Construction Liens & Other Payment Security Strategies

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1. CONSTRUCTION LIENS
What is a construction lien?

» Also sometimes called a mechanic’s lien.

» A security interest in the title to property for the benefit of those who have supplied labor or materials that improve the property.

» Legislative device to protect contractors – greater remedy than the right to sue on the construction contract.
What is a construction lien?

» Only on Private Projects – cannot lien public land.

» First tier subcontractors can place lien on funds still in hands of governmental body that is owed to the Prime contractor.

» Strict compliance with the statute is required for both.
What is a construction lien?

» **Improvement** – building or structure, fixture, demolition, excavation, filling, grading, landscaping, does not have to be for the permanent benefit of the land. Labor, materials, and services. On new construction and remodels.

» **Includes** – general contractors, subcontractors, material manufacturers and suppliers, architects and design professionals, construction managers.

» **Encumbers** – the real property and the “personal property” – house/shed, etc. Also fixtures, **not** personal contents of home – moveable things.
Why are liens important?

» Generals/”Primes” – lien against owner’s property can get you paid.

» Subs – owner can put pressure on general to pay – especially if owner has already paid General.

» MOST owners do not want a lien placed on their property.
Why are liens important?

» The Claim for Lien must be filed no later than 6 months from the last date on which you provided labor or materials.

» THIS DEADLINE IS NOT EXTENDED BY GOING BACK TO DO WARRANTY OR PUNCH LIST WORK.

» It must also be served on the Owner within 30 days of the date upon which the Claim for Lien was filed with the Clerk of Courts.
Why are liens important?

» The legal description of the property must appear on, or be attached to, the Claim for Lien.

» This can be obtained from the Register of Deeds Office, or from a title company.

» Sometimes, especially in cases of new construction, it is difficult and, therefore, time consuming to locate the legal description.
Why are liens important?

» A suit must be brought (a summons and compliant filed) to foreclose the lien within 2 years from the date of filing the Claim for Lien, or the lien expires and you will not be able to pursue foreclosure of the lien.

» Many times, to get value from foreclosing the lien, you must be able to buy out the superior mortgage (the bank) – and, there may be other construction liens that share priority with yours.

» All construction liens share priority dating back to visible commencement of the project, regardless of the date of filing.
2.

WISCONSIN CONSTRUCTION LIENS

Wisconsin construction lien rights cover both private projects and (with a lien on the funds) public projects. The construction lien is an encumbrance on the owner’s (or lessee’s) ownership interest in the real estate.
Any person who performs, furnishes, or procures any work, labor, service, materials, plans, or specifications, used or consumed for the improvement of land, and who complies with the statutory requirements, can take a lien on all interests in the land belonging to its owners.

This applies to contractors, construction managers, designers, subcontractors of all tiers, suppliers, and manufacturers.
To be covered, materials must be delivered to the work site.

Delivery to a prime’s yard requires an additional step to show incorporation of the materials into the work.

Wisconsin caselaw requires strict compliance with the statutory procedures.
“Improve” or “Improvement” Includes any building, structure, erection, fixture, demolition, alteration, excavation, filling, grading, tiling, planting, clearing, landscaping, repairing, or remodeling which is built, erected, made or done on or to land for its benefit.

“Materials” Includes any constructions materials, supplies, tools, fixtures, equipment, machinery, vehicles, fuel and energy.
“Owner”
Means the owner of any interest in land who, personally or through an agent, enters into a contract, express or implied, for the improvement of the land. Agency will be presumed, in the absence of clear and convincing evidence to the contrary, between employer and employee, between spouses, between joint tenants and among tenants in common, but there shall be a similar presumption against agency in all other cases.

“Prime contractor”
Means any of the following:
1. A person, other than a laborer, but including an architect, professional engineer, construction manager, surveyor, or other service provider, employed by the owner, who enters into a contract with an owner of land who is not personally the prime contractor to improve the land.
2. An owner of land who acts personally as prime contractor in improving such land.
“Serve” or “served” means personal delivery, delivery by registered or certified mail, service in a manner described for service of a summons under s. 801.14, or any other means of delivery in which the recipient makes written confirmation of the delivery; except that in s. 779.15, with respect to serving the state [regarding a lien on project funds], “serve" or “served" means delivery by registered or certified mail.
The construction lien has priority over all liens arising after “visible commencement” of the work: substantial excavation for footings, for example – work the average person can see and recognize as beginning of an improvement to the property.

In the case of an addition, this would be readying the existing structure to receive added new construction.
Prime Contractor’s 10-day notice:

Each prime contractor who will have subcontractors must give a notice to the owner that subcontractors (and the prime) have lien rights.

This notice must be given (in the prime contract or separately) within 10 days after the first labor or materials are provided and the language of the notice is statutory.

This notice is not required when the project is partially or wholly non-residential or where, if wholly residential, more than four family living units are provided.
Subcontractor’s 60-day notice

Each non-prime contractor is required to serve notice to the owner (two signed copies) within 60 days after the first labor or materials are provided.

The language of the notice is statutory.

This notice is not required when the project is partially or wholly non-residential or where, if wholly residential, more than four family living units are provided.

If the notice is required, but served late, lien rights apply to all labor and materials provided after the date of the late notice.
30-day notice:
Every lien claimant must serve on the owner the notice of intent to file a claim for lien.
The notice must be given at least 30 days before the lien claim is filed.
Since the lien claim must be filed within 6 months after the last date of work, the 30-day notice must be served on the owner roughly 5 months after the last date of work.
There is no statutory form requirement, but the notice must briefly describe the nature of the claim, the amount of the claim and the land and improvement to which it relates.
**Claim for Lien:**

- Assuming all required prior notices have been given, a lien claimant can file the Claim for Lien.
- The claim must be filed with the clerk of court in the county where the property is located within 6 months after the last labor or materials were provided.
- There is a statutory list of required contents of the lien claim.
- The one most likely to trip you up is the legal description of the property – get it early.
- A copy of the claim for lien must be served on the owner within 30 days after filing.
Two years after filing:

An action to foreclose the lien must be filed within two years (24 months) after the date of filing the lien claim.
Wisconsin

**Effect of Bond Payment**
On private projects, a payment bond issued in the full amount of the contract price eliminates lien rights. Instead, the lien claimant (a first-tier subcontractor or a sub of a first-tier subcontractor) has a right to make a claim against the payment bond. Lien claimants without a direct contract with the prime contractor must give notice to the prime contractor within 60 days after first providing labor or materials in order to maintain their lien rights.

**Private Projects Lien on the Funds**
Where lien rights have been eliminated by issuance of a payment bond, lien claimants can also make a claim for a lien on the funds remaining due to the prime contractor or a subcontractor.
Wisconsin

Public Projects Lien on the Funds

» Public projects (mostly) require payment bonds and no lien rights are available on public improvements. However, an unpaid subcontractor or supplier to a prime contractor has the right to make a claim against funds remaining due to the prime contractor by serving a notice of the claim on the clerk of the municipality, the prime contractor (and the state if state funds are included).

» If the prime contractor doesn’t dispute the claim within 30 days, the funds are paid to the subcontractor by the municipality. If the prime contractor does dispute the claim, the subcontractor must bring an action to resolve the claim within three months of the date of its notice of claim.

» This doesn’t apply in “cities of the first class” (pop. >150,000), which have a separate procedure dictated by ordinance.
3. MICHIGAN CONSTRUCTION LIENS
Private project lien rights only.

Caselaw indicates the statute is to be liberally construed (not so strict) and “substantial compliance” is usually sufficient.

An exception to this is the obligation to record the lien with the register of deeds within 90 days after the last date of furnishing labor or materials.
Any contractor, subcontractor, supplier or laborer who provides improvement to real property has a right to a construction lien.

The lien survives transfer of the property.

The lien may be (and probably is) junior to an existing mortgage.

There are a number of exceptions and complications applicable to 1-2 unit residential construction.
“Contractor” means a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property. This includes a contractor supplying materials only.

“Subcontractor” means a person, other than a laborer or supplier, who pursuant to a contract between himself or herself and a person other than the owner or lessee performs any part of a contractor's contract for an improvement.
“Supplier” means a person who, pursuant to a contract with a contractor or a subcontractor, leases, rents, or in any other manner provides material or equipment that is used in the improvement of real property. Supplier does not include a design professional or a person that has a subcontract with a design professional.

“Improvement” means the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, and installing or affixing a fixture or material, pursuant to a contract.
Prior to start of construction:

Owner is to record a Notice of Commencement.

This sets out the information needed to prepare any lien claim.
20 days after first furnishing labor or materials:

Subcontractors and suppliers must serve a Notice of Furnishing to the owner. This is not required of the contractor.

This can also be done before furnishing labor or materials.

There is a statutory form for the notice of furnishing.

If you miss the 20 days, you can still serve the notice and get coverage for work done after service of the notice.
» Design professionals:

Design professionals must record a notice form not later than 90 days after the last day of services (forms and timing differ slightly for a lead design professional and a subcontractor design professional).
At the time of payment requests:

Contractors and subcontractors must provide a sworn statement listing subcontractors and suppliers, laborers, amounts paid, and amounts due (statutory forms apply).
90 days from last date of furnishing labor or materials:

- The claim for lien must be recorded in the county in which the project is located and proof of service of the notice of furnishing must be included (if applicable).
- There is a statutory form for the lien claim.
- The 90 days is not extended by warranty work.
15 days after recording the claim for lien:

The lien claim must be served on the owner or designee personally or by certified mail.
MICHIGAN -> Notice Requirements

» One year after recording:

» Proceedings to enforce the lien must be started.
MINNESOTA CONSTRUCTION LIENS
 » Lien rights apply to private owner projects only.
 » Public projects have payment bond requirements.
 » Lien rights arise when the first work or materials are supplied to the site, provided the required notices are given.
 » The statutory requirements to create the lien are strictly enforced, except that there is latitude in the pre-lien notices so long as the lien claimant made a good faith effort to comply and the owner does not prove damage as a direct result of the failure to comply with the notice requirements.
Whoever performs engineering or land surveying services with respect to real estate, or contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery for any of the purposes hereinafter stated, whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon the improvement, and upon the land on which it is situated.
An “improvement” is a permanent addition to or betterment of real property that enhances its value and is designed to make it more useful or valuable – distinguished from ordinary repairs or maintenance which maintain the value rather than increasing it.

The lien is for the amount of the contract or, where there is no contract, for the value of the work done.
The 10-day general contractor notice and the 45-day subcontractor notice are not required:

» Where it is entirely residential and four or more family units are provided (multi-unit buildings);

» Where it is not agricultural and is wholly or partially nonresidential and more than 5,000 useable square feet are added or, where an existing property is being improved, the property is greater than 5,000 square feet; and

» If the property is greater than 5,000 square feet where improvements other than constructing or renovating a building are done, such as clearing, excavating, grading, landscaping, well drilling, paving, etc.
» **10-day notice** – With the exceptions stated below, each general contractor must give written notice to the owner either in the contract or by separate written document delivered to the owner within ten days after the date of their agreement regarding the work. The notice language is statutory. Delivery is by personal service or certified mail.

» **45-day notice** – Lien claimants other than the general contractor must give notice to the owner within 45 days after the first day on which labor or materials were provided. Delivery is by personal service or certified mail. The notice language is statutory.
» **Service of Lien Statement** – within 120 days after the last provision of labor or materials, the lien claimant must file a lien statement with the county recorder or registrar in the county in which the work was done and, also within the 120 days, must serve a copy of the lien statement on the owner by personal delivery or certified mail.

» **Foreclosure** – an action to foreclose the lien must be filed within one year after the last labor or materials were supplied.
4. ILLINOIS CONSTRUCTION LIENS

Illinois procedures are unusual and must be followed strictly in order to recover.
A lien claimant may claim a lien for the material, fixtures, apparatus, machinery, services or labor, plus interest at the rate of 10% per year.

The lien covers the property and adjoining land of such owner constituting the same premises and occupied or used in connection with such land.
“Contractor”
Means any person who enters into a contract to improve land with the owner of land (or with the owner’s agent or with a person with whom the owner knowingly permitted to contract for the improvement of the land), or to manage a structure under construction thereon.

“Improve”
Means to furnish labor, services, material, fixtures, apparatus or machinery for the purpose of or in the building, altering, repairing or ornamenting any house or other building, sidewalk, driveway, fence or improvement or appurtenances to the land, including excavation, landscaping, demolition, or to perform any services as an architect, structural engineer, professional engineer, land surveyor, registered interior designer, or property manager, or perform labor or services as superintendent, laborer or otherwise, in the building, altering, repairing or ornamenting of any house or building; or furnish material, fixtures, apparatus, machinery, labor or services.
Section 5 Affidavit – The contractor is required to give to the owner, and the owner must require of the contractor, an affidavit setting out the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, or form work and of the amounts due or to become due to each.

The affidavit is to be given before the owner makes any payment to the contractor. Dealers in materials only are not required to provide this affidavit.
Subcontractor liens – a “subcontractor” is any mechanic, worker or other person who furnishes any labor, services, material, fixtures, apparatus or machinery, or form work for the contractor.

Each subcontractor has a lien for the value of their work, with interest, from the same time, on the same property as provided for the contractor.

In addition to a lien on the land, a subcontractor may make a lien claim on the money due or to become due from the owner to the contractor.
ILLINOIS -> Notices and Dates

» 60-day notice – For single-family, owner-occupied residential projects, there is a statutory lien rights notice to be given within 60 days after the first work by the subcontractor.

» 90-day notice – Subcontractors and material suppliers must, within 90 days after completion of their work, provide a written notice of their claim to the owner and the mortgagee, by certified mail or personal service. If the subcontractor or material supplier misses this date, they may nevertheless retain some lien rights to the extent of the amount shown due to them in the contractor’s Section 5 affidavit.
General Contractor and Subcontractor Liens – within four months after the completion of the work, the general contractor or subcontractor must record a lien claim in the county in which the property is located.

The four-month deadline can be extended to two years if the property has not been sold or there is not intervening mortgage.

The lien claim must be a sworn statement, describing the contract, the date work was complete, the legal description of the land and the amount claimed due.
Foreclosure – an action to foreclose the lien must be filed by the general contractor or subcontractor within two years after completion of the work.

Deadlines – The deadlines for the 90-day notice and the filing of the lien claim run from the date of completion of the work.

*Note that completion of the work does not include punchlist work or warranty work, or work that is trivial, insubstantial and not essential to the completion of the contract*
ILLINOIS -> Public Projects

» Lien on funds due in public projects – A subcontractor may claim a lien on funds remaining due to a contractor on a local public project by giving notice to the clerk of the municipality and the contractor by certified mail or personal service. The notice should contain a sworn statement identifying the lien claimant's contract, describing the work done, and stating the total amount due and unpaid as of the date of the notice.
» The lien claimant must file an action to foreclose the lien on the funds within 90 days after serving the notice of the lien.
» The municipality must hold the funds until the expiration of the 90 days or the resolution of the case, if filed.
» Projects with the State of Illinois have a different set of requirements, but there is a lien on the funds there also.
4. LIEN WAIVERS
Lien Waivers

- Owners and/or financers frequently require contractors, subcontractors, and suppliers to submit lien waivers to ensure that all labor, materials, subcontractors, and equipment are paid for on their projects and unexpected construction liens do not pop up after payments are made.

- The lien waiver is an affirmation by the contractor, subcontractor, or supplier to the owner that it has received payment and will not file a lien claim against the project for that work.

- When a contractor or subcontractor signs a lien waiver and submits it to the owner, the contractor has waived any lien rights it may have had on the project irrespective of whether the contractor, subcontractor, or supplier has actually received payment.
Partial or Interim Waiver
Submitted with a progress payment and waives a lien claim up to the date of the waiver or payment or up to the amount of the payment.

Final Waiver
Submitted upon receipt of final payment and waives all lien rights on the entire project or property.
The purpose of the lien waiver is for the owner or general contractor to ensure that all contractors, subcontractors, and suppliers are paid and accounted for so as to reduce the risk of lien claims on the project.

**FOR SUBS** – Don’t sign **ANY** waivers until **and** unless you are paid – and only sign for the part you got payment for. The general cannot waive your lien rights for you, nor can the general preserve your lien rights for you.
Considerations for Lien Waivers

» Waivers must be in writing and signed – only claimant can waive rights.

» The waiver only applies to labor/materials listed in the waiver.

» Any contract provision that requires you to waive your lien rights prior to payment is VOID. This DOES NOT mean that, if you voluntarily sign a lien waiver with being paid, the lien waiver is void also.
A lien waiver is a contractual document in which a contractor or subcontractor or supplier relinquishes its legal right to file a lien claim.

While a contractor or subcontractor or supplier is entitled to refuse to waive its lien rights prior to being paid for the work, any waiver actually signed is binding.

Ambiguities in any lien waiver are construed against the lien claimant who signed it.
Types of Lien Waivers

**Date Waivers**
Waives lien rights for work done prior to a stated date.

**Money Waivers**
Waives lien rights up to the amount stated, regardless of date of the waiver or the work.

**Full Waivers**

**Conditional & Contingent Waivers**
(Full or partial)
Other Matters to be Considered: “Watch Outs”

- Limit the waiver language to work for which you have been paid.
- The release should be conditional on actual receipt of payment.
- Carefully consider certifications that you’ve already paid all subs & suppliers for the work described in the payment application (less applicable retainable on the sub/supplier).
Other Matters to be Considered: “Watch Outs”

1. Specifically identify any outstanding claims or disputes which are not being waived (open or pending, change orders, retainage, etc.).

2. Unless it’s a waiver for final payment, the waiver should cover only the work covered by the payment application.

3. Watch for language that releases more than just lien rights: waivers of claims for changes to contract amount or schedule; broad waivers of all claims or causes of action; waivers of rights against bonds; or waivers of rights against funds owed by owner or contractor.
Other Matters to be Considered: “Watch Outs”

» Date waivers are difficult to give without giving up more than you should.

» Review the application for payment forms to make sure that there are no waivers of lien rights or other rights or certifications that you cannot give at the time of signature.
Any Questions?

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