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FUNDAMENTALS of CONSTRUCTION LIENS in OREGON

Contractors and suppliers on construction projects not paid on time may not be able to keep current or meet their financial obligations. Lack of payment and late payments also lead to wasted resources and reduced profits. Industry surveys indicate that contractors and suppliers on construction projects are often paid late and many of them don't consider filing a construction lien when payment is not made on time.

With current interest rates relatively high, banks are tightening up and construction financing may be difficult to obtain. In addition, there are concerns about a recession. These factors could very well cause contractors and suppliers on construction projects to encounter payment issues. Thus, it is important that contractors and suppliers take advantage of their construction lien rights to avoid late payments and help ensure they are paid. Just the simple step of providing notice of lien rights to the property owner at the beginning of a project can cause payment to be made in a timely manner. If a general contractor or owner is having cash flow issues, they are more likely to pay the contractors and suppliers who secured their lien rights by providing notice to the owner.

In my experience, construction liens are a very effective collection device for construction contractors and suppliers. The purpose of this article is to explain what construction liens are and how they work in Oregon.

WHAT IS A CONSTRUCTION LIEN?

Construction liens are a charge against privately owned real property to secure payment of a debt obligation. They are referred to as mechanics' liens in other states. Construction liens are granted by Oregon statute to a person who has provided labor, materials, equipment, and certain services which are incorporated into, consumed in, or contribute to the improvement of real property. A construction lien gives the contractor or supplier the right to enforce a charge upon the property that benefitted from their labor, materials, equipment, or services.

Lien is a French word which means a string, a tie, or a bind. Even if a construction contractor or supplier of materials or equipment does not have a contract with the owner of the subject property, they may still have the right to file a construction lien against the property if they are not paid by the person who ordered from them. However, in order to secure the right to file a construction lien, they may have to provide notice to the property owner before they commence work or begin providing materials or equipment to a construction project.

Construction lien laws are supported by a policy of fairness: When work or material or equipment is devoted to the improvement of real property, the value of the property is likely to be enhanced and the owner of the property receives the benefit and enjoyment of the work, materials, and equipment—thus, the cost of the work or materials or equipment may appropriately be treated as a charge against the property.

In many situations, the filing of a construction lien will cause the property owner to promptly pay the deserving contractor or supplier in exchange for the release of the construction lien from their property. The filing of a construction lien can hold up the sale of real property until it has been addressed. The filing of a construction lien may also cause a construction lender to cease draws on a construction project until the lien has been resolved. However, there are a number of notice requirements and deadlines that must be met to secure and file a valid construction lien in Oregon. Those notice requirements and deadlines are discussed below.

Construction liens in Oregon can be placed upon residential and commercial properties. Construction liens cannot attach to publicly owned real property in Oregon, but Oregon has laws designed to protect the claims of those whose labor, materials, equipment or services contributed to the improvement of public property. Oregon law requires prime contractors on Oregon public construction projects to post a payment bond guaranteeing the payment of their subcontractors and suppliers (see ORS 279C).

WHO IS ENTITLED TO A CONSTRUCTION LIEN IN OREGON?

Generally – anyone who has entered into a contract with the property owner or the property owner’s construction agent and whose efforts are used in the construction of an improvement or the preparation of a lot or parcel of land. *For example – general contractors, subcontractors, materials suppliers, equipment renters, architects, and land surveyors.*

More specifically (per ORS 87.010), those who:

- Provide labor for the construction of an improvement or the preparation of a lot or parcel of land.
- Furnish materials to be used in the construction of an improvement.
- Rent equipment used in the construction of an improvement or preparation of a lot or parcel of land.
- Provide certain services for the construction of an improvement or preparation of a lot or parcel of land.

LIENABLE ITEMS IN OREGON

Labor – A person who performs labor in conjunction with the construction of an improvement or the preparation of a lot or parcel has the right to a construction lien for said labor. Labor includes:

- Direct wages paid to employees.
- Related overhead costs, such as insurance, social security payments, unemployment insurance, payroll taxes, room and board costs, and travel allowances.

Materials – Those who transport or furnish materials used in the construction of an improvement are entitled to a construction lien in Oregon. The materials must either (a) become a permanent part of the improvement; (b) be used during construction; or (c) become unfit for use during construction.

Equipment – Those who rent equipment used in the construction of an improvement or in the preparation of a lot or parcel of land are entitled to construction liens in Oregon.

Services – Architects, land surveyors, and engineers who provide plans, drawings, and specifications for the construction of an improvement or the preparation of a lot of parcel of land are also entitled to construction liens.

PRELIMINARY REQUIREMENTS TO SECURE THE RIGHT TO FILE A CONSTRUCTION LIEN IN OREGON

Pre-Lien Notices

Oregon's construction lien laws follow the principal that notification of lien rights is a useful means of protecting the property owner and mortgagee (e.g., bank or lender) by ensuring they are adequately notified of the creation, perfection and foreclosure of construction liens against their property or the property they are using as collateral for a loan made to the property owner.

Oregon has two different notices which must be provided by a potential lien claimant to the property owner to secure the right to file a lien in the event of non-payment: (1) Information Notice to Owner About Construction Liens; and (2) Notice of Right to a Lien. Generally, only one of the notices must be provided by a potential lien claimant to secure their right to file a lien. In some circumstances, no notice may be required to secure the right to file a lien. However, as one of my clients says about pre-lien notices, "when in doubt, send it out".

The requirements for the Information Notice to Owner About Construction Liens and the Notice of Right to a Lien are discussed below. Which notice must be provided generally depends upon the type of project (i.e., residential or commercial) and the relationship of the construction lien claimant with the owner of the subject property.

Most residential contractors in Oregon are required to provide one of the pre-lien notices to the property owner to secure their lien rights. Because commercial property owners need less protection than residential property owners, construction contractors performing work on commercial property in Oregon generally are not required to provide pre-lien notices to secure their lien rights. Materials suppliers and providers of rental equipment, largely because they are not very conspicuous on a project, generally are required to provide pre-lien notices on both residential and commercial projects to secure their lien rights.

TWO PRE-LIEN NOTICES IN OREGON:

- 1. Information Notice to Owner About Construction Liens; and**
- 2. Notice of Right to a Lien.**

1. INFORMATION NOTICE TO OWNER ABOUT CONSTRUCTION LIENS (ORS 87.093)

The Information Notice to Owner About Construction Liens (“Information Notice”) is the notice that residential contractors who contract directly with residential homeowners provide to their clients. The only persons required to provide the Information Notice to secure their right to file a construction lien are those who meet all of the following criteria:

- They are the “original contractor” (have a direct contract with the property owner);
- The subject property is a residential structure; and
- The contract amount exceeds \$2,000.

When and how to provide the Information Notice:

1. The Information Notice must be provided to the property owner at the time the contract is signed. It must be delivered personally or by registered or certified mail or by first class mail with a certificate of mailing. The Information Notice is published by the Construction Contractors Board (“CCB”) and can be downloaded from the CCB website.
2. If the contract was initially less than \$2,000, but later exceeds \$2,000, the Information Notice must be delivered to the property owner not later than 5 days after the contractor knows or should know that contract price exceeds \$2,000.
3. Contractors must maintain proof of delivery of the Information Notice for two years after entering into the contract. Proof of delivery includes: A signed copy of the Information Notice; language in the written contract acknowledging receipt of the Information Notice; and a copy of the signed contract if the Information Notice is fully integrated into the contract.

Consequences for failure to provide the Information Notice:

1. Failure to provide the Information Notice when required will cause the contractor to lose the right to file a construction lien on the project.
2. The CCB may also penalize a contractor up to \$5,000.00 or suspend a contractor who failed to provide the Information Notice when required to do so.

2. NOTICE OF RIGHT TO A LIEN (ORS 87.021)

The Notice of Right to a Lien is the notice given to the property owner of the subject property by potential lien claimants who do not have a direct contract with the property owner. It is generally required of subcontractors on residential projects and materials suppliers and providers of rental equipment on both residential and commercial projects. The Notice of Right to a Lien should also be provided to any mortgagees (for example, the bank or lender) to protect the lien claimant's lien priority.

Contractors and suppliers often engage a lien filing service to deliver the Notice of Right to a Lien because they don't have a contract with the property owner and often don't know the name and/or proper mailing addresses of the property owner and mortgagee. The required form of the Notice of Right to a Lien is prescribed in ORS 87.023.

When and how to provide the Notice of Right to a Lien:

The Notice of Right to a Lien may be given at any time during the progress of the project—but, the best way to ensure that the construction lien covers all of the materials, labor, equipment, and services provided is to have the Notice of Right to a lien delivered in person or via registered or certified mail the very first day they begin to provide labor, materials, equipment, or services to a project. That's because any materials, labor, equipment, or services provided more than eight working days before the notice was provided are not lienable (i.e., the "eight-day rule"). And, if the entire project will last less than eight working days, the Notice of Right to Lien must be provided before the project has been completed.

Consequences for Failure to Provide Notice of Right to a Lien

If a potential construction lien claimant fails to provide a Notice of Right to a Lien to the property owner as required, they lose the right to file a construction lien. If the party with whom the potential lien claimant contracted goes out of business or files for bankruptcy, they may not have any recourse. Those are the type of situations where having construction lien rights is very important. Many companies have a policy of providing a Notice of Right to a Lien on every project or on every project that exceeds a particular amount. The CCB cannot penalize a subcontractor who failed to provide the Notice of Right to a Lien. If a potential lien claimant fails to provide a Notice of Right to a Lien to any mortgagees, they lose any priority they may have had over the mortgagee.

Contractor's License requirement

A construction contractor cannot file a construction lien in Oregon unless they were licensed with the CCB at the time the project was bid or at the time they entered into a contract for the project (ORS 701.131). There are some limited exceptions to this requirement, but it is very important that contractors make sure their CCB license is active anytime they are bidding on or performing construction projects. A construction contractor must also be licensed with the CCB during the entire time the subject work was being performed to maintain their right to file a construction lien.

Subcontractors and suppliers should also confirm that the party who ordered the labor, materials, equipment, or services from them were licensed with the CCB at the time of the order. If not, the lien rights of the subcontractor and supplier could be adversely impacted.

Perfecting a Construction Lien (ORS 87.035)

Perfection = the process of filing and recording a construction lien with the county recorder in the county where the subject property is located. Most counties in Oregon allow construction liens to be filed electronically. After a construction lien has been recorded by the county recorder's office, the construction lien is a formal, legally recognized lien against the subject property. After being recorded, the lien will show up on the tax assessor's records for the property and through a title search. Generally, the property won't be sold or be used as collateral for financing until the construction lien has been resolved and released from the property.

Deadline to file construction liens in Oregon:

Construction liens must be filed in Oregon within 75 days of the earlier of when: (1) the contractor or supplier ceased to provide labor, materials, equipment and services to the project; or (2) the entire project is substantially complete. A small amount of work, warranty work, or the repair of work previously performed incorrectly may not count as the valid last day of work for a lien claimant. Completion occurs when: the project is substantially completed; or when a completion notice is posted and recorded; or when the project is abandoned (ORS 87.045). A project is considered abandoned 75 days after construction work ceases on the project or when an owner, mortgagee, or construction agent posts a written abandonment notice.

Whether a construction lien has been filed in a timely manner is an issue that is often litigated in Oregon. As such, it is important that potential lien claimants are aware of the deadline for them to file a lien on a project. When payment is over thirty to forty-five days late, it is probably time to start thinking about filing a construction lien. Depending on how much money is owed, a lien claimant should consider engaging the services of an experienced lawyer to prepare the lien for them.

Information to be included in construction lien (ORS 87.035)

- A true statement of demand- a statement of how much is owed.
- The name of the owner of the subject property.
- The name of the person who ordered the labor, materials, equipment, or services from the lien claimant
- A description of the property to be charged with the construction lien sufficient for identification, including the address, if known (this is generally a legal description).
- The lien claimant's signature must be notarized before the lien is recorded.

Notice of lien filing to property owner and mortgagees (ORS 87.039)

After the construction lien has been recorded, the lien claimant should promptly send notice to the property owner and any mortgagees that the lien has been recorded. The notice, along with a copy of the lien, must be deposited in the mail (via certified or registered mail) within 20 days of recording the lien. Failure to do so will prevent the lien claimant from obtaining an award for their attorney's fees and costs if they prevail on the foreclosure of their construction lien at court. In addition, notifying the property owner and any mortgagees of the lien filing may cause them to pressure the owner or general contractor to pay the lien claimant so the lien is removed from the property.

FORECLOSURE OF CONSTRUCTION LIEN (ORS 87.060)

While the filing of a construction lien often leads to payment, it does not guarantee payment. If the lien does not lead to payment, the lien claimant will need to institute a lien foreclosure lawsuit.

Foreclosure is the actual enforcement of the construction lien. It is a legal proceeding. A lawsuit to foreclose a construction lien in Oregon must be commenced within 120 days of the date the construction lien was recorded. Failure to file a lawsuit to foreclose a construction lien in a timely manner will cause the construction lien to no longer have any effect on the subject property – it will expire and no longer legally exist.

Notice of intent to foreclose lien (ORS 87.057)

Before a lawsuit is commenced to foreclose a construction lien, the lien claimant should provide notice to the property owner and any mortgagees of their intent to foreclose the construction lien. The written notice must be delivered at least ten days before the lien foreclosure lawsuit is filed. Failure to provide notice at least ten days prior to filing the foreclosure lawsuit will prevent the lien claimant from obtaining an award for their attorney's fees and costs if they prevail on the foreclosure of their lien at court. It is common practice in Oregon for a lien claimant to notify the owner and mortgagee of their intent to foreclose the lien in the same notice sent to inform them that a lien had been filed.

BONDING OFF THE CONSTRUCTION LIEN (ORS 87.076)

After a construction lien has been recorded, the property owner or other interested person may post a bond or cash deposit to remove the lien from the subject property. The bond or cash deposit must be 1.5 times the amount of the lien claim or \$1,000, whichever is greater. This is often done so the property can be sold or used as collateral for financing. After a bond or cash deposit has been posted and proper notice of it has been provided, the construction lien will be removed from the property and attach to the bond or cash deposit. If it is necessary for the lien claimant to foreclose the lien, the foreclosure lawsuit will be against the bond or cash deposit and the property is no longer involved.



Van M. White, III is a construction and real estate lawyer at Samuels Yoelin Kantor, LLP in Portland. Van has prepared thousands of construction liens and filed hundreds of construction lien foreclosure lawsuits. Van has been instructing lien law classes to contractors for over 30 years.

If you need assistance with any issues regarding construction liens, Van can be contacted at (503)226-2966 or vmw@samuelslaw.com

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