

Lien Basics

by Quenda Behler Story

A construction lien is a security interest on a piece of real estate. The person who owns the lien, called the lienholder, has the right to foreclose on that real estate if the property owner doesn't pay a debt he or she owes the lienholder.

A lien is something like a mortgage, but not exactly. You have to agree to give someone a mortgage on your house, but the property owner's consent is not necessary for a construction lien. Nor does a lien have anything to do with loaning money to the property owner. The construction lien secures the owner's debt for work done by the lienholder.

Construction liens have been around for a long time. Way back in the middle ages, common law judges decided that if you fixed something for somebody and didn't get paid, you could repossess it and sell it to get your money. It was a good idea, but it had a fatal flaw when it was applied to the construction industry: A carpenter can't cut off and repossess the new kitchen he just built.

So the common law judges decided to give contractors an interest in the title to the property until they were paid. Then, if they aren't paid, they can ask a judge to order the sale of that property and use the money from the sale to pay off the debt.

In addition, a construction lien is a "cloud" on the title, which means that the lien has to be paid even if the property is sold to some third person who's never heard of the lienholder.

Recording a Lien

In most states, anyone who supplies material to or does construction work on a property is entitled to what's

called an "unrecorded lien." Such a person is called a "lien-claimant," but that's several steps away from being a lienholder. A lien-claimant becomes a lienholder by recording the lien, which gives him or her the right to foreclose on the real estate if the owner doesn't pay the debt.

To get your lien recorded, you must follow exactly the procedure set out by your state. If your state statute says your Claim of Lien has to be notarized, then it must have a notary's signature and stamp on it. If your state statute says the Claim of Lien has to be filed within 30 days, you can't file it on the 31st day. If your statute says blue paper with red lines, so be it.

In particular, information like the exact address and legal description of the property must be correct. If you make a mistake, you will jeopardize your lien rights. However, some information may be disputed by the property owner. For example, in your lien you may claim that you are owed \$30,000, but the property owner may

example, if your portion of the work involves pouring the foundation, the moment you're finished pouring, the clock starts running on your lien, even if the project itself won't be finished for months.

You should find out what your state time limits are before you start a project. That way if you don't receive a payment or if it's late, you still have time to record a lien. But remember: If you don't record your lien in time, you will forfeit your lien rights.

Notice to the property owner. Most states require anyone who intends to claim a lien to give preliminary notice of that action to the property owner. In many states, this is called a Notice of Completion.

Filing the lien. After you've given the necessary preliminary notices to the property owners, you need to file your Claim of Lien in the place where real property deeds and mortgages are filed in your state. It may be called a "Tract Index," "Recorder's Office," or "Deed Register."

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dispute this amount and claim the debt is \$20,000. Factual questions like these will be decided by the court during foreclosure.

Time limits. Most state statutes establish time limits for recording liens. For subcontractors, the clock often starts running the moment the sub's work on the project is done. For

Foreclosure

After you've recorded your lien, what you have is the right to demand that this real estate, which belongs to somebody else, be sold to pay off a debt owed to you. That's called a foreclosure, but before the court will order the property sold, you have to prove the money really is owed to you. This is done at a

trial before a judge, who will examine evidence such as contracts and specifications, photographs of the work, receipts, bills, and personal testimony.

Timing is everything. Once the property is sold, the court pays out the money from the foreclosure sale according to the “priority of the claims,” which determines who gets paid first. Even though you are the foreclosing lienholder, you may not be first in line, which means you may not

be fully paid. If a mortgage on the property was in force before your lien was attached, the mortgage will be paid off first. Say, for instance, you’re owed \$30,000 and the property is sold for \$50,000. If there is a \$40,000 mortgage that has priority over your lien, then all you will get is the \$10,000 dollars that’s left over after the mortgage is paid.

The priority of claims depends on state law. In some states, the mortgage will not have priority over a construc-

tion lien unless the mortgage was *recorded* before construction actually started on the property. In other states, the mortgage only has to be recorded before the construction lien is recorded.



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