

Mechanic's Lien Law

A Checklist for Verifying the Validity of Liens

OVERVIEW

Pros & Cons of Liens

Pros:

- ◆ *Pre-lien puts others on notice that you are serious about being paid.*
- ◆ *A valid lien provides a right to payment secured by the property itself—if you don't get paid, you can foreclose on the property.*
- ◆ *A valid lien usually leads to a favorable settlement.*
- ◆ *Successful lien claimants are entitled to the full amount of valid principal plus 18% interest and their attorneys' fees and costs.*

Cons:

- ◆ *No cons to filing a pre-lien. Sophisticated owners know to expect them.*
- ◆ *Recording a mechanic's lien can be costly, generally between \$250 and \$1000.*
- ◆ *Legal counsel is almost always required to foreclose a lien.*
- ◆ *All documents must be accurate, or lien rights may be waived.*
- ◆ *Foreclosure can be a lengthy process when not promptly settled.*

the who, what, when, why, and how on

Mechanic's Liens in Arizona

When properly perfected, a mechanic's lien claim can be the most persuasive method of collecting construction monies from a project owner. A mechanics lien is an encumbrance or charge against the real property that secures certain construction-related obligations or debts. Mechanic's and materialmen's liens exist to prevent the unjust enrichment of a property owner at the expense of those whose labor or material increased the value of the property. Once perfected, a lien can be judicially foreclosed, and the property sold to satisfy the debt secured by the lien. It is this ability to secure construction receivables through an interest in the property itself that makes liens such a powerful collections tool.

As powerful as liens can be, they are also strictly regulated. For example, not every contractor on a project is entitled to record a lien. And, even if a contractor or supplier is otherwise entitled to lien, other important limitations may apply.

Even assuming that a contractor does possess lien rights, other hurdles must be cleared. The first is a 20-Day Preliminary Lien Notice, or pre-lien. A pre-lien must be filed within twenty (20) days of furnishing the material, labor, or services described in the notice. While it is preferable to file a pre-lien within 20 days of first furnishing the material, labor, or services, it is not absolutely necessary to do so, provided that the 20 Day Notice covers only material, labor, or services provided within 20 days prior to its filing. Schern Richardson recommends using a reputable lien service to file pre-liens. A pre-lien simply preserves your right to later record a mechanics lien with the county recorder. Not filing a pre-lien is fatal to a mechanics lien claim:

What comes after the filing of a pre-lien? The next step is to record a mechanics lien to collect unpaid construction monies. Like the pre-lien, the mechanics lien is also subject to strict time requirements. Normally, a lien must be recorded within 120 days of project completion. If a Notice of Completion has been recorded on the project, that time period is shortened to 60 days of the record date. The Notice and Claim of Lien should be recorded with the county recorder in the county where the jobsite is located. It must then be sent to all those with an interest in the property within a "reasonable time" thereafter, via certified mail. Once recorded, the contractor, subcontractor, or supplier has 180 days to foreclose on its lien. Foreclosure requires filing a lawsuit in the Superior Court for the county where the property is located. A Notice of Lis Pendens must also be filed with the Superior Court and recorded with the County Recorder. The Notice, which provides presumptive notice of the litigation to all those interested in the property, must be recorded within 5 days of filing the foreclosure suit.

Recording a wrongful lien can subject the individual or entity responsible to substantial damages, including \$5,000 or treble the actual damages caused to the property owner, plus costs and fees. Thus, it is vitally important to ensure that any lien you record is valid—prior to recording it. The following checklist can help you determine if lien rights exist on a project, and whether a lien is valid.



Lien Checklist

Steps to Verify the Validity of a Mechanic's Lien

Are mechanic's liens allowed on the project?

- On owner-occupied dwellings (i.e., most single family residential projects), no liens are allowable except by a contractor who has a written contract directly with the owner. A.R.S. § 32-1002. Therefore, subcontractors on single family residential projects who contract with the general contractor but have no written contract directly with the owner have no lien rights.
- Mechanic's liens are not permitted on public works projects. Under Arizona law, you can't lien public property. Instead, the contractor must execute a payment bond.
- On private projects where a payment bond has been executed and recorded under A.R.S. § 33-1003, mechanic's liens are not permitted. Recovery can be made against the bond.
- On all other private projects, mechanic's liens are permitted.

Is the contractor properly licensed?

- If the contractor is not properly licensed, it cannot recover pursuant to A.R.S. § 32-1153 and A.R.S. § 33-981.

Does the lien secure a valid right to payment?

- Has the contractor satisfied its obligations of performance on the project or is otherwise excused from doing so? Pursuant to Prompt Pay Act, A.R.S. § 32-1129.04, a contractor may suspend or terminate performance under certain circumstances if the contractor has not been paid. If so, the contractor may still be entitled to record a mechanic's lien. If the contractor is not entitled to the monies it seeks to secure, no lien should be recorded.

Has the mechanic's lien been properly perfected?

- Did the contractor provide a Preliminary 20-day Lien Notice? The notice must be in the form set forth in A.R.S. § 32-992.01. If it is not, any mechanic's lien will be invalid. The Preliminary 20-day Lien Notice only secures an amount equal to the reasonable value of the labor and materials supplied to the jobsite within the past twenty days and thereafter.

- The contractor must provide proof of service. Recipients rarely return the acknowledgment of service on the notice, so the contractor should prove service by: (1) Obtaining a certificate of mailing showing when the notice was mailed, and (2) Providing an affidavit that service was made as indicated on the certificate of mailing.

- If the value of the labor and materials the contractor intends to furnish (or has furnished within the past 20 days) to the project exceeds 20% of the amount stated on the preliminary lien notice, the contractor must provide an amended notice for the new total amount sought to be secured, not simply the amount of the increase. Otherwise, the contractor's recovery will be limited to 120% of the amount stated in initial notice.

Does the lien contain the required information?

- The lien must provide all the information required by A.R.S. § 33-993, including:

- The lien must provide the exact legal description of the property. Simply listing the street address or the name of the project is not sufficient.
- The lien must identify the name of the owner or the reputed owner, and the name of the contractor (if any) to whom the contractor furnished labor or materials.
- The lien must state the terms of the contract, if oral, or attach a copy of the contract, if written.
- The lien must state the contractor's demand, after deducting all just credits and offsets.
- The lien must state the date of completion.
- The lien must state the date the contractor served its Preliminary 20-day Notice; and
- The lien must provide a copy of the notice, and provide proof of service.

Has the lien been timely recorded and served?

The contractor must timely record the lien with the appropriate county recorder. The contractor must record its lien within one hundred twenty (120) days of completion, unless a notice of completion has been recorded and served, in which case the contractor has only sixty (60) days to record its lien.

Completion is defined as the earlier of: (1) Thirty (30) days after final inspection and final written acceptance by the government body that issued the building permit, or (2) Cessation of labor for a period of sixty (60) consecutive days. If a building permit is not issued or if the governmental body that issued the building permit does not issue final inspections and written final acceptances, then completion is the last day on which any labor, materials, fixtures, or tools were furnished.

If a project for residential occupancy consists of more than one separate structure, regardless of whether the structures are constructed pursuant to separate contracts or a single contract, the time within which to record a lien commences on the completion of each separate building, and a separate lien needs to be filed within the appropriate time frame after completion of each separate building.

If the lien is invalid, what are the penalties?

A contractor should never record a lien which it knows is invalid. Filing a wrongful lien could lead to a penalty of \$5,000.00 or treble the actual damages caused by the wrongful recording of the lien, whichever is greater, plus the other side's costs and attorneys' fees. A.R.S. § 33-420.

Has the lien been foreclosed on properly?

If the contractor has not been paid on its lien, it must file suit to foreclose on the lien before the expiration of the statute of limitations; within six months of recording the lien. A.R.S. § 33-998.

A lis pendens must be recorded with the appropriate County Recorder within five calendar days after the contractor files its lawsuit to foreclose. A.R.S. § 12-1191. Additionally, A.R.S. § 33-998 requires that the lis pendens be recorded within 6 months of the date the mechanic's lien was recorded. Failure to timely record a lis pendens is fatal to a lien foreclosure claim, and the lien is extinguished. Consequently, it is unwise to wait for the last day to file a suit to foreclose a lien, and the lis pendens should be recorded at the same time the suit is filed.

A successful lien claimant is entitled to its attorneys' fees and costs pursuant to A.R.S. § 33-998.

Does a lien discharge bond exist on the project?

An owner may "bond around" a lien claim by executing and recording a lien discharge bond. A.R.S. § 33-1004. If notice is provided to the contractor that a lien discharge bond is in place, the contractor should provide notice to the bond surety pursuant to the terms of the bond. The contractor must then name or join the bond principal and surety to any lawsuit within the limitations period for filing a lawsuit to foreclose the lien. Alternatively, if the bond is provided to the contractor within 90 days of its deadline to file suit, the contractor has 90 days from receipt of the bond to file suit. If the bond was not provided to the contractor, but is discovered within two years from the date the bond was recorded, the contractor has six months from the date of discovery to bring suit to foreclose on the lien. A.R.S. § 33-1004.

If a lien has been satisfied, has the lien been released?

Once a contractor is paid on its mechanic's lien, the contractor must record the appropriate lien release and release of lis pendens. A.R.S. § 33-1006.

Disclaimer

This checklist is provided for informational purposes only. Neither it nor the information it contains should be relied on for specific legal advice. Laws cited herein are always subject to revision, and your individual circumstances may be different. If you have any questions concerning any aspect of the laws governing mechanic's liens, consult a licensed and experienced construction law attorney.

About the Firm

Schern Richardson, PLC was founded in 2006 from several of the Valley's most knowledgeable and respected attorneys. An agile, dedicated legal group, the Firm's practice is devoted to construction, contract, and business law. The Firm represents contractors, subcontractors, suppliers, and design professionals in all types of construction-related disputes.

The Firm's attorneys represent contractors in judicial and administrative proceedings throughout the State of Arizona. Its clientele is largely contractors, although the Firm has substantial experience representing project owners, suppliers and lenders. Two of the Firm's attorneys are also contributors to the Arizona Lien Law Manual, published by the State Bar of Arizona.