county where the property lies).

[2] *Compare* RCW 61.12.040 (a mortgage may be foreclosed "in the superior court of the county where the land, or any part of it, lies") *with* RCW 60.04.081 (a challenge to a frivolous lien may be in "the county where the property, or some part thereof is located").

contracts with the statutory requirement that lien foreclosure occur in the county where the project is located. Failure to do this can result in unnecessary expense and confusion.[3]

The lien foreclosure action must be filed within eight calendar months after the lien claim was recorded.[4] The emphasis on filing is important. In general, civil actions may be commenced either by filing or by service (CR 3(a)), but, for lien foreclosure actions, timely filing is critical. Failure to file the action in a timely manner causes the lien to expire.[5]

The following comments will help in identifying the filing deadline:

- "Within eight calendar months" means that, if a lien claim is recorded on (say) the 15th day of January, the deadline for a foreclosure lawsuit is the 15th day of September. This rule creates a few puzzles. For example, if a lien claim is recorded on June 30 then what is the filing deadline? There is no February 30. In this scenario, it would be safest to file by the end of February.

- A rule applicable to time periods generally is that the first day is not included and the last day is included unless it is a Saturday, Sunday or official holiday, in which case the next business day will be the last day.[6] Thus, if the filing deadline falls on a Saturday, Sunday or holiday, the lien claimant has until the next business day to file. Official holidays are listed in RCW 1.16.050.

- If the lien claimant amends her claim of lien within the 90-day deadline of RCW 60.04.091, the eight-month period for commencing the foreclosure lawsuit begins to run from the amended claim filing.[7]

- If "credit" is given and the terms thereof are stated in the claim of lien, then the eight-month deadline is measured from the expiration of the credit. This allows the parties to extend the deadline for a foreclosure action by an agreement that the lien claimant will accept payment later than her contract would otherwise require. The credit terms must be stated in the recorded claim of lien so that third parties searching the title records will have notice of the modified deadline for filing.[8]

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[3] *See, e.g., A.C.E. Elevator Co. v. V.J.B. Constr. Corp.*, 746 N.Y.S.2d 361 (2002) (contractor had to seek foreclosure in the county specified in forum selection clause and then file the resulting judgment in the county where the project was located).

[4] RCW 60.04.141.

[5] *See Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 871, 251 P.3d 293 (2011).

[6] RCW 1.12.040; CR 6(a); *Stikes Woods Neighborhood Assn. v. City of Lacey*, 124 Wn.2d 459, 463, 880 P.2d 25 (1994) (CR 6(a) applies to statutes of limitations).

[7] *Geo Exchange Systems, LLC v. Cam*, 115 Wn. App. 625, 632-33, 65 P.3d 11 (2003) (citing *Lindley v. McGlauflin*, 58 Wash. 636, 638, 109 P. 118 (1910)).

[8] If the extension agreement contains an acceleration clause, the credit does not automatically expire on default, but only when the lienor elects to accelerate. *See A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 614-16, 440 P.2d 465 (1968) (interpreting former RCW 60.04.100).

- The deadline for filing the lawsuit is "tolled by the filing of any petition seeking protection under Title Eleven, United States Code by an owner of any property subject to the lien." Before relying on this provision, the lien claimant should ensure that the person seeking bankruptcy protection in fact owns a property interest subject to her lien.

- If a prior action to foreclose a lien on the same property is already pending, the lien claimant must seek to join in the existing action, and the eight-month filing deadline will be tolled "until disposition of the application or other time set by the court."[9] Saying that the deadline is "tolled" means that it is suspended temporarily. Thus, if a claimant files a claim of lien, waits seven months, and then applies to join an existing foreclosure lawsuit, she has only one month left to file a pleading setting forth her claim in the existing action (if her application is granted) or in a separate action (if her application is denied).[10]

The period for commencing a lien foreclosure lawsuit is not tolled by an arbitration proceeding. If a lien claimant wishes to arbitrate issues that relate to her lien claim, she should timely file a foreclosure action and then seek a stay pending the arbitration award. See Section 9 below. The period for commencing a lien foreclosure lawsuit is also not tolled if another party challenges the lien as frivolous. See Chapter Six, Section 5.

3. Serving the Foreclosure Action on the Owner.

Filing a timely foreclosure action is not sufficient to preserve the lien right. The lien claimant must also serve the "owner of the subject property" with a summons and complaint within 90 days after filing.[11] Failure to comply with this requirement causes the lien to expire.[12]

Who is the "owner of the subject property"? Neither "owner" nor "subject property" is defined in the statute. It is clear, however, that serving only a "reputed" owner is not sufficient. In this respect, RCW 60.04.141 differs from RCW 60.04.091, under which a recorded claim of lien may list the "reputed owner" or even state that the owner is unknown.[13] It is helpful to review the following parts of the lien statute:

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[9] RCW 60.04.171, which also provides that, if a lien claimant commences a second action in violation of the statute, the court has discretion to consolidate the two actions or to dismiss the second one.

[10] *See Van Wolvelaere v. Weathervane Window Co.*, 143 Wn. App. 400, 407-08, 177 P.3d 750 (2008).

[11] RCW 60.04.141. Service may occur after the eight-month filing deadline as long as it is within 90 days of filing. *See Van Wolvelaere, supra*, 143 Wn. App. at 408 (claimant must file its action within eight months and has 90 days "thereafter" to serve the owner).

[12] *Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 700, 850 P.2d 1361 (1993).

[13] *See Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 871-72, 251 P.3d 293 (2011).

> [A]ny person furnishing labor . . . for the improvement of real property shall have a lien upon the improvement for the contract price of labor . . . furnished at the instance of the owner. RCW 60.04.021.
>
> The . . . parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance . . . the labor . . . [was] furnished . . . . RCW 60.04.051.

For a lien to arise, the lien claimant's work must be requested (directly or through an agent) by someone who owns some interest in the property to be improved. Under RCW 60.04.021, the lien always encumbers the improvement. Under section .051, the lien also encumbers the underlying real estate to the extent that the person requesting the work owns an interest in the underlying real estate.[14]

In some cases, more than one person may be an "owner" with respect to a particular construction lien. There is always the person who requested the work, and there may be a second person for whom the first acted as agent. It is the real estate interests of these persons (in the improvement and possibly in the underlying land) to which the construction lien may attach.

Let us now return to the requirement that the "owner of the subject property" must be served within 90 days. Some cases are easy: if the fee owner of a lot hires a contractor to build a house on the lot, the "subject property" is the lot and the "owner" is the fee owner. But there are harder cases. Suppose a private party obtains a concession to operate an improvement on public land and hires a contractor to build that improvement. The only property that can be "subject to" a lien is the improvement itself; the underlying public property is not subject to liens.[15] Next, suppose that a person hires a contractor to build an improvement on his property and then sells his property interest before the foreclosure action is filed.[16] In these scenarios who is the "owner of the subject property" that must be served?

It has been suggested that "owner of the subject property" should be interpreted to mean "the record holder of the legal title," presumably meaning the record owner of the improved property at the time the foreclosure action is filed.[17] This interpretation would simplify the service requirement, but in some cases (*e.g.*, when the lien does not reach the underlying land) it would mandate service on a party having no liability on the lien claim. Alternatively, "owner of the subject property" could be interpreted to mean "the current owner(s) of each property interest against which the lien is claimed." This interpretation would strengthen the link

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[14] *See Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 500, 210 P.3d 308 (2009) (lien was limited to improvements and did not reach the underlying real estate). Work done for a purchaser of real property does not give rise to a lien until the purchaser acquires a real estate interest. *See Olson Engineering, Inc. v. KeyBank*, 171 Wn. App. 57, 76, 286 P.3d 390 (2012).

[15] This situation was presented in *Estate of Haselwood, supra*.

[16] This situation was presented in *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 653 P.2d 1331 (1982).

[17] *See Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 875, 251 P.3d 293 (2011) (citing *27 Washington Practice* §4.52).

between the service requirement and persons with potential liability, but it would create complexity and uncertainty because not all of the property interests are matters of public record.

The former, simpler interpretation is to be preferred. This reading has already been adopted by the Court of Appeals.[18] It provides a single rule for all cases and allows the lien claimant to be confident of compliance by using the public title records. It is consistent with RCW 60.04.230, which requires the prime contractor to post a notice identifying the "property owner," which is evidently intended to identify the owner of the land at the project site. The downside of the proposed rule is that sometimes the lien claimant will be required to serve a party that has no liability, but this is a minor inconvenience.[19] The alternative rule would create a potentially fatal trap for unwary lien claimants, contrary to the principle that the lien statute is to be "liberally construed to provide security for all parties intended to be protected."[20]

While it makes sense to regard the "owner" to be served under RCW 60.04.141 as the record holder of legal title to the land underlying the project, this issue is not clearly settled in Washington. It would be safest for the lien claimant to identify every property interest that she believes is affected by her lien and to serve the owners of each of those interests within 90 days of filing her foreclosure action.

The task of identifying the "owner of the subject property" becomes more complex if the encumbered property is transferred. The timing is important, as shown in the following scenarios:

- The (potential) lien claimant begins work and, thereafter, the record owner transfers the property to another. The transferee will take subject to the (potential) lien.[21] If the transferee records his interest before the lien claimant files a foreclosure action, the transferee becomes the record owner that must be served. In addition, the transferee must be joined as a party for his interest to be affected.[22] To manage this risk, the lien claimant can conduct a title search shortly before (and, to be fully protected, shortly after) filing her action, to identify the recorded interests on the filing date.

- Same scenario as above: the transferee takes subject to the (potential) lien. This time, however, the transferee does not record his interest before the lien claimant files her foreclosure action. As explained above, the lien claimant arguably satisfies the requirement of RCW 60.04.141 if she serves

[18] *See Diversified Wood Recycling, Inc., supra*, at 875, 881-82. The title records listed "Harold Johnson" as the property owner, but there were two persons with that name, father and son, who shared the same business address. The court held that the lien claimant was entitled to rely on the title records and that service on the son satisfied RCW 60.04.141, despite the son's allegation that the father was the true owner.

[19] The lien claimant does not need to include the record owner as a party to the foreclosure action if she believes the owner has no liability. *See Diversified Wood Recycling, Inc., supra*, at 885-89.

[20] RCW 60.04.900.

[21] RCW 60.04.061; *but cf. Nelson v. Bailey*, 54 Wn.2d 161, 338 P.2d 757 (1959) (construction lien was subordinate to mortgage that was recorded first, but did not attach to the property until after work had begun).

[22] RCW 60.04.171.

the owner of record, but now she is at risk if she fails to name as a defendant the person who actually owns the property. To manage this risk, the claimant should conduct discovery to confirm the current property owner(s).

- The lien claimant begins work and records a lien claim. Then, the general contractor records a lien release bond under RCW 60.04.161. The claimant need not serve the property owner to preserve her lien claim against the bond. *CalArtland Co. v. LevelOne Concrete, LLC*, 180 Wn. App. 379, 391, 321 P.3d 1261 (2014).

- The lien claimant begins work, records a claim of lien, commences a foreclosure action and serves the record owner. Then the record owner transfers the land to another. The lien claimant has satisfied the service requirements of RCW 60.04.141 and she is not at risk under RCW 60.04.171. The transferee's property interest is subordinate to the pre-existing lien, even if the transferee is not included as a party to the foreclosure action.[23]

A lien foreclosure action not prosecuted to judgment within two years of filing may be dismissed at the court's discretion for want of prosecution.[24] This is of particular concern in counties where the parties must ask for a trial schedule, as opposed to counties (like King County) that issue a trial schedule when the complaint is filed.

Failure to timely commence a lien foreclosure action does not preclude the claimant from seeking satisfaction of the underlying debt, without the lien remedy.[25]

4. Parties To Be Included in a Foreclosure Action.

The previous section discussed the critical steps in commencing a lien foreclosure action: timely filing and service. This section talks about which parties should be named in the lien foreclosure complaint. The key principle here comes from RCW 60.04.171: any interest in the liened property that is recorded before the action is filed will not be foreclosed or affected by the action unless the owner of that interest is joined as a party. Thus, the lien claimant should join all persons who have property interests that she wants to foreclose.

One obvious candidate for inclusion in the lien foreclosure action is the owner of the underlying property, though, as noted above, this may not always be appropriate (*e.g.*, if the land is publicly owned).[26] The

[23] *See John Morgan Constr. Co. v. McDowell*, 62 Wn. App. 79, 813 P.2d 138 (1991) (property interest purchased during pendency of lien foreclosure action was subordinate to the lien). See Section 4, about which parties to include in a foreclosure action.

[24] RCW 60.04.141.

[25] RCW 60.04.191; *Geo Exchange Systems, LLC v. Cam*, 115 Wn. App. 625, 630, 65 P.3d 11 (2003).

[26] Although RCW 60.04.171 says that the owner "shall be joined," it has been held that failure to join the owner is not fatal to the action. The statutory language has been interpreted to mean that the court shall grant any party's application to join the owner. *See Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 885-890, 251 P.3d 293 (2011).

presence of some other property interests may be discerned in the public records, and it is common practice to hire a title company to produce what is called a "litigation guarantee," a form of title report that lists persons with interests in the identified property. Other interested parties may need to be identified through discovery after the foreclosure action has been filed. Generally, every person with a potentially junior interest in the property (at the time the action is filed) and every person liable on the underlying debt should be joined.[27]

The holder of an interest (*e.g.*, a mortgage or deed of trust) that is prior or superior to the claimant's lien need not be joined because foreclosure of the lien will not affect that person's rights.

If the claimant is a subcontractor, supplier or laborer, the person or entity that hired the claimant is normally an appropriate party because that person or entity is personally liable on the debt. The property owner will probably wish to bring the prime contractor into the case because the owner has statutory rights against the prime (see RCW 60.04.151) and may have contractual rights as well.

While a claim of lien need not name both spouses to be valid,[28] an older case held that a foreclosure lawsuit must name both in order to give the court jurisdiction to issue a judgment that affects community property.[29] This rule is in doubt because the statute now says that a notice listing one spouse "shall subject all the community interest of both spouses . . . to the lien."[30] If in doubt about whether property is owned by a single individual or a marital community, the safest course is to name a "John Doe" or "Jane Doe" spouse in the complaint.

If the owner of the property is a trust, the trustees must be named in their representative capacities, not their individual capacities.[31]

If a lien release bond has been recorded, the surety on the bond should be included as a party. The owner of the underlying property may ask to be released on the ground that he has no remaining personal stake in the litigation. The lien claimant should consider whether there are grounds for a personal judgment against the owner (*e.g.*, because the owner ordered the work). The lien claimant may also be concerned that releasing the owner will prevent her from obtaining a "judgment upon the lien" needed to trigger payment under the bond (see RCW 60.04.161). It seems that the purpose of a lien release bond is promoted by allowing dismissal of the owner, but no published case has confirmed this notion. To be safe, the lien claimant should

[27] The owner may be personally liable on the debt if he or his common law agent (not a "construction agent") has ordered the claimant's work. *See generally, Douglas Northwest v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 689-90, 828 P.2d 565 (1992).

[28] RCW 60.04.211.

[29] *See Peterson v. Dillon*, 27 Wash. 78, 88-89, 67 P. 397 (1901).

[30] RCW 60.04.211.

[31] *See Mauerman & Davis, LLC v. Hollamer Investments, LLC*, 2006 WL 226715, an unpublished case from Division Two dated January 31, 2006.

obtain the surety's agreement that a judgment against the construction agent, along with proof that the lien was timely perfected, will trigger payment under the bond even if the owner is dismissed as a party to the foreclosure lawsuit.

5. The Allegations in a Foreclosure Complaint.

The details of the complaint in a lien foreclosure action will depend on the particular circumstances, but the following allegations will normally be made:

- The lien claimant has performed lienable work in substantial compliance with the requirements of her contract.
- The lien claimant has not been paid moneys due for that work and certain (identified) people owe money to the claimant. If other moneys will become due in the future (*e.g.*, for retention), this can be alleged also.
- The unpaid work improved certain (identified) real property interests and therefore the claimant's lien attaches to those interests.
- If the lien is asserted against two or more separate pieces of property, the complaint should state how much is due on each one.[32]
- The lien claimant has complied with the procedural requirements of perfecting a construction lien: pre-claim notice (if required), timely filing of the lien claim and timely filing of the foreclosure lawsuit.[33]
- If the claimant is required to register as a contractor in order to pursue a lien claim (see RCW 18.27.080), she should allege compliance with the statute.[34]
- If RCW 18.27.114 applies, the claimant must allege that she has provided the required "notice to customer."[35]

A lien foreclosure action presents at least two distinct issues: whether the claimant is owed anything for her work on the property, and whether the procedural requirements for perfecting and foreclosing a lien have

[32] RCW 60.04.131.

[33] Compliance with statutory deadlines is part of the claimant's burden of proof. *See, e.g., Detroit v. Gunderson*, 41 Wn.2d 886, 887, 252 P.2d 580 (1953); *Hyak Lumber & Millwork, Inc. v. Cissell*, 40 Wn.2d 484, 244 P.2d 253 (1952).

[34] This is the safest course because the statute says the claimant must allege and prove compliance; however, there is authority that lack of contractor registration is an affirmative defense that is waived if not timely asserted. *See Davidson v. Hensen*, 135 Wn.2d 112, 130-31, 954 P.2d 1327 (1998).

[35] This is the safest course because the statute says the claimant must allege and prove compliance; however, an argument could be made that noncompliance should be considered a waivable affirmative defense; see the previous footnote.

been met. Although in some states these issues are sharply distinguished (so that, for example, a jury may be available to decide the debt issues while the judge decides the lien issues), in Washington both issues are commonly tried together.[36] A foreclosure suit is equitable in nature; therefore, it is not tried by a jury.[37]

If a lien claimant files a timely foreclosure action and other claimants join in the action, the first claimant may not voluntarily dismiss the action to the prejudice of another party claiming a lien.[38] The plaintiff (claimant) may amend the complaint to the same extent that civil pleadings may be amended under the court rules, but amendment may not be used to retroactively correct an invalid claim of lien.[39]

6. Lien Priority Issues in a Foreclosure Action.

The lien law provides rules for prioritizing construction liens with respect to other property interests and with respect to other construction liens. These priority issues are the subject of this section.

It is helpful to begin by reviewing the rule of priority for nonlien property interests. Under Washington's "race-notice" recording regime, unrecorded conveyances are "void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration . . . whose conveyance is first recorded."[40] For example, a bona fide lender's recorded deed of trust will generally take priority over unrecorded or subsequently recorded encumbrances.

[36] Of course, nothing in the lien statute prevents a contractor from suing on the debt alone, without seeking a lien remedy, even if the time for a lien has expired. RCW 60.04.191.

[37] If the lien is held invalid, a jury right may arise if the claimant has made a timely demand. *See Lumber Mart Co. v. Buchanan*, 69 Wn.2d 658, 663, 419 P.2d 1002 (1966).

[38] RCW 60.04.171.

[39] *See Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 395, 62 P.3d 548 (2003) (once a lien claim has been declared invalid, it cannot be amended to make it valid).

[40] RCW 65.08.070.

Construction liens are an *exception* to the foregoing rule. RCW 60.04.061 provides:

> The claim of lien created by this chapter upon any lot or parcel of land[41] shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

In other words, for priority purposes, a lien attaches automatically, without recording, when the claimant begins to provide labor, professional services, materials or equipment.[42]

The statute establishes a clear and rather mechanical rule: a construction lien has priority over a competing encumbrance unless the encumbrance both attached to the property and was recorded before the lien arose.[43] However, there can be exceptions to the rule if a lien claimant agrees at the outset that another will have a prior security interest in the property[44] or if a lien claimant is better characterized as a "promoter" of the project than as a contractor.[45] These examples serve as a reminder that lien foreclosure is an equitable matter and may be affected by equitable considerations such as estoppel and unclean hands.

Although professional services are included in the rule quoted above, they give rise to special priority problems. Some professional services leave no visible trace on the land, meaning that even careful purchasers may have no notice that a lien has arisen. To balance the interests of professional service providers with the interests of persons purchasing land in good faith without notice of those services, RCW 60.04.031(5) provides:

> Every potential lien claimant providing professional services where . . . the professional services provided are not visible from an inspection of the real property may record in the real property records of the county where the property is located a notice. . . . If such notice is not recorded, the lien claimed shall be subordinate to the interest of any subsequent mortgagee and invalid as to the interest of any subsequent purchaser . . . if the mortgagee or purchaser acts in good faith and for a valuable consideration . . . without notice of the professional services being provided.

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[41] The phrase "upon any lot or parcel of land" includes improvements built on the land, even if the land itself is not subject to a lien. *See Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 501-02, 210 P.3d 308 (2009).

[42] "Delivery" here means actual delivery to the liened property, not the date when shipment began. *See Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 904-10, 973 P.2d 1103 (1999); *see also Berger v. Baist*, 165 Wash. 590, 601-02, 6 P.2d 412 (1931) (to support a lien, materials must be delivered for a particular project). Liens that secure claims to contributions for employee benefit plans presumably attach when the employees' work begins.

[43] The phrase "lien, mortgage, deed of trust, or other encumbrance" is evidently intended to be wide in scope and thus presumably includes judgment liens and other statutory liens.

[44] *See Mutual Reserve Assn. v. Zeran*, 152 Wash. 342, 277 P. 984 (1929).

[45] *See Dalk v. Varick Inv. Co.*, 167 Wash. 678, 10 P.2d 231 (1932).

In other words, once the professional records a notice, her lien retains the priority stated in RCW 60.04.061 with respect to a subsequent mortgagee or purchaser. If the professional does not record but a subsequent mortgagee or purchaser has notice of the professional's work, the professional's lien still retains its priority.[46] However, if the professional does not record and a subsequent mortgagee records a security interest (or a purchaser takes title) without notice of the professional's work, then the professional's lien is subordinated to the mortgagee's interest or invalidated as to the purchaser.[47]

A lien may cover more than one piece of property. If it does so, the lien's priority on each piece of property will depend on what competing interests there may be relative to each separate property. Relevant here is RCW 60.04.131, which provides that, if a lien is claimed on more than one property owned by the same person(s), then the recorded lien claim should state the amount due on each piece of property; otherwise, the lien is subordinated to other liens on the same property.

The foregoing discussion has focused on priorities between construction liens and other types of property interests. The same rules apply when comparing construction liens arising from different improvements to the same property.[48] A different rule applies when comparing construction liens that arise from the same improvement on the same property. In that case, the lien law treats all the construction liens (even if they attached at different times) as equivalent in time, and ranks the liens based on their nature, not their age.[49] This remains true even if a bond has been recorded to remove one or more of the liens from the property.

The statutory rank of liens by category is stated in RCW 60.04.181(1) as follows:

a. Liens for labor.

b. Liens for contributions owed to employee benefit plans.

c. Liens for furnishing materials, supplies or equipment.

d. Liens for subcontractors, including labor and materials.

e. Liens for prime contractors and for professional services.[50]

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[46] *See Zervas Group Architects v. Bay View Tower LLC*, 161 Wn. App. 322, 254 P.3d 895 (2011) (inquiry notice is sufficient to trigger the professional's lien priority).

[47] Pursuant to RCW 60.04.226, the priority of a mortgage or deed of trust is established when it is recorded. In other words, future advances under a recorded mortgage or trust deed take priority over later construction liens; this rule applies to both obligatory and discretionary advances.

[48] *See Homann v. Huber*, 38 Wn.2d 190, 197, 228 P.2d 466 (1951) (liens arising from different improvements on same property take priority pursuant to common law rule that first in time is first in right).

[49] RCW 60.04.181(1).

[50] The list of lien priorities more or less reverses the usual "food chain" of persons working on a project. Often, paying a person with higher priority (*e.g.*, a laborer) will decrease the amounts claimed by persons with lower priority.

To see this rule in action, assume a prime contractor begins work on January 1, her electrical supplier begins to deliver materials to the site on February 1 and a subcontractor begins to provide carpentry labor on March 1. If all three have valid liens, the proceeds of the property will be applied first to the carpenter (for labor), second to the electrical supplier (for materials) and third to the prime contractor, notwithstanding the fact that the prime contractor's work was first in time.

The situation gets more complicated if a nonconstruction-lien interest intervenes. If a construction lien is in competition with a mortgage, deed of trust or other encumbrance on the property, it is likely that the common law rule of priority – the interest that is earlier in time has priority of right – will govern. To see how this works, assume the same situation as in the previous paragraph, except that on January 15 a lender records a deed of trust against the property. Although there is no Washington case on point, the likely outcome is that the proceeds of the property sale will be applied first to the prime contractor (because her lien attached first in time), then to the holder of the trust deed (second in time), then to the carpenter and finally to the electrical supplier (the latter two being subordinate to the trust deed and ranked according to RCW 60.04.181).[51]

Sometimes priority questions arise in the context of bankruptcy. Although bankruptcy law is outside the scope of this treatise, the following general principles may be helpful:

- It might appear from 11 U.S.C. §362(a)(5) that the usual steps to "perfect" a lien (*e.g.*, giving a pre-claim notice or recording a claim of lien) are barred by the automatic stay. However, subsection 362(a) is expressly subject to subsection 362(b). Subsection (b)(3) says that an act to perfect a lien is not barred by the automatic stay to the extent permitted by section 546(b). That section in turn permits perfection of a lien interest.[52]

- Commencing a lien foreclosure action is not an act to "perfect" the lien and consequently the automatic stay applies.[53]

- Because the owner can generally transfer only those rights that he has in property, any lien that encumbers the owner's interest will be valid against a transferee of the owner's interest, whether by purchase, levy or otherwise.[54]

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[51] However, if the prime contractor's lien claim includes amounts payable to the carpenter and electrical supplier, the latter benefit from the prime's priority over the trust deed.

[52] *See In re Electric City, Inc.*, 43 B.R. 336, 340 (Bankr. W.D. Wash. 1984); *In re North Side Lumber Co.*, 59 B.R. 917, 921 (Bankr. D. Or. 1986).

[53] *See In re Hunter's Run L.P.*, 875 F.2d 1425, 1429 (9th Cir. 1989). This is consistent with RCW 60.04.141, which tolls the time for commencing lien foreclosure if the property owner files a petition for protection under of the Bankruptcy Code.

[54] *Kellison v. Godfrey*, 154 Wash. 219, 281 P. 733 (1929); *A.A.C. Corp. v. Reed*, 4 Wn. App. 777, 780, 483 P.2d 1293 (1971); *Washington Asphalt Co. v. Boyd*, 63 Wn.2d 690, 388 P.2d 965 (1964).

- If the owner is insolvent, a perfected lien will prevail in insolvency procedures at state law, such as an assignment for the benefit of creditors.[55]

- If a bankruptcy petition is filed by or against the owner after a construction lien has attached, the lien will prevail against the trustee in bankruptcy. The trustee may not treat a perfected construction lien as a voidable preference under section 547 of the Bankruptcy Code.[56]

- The question to determine, in the bankruptcy context, is when the lien became effective as against a hypothetical bona fide purchaser of the property. If that occurs before the bankruptcy petition, the lien is valid as against the trustee. As explained above, in Washington a construction lien becomes effective when it attaches (generally upon the commencement of work at the property), provided that subsequent actions are taken to give timely notice and to commence timely foreclosure proceedings.

7. Relief Available in a Foreclosure Action.

The judgment in a foreclosure case will determine which defendants owe which lien claimants money and how much they owe. This will be expressed as a personal judgment in favor of one or more claimants against one or more defendants, based in each case on a contractual relationship between claimant and debtor or on some other legal relationship for which the claimant is the beneficiary. For example, the party who ordered the claimant's work may be liable for nonpayment. A surety may be liable on a lien release bond. A lender withholding funds pursuant to a stop notice may be subject to a personal judgment that requires delivery of those funds, or some of them, to the claimant.[57]

In addition, the judgment may order one or more liens foreclosed with respect to some or all of the amounts owed to the claimants and with respect to one or more properties.[58] This gives the claimant(s) an opportunity to recover their judgment(s) through execution on liened property. This is a valuable right, particularly in cases where the defendant debtors are unable to pay their debts.

The process for executing a foreclosed lien is said to be like the process for execution on a judgment lien.[59] Basically, the court orders the county sheriff to sell certain identified property and either to disburse the proceeds according to priorities stated in the order or to deposit the proceeds into the registry of the clerk of

[55] *See Seattle Assn. of Credit Men v. Daniels*, 15 Wn.2d 393, 395, 130 P.2d 892 (1942).

[56] 11 U.S.C. §547(c)(6): "The trustee may not avoid under this section a transfer . . . that is the fixing of a statutory lien that is not avoidable under §545 of this title."

[57] See Chapter Seven for more on stop notices.

[58] Pursuant to RCW 60.04.051, the court has discretion to determine the extent of land burdened by a lien arising from an improvement on that land.

[59] RCW 60.04.181(2). The process of executing on a judgment lien is governed by Chapter 6.17 RCW.

court pending further action by the court.[60] The proceeds are applied first to the costs of the sale and then to each category of lien in turn; if there are multiple liens in a category then they share in the proceeds pro rata.[61]

If the lien claimant's rights extend only to an improvement on the property, not to the underlying land (which can happen, for example, if the person ordering the work owns only a leasehold), then the court may order the sale and removal of the improvement from the land.[62] Even if the underlying land is subject to the lien, the claimant may decide it is in her interest to seek the sale of the improvement rather than the land as a whole.[63] The removal of improvement from land may be ordered even if the person ordering the work had an agreement with the landowner that that improvement would become part of the land; to this extent the statutory right of removal conflicts with the common law rule that things attached to realty become part of it.[64]

In ordering removal of improvements from land, the court considers the rights of the person who owns the underlying land. If the removal detracts from or damages the land, the court has discretion to refuse to order the removal or to require that the improvements be offered for sale first to the underlying property owner.[65]

If the claimant's lien is foreclosed, the claimant's first recourse must be from the property sale. Any amounts distributed to a lien claimant from the property sale will be credited against her personal judgment(s); any remainder can be collected by execution against individual debtors who are parties to the action.[66] If the party personally liable to the lien claimant is unable to pay, the claimant's recovery will be limited to her share of the proceeds of the property.

The court "may" award costs and attorneys' fees to the prevailing party in the foreclosure suit.[67] The prevailing party may be the lien claimant, a party successfully defending against a lien claim or other persons seeking or resisting relief under the lien statute.[68]

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[60] RCW 60.04.181(4).

[61] RCW 60.04.181(2).

[62] RCW 60.04.051. This rule applies only in cases where work has been performed at the instance of a party owning less than the fee, and not to liens placed by the owner of the fee on premises subject to prior mortgages. *See Gile Inv. Co. v. Fisher*, 104 Wash. 613, 618, 177 P. 710 (1919).

[63] In a defended action, the removal and sale of the improvement may be ordered even if it was not claimed in the complaint. If the judgment is rendered by default, the removal may be ordered only if it was claimed in the complaint or the defendant was given advance notice that such relief was to be given. *See Scera Steel Buildings, Inc. v. Weitz*, 66 Wn.2d 260, 262, 401 P.2d 980 (1965).

[64] *Columbia Lumber Co. v. Bothell Dairy Farm*, 174 Wash. 662, 664-65, 25 P.2d 1037 (1933).

[65] *See Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 829, 685 P.2d 1062 (1984).

[66] RCW 60.04.181(2).

[67] RCW 60.04.181(3).

To recover fees and costs, a party must prevail on an issue resolved under the lien statute. If a claimant fails to obtain lien foreclosure, even if she recovers on the underlying debt, no fees will be awarded under the lien statute.[69] If a lien claimant has a valid lien but unsuccessfully claims that her lien has priority over some competing property interest, she may be required to pay fees to the party that prevailed on that contested issue.[70] Conversely, if an owner successfully defends against lien foreclosure, but prevails on some ground other than the lien statute, he will not be entitled to fees under the statute.[71]

The statute lists as recoverable costs paid for recording the claim of lien, the cost of a title report (to determine the true owner and find other potential parties), the cost of posting a lien release bond and attorneys' fees and necessary expenses incurred at trial, on appeal or in arbitration.[72] Such costs are recoverable from the proceeds of a lien foreclosure with the same priority as the underlying lien.[73] Attorneys' fees incurred before the foreclosure action is commenced are not recoverable under this statute.[74]

If a party records a lien release bond, this does not affect the lien claimant's right to recover fees if she prevails.[75]

A party need not obtain complete victory to be entitled to fees. Fees should not be denied or even reduced if a party fails to prevail on one of several related issues.[76] However, if both parties prevail on major issues, the court may conclude that neither has prevailed and deny fees to both.[77]

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[68] *See Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 850 P.2d 1361 (1993) (defendants who succeeded in dismissing the foreclosure suit were entitled to attorneys' fees and costs); *cf. Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891, 251 P.3d 908 (2011) (fees assessed against owner who sought unsuccessfully to intervene in a foreclosure action).

[69] *See Dean v. McFarland*, 81 Wn.2d 215, 500 P.2d 1244 (1972) (contractor who recovered a contract judgment for nonlienable demolition work was not entitled to fees under the lien statute).

[70] *See Emerald City Elec. & Lighting, Inc. v. Jensen Elec., Inc.*, 68 Wn. App. 734, 741, 846 P.2d 559 (1993) (fees assessed against subcontractors who failed to prove that their liens were prior to lender under the stop notice statute).

[71] *See Frank v. Fischer*, 108 Wn.2d 468, 739 P.2d 1145 (1987) (owner prevailed in foreclosure suit because claimant was not registered as a contractor; owner was not entitled to fees under lien statute); *cf. Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 456-58, 266 P.3d 881 (2011) (owner prevailed for two reasons; fees were awarded because one reason was grounded in the lien statute).

[72] The fees of paralegals performing legal functions can be recovered. *See Absher Constr. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 844-46, 905 P.2d 1229 (1995). No case authority has decided the extent of "necessary expenses" that can be recovered.

[73] RCW 60.04.181(3). A successful lien claimant may not recover fees personally from the property owner unless she has a contract with the owner, even though had the owner prevailed he would have been able to recover fees personally from the lien claimant. *See CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 622, 821 P.2d 63 (1991).

[74] *See Trane Co. v. Brown-Johnson, Inc.*, 48 Wn. App. 511, 519-20, 739 P.2d 737 (1987).

[75] *See Olson Engineering, Inc. v. KeyBank*, 171 Wn. App. 57, 286 P.3d 390 (2012). A similar result followed in *Kinnebrew v. CM Trucking & Constr., Inc.*, 102 Wn. App. 226, 6 P.3d 1235 (2000), where, instead of using a lien release bond, the owner interpleaded the disputed lien amount. The claimant prevailed on the underlying debt at trial, but the trial court denied fees on the ground that no lien had been foreclosed. The Court of Appeals reversed, holding that the parties' agreement to release the lien did not preclude the claimant from seeking fees under RCW 60.04.181.

[76] *See Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 702, 850 P.2d 1361 (1993).

RCW 60.04.181 is not the only basis for fees under the lien statute. Fees may also be awarded in connection with a challenge to a frivolous lien[78] or in connection with a stop notice,[79] and they may be forfeited if a claimant fails to serve the recorded claim of lien on the owner within 14 days.[80]

Of course, a lien claimant may have a right to recover fees even if fees are not available under the lien statute. Such a right may be based in a contract or in another statute.[81]

A successful lien claimant is also entitled to interest. This right is not stated in the statute, but case law supports the conclusion that a successful lien claim, if the amount is liquidated, accrues interest at the legal rate (12 percent) from the date the lien claim is filed, or from an earlier time when a liquidated amount was invoiced.[82]

A lien claimant may have a contractual right to interest in addition to the statutory right. Suppose a subcontractor commences a lien foreclosure action against two defendants: (1) the property owner and (2) the prime contractor with whom she has a contract providing for 18 percent interest on unpaid invoices. If the lien claimant prevails, she is entitled to interest against the owner at the 12 percent rate. Nothing in the statute would appear to prevent a personal judgment against the prime including interest at the higher contractual rate. However, the claimant cannot use her contract with the prime to get a higher rate of interest from the owner, with whom she has no contract.[83]

8. Redemption of Property After a Foreclosure Sale.

Washington's lien statute does not establish a right of redemption after a foreclosure sale.[84] However, RCW 60.04.181(2) provides that lien foreclosure shall be ordered "as in the case of foreclosure of judgment liens." The statute dealing with sales under execution of judgments provides that, except for short-term leases and vendor's rights under purchase and sale agreements, execution sales of real property shall be

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[77] *See Phillips Building Co. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996). It may also be relevant that the claimant's recovery is less than an amount the owner offered in settlement. *See Sherwood v. Wise*, 132 Wash. 295, 305, 232 P. 309 (1924).

[78] *See* RCW 60.04.081(4) and Chapter Six, Section 5.

[79] *See* RCW 60.04.221(7) and (9)(d) and Chapter Seven.

[80] See the last paragraph of RCW 60.04.091.

[81] *See, e.g., Kingston Lumber Supply Co. v. High Tech Dev., Inc.*, 52 Wn. App. 864, 765 P.2d 27 (1988) (if the amount in controversy is $10,000 or less, RCW 4.84.250 mandates fees to the prevailing party).

[82] *See Rosellini v. Banchero*, 83 Wn.2d 268, 274, 517 P.2d 955 (1974); *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 618, 821 P.2d 63 (1991) (interest properly related back to invoice date). The legal rate of interest is stated in RCW 19.52.010.

[83] *See U.S. Filter Distrib. Group, Inc. v. Katspan, Inc.*, 117 Wn. App. 744, 754-55, 72 P.3d 1103 (2003) (under public works bond statute, claimant's entitlement to fees was governed by the statute, not by her contract with another contractor).

[84] "Redemption" means recovery of title to property free and clear of an encumbrance that led to the sale of that property.

subject to redemption.[85] Details about the redemption process are provided in Chapter 6.23 RCW, which provides that the judgment debtor and persons with liens arising after the judgment on which the property was sold may redeem the property using the procedure set forth.

Redemption was recognized as available following foreclosure sale under an earlier version of the lien statute.[86] Subsequent changes to the statute do not seem to have affected this right.

If a junior lienor believes that foreclosure will not yield enough proceeds to pay prior interests as well as her own, she has the option of waiving foreclosure and preserving her right to redeem the property.[87]

9. Using Arbitration in a Foreclosure Action.

Arbitration can be a more speedy and economical method of dispute resolution than a court action, with the added advantage that the parties can choose their own decision-maker with expertise relevant to the issues in the case. However, an arbitrator has no power to order the county sheriff to sell property and distribute the proceeds. One common approach is to let the arbitrator resolve as many issues as possible, leaving only the confirmation and enforcement of the judgment to the court pursuant to Chapter 7.04A RCW. If the parties to a lien claim wish to arbitrate some or all of their disputes, the following points may be helpful:

- Commencing an arbitration is not in itself a waiver of the right to pursue a lien remedy.[88] To avoid a dispute about waiver, however, it is prudent to include nonwaiver language in an agreement to arbitrate.

- Commencing an arbitration does not toll the deadline in RCW 60.04.141 for commencing a foreclosure suit (eight months after the claim has been recorded). Therefore, a party intending to use arbitration should timely commence a court action, then seek to stay that action pending the outcome of the arbitration hearing, otherwise the lien may expire. Having the court action on file may help to get the lien confirmed and enforced, something an arbitrator has no power to do.

- Because arbitration is consensual, it is important to consider whether all necessary parties will consent to join an arbitration proceeding. If they do not consent, then an analysis must be done to determine what relief is possible without them.

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[85] RCW 6.21.080.

[86] *See Burwell & Morford v. Seattle Plumbing Supply Co.*, 14 Wn.2d 537, 128 P.2d 859 (1942) (holding that a lien claimant that caused the foreclosure sale may not later redeem).

[87] *See Seattle Medical Center, Inc. v. Cameo Corp.*, 54 Wn.2d 188, 194-95, 339 P.2d 93 (1959).

[88] The lien statute expressly contemplates arbitration. *See* RCW 60.04.181(3).

- RCW 60.04.181(3) provides that, in a foreclosure action, the court may award attorneys' fees and expenses in court and in arbitration, "as the court or arbitrator deems reasonable." This suggests that the prevailing party should ask the arbitrator to make a specific fee award, because a court may rule it has no authority to determine fees in arbitration, that its authority is limited to confirming the amount awarded by the arbitrator.

- To streamline the confirmation process following the arbitration, the arbitrator should be clearly empowered to decide both (1) the amount of money owed to the lien claimant and (2) whether or not the lien claimant has met the preconditions for asserting and foreclosing a lien (lienable work, timely pre-claim notice if required, timely commencement of a court action, priority of lien relative to other interests). The lien claimant should seek an award that can easily be confirmed as a court judgment justifying foreclosure and that avoids the problems that can lead to vacation or amendment of an award under RCW 7.04A.220-.240.

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CONSTRUCTION LIENS IN WASHINGTON
Chapter Six
—Defending a Construction Lien Claim—

1. Introduction.

The foregoing chapters have focused on the lien claimant who is seeking to establish, record and foreclose a construction lien. This chapter focuses on persons defending against a lien claim. In particular:

Section 2: Defenses to the underlying debt.

Section 3: Defenses to lien validity.

Section 4: Lien waiver, release and modification.

Section 5: Challenging a frivolous lien claim.

Section 6: How owners can protect themselves against liens.

2. Defenses to the Underlying Debt.

A construction lien secures collection of a debt. If no debt exists, there is nothing to secure. Accordingly, a successful challenge to the underlying debt will render the lien ineffective. Defenses to the debt are typically asserted by the person alleged by the lien claimant to owe the debt. This person may be the property owner or the owner's "construction agent" (*e.g.*, a prime contractor).

Challenges to a claimed debt depend on the facts of each particular case. This subject is not strictly part of lien law, but the following common defenses should be considered, among others:

- The claimant is not registered as a contractor (or architect), and therefore may not sue for compensation.[1]
- The claimant has waived her claim because she failed to satisfy contractual claim notice requirements.[2]
- The claimant has been paid all amounts due.[3]

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[1] *See* RCW 18.27.080 (unregistered contractors) and RCW 18.08.460(4) (unregistered architects). There is no similar statute for engineers and land surveyors in Chapter 18.43 RCW or for electricians in Chapter 19.28 RCW. The contractor registration statute does not bar an unregistered contractor from suing another contractor. *See Frank v. Fischer*, 108 Wn.2d 468, 472, 739 P.2d 1145 (1987) (citing *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 585 P.2d 1174 (1978)); *see also Hinton v. Johnson*, 87 Wn. App. 670, 942 P.2d 1061 (1997) (owner who regularly engaged in business as a contractor was not entitled to assert the construction registration statute as a defense to a lien claim).

[2] *See, e.g., Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003).

[3] Acceptance by endorsement of a joint check may be deemed payment, even if the co-payee fails to share any of the funds. *See AAA Cabinets & Millwork, Inc. v. Accredited Sur. & Cas. Co.*, 132 Wn. App. 202, 208-09, 130 P.3d 887 (2006).

- Any amount owed to the claimant must be offset by amounts owed by the claimant.
- The statute of limitations has expired for enforcing the alleged debt.

3. Defenses to Lien Validity.

Defenses to lien validity are independent of defenses to the underlying debt; they may be asserted to block the lien remedy even if the claim of debt has merit. The lien defenses mirror the elements of the lien claimant's case, so review of prior sections of this book will be helpful in formulating the defenses. Which elements of a lien claim can be challenged will depend on the facts of each particular case, but the following should be considered:

- Claimant's work did not constitute an "improvement" as required by RCW 60.04.021.[4]
- Claimant's work was not performed at the instance of the owner or the owner's common law or construction agent as required by RCW 60.04.021.[5]
- Claimant did not give a pre-claim notice required by RCW 60.04.031.[6]
- Claimant did not give other required statutory notice.[7]
- The property identified by the claimant is not subject to liens because it is publicly owned.
- The property identified by the claimant is not subject to liens because of the right of homestead.[8]
- The property identified by the claimant is not subject to a lien because the allegedly unpaid work was not performed on that property.[9]
- The asserted lien is subordinate to other interests.[10]

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[4] See Chapter Two, Section 3.

[5] See Chapter Two, Section 5. *See* RCW 60.04.041, which limits the ability of an unregistered contractor to serve as the agent of the owner; *see also Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 664, 246 P.3d 835 (2011) (to support lien, work must be performed under contract with owner or owner's construction agent).

[6] See Chapter Three, Section 2.

[7] *See* RCW 18.27.114, which requires notice on projects to construct or repair four or fewer residential units or to construct or repair a commercial building where the contract price is less than $60,000.

[8] The homestead exemption is of limited use in lien cases, *see* RCW 6.13.080(1). A homestead declaration filed after lienable work has begun is not effective. *See Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 361-63, 154 P. 465 (1915).

[9] RCW 60.04.051 (lien attaches to property on which improvement was made). Note that a claim of lien may be amended to correct the property description. *See, e.g., Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983) (claimant was allowed to amend lien claim to expand property description).

- The lien claimant has waived or modified her lien rights.[11]
- The lien claim was recorded more than 90 days after the claimant ceased to furnish labor, professional services, materials or equipment, or the last date on which employee benefit contributions were due.[12]
- The recorded lien claim was invalid because it did not meet the form requirements of RCW 60.04.091.[13]
- The lien claim is invalid because no foreclosure action was filed within eight months after the lien claim was recorded.[14]
- The lien claim is invalid because the lien claimant did not serve the owner within 90 days of filing the foreclosure action.[15]

Many of these defenses will involve disputes of fact that may not be resolved by motion. If the facts and law are clear, a defendant may be able to challenge the lien claim as frivolous, as explained in Section 5 below.

4. Lien Waiver, Release and Modification.

Lien claimants are favored in the law and lien remedies are liberally construed.[16] Nevertheless, a potential lien claimant can waive, release and modify her lien rights, and such actions may support defenses to a claim of lien.

A. Lien Waiver and Release.

Waiver and release are closely related concepts. Technically, waiver is an equitable principle that gives effect to a person's intentional relinquishment of a known right, either through positive action or by failing to assert available remedies.[17] Waiver occurs unilaterally, without consideration.[18] Release relates to the law

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[10] See Chapter Five, Section 6.

[11] See Section 4 below.

[12] See Chapter Four, Section 3.

[13] See Chapter Four, Section 4.

[14] See Chapter Five, Section 2.

[15] See Chapter Five, Section 3.

[16] RCW 60.04.900.

[17] *See Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013); *Albice v. Premier Mtg. Serv. of Wash.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012).

of contracts and gives effect to an intentional relinquishment of rights in exchange for consideration.[19] In examining the cases in this area, it is sometimes important to distinguish waiver from release.

Waiver or release of lien rights is not to be presumed; any waiver or release must be established by evidence that is clear, certain and unequivocal.[20] Such evidence may consist of an express relinquishment of rights, written or oral.[21] The evidence of waiver or release may also consist of conduct "inconsistent with any other intention than to waive."[22] Failure to satisfy lien statute requirements for maintaining a lien is conclusive evidence of waiver.[23]

It has been held (in Oregon) that an agreement to take a mortgage to secure payment for construction work on the mortgaged property is a waiver of a construction lien because a mortgage is regarded, as a matter of law, as inconsistent with the right to a lien.[24] By contrast, an agreement to accept a promissory note or to extend credit is not in itself proof of a waiver or release.[25] An agreement to arbitrate claims arising from a construction project is not in itself proof of a waiver or release.[26]

Leaving aside questions of proof, what are the situations in which a (potential) lien claimant can, or cannot, waive or release her lien rights? The Washington lien statute does not fully resolve this question. The statute does mandate release of a lien upon payment of the amount due.[27] The statute also presumes that, once a lien claim has been recorded, it is subject to release ("discharge") in exchange for a promissory note

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[18] *See Voelker v. Joseph*, 62 Wn.2d 429, 435, 383 P.2d 301 (1963); *Bowman v. Webster*, 44 Wn.2d 667, 670, 269 P.2d 960 (1954).

[19] *See, e.g., De Nike v. Mowery*, 69 Wn.2d 357, 367, 418 P.2d 1010 (1966). The term "release" has additional meanings in the lien context. *See, e.g.*, RCW 60.04.081(4) (court may issue an order "releasing" a claimant's frivolous lien); RCW 60.04.161 (a bond may "release" another person's real property from a construction lien).

[20] *See Boise Cascade Corp. v. Distinctive Homes, Inc.*, 67 Wn.2d 289, 290, 407 P.2d 452 (1965). The Court of Appeals reversed a finding of an oral "waiver" of lien rights in exchange for a promissory note, even though the finding was supported by substantial evidence.

[21] No published Washington authority states that lien rights can or cannot be waived or released orally, but lien rights can be waived by conduct (*e.g.*, by failing to timely commence foreclosure), from which it follows that a writing is not required. In *Boise Cascade Corp. v. Distinctive Homes, Inc.*, 67 Wn.2d 289, 407 P.2d 452 (1965), the court appears to have assumed that lien rights could be released orally (for consideration). *See also North Coast Elec. Co. v. Arizona Elec. Serv., Inc.*, 2006 Wash. App. LEXIS 463, an unpublished case in which the Court of Appeals remanded to allow a contractor to prove the terms of an alleged oral contract that included a release of lien rights. It would seem that an express oral waiver or release can be effective, though it may be hard to prove.

[22] *See Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954).

[23] *See, e.g.*, RCW 60.04.091 (90-day period for recording lien claim is a "period of limitation").

[24] *See Charles K. Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 238-42, 6 P.2d 25 (1932). Under the terminology used here, this action could be characterized as a waiver or a release.

[25] *See* RCW 60.04.191 (effect of note); *Emerich v. Gardner & Hitchings, Inc.*, 51 Wn.2d 528, 534, 320 P.2d 288 (1958) (extension of credit); *see also* RCW 60.04.141 (credit terms stated in lien claim extend the deadline for commencing foreclosure and, by implication, do not waive the lien).

[26] The lien statute expressly contemplates arbitration. *See* RCW 60.04.181(3).

[27] RCW 60.04.071.

that expressly provides for release.[28] In general, parties are free to enter into agreements that result in the "release of real property from a claim of lien."[29] Thus it appears clear that, once a lien claim has been recorded, it may be freely waived or released by the claimant, though a court will insist on clear evidence of waiver or release.

It is also well-established that, even before a lien claim has been recorded, a lien claimant may release her lien rights incrementally during the course of a construction project. This is typically accomplished by "partial lien releases" (also called "partial lien waivers"), which are agreements signed by the lien claimant to relinquish lien rights (to some stated extent) in exchange for progress payments. Sometimes a contractor submits a "conditional lien release" before a payment and then an "unconditional lien release" once payment has been made.

Lien release forms vary in their terms and effect. Some are little more than receipts for money paid; others release all lien rights and underlying claims for payment with respect to any work done during stated time periods.[30] It is prudent to examine the terms of any proposed lien release and to raise questions if a contract contains an open-ended term like "monthly invoices shall include lien releases."[31]

Thus it appears that lien rights may be freely waived or released even before a lien claim is recorded. But can lien rights be waived or released prospectively, before work begins that creates the lien rights? Technically, the answer regarding waiver is no: a person cannot waive a substantive statutory right before that right exists; accordingly, such waivers are void.[32] Because lien rights are substantive statutory rights, they cannot be waived (unilaterally, without consideration) before they have arisen.

Can lien rights be released (for consideration) before the work begins? Suppose a construction contract contains the following provision: "contractor agrees not to assert any rights against the project property under Chapter 60.04 RCW." Would such a provision be enforced? The lien statute does not resolve this question, nor does any published Washington case. The following considerations are relevant:

- The lien statute provides that acts of coercion, including threats to withhold future contracts made to discourage a person from submitting a pre-claim notice or from recording a claim of lien, are unfair

[28] RCW 60.04.191.

[29] RCW 60.04.161, last paragraph.

[30] *See A.A.R. Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wn. App. 442, 50 P.3d 650 (2002) (lien waivers given with progress payments released lien rights with respect to work through stated dates).

[31] It is prudent to use forms of conditional and unconditional lien releases that balance the interests of the parties by (a) releasing the claimant's lien rights and claims with respect to work performed on a particular project during a particular time period, but (b) allowing the claimant to reserve lien rights and claims with respect to retainage (if any) and other timely asserted claims for compensation.

[32] *See Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) ("the right, advantage, or benefit must exist at the time of the alleged waiver").

and deceptive acts.[33] This statute does not clearly apply to prospective lien releases but, even if it does, it seems to say that only "coerced" lien releases are ineffective. The statute does express a policy of protecting potential lien claimants at a very early stage, even before they file a pre-claim notice.

- The common law rule is that prospective lien releases are enforceable.[34] At least one older federal court case in Washington seems to have assumed that prospective lien waivers could be effective.[35]

- As explained further below, an agreement to subordinate lien rights to (usually) a mortgage interest is enforceable, even if made before the lien rights have arisen. If this very important lien right (priority) can be released before it arises, it would seem reasonable that other lien rights can also be released.

- A growing number of states have restricted lien releases by statute, suggesting that such restrictions, if they exist, must be based on legislation rather than arising from common law.[36]

The above considerations suggest that a prospective lien release would be enforced in Washington, though the proof would have to be clear and any element of coercion would raise a risk of liability under RCW 60.04.035. Given the lack of clear authority, however, the effectiveness of a prospective release is not assured. The safest course might be to pattern a proposed lien release on forms that have proved effective in disclaiming implied warranties.[37]

It has been held in other jurisdictions that a lien waiver clause agreed to by a prime contractor can bind the prime's subcontractors and suppliers through a "flow-down" clause.[38] Whether a Washington court would allow this will depend on the specific facts of the case and to what extent the "flow-down" clause is valid and enforceable.

In any case, there are limits to any waiver or release of lien rights. Only those provisions in the lien statute that create rights can be waived. For example, RCW 60.04.021 provides that persons furnishing labor to

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[33] RCW 60.04.035.

[34] *See* 76 A.L.R.2d 1087 (2009) (collecting cases).

[35] *See Haskell v. McClintic-Marshall Co.*, 289 F. 405 (9th Cir. 1923) (affirming trial court's ruling that contractual lien waivers were induced by fraud, but raising no general objections to such waivers).

[36] *See, e.g.,* Alaska Statutes 34.35.117; Cal. Civ. Code §8122. The Nevada Supreme Court held a prospective lien release void on grounds of public policy even before a limiting statute came into effect, relying on California's legislative lead. *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032, 1041-42 (Nev. 2008).

[37] *See, e.g., Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 395-96, 238 P.3d 505 (2010) (disclaimer of implied warranties is effective if conspicuous and bargained for).

[38] *See* 75 A.L.R.3d 505.

improve private property "shall have a lien on the improvement." This right can be waived. By contrast, RCW 60.04.091 provides that lien claims must be recorded no more than 90 days after the claimant has ceased to perform work. This provision does not create lien rights; it limits the lien claimant's exercise of her rights. Thus the time limit in RCW 60.04.091 (and other procedural aspects of the lien statute) probably cannot be waived, released or varied by agreement.[39]

Because lien rights are *quasi in rem*, they affect property. A lien waiver or release may be used as a defense by anyone with an interest in the property.[40]

B. Lien Modification.

A lien claimant may modify her lien rights by agreement, without completely waiving them. The most common instance is a subordination agreement. A contractor may begin work before the property owner closes his construction loan. Before granting the loan, the lender may insist that its security in the property be given first priority. This can be accomplished by a subordination agreement. Such agreements are enforceable, though they are strictly construed.[41]

Apart from subordination by agreement, there are provisions in the lien statute that result in subordination of an otherwise prior right.[42]

The waiver, release or modification of a lien right does not affect the claimant's right to pursue the underlying debt.[43]

5. Challenging a Frivolous Lien Claim.

RCW 60.04.081 provides a summary procedure for challenging a lien that is "frivolous and made without reasonable cause, or clearly excessive." This procedure may be invoked at any time after a lien claim has

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[39] The following cases explore the same issue in other contexts: *Schroeder v. Excelsior Mgt. Gp., LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) (property owner may not waive requirement that deeds of trust on agricultural land be foreclosed judicially); *Bain v. Metropolitan Mtg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) (parties cannot by agreement change the definition of "beneficiary" in the deed of trust statute); *Godfrey v. Hartford Ins. Cas. Co.*, 142 Wn.2d 885, 889, 16 P.3d 617 (2001) (parties who agree to arbitrate cannot vary by agreement the provisions of Washington's arbitration statute).

[40] *Den Adel v. Blattman*, 57 Wn.2d 337, 341, 357 P.2d 159 (1960) (waiver of lien given to lender discharged the property from the lien; the owner could claim the benefit of waiver).

[41] *See A.A.R. Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wn. App. 442, 449, 50 P.3d 650 (2002) (subordination agreements are enforced); *Ban-Co Inv. Co. v. Loveless*, 22 Wn. App. 122, 134-35, 587 P.2d 567 (1978) (priority rights under a subordination agreement are limited strictly by the express terms and conditions of the agreement).

[42] *See, e.g.*, RCW 60.04.031(5) (if claimant provides professional services not visible from an inspection of the property and fails to record notice, her lien will be subordinated to the interest of a subsequent mortgagee or purchaser); RCW 60.04.131 (if a claimant working on two separate properties fails to allocate the amount due between the properties, her lien is subordinated to other liens that are allocated); RCW 60.04.221(7) (if a lender fails to respond properly to a stop notice, its lien is subordinated to that of the party sending the notice).

[43] *See Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 886 (1964).

been recorded, even before a foreclosure action has been commenced. If no foreclosure action has been commenced, the challenge can be brought as a stand-alone proceeding upon payment of a filing fee.[44]

The frivolous lien statute establishes a summary proceeding in which a property owner (or other permitted challenger) may quickly obtain the release of a lien that is frivolous or the reduction of a lien that is clearly excessive. Other issues are not permitted.[45]

The challenger may be the owner of the liened property, another contractor or subcontractor or lender on the project, or any person with a competing lien.[46] The challenger brings a motion in the superior court of the county where the property (or some part of it) is located. The motion must present evidence (by affidavit or declaration) tending to show that the lien is frivolous or clearly excessive and should ask the court to issue an order requiring the lien claimant to appear between six and 15 days after the order is issued to show cause why the lien should not be disallowed.[47]

The challenger bears the initial burden of showing why the lien is frivolous. The burden is heavy: the challenger must show that the lien was improperly filed beyond legitimate dispute.[48] If the challenger makes an initial showing, the burden shifts to the lien claimant to make a prima facie case showing that her lien is not frivolous. If such a showing is made, the burden shifts back to the challenger to prove that the lien was frivolous.[49] If the lien dispute presents debatable issues of law or fact, the lien should not be found frivolous or without reasonable cause.[50]

The level of proof required to prove a lien frivolous "beyond legitimate dispute" was illustrated in *Intermountain Electric, Inc. v. G-A-T Bros. Constr., Inc.*[51] The lien claimant admitted that its claim of lien was filed 94 days after its last active work at the site, but it argued (1) that the law should be changed in cases where the owner promised that work would resume, and (2) leaving its trailer on the site counted as "furnishing equipment" under RCW 60.04.091. The trial court rejected these arguments and found the lien frivolous. The Court of Appeals agreed that the lien was "invalid on its face" but reversed the determination

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[44] RCW 60.04.081(3). The statutory challenge to a frivolous lien was patterned after the unlawful detainer statute.

[45] *See Andries v. Covey*, 128 Wn. App. 546, 550, 113 P.3d 483 (2005) (procedure under frivolous lien statute does not substitute for a foreclosure action or a suit to recover on the underlying contract).

[46] A former owner of the liened property may not use the frivolous lien statute. *See Christenson v. McDuffy*, 93 Wn. App. 177, 968 P.2d 18 (1998).

[47] RCW 60.04.081(1).

[48] *See Gray v. Bourgette Constr., LLC*, 160 Wn. App. 334, 342, 249 P.3d 644 (2011).

[49] *Id.*

[50] *Id.*, 160 Wn. App. at 344.

[51] 115 Wn. App. 384, 62 P.3d 548 (2003).

that it was frivolous, noting that "not every invalid lien is frivolous."[52] The Court of Appeals concluded that the lien claimant had made at least a good faith argument for change in the existing law. In general, debatable issues about material fact will prevent a lien from being frivolous.[53]

Proving that a lien is "clearly excessive" also requires the challenger to carry a heavy burden. A lien will not be found "clearly excessive" unless it is shown by clear evidence, without legitimate dispute about material facts, that the amount stated was claimed with an intent to defraud or in bad faith.[54]

A challenge under the frivolous lien statute leads to a hearing, after which the court issues an order discharging the lien (if frivolous), or reducing the lien (if clearly excessive) or denying the requested relief. The court must grant costs and reasonable attorneys' fees to the prevailing party.[55] The court should issue findings of fact and conclusions of law to support its order.

6. How Owners Can Protect Themselves Against Liens.

The pre-claim notice required (in some cases) by RCW 60.04.031 contains "Important Information" for owners of property being improved. The statutory notice form says in part:

> COMMON METHODS TO AVOID CONSTRUCTION LIENS: There are several methods available to protect your property from construction liens. The following are two of the more commonly used methods.
>
> > DUAL PAYCHECKS (Joint Checks): When paying your contractor for services or materials, you may make checks payable jointly to the contractor and the firms furnishing you this notice.
> >
> > LIEN RELEASES: You may require your contractor to provide lien releases signed by all suppliers and subcontractors from whom you have received this notice. If they cannot obtain lien releases because you have not paid them, you may use the dual payee check method to protect yourself.

These suggestions, while well meant, are not helpful in all cases. Even a project of modest size may have a dozen subcontractors and suppliers; it is not practical to issue checks to 12 parties at once. Moreover, doing so will not protect the property from a lien by the prime contractor. Lien releases can provide useful

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[52] *Id.*, 115 Wn. App. at 394.

[53] *See S.D. Deacon Corp. v. Gaston Brothers Excavating, Inc.*, 150 Wn. App. 87, 206 P.3d 689 (2009) (whether parties' contract was integrated was debatable, preventing relief under frivolous lien statute).

[54] *See Pacific Industries, Inc. v. Singh*, 120 Wn. App. 1, 10-11, 86 P.3d 778 (2003).

[55] Under RCW 60.04.081(4), the court "shall" make an order including an award of fees. *Cf. W.R.P. Lake Union LP v. Exterior Services, Inc.*, 85 Wn. App. 744, 934 P.2d 722 (1997) (fees mandatory under RCW 60.04.081). By contrast, under RCW 60.04.181 the court "may" award fees.

information, but a reasonable form of release will allow subcontractors and suppliers to reserve pending claims that may later turn into liens.[56] A fuller list of owner options is provided below.

1. The owner's contracts with its contractor(s) and designer(s) can include a release of lien rights.

2. The owner can obtain the consent of appropriate contractors and designers to subordinate their lien rights to the interest of the owner's lender.

3. The owner's contracts with its contractor(s) and designer(s) can minimize the likelihood of claims for additional compensation by clearly stating the scope of work and establishing strict deadlines for notice and submission of claims.

4. The owner can minimize the risk of multiple liens by requiring the prime contractor and lead designer to respond to liens from their subcontractors, suppliers and subconsultants. Here is sample language of the sort commonly used in prime construction contracts:

> Upon learning that any lien has been recorded against the Project improvements or property by any person performing a portion of the Contract Work, Contractor shall, at its own expense and within ___ calendar days, remove that lien from the Project improvements and property by settling the claim underlying the lien, recording a bond under RCW 60.04.161, providing other security to the lien claimant, or otherwise. If Contractor fails to act as provided in the previous sentence, Owner may record a bond under RCW 60.04.161, and Owner may recover the cost of the bond from Contactor or deduct that cost from amounts otherwise coming due to Contractor.

5. If the owner is concerned about liens arising from work ordered by a person holding (*e.g.*) a leasehold interest in the property, make sure the lease clearly defines the extent to which the lessee is required to perform improvements.

6. The owner can require the prime contractor and lead designer to submit, with their periodic invoices, conditional or unconditional lien releases for at least their major subcontractors, suppliers and subconsultants, or to give notice if any of the subcontractors, suppliers or subconsultants has asserted a timely claim for additional compensation.

7. The owner can provide (or direct the prime contractor to provide) a bond or other security for payment of the contractor(s) or designer(s) and obtain agreements expressly accepting the alternate security in place of lien rights. This can be done at the outset of a project or after lien claims have been recorded.

[56] See Section 4 above.

8. If a lien claim is recorded by a subcontractor or supplier not in privity with the owner, the owner may under RCW 60.04.151 withhold amounts from the prime contractor sufficient to protect against the lien claim.

9. If a lien claim is recorded by a subcontractor or supplier not in privity with the owner, the owner can use joint checks made out to the prime contractor and the lien claimant.

10. Track recorded lien claims and determine whether there are grounds to challenge them as frivolous or clearly excessive in amount. If the lien claimant records an "unjust, excessive, or premature notice" of lien under the stop notice provisions, the owner may recover damages and attorneys' fees.[57]

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[57] RCW 60.04.221(8); *see also Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 542 P.2d 756 (1975).

CONSTRUCTION LIENS IN WASHINGTON
Chapter Seven
—The Stop Notice—

1. Introduction.

As explained in the previous chapters, a person providing labor, professional services, materials or equipment for the improvement of private real property is protected against nonpayment with a construction lien encumbering the improvement and (sometimes) the underlying real estate. Construction liens are available in all 50 states. Some states provide additional protections for lien claimants. In Washington, the chief of these additional protections is the stop notice remedy.

The stop notice remedy is intended to protect persons providing lienable work in situations where a construction lien may be ineffective. For example, if a developer borrows construction funds and the lender records a mortgage before any work begins, the lender's interest in the project property will be prior to that of any lien claimant. If the lender's interest approaches the market value of the property, there will be no equity left for a lien claimant.

To address this problem, Washington law permits a potential lien claimant to send a notice to the owner's construction lender directing the lender to withhold stated amounts from future draws by the owner.[1] Upon receipt of the notice, a construction lender must either take steps to protect the lien claimant's interest or else risk having its security subordinated to the construction lien. Similar remedies are available in other states. The common term for this type of remedy is a "stop notice." That term will be used here.

Because it potentially interrupts the flow of loan proceeds, a stop notice gives the owner an incentive to deal with an unpaid contractor or subcontractor. A stop notice does not (except as noted below) change the priority of the claimant's lien.

The following sections will examine the stop notice remedy from the points of view of those most directly involved.[2] In particular:

Section 2: Stop notices from the lien claimant's perspective.

Section 3: Stop notices from the lender's perspective.

Section 4: Stop notices from the owner's perspective.

2. Stop Notices from the Lien Claimant's Perspective.

For a stop notice to be effective, a number of preconditions must be met. First, the person submitting the stop notice must be a "potential lien claimant." This term is defined in RCW 60.04.011(11) to mean a person

[1] *See generally* RCW 60.04.221.

[2] *See generally*, Note, *Mechanics' Lien: The "Stop Notice" Comes to Washington*, 49 Wash. L. Rev. 685 (1974).

"entitled to assert lien rights under this chapter who has otherwise complied with the provisions of this chapter" and who has also complied with applicable licensing requirements. So the stop notice is available only to a person who (at the time the notice is given) has performed lienable work on private property at the request of the property owner or his construction agent.

The phrase "potential lien claimant" indicates that a stop notice may be issued at an early stage of a project, before the issuer has become an actual (as opposed to a potential) lien claimant. In fact, the statute does not require a person pursuing a stop notice to also pursue a construction lien. However, a stop notice and a construction lien certainly may be pursued together[3] and there is good reason to do so: as explained below, a claimant may lose valuable rights under the stop notice statute if she fails to perfect her construction lien.

A second requirement for a stop notice is a lender providing "interim or construction financing." This term means funds secured by a mortgage or other encumbrance on real property to finance an improvement to that property.[4] Funds loaned to acquire the property, to pay for insurance or taxes, or to acquire nonlienable personal property do not count as interim or construction financing for purposes of the stop notice statute. In some cases, only part of a loan may qualify as interim or construction financing. The evident intent is that the interim or construction financing must fund the improvement that the issuer of the stop notice is working on, though this is not stated expressly.

The stop notice remedy is not available if the borrower has obtained a payment bond of at least 50 percent of the amount of construction financing. The idea is presumably that the bond security makes a stop notice unnecessary. However, payment bonds come in various forms. A bond may or may not secure payments to all potential lien claimants, and it may contain notice requirements or other conditions precedent that complicate recovery. Presumably the intent of the legislature was to bar stop notices only in cases where the potential lien claimant has reasonable access to the protection of a bond, though this is not stated expressly.

Another requirement for issuing a stop notice is that the potential lien claimant must have performed work for which timely payment has not been made. The statute says that the notice may be issued "within thirty-five days of the date required for payment by the contract, invoice, employee benefit plan agreement, or purchase order."[5] Construction contracts and purchase orders commonly state that payment is due within a certain number of days of the invoice. If no payment date is specified by agreement, there is authority that the notice deadline should be measured from the date payment was requested and refused.[6] If the last day of this period falls on a Saturday, Sunday or legal holiday, the period for sending the notice will be extended to

[3] *See Cordell v. Regan*, 23 Wn. App. 739, 746, 598 P.2d 416 (1979).

[4] RCW 60.04.011(6). The statute does not require that the lender of "interim or construction financing" be a bank or similar institution.

[5] RCW 60.04.211(1).

[6] *See Cordell v. Regan, supra,* at 746 (construing prior statute).

the next day that is not one of those days.[7] There is a potential trap for the unwary here. If a project has cash-flow problems, a potential lien claimant may acquiesce in late payments. However, if a claimant allows 35 days to pass before issuing a stop notice, she may discover that her notice is late because the deadline is measured from the date payment was "required" under her contract, not the date she had informally acquiesced to.

The statute says that the notice should not be sent until payment is five days overdue; this gives a 30-day window for the notice. If no payment date is specified by agreement, it would probably be safest to wait five days after a refusal of payment before submitting the stop notice.

The statute contains detailed directions regarding the content of the notice, the persons to whom it should be delivered, and the permitted means of delivery. These directions should be consulted when preparing a stop notice. One requirement is that the notice be delivered to the lender's "office administering the interim or construction financing." The location of this office should be stated on a notice posted by the prime contractor pursuant to RCW 60.04.230(1) or on the building permit posted pursuant to RCW 19.27.095.[8] But these posting requirements apply only to projects costing more than $5,000. On small projects a claimant may need to make inquiries.

RCW 60.04.211(1) indicates that the stop notice may include a statement of "the sums due and to become due." The statutory form of notice, however, lists only the "amount owing" and RCW 60.04.221(5) says that the lender should withhold only "the amount claimed to be due." It appears that stating amounts "to become due" will not be effective.[9] If a claimant wishes to have ongoing protection, she should submit a stop notice each time an invoice goes unpaid for more than five days.[10]

3. Stop Notices from the Lender's Perspective.

Upon receipt of a stop notice, the lender is directed to "withhold from the next and subsequent draws the amount claimed to be due" or else obtain a payment bond for the benefit of the claimant.[11] Although the statute seems to limit the lender's options to two, the lender actually has more options than these. The lender

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[7] *See* RCW 1.12.040.

[8] In the case of noninstitutional lenders who lack an administrative office, presumably service is permitted at some appropriate business or home address.

[9] This phrase played a role under a previous version of the statute.

[10] Incidentally, it has been held that existence of the stop notice remedy does not prevent a contractor from pursuing a claim of unjust enrichment against a lender. *See Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wn. App. 493, 498, 717 P.2d 1384 (1986).

[11] RCW 60.04.221(5).

must choose its response promptly, even before knowing whether the information in the stop notice is accurate.[12]

If there is a payment bond in place for (at least) 50 percent of the interim or construction financing amount, claimants protected by the bond have no stop notice rights. In that case, the lender need take no action in response to a stop notice. If all of the loaned funds have been disbursed, there are no "subsequent draws" to withhold money from and so the stop notice has no effect. Again, the lender need not respond to the stop notice.

Upon receipt of a stop notice, the lender may withhold funds from the "next and subsequent draws" up to the amount stated in the stop notice. "Draw" means a disbursement of interim or construction financing.[13] So for example, if the borrower is entitled to a draw of $12,000 but a stop notice is submitted for $5,000, the lender must withhold $5,000 and may disburse no more than $7,000. If the draw is $12,000 but a stop notice is submitted for $20,000, the lender must withhold the entire draw and then continue to withhold from the next draw(s) until a total of $20,000 has been withheld. Making an accounting entry is not sufficient.[14] Paying subcontractors and suppliers directly is also not permitted.[15] The money withheld must be retained until there is written agreement between the claimant, the owner and the prime contractor, or until receipt of a court order.[16]

Another option for the lender is to obtain a special payment bond for the benefit of the stop notice claimant. The bond must be in (at least) the amount claimed. The statute suggests that the bond must come "from the prime contractor or borrower," but presumably any interested party could provide the bond.

Another option for the lender is to continue disbursing funds to the borrower. In that case the lender's security will be "subordinated to the lien of the potential lien claimant to the extent of the interim or construction financing wrongfully disbursed."[17] So for example, if after receipt of a stop notice in the amount of $10,000 the lender disburses $25,000 from the loan, the amount wrongfully disbursed is $10,000. In the same scenario if the lender disburses $7,500 from the loan, the amount wrongfully disbursed is $7,500.

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[12] As explained below, the statute provides remedies for false stop notices.

[13] RCW 60.04.011(3). *See also Emerald City Elec. & Lighting, Inc. v. Jensen Elec., Inc.*, 68 Wn. App. 734, 846 P.2d 559 (1993) (lender's disbursement for personal property was not a "draw" and so did not violate the stop notice statute).

[14] *See Pacific Continental Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 273 P.3d 1009 (2012) (creating a reserve that did not result in any reduction of monthly draws did not comply with the stop notice statute).

[15] *See In re Aspen Homes*, 54 B.R. 541 (E.D. Wash. 1985) (payments to suppliers and laborers counted as "draws" in violation of the stop notice statute).

[16] RCW 60.04.221(6).

[17] RCW 60.04.221(7). The statute says that subordination follows if the lender fails to abide by "subsections (4) and (5) of this section." As noted by the code reviser, the reference should be to subsections (5) and (6).

Of course, the lender's interest can be "subordinated to the lien" only if the stop notice claimant also perfects a construction lien. It would be wise for her to do so, just to keep the subordination remedy available. Even if the lender initially withholds money as requested in the stop notice, the claimant should continue to perfect her construction lien because, if she fails to do so, the lender could choose to disburse the withheld funds to the borrower. For this reason, the lender can expect the issuer of a stop notice to take the necessary steps to perfect her construction lien.

The final option for the lender is to make no further disbursements and foreclose on its mortgage or other security.[18] This option is open even if the lender has initially withheld funds pursuant to a stop notice. The statute does not give a claimant any lien or other right to the withheld funds (unless a court so orders), so the lender should be free to declare the loan in default. To facilitate this option ahead of time, the loan agreement could provide that the existence of a stop notice constitutes a default unless the borrower takes prompt action (by posting a payment bond or otherwise) to remove or satisfy the claim.

4. Stop Notices from the Owner's Perspective.

Because a stop notice seeks to interrupt the flow of financing, this is of serious concern to the borrower (usually the project owner). The owner can pursue various strategies to avoid stop notices. The owner can arrange for a payment bond in the amount of (at least) 50 percent of the interim or construction financing. The owner can arrange to have the loan disbursed at an early date, before any stop notices have been submitted. The owner can require the prime contractor to protect the project against stop notices by posting a payment bond of its own or by promptly responding to stop notices as they are submitted. The owner can also require the contractor to submit periodic lien releases from its major subcontractors and suppliers.

If a stop notice is submitted despite these precautions, the owner (along with other interested parties) has a right to challenge it on the grounds that it is "frivolous and made without reasonable cause, or is clearly excessive."[19] This statute parallels the language of the frivolous lien statute (RCW 60.04.081), and presumably a court would treat the two parts of the lien statute as procedurally and substantively equivalent. This means that a person challenging a stop notice under RCW 60.04.221(9) would bear a heavy burden to show that the stop notice was frivolous or excessive "beyond legitimate dispute."[20] The party who prevails in a challenge to a stop notice is entitled to a mandatory award of fees.

It may well occur that a stop notice is procedurally invalid (*e.g.*, submitted too late) or substantively invalid (*e.g.*, the claim is subject to valid defenses), though the issues are not "beyond legitimate dispute." In such cases, the stop notice cannot be declared void using the summary procedure of RCW 60.04.221(9). The

[18] *See Pacific Continental Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 385, 273 P.3d 1009 (2012) (quoting *Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wn. App. 493, 717 P.2d 1384 (1986)).

[19] RCW 60.04.221(9)(a).

[20] See Chapter Six, Section 5.

validity of the stop notice will need to be resolved in litigation, usually the same litigation in which the claimant's construction lien is foreclosed. Because litigation over a stop notice raises questions of lien priority, fees should be awarded to the prevailing party.[21]

One subsection of the stop notice statute says that a person shall be liable for "any loss, cost, or expense, including reasonable attorneys' fees and statutory costs, to a party injured thereby [sic] arising out of any unjust, excessive, or premature notice filed under purported authority of this section."[22] This statute is apparently intended to apply to (at least) the following kind of case: a claimant submits a stop notice and, in response, the lender withholds substantial money that would otherwise have been disbursed to the project owner. Lacking this money, the project owner is not able to pay other contractors, the project is delayed and damages accrue. A court later determines that the claim underlying the stop notice was meritless and that the stop notice was submitted to exert unfair pressure on the owner to pay an unjustified claim. In such cases, surely, the claimant may be held liable for the owner's losses caused by the stop notice.[23]

What happens in less extreme cases? The statute does not make it clear what evidence is required to establish that the stop notice was "unjust, excessive, or premature." Surely it is not enough that the stop notice claimant fails to receive any of the money withheld. Consider the following scenario: a claimant submits a stop notice for $10,000. The lender withholds $10,000 from money that would otherwise have been disbursed and, as a result, the project is delayed and damages accrue. The court later determines that the claimant was in fact owed the $10,000, but this occurs in a lien foreclosure action involving multiple contending parties. In the end, the property is sold and the court orders the sale proceeds, and the money still held by the lender, to be disbursed to other parties whose claims are prior to those of the stop notice claimant. It would seem that the stop notice claimant's claim was not unjust, excessive or premature, even though she failed to recover a money judgment, and she should not be liable for damages arising from project delays. More than an unfavorable judgment should be required. How much more may depend on the specific facts presented in future cases.

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[21] *See Emerald City Elec. & Lighting, Inc. v. Jensen Elec., Inc.*, 68 Wn. App. 734, 741, 846 P.2d 559 (1993) (construing prior statute).

[22] RCW 60.04.221(8).

[23] *See Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 542 P.2d 756 (1975) (decided under prior similar statute).

CONSTRUCTION LIENS IN WASHINGTON
Chapter Eight
—Lien-Like Remedies on Public Projects—

1. Introduction.

Construction liens do not attach to public property.[1] On projects where public property is improved, Washington law establishes two lien-like remedies to supplement a direct action for nonpayment. The first, codified in the state's "Little Miller Act,"[2] requires the contractor on most public projects to post a payment bond for the benefit of laborers, subcontractors and suppliers. The second requires public owners to retain a percentage of the monies otherwise due to the prime contractor as a fund against which laborers, subcontractors and suppliers can assert lien-like claims. There is also a prompt payment requirement on state public projects. These and other matters are discussed below, as follows:

Section 2: Bonds on public projects.

Section 3: Retainage on public projects.

Section 4: Prompt payment requirements on public projects.

Washington courts have noted that the bond and retainage remedies are analogous to the private lien law in that they provide security for the payment of persons performing work to improve property. Washington courts have accordingly looked to lien law when interpreting these public works statutes.[3]

2. Bonds on Public Projects.

The bond remedy is mandatory on most public projects. In particular, anyone contracting with a public body (defined broadly to include the state and any county, municipality and district) to perform work for that public body must deliver a "good and sufficient bond, with a surety company as surety," to ensure the faithful performance of the work (*i.e.*, a performance bond) and payment to all those furnishing work on the public project (*i.e.*, a payment bond).[4] The statute allows only limited exceptions to the bond requirement:

- On contracts of $35,000 or less, the contractor may elect to have the public body retain 50 percent of the contract amount instead of posting a bond.

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[1] *See Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 500, 210 P.3d 308 (2009).

[2] The term comes from the resemblance to the federal Miller Act, 40 U.S.C. § 270(a), *et seq*. Lien-like remedies on federal projects are outside the scope of this book.

[3] *See, e.g., Maryland Cas. Co. v. City of Seattle*, 11 Wn.2d 69, 73-74, 118 P.2d 416 (1941) ("all of our cases dealing with the subject of claims under public works bonds proceed upon the theory that the purpose of the statute requiring such bonds is to protect those persons who would be protected by the lien laws, if the work was private in character"); *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 729, 741 P.2d 58 (1987) ("there is good reason to look to private materialman's lien statutes as a guide for interpreting the scope of the [public] retainage statute").

[4] RCW 39.08.010.

- On contracts of $100,000 or less, the public body may accept a bond from one or more individual sureties (*i.e.*, not from a surety company).

The bond, if required, must be in the amount of the full contract price and payable to the State of Washington, again with limited statutory exceptions:

- Cities and towns may, by general ordinance, reduce the bond amount to no less than 25 percent of the contract price and may require the bond to be payable to the city or town.

- Under the job order contracting procedure, bonds must be in an amount no less than the dollar value of all open work orders.[5]

- On highway construction projects for the Department of Transportation costing more than $250 million, the department may authorize bonds for less than 100 percent of the contract price.[6]

- There are special rules relating to the construction, maintenance and repair of marine vessels.[7]

If a public body contracts for work without enforcing the bond requirement, then the public body will be directly liable to the persons who would have been protected by the bond.[8] The liability is strict; good faith is no excuse.[9]

The parties protected by a public payment bond are "all laborers, mechanics, and subcontractors and material suppliers, and all persons who supply such person or persons, or subcontractors." This provision is a bit obscure. The phrase "such person or persons" appears to refer to individual workers (laborers and mechanics). Persons who provide materials to subcontractors are protected by the bond, but persons who provide materials to material suppliers are not.[10]

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[5] RCW 39.08.030(2).

[6] RCW 39.08.030(3). This provision is scheduled to expire on June 30, 2016.

[7] RCW 39.08.100.

[8] RCW 39.08.015.

[9] *See Old Nat. Bank of Spokane v. Lewis County*, 137 Wash. 436, 441, 242 P. 961 (1926).

[10] This limitation was recognized in *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 722-26, 741 P.2d 58 (1987). See Chapter Two, Section 2.c, for a similar rule denying construction lien rights to persons providing materials to material suppliers. The *Farwest* opinion discusses how to distinguish subcontractors from material suppliers. Note that the federal Miller Act provides protection only to persons who contract directly with the prime contractor or who contract with a subcontractor that contracts directly with the prime. *See J.W. Bateson Co. v. United States*, 434 U.S. 586, 589, 55 L. Ed.2d 50, 98 S. Ct. 873 (1978). By contrast, the Washington public bond statute protects subcontractors at any tier.

Because the bond is a form of security given by the contractor, an unregistered contractor can pursue a claim against the bond just as it could pursue a claim against the contractor directly.[11]

It has been held that, by allowing claims for "provisions and supplies" as well as for "materials," the bond statute gives broader protection than the lien statute.[12] "Supplies" are things furnished for the work that are necessarily consumed by use in the work, such as fuel for equipment, food for workers[13] and expendable drill bits[14] but not insurance[15] or freight charges to bring equipment to the site.[16] The rental cost of equipment is claimable[17] but the cost of repairing or replacing worn-out equipment is not.[18] Unfortunately, it is not always obvious whether a particular cost should be classified as material, supplies or equipment.[19]

If a bond claim is made based on the supply of materials, the bond claimant must demonstrate that the material was either incorporated into the work or at least delivered to the site for such use.[20]

The rights of claimants under a public payment bond, like rights under the lien statute, must be perfected by timely actions. The first of these is pre-claim notice. The purpose of pre-claim notice is to protect the general contractor against having to pay twice for the same work.[21] Pre-claim notice must be given by anyone providing "materials, supplies, or provisions" to a subcontractor.[22] In other words, pre-claim notice

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[11] *See Lobak Partitions, Inc. v. Atlas Constr. Co.*, 50 Wn. App. 493, 499-502, 749 P.2d 716 (1988).

[12] *See National Grocery Co. v. Maryland Cas. Co.*, 148 Wash. 387, 393-94, 269 P. 4 (1928). This holding is in tension with the idea that the bond statute is intended to protect the same claimants that would have lien rights on a private project. *See* fn. 3 above.

[13] *See National Grocery Co., supra*.

[14] *See U.S. Fid. & Guar. Co. v. E.I. DuPont de Nemours & Co.*, 197 Wash. 569, 85 P.2d 1085 (1939).

[15] *See Maryland Cas. Co. v. City of Seattle, supra*.

[16] *See Hamilton v. Whittaker*, 29 Wn.2d 173, 186 P.2d 609 (1947). *Cf. King County v. Guardian Cas. & Guar. Co.*, 103 Wash. 509, 515, 175 P. 166 (1918), which held that the cost of delivering materials for a project was properly charged against the bond.

[17] *See Willett v. Davis*, 30 Wn.2d 622, 635-36, 193 P.2d 321 (1948).

[18] *See Standard Boiler Works v. National Surety Co.*, 71 Wash. 28, 30, 127 P. 573 (1912) (no claim for repairs to equipment); *U.S. Fid. & Guar. Co. v. E.I. DuPont de Nemours & Co.*, 197 Wash. at 576 (no claim for replacement of worn out equipment).

[19] The rental cost of equipment can be considered a "supply," something necessarily consumed in the work, only through the fiction that the "use" of the equipment (as opposed to the equipment itself) is consumed. *See United States Rubber Co. v. Washington Eng. Co.*, 86 Wash. 180, 184-85, 149 P. 706 (1915).

[20] *See Holly-Mason Hardware Co. v. National Sur. Co.*, 107 Wash. 74, 78-79, 180 P. 901 (1919). See Chapter Two, Section 2.c, for a similar rule applicable in lien cases. Under RCW 39.12.050, unpaid amounts under the prevailing wage statute can also be pursued as claims against the bond.

[21] *See LRS Elec. Controls, Inc. v. Hamre Constr. Inc.*, 153 Wn.2d 731, 739, 107 P.3d 721 (2005).

[22] RCW 39.08.065.

must be given by all potential bond claimants not in direct privity with the prime contractor, except that persons who provide only labor need not give pre-claim notice.[23]

Pre-claim notice must be given within 10 days of starting work or the bond claim is lost.[24] Note that this provision differs from the rule in lien cases. Under the lien statute, pre-claim notice may be given at any time, but it has a limited retroactive effect. In the case of public works bonds, the pre-claim notice must be given within the specific 10-day period. The pre-claim notice requirement may be excused in the following situations: first, if the prime contractor makes a subcontractor its common law agent (in which case a person working for the subcontractor is in effect working for the prime); and second, if the supplier reasonably (but incorrectly) believes it is dealing with the prime.[25]

The pre-claim notice must be delivered or mailed to the contractor (*i.e.*, the prime contractor that has arranged for the bond). The statute does not mandate any particular form for pre-claim notice, but the notice should identify the claimant, the bond and the person ordering the work (typically a subcontractor). It should also state that the contractor and its bond will be held responsible for payment to the claimant. It has been held that substantial compliance with the notice requirement is sufficient.[26] However, actual notice of the claimant's work is not enough.[27] The statute does not specify any particular kind of delivery or mailing, but it would be prudent to follow the same procedures for pre-claim notices in lien cases: personal delivery with a signed receipt (to someone with authority to sign for the contractor) or certified or registered mail (to the contractor's address as listed on the Department of Labor and Industries website).

The second step toward perfecting a bond claim is to actually make a claim against the bond. The claimant must "file with [the] board" or other governing body of the public owner a written notice of claim.[28] The statute contains a form of notice that is easy to use. Substantial compliance is acceptable: the notice is sufficient if it identifies the bond, the surety and the work involved, and if it gives notice of an intent to claim against the bond.[29] Again, actual notice that the claimant remains unpaid is not sufficient.[30]

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[23] *See Campbell Crane & Rigging Services, Inc. v. Dynamic Intern. AK, Inc*., 145 Wn. App. 718, 726, 186 P.3d 1193 (2008) (sub-subcontractor providing "crane lifting services" on a public project was a supplier of labor and therefore not required to provide pre-claim notice to maintain a claim on the bond); *cf. LRS Elec. Controls, Inc., supra*, 153 Wn.2d at 740 (subcontractor providing both materials and labor on a public project was required to give pre-claim notice for the materials portion of its claim).

[24] RCW 39.08.065.

[25] *See Austin v. C.V. Wilder & Co.*, 65 Wn.2d 456, 459-60, 397 P.2d 1019 (1965).

[26] *See Keller Supply Co. v. Lydig Constr. Co.*, 57 Wn. App. 594, 598-600, 789 P.2d 788 (1990).

[27] *See LRS Elec. Controls, Inc., supra*, 153 Wn.2d at 740.

[28] RCW 39.08.030(1). The governing body is unlikely to be involved in the project day-to-day, so a bond claim will probably not resemble an ordinary claim for time or money under the construction contract.

[29] *See Foremost-McKesson Sys. v. Nevis*, 8 Wn. App. 300, 505 P.2d 1284 (1973).

The notice of bond claim must be given within 30 days after the "acceptance of the work by the affirmative action of the . . . public body."[31] This means that the 30-day period for filing bond claims begins to run when the public body gives "final and absolute" acceptance of the work.[32] The fact that minor work remains to be done is immaterial if the public body's acceptance is unconditional in form; however, an acceptance expressly conditioned on additional work being done does not start the 30-day time period.[33] But the claimant need not wait until the last minute: a notice of claim may be filed even before the final acceptance of the work.[34] A subcontractor whose work is terminated need not file a bond claim within 30 days of termination; the deadline is tied to the public body's acceptance of the overall work (even if finished by others).[35]

Once a bond claim has been perfected, it may be enforced by a lawsuit against the surety that issued the bond. The statute does not provide for any particular venue, so presumably the lawsuit may be brought in any county where the surety can be found. The venue may be fixed by the claimant's contract.[36]

The statute does not give any time limit for commencing a bond lawsuit. Thus the usual statute of limitations for a bond claim (which is based on a written contract) is six years.[37] This may be varied to some degree by the terms of the bond.[38]

In a bond lawsuit, the claimant has the burden to show timely pre-claim and claim notices, the underlying merits of her claim, and that the claimed items are all properly charged against the bond. If proper items

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[30] *See Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 615-16, 129 P. 382 (1913); *cf. Van Doren Roofing & Cornice Co. v. Guardian Cas. & Guar. Co.*, 99 Wash. 68, 71-72, 168 P. 1124 (1917) (defective notice was excused because the public body treated it as sufficient).

[31] RCW 39.08.030(1). Note that the period for claims against retainage on a public project is different (45 days from actual completion). See Section 3 below.

[32] *See National Blower & Sheet Metal Co. v. American Surety Co.*, 41 Wn.2d 260, 264, 248 P.2d 547 (1952).

[33] *Id.*, 41 Wn.2d at 267-68.

[34] *See Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 508-09, 106 P. 158 (1910).

[35] *See Puget Sound Bridge & Dredging Co. v. Jahn & Bressi*, 148 Wash. 37, 50, 268 P. 169 (1928) (terminated contractor had until 30 days after final completion to file bond claim).

[36] *See Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 935-36, 147 P.3d 610 (2006) (venue for combined bond and retainage claim was fixed by contract); *see also 3A Industries, Inc. v. Turner Constr. Co.*, 77 Wn. App. 407, 418-19, 869 P.2d 65 (1993) (subcontractor's bond claim was governed by arbitration clause in prime contract).

[37] *See Industrial Coatings Co. v. Fid. and Dep. Co. of Maryland*, 117 Wn.2d 511, 513-18, 817 P.2d 393 (1991).

[38] *Cf. Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 412 P.2d 511 (1966) (court enforced limitation of action clause in payment bond on private project).

cannot be distinguished from improper items, the entire bond claim may be rejected, as in the case of a private lien claim.[39] Mistaken claims may be excused if in good faith.[40]

A bond claim action is one at law, so there is a right to a jury. If the action is combined with foreclosure of a retainage lien, the matter is murkier, but juries have been allowed on such combined claims.[41]

The claimant's recovery in a bond claim is measured by *quantum meruit*, which may be more or less than the claimant's contract amount.[42] A successful claimant is also entitled to recover attorneys' fees: an award of fees is mandated, but the amount of any such award is discretionary with the court.[43] There are two exceptions. First, no attorneys' fees may be recovered in a bond lawsuit filed within 30 days after the claim notice is filed.[44] This gives the public body an opportunity to investigate and resolve claims without litigation; the sanction is sufficiently serious that a claimant should wait the 30 days before filing a lawsuit. Second, attorneys' fees are not recoverable unless the surety maintains a position adverse to the claimant.[45]

A successful claimant on a bond claim may also recover interest on the judgment. Interest is at the statutory 12 percent rate, without regard to any different rate of interest in the claimant's contract. This is because the right to recovery (and to interest) arises from the bond statute and not from the claimant's contract.[46]

3. Retainage on Public Projects.

The retainage remedy is mandatory on many public projects. In particular, all public improvement contracts must provide, and public bodies must reserve, a contract retainage not to exceed 5 percent of the monies earned by the contractor as a trust fund for (a) persons with claims arising under the contract and (b) the state with respect to taxes and penalties that may be due from the contractor.[47] "Public improvement contract" is

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[39] *See Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 650, 110 P. 541 (1910).

[40] *See Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 456, 144 P. 698 (1914); *Strandell v. Moran*, 49 Wash. 533, 535, 95 P. 1106 (1908).

[41] *See Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 145 P.3d 399 (2006) (jury trial held on combined bond and retainage claims).

[42] *See Maryland Cas. Co. v. City of Tacoma*, 199 Wash. 72, 87-88, 90 P.2d 226 (1939). This is different from the recovery in a claim against retainage, which is measured by the claimant's contract price. See Section 3 below.

[43] *See Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 574, 145 P.3d 399 (2006).

[44] RCW 39.08.030(1).

[45] *See Lakeside Pump & Equip., Inc. v. Austin Constr. Co.*, 89 Wn.2d 839, 846-47, 576 P.2d 392 (1978); *cf. Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 577, 145 P.3d 399 (2006) (surety admitted some parts of claimant's claim and denied others; this was sufficiently adverse to justify a fee award); *U.S. Filter Dist. Group, Inc. v. Katspan, Inc.*, 117 Wn. App. 744, 754, 72 P.3d 1103 (2003) (surety refused to pay unless claimant signed a release form that claimant had no duty to sign; this was sufficiently adverse to justify a fee award).

[46] *See U.S. Filter Dist. Group, supra*, 117 Wn. App. at 754.

[47] *See* RCW 60.28.011(1)(a). A major exception is projects supported by federal transportation funds, which applies to many WSDOT projects.

broadly defined to cover all contracts for public works, except for professional services contracts and work orders.[48] "Public body" is broadly defined to include the state, counties, cities, towns and districts.[49] The phrase "claims arising under the contract" is not limited to claims by the prime contractor; all persons working on the project have a potential lien against the retainage fund.[50]

The public body may retain an amount "not to exceed five percent." The statute does not state any minimum retainage percentage or amount, but evidently the lower limit is not zero because the statute says that the public body "must reserve" a retainage fund. No published opinion has addressed what amount between 5 percent and 0 percent is required.

The prime contractor may ask that the retainage fund be reduced to the value of the work remaining under the contract; moreover, once all the work other than landscaping is completed, the contractor can ask for return of all amounts retained.[51] The statute does not require the prime contractor or the owner to give notice to potential claimants of a request to diminish or eliminate the retainage fund. However, the prime contractor's right to reduce the fund is said to be "subject to" the remainder of the statute.[52] The evident intent (nowhere clearly stated) is that the public body should refuse to reduce the retainage fund if there are outstanding claims against the fund. For this reason, a subcontractor or supplier claimant should consider asserting claims against the fund promptly, even if work is continuing at the site.

The contractor has a right to choose how the public body will retain money, either in a separate fund with the public body or deposited in a financial institution (with interest accruing to the contractor) or invested in bonds or securities (with interest accruing to the contractor).[53]

If the contractor is subject to retainage, the contractor may in turn retain monies from its subcontractors and suppliers, who may in turn retain monies from their lower-tier subcontractors and suppliers. Any interest accruing on such retained funds is for the benefit of the parties from whom the monies are withheld.[54]

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[48] RCW 60.28.011(12)(d).

[49] RCW 60.28.011(12)(c).

[50] RCW 60.28.011(2) says that "[e]very person performing labor or furnishing supplies toward the completion of a public improvement contract has a lien" on the retainage fund. *See Crabtree v. Lewis*, 86 Wn.2d 282, 288, 544 P.2d 10 (1975) (employee benefit plan was entitled to lien on retainage for benefit of subcontractor's employee).

[51] RCW 60.28.011(3).

[52] It is also subject to the prevailing wage statute, RCW Chapter 39.12. In particular, RCW 39.12.050 makes unpaid prevailing wages a lien against the retainage fund.

[53] RCW 60.28.011(4).

[54] RCW 60.28.011(5).

As a substitute for some or all of the retainage, the prime contractor can offer a bond (different from the bond required by RCW 39.08) and the public body must generally accept it.[55] The bond stands in for the retainage fund and is subject to all the claims and liens to which the fund would have been subject. If the prime contractor posts a bond, it must in turn accept bonds in lieu of retainage from its own subcontractors and suppliers.[56]

The retainage rules are modified with respect to contracts funded in whole or in part by federal transportation funds, contracts terminated for reasons beyond the contractor's fault, contracts for construction of ferry vessels and projects funded by the Farmers Home Administration, and contracts using the general contractor/construction manager method.[57]

The statute says that every person "performing labor or furnishing supplies toward the completion of a public improvement contract" is entitled to a lien on the retainage fund.[58] As noted above, this includes subcontractors and suppliers who are not in privity with the prime contractor; it does not include material suppliers to material suppliers.[59] Persons with lien rights against the retainage fund should be the same persons who have rights against a public works bond.[60]

The rights of claimants under the public retainage statute, like rights under the lien statute, must be perfected by timely actions. The first of these is pre-claim notice. The statute says that "every person" furnishing materials, supplies or equipment "shall" give written pre-claim notice to the prime contractor, but it also says that the notice shall include the "name of the subcontractor" ordering the materials, supplies or equipment.[61] From this last phrase, and by analogy to the bond statute, it is arguable that subcontractors and material

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[55] RCW 60.28.011(6).

[56] *See id.* The prime bond and the sub bond may have been intended to be analogous, but they are importantly different. Under the statute, the retainage fund protects lower-tier subs and suppliers who have no lien against public property. If the prime offers a bond in lieu of retainage, the bond similarly protects the lower-tier subs and suppliers. If the prime retains monies from its subcontractors, no statute subjects this retainage fund to claims by lower-tier subs and suppliers; the purpose of the prime's retainage is to protect the prime. If the prime accepts a bond from its sub in lieu of retainage, that bond continues to protect the prime.

[57] RCW 60.28.011, subsections 1(b), 7, 8, 10 and 11.

[58] RCW 60.28.011(2).

[59] *See Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 722, 741 P.2d 58 (1987).

[60] See Section 2 above; *see also United States Fid. & Guar. Co. v. E.I DuPont de Nemours & Co.*, 197 Wash. 569, 85 P.2d 1085 (1939) (treating the bond and retainage statutes together for purposes of identifying potential claimants). Under RCW 39.12.050, unpaid amounts under the prevailing wage statute are also liens against the retainage fund.

[61] RCW 60.28.015. Like the bond statute and the lien statute, the retainage statute does not require persons providing only labor to give a pre-claim notice. *See Campbell Crane & Rigging Serv., Inc. v . Dynamic Int'l AK, Inc.*, 145 Wn. App. 718, 724, 186, P.3d 1193 (2008).

suppliers in direct privity with the prime contractor do not need to give pre-claim notice to preserve claims against the retainage.[62]

The notice can be given at any time, but its effect is limited to work performed during the 60 days preceding the notice.[63] Giving notice requires mailing (by registered or certified mail) or personal delivery with written receipt; accordingly, the 60 days should be measured from when these steps are taken (and not from the date a mailed notice is received).

The statute provides an outline of the information to be included in a pre-claim notice. Including this information "in substance and effect" should be sufficient.[64] Under the retainage statute, the failure to give a pre-claim notice (if required) bars any claim against the retainage.

On public projects where bonds and retainage remedies are both available, it may make sense to provide a pre-claim notice covering both remedies. Such a combined notice should comply with the bond statute's stricter timing requirement.

The pre-claim notice may be delivered by registered or certified mail (to the contractor's address listed on the Department of Labor and Industries website) or by personal service on the prime contractor's representative (some person at the site or the contractor's home office with authority to sign).[65] Both methods produce written receipts.

The second step toward perfecting a retainage claim is to actually make a claim against the retainage. The statute provides that the claim must be submitted within 45 days of completion of the contract work, and "in the manner provided in RCW 39.08.030."[66] Note that the time for filing a retainage claim runs from the "completion" of the work, while the time for filing a bond claim runs from the public body's "acceptance" of the work.[67] What counts as "completion" is usually defined by contract. The "manner provided" in the bond statute means the form given in the bond statute and also the direction that the claim be filed with the public owner of the project.

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[62] *Cf. LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 740, 107 P.3d 721 (2005). The court said that the claimant's lack of privity with the prime contractor was "fundamental" to the conclusion that the claimant needed to submit a pre-claim notice.

[63] *See id.* This provision is similar to the private lien statute, RCW 60.04.031(1).

[64] RCW 60.28.015; *see also Keller Supply Co. v. Lydig Constr. Co.*, 57 Wn. App. 594, 598-600, 789 P.2d 788 (1990).

[65] RCW 60.28.015.

[66] RCW 60.28.011(2).

[67] Former RCW 60.28.010 required retainage claims to be filed "in the manner and within the time provided in RCW 39.08.030." The changed language in current RCW 60.28.011(2) presumably reflects an intent to measure the time for retainage claims differently from bond claims.

At the conclusion of the 45-day period, the public body will determine whether claims (from contractors, suppliers or taxing authorities) remain unresolved; if they do, the public body will continue to hold sufficient retainage to satisfy the claims and return the remainder (if any) to the contractor.[68]

Once the retainage lien has been perfected, it has only a limited lifespan. The claimant must commence a foreclosure action within four months from the time of filing the claim.[69] Failure to commence an action within the four-month period discharges the claimant's lien, but discharge can be avoided by re-filing the retainage claim before it expires.[70]

There is a trap for the unwary here. A re-filed retainage claim must be filed within four months of the previous claim filing. Otherwise, the previous claim expires and the new one is ineffective, even if the work is not yet complete.[71] So a claimant filing an early claim (to guard against the retainage fund being decreased at the prime contractor's request) must make sure to renew the claim or else commence a foreclosure action within the four-month period.

The statute says that a retainage lien foreclosure action shall be "governed by the laws regulating the proceedings in civil actions touching the mode and manner of trial and the proceedings and laws to secure property so as to hold it for the satisfaction of any lien against it."[72] This provision has caused considerable controversy about how the "laws regulating the proceedings" in construction lien cases should be applied to retainage lien cases. One case, relying on an early decision about private lien rights, held that retainage lien rights were lost unless a foreclosure action was filed and served within the four-month life of the lien.[73] Then, the early case (relating to private liens) was held to have been superseded by changes to the Civil Rules, so that (private) lien rights survived as long as a foreclosure action was timely commenced (by filing or service) within the statutory period.[74] Then, the private lien statute was amended to provide that the foreclosure lawsuit had to be both filed within the statutory period and served on "all necessary parties" within 90 days.[75] It was held that these specific requirements superseded the Civil Rules and that failure to

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[68] RCW 60.28.021.

[69] RCW 60.28.030.

[70] *See Shope Enter., Inc. v. Kent School Dist.*, 41 Wn. App. 128, 132-33, 702 P.2d 499 (1985).

[71] *See Airefco, Inc. v. Yelm Comm. Schools No. 2*, 52 Wn. App. 230, 234, 758 P.2d 996 (1988). This decision was based on the premise that the lien statute must be "strictly construed," and may be subject to revision in light of later clarification of that rule. *See Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 696-97, 261 P.3d 109 (2011).

[72] RCW 60.28.030.

[73] *See Galvanizer's Co. v. State Hwy. Comm.*, 8 Wn. App. 804, 806, 509 P.2d 73 (1973) (*citing City Sash & Door Co. v Bunn*, 90 Wash. 669, 156 P. 854 (1916)).

[74] *See Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767-68, 522 P.2d 822 (1974) (disapproving *City Sash & Door*).

[75] This was in former RCW 60.04.100.

serve even one necessary party was fatal to the lien.[76] Thereafter, the private lien statute was amended again; the current provision requires filing of the foreclosure action within the statutory period and service on the "owner" within 90 days of filing.[77]

In light of this history, a claimant should assume that, to preserve retainage lien rights, she must file a foreclosure action within four months after filing the lien claim and also serve the "owner" (the public owner holding the retainage) within 90 days of filing the lawsuit. If the retainage fund has been replaced with a retainage bond, the same time frames should apply.[78] If a claimant is joined in a foreclosure action commenced by another party, the claimant's own action is commenced only when she files an answer and cross complaint, which she must do before the four-month period expires.[79]

One necessary party to the lien foreclosure action is the public body holding the funds, though the public body need not "make any detailed answer to any complaint."[80] If the public body itself has no claims (*e.g.*, for taxes due) then the public body is likely to tender the retainage fund to the court and ask to be dismissed.

The statute says that the foreclosure action is to be brought in the county where the retainage lien claim was filed (*i.e.*, where the public body is located).[81] This apparently mandatory provision can be modified by a valid contractual forum selection clause.[82]

Another necessary party is the prime contractor, who gets any part of the retainage not paid out to claimants. Other claimants against the retainage are certainly parties to be joined if possible, particularly if there is doubt whether the retainage fund will cover all the claims. By analogy with RCW 60.04.171, all claimants should seek to combine their claims in a single foreclosure action, and failure to include a particular claimant may result in the judgment having no effect on that claimant. If the claimant wishes to pursue a contract claim for nonpayment, then the alleged debtor is a necessary party to that claim, but the contract claim does not make the alleged debtor a necessary party in the lien foreclosure. This may be significant if the debtor is bankrupt or otherwise not available to participate.

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[76] *See Queen Anne Painting Co. v. Olney & Assoc., Inc.*, 57 Wn. App. 389, 394-95, 788, P.2d 580 (1990).

[77] RCW 60.04.141.

[78] The limitations on a retainage action do not affect the claimant's right to sue the contractor or its surety if no foreclosure is sought against the retainage. *See* RCW 60.28.030.

[79] *See Nemah River Towboat Co. v. Brewster*, 152 Wash. 672, 679-80, 278 P. 694 (1929).

[80] RCW 60.28.030. If the retainage fund has been replaced with a retainage bond, the public owner may not be a necessary party, since the sole beneficiaries of the bond will be claimants.

[81] RCW 60.28.030.

[82] *See Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 935-36, 147 P.3d 610 (2006) (contract forum selection clause overrode the retainage venue statute).

Because an action to foreclose a retainage lien is similar to an action to foreclose a construction lien, a jury trial is probably not available. Venue is generally in the jurisdiction of the public agency, but may be changed by agreement.[83] The measure of recovery, as in private lien cases, is measured by the contract price of the work.[84]

When the work is completed, the public agency notifies the Department of Revenue, the Employment Security Division, and the Department of Labor and Industries and waits to find out whether any of those entities assert claims against the retainage. RCW 60.28.051. Once the responses have been received, the public owner is in a position to calculate the total claims (including its own, if any) against the retainage fund. Any unclaimed amount should be returned to the contractor. RCW 60.28.021.

The statute does not say how to prioritize payments if there are multiple claimants, except that state tax liens take priority on contracts over $35,000.[85] No published case provides guidance. Two leading options are (a) to resolve priorities by analogy with the private lien statute, RCW 60.04.181, or (b) to pay all claims pro rata.[86]

A prevailing claimant in a retainage lien foreclosure action is entitled to "attorney fees in such sum as the court finds reasonable."[87] Fees are not available unless the claimant prevails on the lien foreclosure issue in particular.[88] Interest is also available from the date the lien claim was filed with the public body.[89]

4. Prompt Payment Requirements on Public Projects.

On public projects, the contractors and subcontractors are required to make payment of uncontested amounts within specified time frames, generally 10 days after receiving funds; up to 150 percent of amounts disputed in good faith may be withheld.[90] Failure to make timely payments subjects the responsible party to

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[83] *See Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 147 P.3d 610 (2006).

[84] *See Norris Ind. v. Halvorson-Mason Constructors*, 12 Wn. App. 393, 398-99, 529 P.2d 1113 (1974). This contrasts with the measure of recovery in a bond action, which is *quantum meruit*. See Section 2 above.

[85] RCW 60.28.051.

[86] Payment pro rata leads to further questions. If a prime contractor has two subs (S1 and S2) and S1 has two sub-subcontractors (S1a and S1b) and all four make equal claims, should all four get equal payments or should half the retainage go to the "S1 family" and half to the "S2 family"? In any case, it will be important to avoid double recovery (which is a risk if S1's claim includes the amounts claimed by S1a and S1b).

[87] RCW 60.28.030.

[88] *See Expert Drywall, Inc. v. Ellis-Don Constr., Inc.*, 86 Wn. App. 884, 939 P.2d 1258 (1997) (no fees allowed where claimant resolved underlying claim, but not retainage lien foreclosure, in arbitration proceeding).

[89] *See U.S. Fid. & Guar. Co. v. Feenaughty Machinery Co.*, 197 Wash. 569, 581, 85 P.2d 1085 (1939).

[90] RCW 39.04.250.

prejudgment interest at the legal rate and, in an action to recover wrongfully withheld payments, liability for costs and reasonable attorneys' fees.

The public body also has an obligation to make prompt payment of uncontested amounts; failure to make timely payments subjects the public body to interest at the rate of 1 percent per month.[91] Payment must be made within 30 days of receipt of a proper invoice or receipt of goods or services, whichever is later.[92] An invoice is received when delivered (generally reflected on a date stamp) and payment is made when mailed or delivered to the payee.[93] If a public body orders additional work beyond the scope of the original contract, the public body must issue a change order for the full dollar amount of additional work not in dispute, or else interest will accrue on that undisputed charge.[94]

Amounts may be withheld if the public body explains within eight days of receiving an invoice specifically why part or all of the payment is being withheld and what remedial actions the contractor must take to receive the withheld amount.[95] Once the contractor remedies the unsatisfactory work, the public body must pay the contractor within 30 days.[96]

If the contractor, after submitting an invoice that includes money for its subcontractor, S, discovers that part of the requested money should be withheld from S because of defective work, the contractor may withhold the money from S but must give notice to S and to the public owner and pay S within eight working days after the work is corrected.[97]

In any action brought to collect interest due for late payments by a public body or by a contractor, the prevailing party is entitled to an award of reasonable attorneys' fees."[98]

An illustration of the interplay between the prompt payment statute and other contractor remedies was presented in *Thompson v. Peninsula School District No. 401*.[99] The contractor finished its work, but the

[91] RCW 39.76.011, *et seq.*

[92] RCW 39.76.011(2)(a).

[93] RCW 39.76.011(3).

[94] RCW 39.04.360.

[95] RCW 39.76.011(2)(b).

[96] RCW 39.76.011(d).

[97] RCW 39.76.011(e).

[98] RCW 39.76.040. *See Thompson v. Peninsula School Dist. No. 401*, 77 Wn. App. 500, 507, 892 P.2d 760 (1995) (where the court found that a school district had failed to pay the retained percentage to a contractor in a timely manner and, therefore, the contractor was entitled to interest at the statutory rate, plus reasonable attorneys' fees incurred during both the underlying proceedings and on appeal).

[99] 77 Wn. App. 500, 892 P.2d 760 (1995).

school district withheld final payment (including retainage withheld under RCW 60.28.011) because an employee of the Department of Labor and Industries claimed that the contractor had failed to pay its workers according to law. The four-month period for bringing retainage claims passed without the Department making any claim, but the district continued to withhold final payment. The Court of Appeals found that the district had no legal excuse for nonpayment and that the contractor was entitled to both interest and attorneys' fees.[100]

There are a number of situations where the prompt payment obligations do not apply. The one most likely to be encountered is the case of money withheld subject to a good-faith dispute, but the public body must give notice of the dispute (via certified mail, personal delivery or in compliance with the contract) before timely payment is due.[101]

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[100] The court rejected the district's argument that it had acted reasonably in the circumstances. "[T]he District fails to cite any authority, and we are aware of none, that adopts a reasonableness standard as opposed to a requirement that the District comply with applicable statutes." *Id.*, 77 Wn. App. at 504.

[101] RCW 39.76.020, especially subpart (4); *see also Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d 157, 170-71, 273 P.3d 965 (2012) (dispute and litigation in good faith did not make payment untimely and, thus, contractor was not entitled to interest).

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