



Construction Lien Traps and Pitfalls

Many attorneys who do not routinely practice construction law occasionally receive requests from clients to record construction liens and file construction lien foreclosure actions. While a number of forms exist to simplify the process, numerous traps and pitfalls await the unwary. The purpose of this article is to assist the practitioner who occasionally records or forecloses a lien on behalf of a client. The article does not identify every requirement or step in the recording or foreclosure processes and does not address specific lien rules applicable to non-contractors (such as design professionals).

Recording a Lien

The following are some key issues to consider in recording a construction lien:

■ **CCB License.** Regardless of what your client tells you, always confirm through the Construction Contractor's Board (CCB) that your client was licensed (without lapse) from execution of the contract through completion of the work, as well as when the lien is recorded. If your client was not properly licensed and cannot cure any licensing deficiency under one of the limited exceptions in ORS Chapter 701, its lien claim will fail and your client may be subject to a claim for attorney fees under ORS 87.060.

■ **Pre-Lien Notices.** Confirm whether your client was required to give a pre-lien notice (Notice of Right to a Lien or Information Notice to Owner) and, if so, whether your client can prove such notice was given. Regardless of the merits of a client's claim, failure to give any re-

quired pre-lien notice will invalidate the client's lien and expose it to attorney fee liability. If a client did not give proper notice or cannot prove proper notice was given, you may wish to consider simply asserting a breach of contract action without recording a lien.

■ **Last Day of Work.** Trifling or *de minimus* work and work to correct deficiencies caused by the client are insufficient to toll the 75-day period for recording a lien, which starts on completion of the project or 75 days after a contractor last performs work on a project, whichever is earlier. Unless it is too late, always use the last day you are certain your client performed substantial work under its contract for the purpose of calculating the 75-day period. Ask for backup documentation from your client.

■ **No Extensions or Extra Days.** The deadlines for recording construction liens are strictly construed. If the 75th day falls on a county holiday or a weekend, the time for recording the lien will not be extended. Additionally, the 75-day deadline cannot be extended by agreement and probably cannot be waived.

■ **Foreclosure Guarantee.** Obtain a foreclosure guarantee before recording the lien, or shortly thereafter if there is no time prior to the deadline for recording the lien. The foreclosure guarantee will identify any mortgagees. If you do not timely provide the required notice of lien filing to mortgagees and the owner and you later foreclose on the lien, your client may lose its right to attorney fees.

■ **Notice of Filing and Intent to Foreclose.** Although the requirement to give the owner and all mortgagees notice of a lien re-

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ording within 20 days is separate from the notice of intent to foreclose – which is timely if given more than 10 days prior to filing a foreclosure action – these notices should always be combined and properly served within 20 days after the recording of the lien to avoid any risk that a notice is missed.

■ **Arbitration Clause.** If your client’s contract contains an arbitration provision, this does not change any of the statutory or regulatory requirements for recording or foreclosing a lien. If the lien covers work that is subject to an arbitration clause, the proper course is usually to timely record the lien, and then timely file the foreclosure action in court together with a motion to abate the foreclosure action pending arbitration.

■ **Calculating Amount of Claim/Segregation of Lien Amounts.** Take care in calculating the amount of the lien claim. A lien claim that is substantially overstated may be ruled invalid in its entirety. Additionally, if possible, it is a good idea to segregate the amounts claimed for labor, materials, and equipment on the face of the lien claim. In some circumstances, a portion of the work (e.g., labor) may have certain priorities that other portions of the claim do not have. A court is also less likely to declare a lien invalid for overstatement if the amounts are segregated.

■ **Signing the Lien.** The best practice is to have the client or client’s representative sign the lien. This prevents the lawyer from becoming a witness.

Foreclosing a Lien

The following are some key issues to consider in foreclosing a construction lien:

■ **120-day Deadline.** As with the 75-day period for recording the lien, weekends and county holidays do not toll the 120-day period for filing the foreclosure action, which runs from the date of lien recording. However, the 120-day period can be extended by agreement if an agreement exists to extend payment up to two years and such agreement has been set forth in the claim of lien. Even then, such agreement probably has no effect on third parties.

■ **Naming Defendants.** The owner, all persons personally liable, other lien claimants, and all junior interest holders should be named as defendants. Remember that construction lien claimants have priority over certain interests recorded prior in time. So unless it’s clear that certain interest holders are senior under ORS Chapter 87, they should be named. Consider not naming lessees if your client wants them to remain as tenants after a foreclosure sale.

■ **Service.** Be diligent in your service efforts so that you meet the standard for service by publication if necessary. If service is not deemed to relate back to the filing date, the date the foreclosure action is deemed to have commenced may be beyond the 120-day period, at least with respect to some parties.

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