

# Mechanics' liens: knowing rights insures payment

**W**e could each write the script. Four months ago you delivered the promised materials and provided the contracted services. "Payment due within 90 days of receipt," read the contract signed by the client. One hundred and twenty days have passed and you have not seen a penny.

You have called the customer to request payment. If he answers the call, he says, "Sorry, we are not paying subs or suppliers this month." Or he claims the work was not satisfactory. Or as you read *The Wall Street Journal*, drink your coffee and wait for the mail, you come across a small notice announcing that your customer has just filed for protection from creditors under Chapter 11 of the Bankruptcy Act.

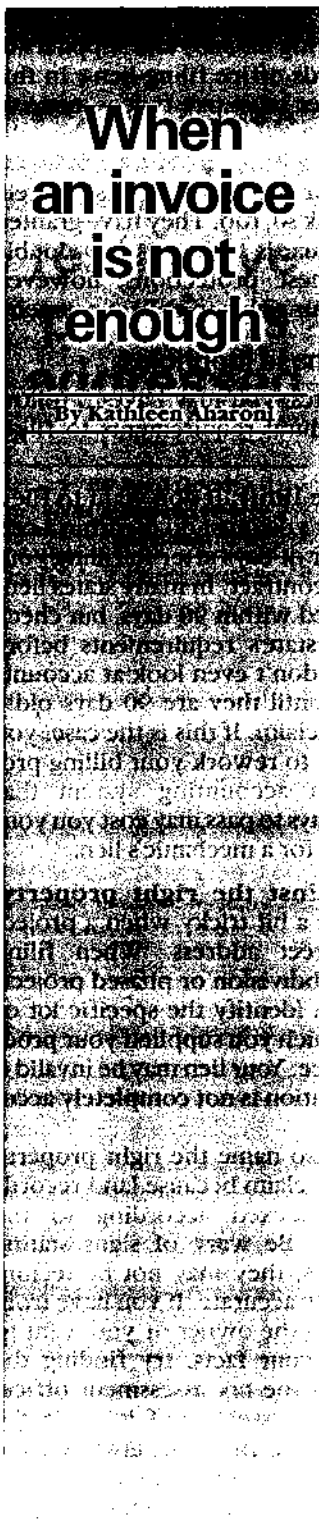
You decide to get tough so you phone your lawyer. He gives you an outrageous quote for fees and says, "... but I can't promise you anything." Even if the courts rule in your favor, your retrieved funds may not offset your lawyer's fees.

## Lien on me

The day a general contractor signs his agreement with you, the day you sign a contract with the owner or the day a customer gives you an order is the day your job is fully collectible. Every day thereafter, you lose your rights.

What rights, you ask? There are two major payment protections—bonds and liens—that if filed correctly are the best ways to ensure payment. A bond is a legal document that guarantees payments for labor and materials used on public jobs. The federal government and most states have laws covering bonds. For private projects, the mechanic's lien is available. Liens are legal in all 50 states. However, each state has passed its own version of the lien law.

The mechanic's lien provides you, the provider of labor, materials or service, with a lien—a legal claim on the property of another for the satisfaction of a debt or the fulfillment of a duty (thank you, Merriam-Webster, copyright 1974).



A lien is based on the premise that if you, the contractor, supply labor, material or services that increase a property's value, then you are entitled to recover that increased value if you are not paid. It is like a mortgage; the lien must be satisfied before the property can be purchased. Thus, the building will sit idle unless somewhere down the line someone pays you.

## Filing the lien

The day you sign a contract is the day you have a right to a mechanic's lien. The filing procedure differs from state to state, but the basic steps are similar.

- To begin legal proceedings, you must file a mechanic's lien memorandum in the land records office where the project is located. Generally, this is a short document listing your name, the amount owed, the property owner's name and a legal description of the property.
- You will then be asked to sign a statement swearing to the amount you are due. Don't try to seek compensation for damages above the initial amount due or you may invalidate your lien.
- Finally, you will be required to pay a filing fee.

Once this procedure is completed, the clerk puts the lien in land records with deeds, mortgages and similar documents. Anyone looking at the property's legal status will find the lien as a charge against the property.

If you are a sub or supplier and you file a lien, you must notify the owner and general contractor.

## Filing suit

If you have filed for the lien, notified the involved parties and still have not received payment, it is time to foreclose on your claim. This procedure involves a court suit and unfortunately, lawyer fees.

Your foreclosure suit must state that your lien is valid and specify the amount of money owed. To win your case, you must prove that you are due this amount and

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that the lien was properly filed against the correct owner, the right property and at the right time. If you are successful, you are entitled to a foreclosure.

Although in some jurisdictions an owner is liable only for the amount he is actually holding, in other jurisdictions an owner may lose in court to a double-jeopardy or double-liability ruling.

For instance, an owner may discover the general contractor, having been paid and craving white sandy beaches, has headed for Tahiti, leaving his subs and suppliers in the land records office filing liens. In this case, the owner must pay twice—once to the sun-bathing GC and again to the subs and suppliers.

Burn deal for the owner, you say? Well, the courts think so, too. They have granted owners safeguards against this double indemnity. These protections, however, can restrict your rights to collect payment.

### **Beware of these loopholes**

In some states, you may have to follow certain procedural requirements to file a valid claim.

■ **Filing time limit.** If you want to file a lien, usually you must do it within a certain number of days after fulfilling your part of the contract. In many states liens must be filed within 90 days, but check your own state's requirements before filing. "We don't even look at accounts receivable until they are 90 days old!" you may exclaim. If this is the case, you might want to rework your billing procedure. An accounting system that allows 90 days to pass may cost you your right to file for a mechanic's lien.

■ **Filing against the right property.** This can be a bit tricky when a project has no street address. When filing against a subdivision or phased project, be sure you identify the specific lot or phase in which you supplied your product or service. Your lien may be invalid if this information is not completely accurate.

You must also name the right property owner in your claim because land records are usually indexed according to the owner's name. Be wary of signs stating project owners; they may not be technically or entirely accurate. If you have trouble discovering the owner or you want to double-check your facts, try finding the information in the tax assessment office. Often, if the assessor's staff is given the property location, they can give you the owner's name. Sometimes this information can be obtained over the phone.

■ **Foreclosing within time limitations.** In most states you must foreclose on your lien within a year after it is filed. If you are even one day late, your lien will be void. This time limit varies from state to state so it is best to find out your state's requirement.

■ **Catching the owner before he has paid his bills.** To receive total payment in many jurisdictions, contractors, subs and suppliers must catch the owner before he pays even part of his bills. Say, for instance, six subcontractors file \$12,000 worth of liens against a mall project. If the owner owes \$6,000 in outstanding payments, in some states, this is the only amount for which he is liable. As a result, the subs will receive only a percentage of their claims.

By now, you may be discouraged by the complicated procedures, pitfalls and possible legal costs involved in filing a lien. But, there is a ray of hope. Usually, once a lien is filed, there is a settlement and many times, just the threat of a lien is enough to get that check quickly into your hands.

To avoid wasting your time and effort filing a claim, make sure you sign no contract containing a clause similar to this:

■ It is agreed that no lien shall at any time be filed against the premises upon which the work is performed, or any part thereof, by the contractor or any of his subcontractors or other persons employed by or furnishing labor, services, equipment or materials to the contractor or any of the subcontractors for, in or about the performance of the work.

On the other hand, you may want to protect yourself by adding a clause similar to the one found in Article 5 of the Standard Form Agreement between Owner and Contractor, AIA Document A101. This clause reads: "Payments due and unpaid under the contract document shall bear interest from the date payment is due at the legal rate of (entered below), or in the absence thereof, at the legal rate prevailing at the place of the project."

If you are still uncertain of your rights or the filing procedure, consult a lawyer or attend the 98th NRCA Convention seminar "What to do when you don't get paid." Steven Phillips, NRCA legal counsel, will lead this seminar Tuesday, Feb. 12. Consult your Convention program for details.