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Construction Contracts
Mechanic's Liens
Preliminary Notices
Stop Notices
Bond Claims
Miller Act
Lien Foreclosure
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Incorporations
Corporate Compliance
Civil Litigation
Small Claims
Judgment Enforcement

The California Mechanic's Lien

The Mechanic's Lien remedy was created to ensure that a designer, contractor or supplier who contributes to a work of improvement will be paid; as his contribution increases the value of the improved property.

Sometimes referred to as a "Construction Lien," the Mechanic's Lien creates a security interest in real property for the benefit of those who have supplied labor or materials to improve that property.

Other Potential Remedies

In addition to the Mechanic's Lien, claimants may be able to pursue any or all of the following:

- Stop Notice
- Payment Bond Claim
- Breach of Contract remedies

Who Can Record a Mechanic's Lien?

Claimants are entitled to a Mechanic's Lien if:

- The claimant contributed labor, services, equipment, or material to a work of improvement;
- The work of improvement is permanent; and
- The work was performed with consent of the owner or owner's agent ("agent being one who has charge of the work of improvement or a portion

of it, e.g. contractor, architect, etc.).

Qualified claimants include:

- Material supplier (*except* a material supplier to a material supplier)
- Licensed contractor
- Licensed subcontractor
- Lessor of equipment
- Artisan
- Architect (if the designs are actually used for construction; see *Design Professional's Lien* on page 5)
- Registered engineer
- Laborer

Unlicensed contractors are **not** entitled to a Mechanic's Lien or Stop Notice. Generally, "substantial compliance" with the licensing requirement is not sufficient; however there are a few exceptions, e.g. if the contractor:

- Had been duly licensed in California before performing the contract;
- Acted reasonably and in good faith to maintain proper licensure;
- Did not know or reasonably should not have known that he or she was not duly licensed when work commenced; and
- Acted promptly and in good faith to reinstate his or her license on learning that it was invalid.

A supplier to a material supplier is not entitled to a Mechanic's Lien or Stop Notice.

Definitions

Claimant: One who performs labor, skill, or services, or furnishes material or equipment to be used in a work of improvement.

Owner: One who has interest in real property where work of improvement is located; causes work of improvement to be undertaken; and will be asked to pay for the work performed.

Original contractor: One who has a direct contractual relationship with the owner.

General or Prime Contractor: Not every original contractor is the "general" or "prime" contractor. These terms are usually reserved for a contractor hired by the owner for an entire project.

Subcontractor: A contractor who does not have a direct contractual relationship with the owner. "First-tier subcontractor" refers to subcontractor who has contract with original contractor; "second-tier subcontractor" refers to subcontractor under contract with another subcontractor; and a "third-tier subcontractor" is a subcontractor under contract with a "second-tier subcontractor."

Material supplier: One who furnishes supplies for work of improvement.



Paperwork: Burden or Boon? Document! Document! Document!

From the beginning of the project, contractors should keep in mind what will be required to successfully record and foreclose a Mechanic's Lien if they are not paid after the work is complete. Proper documentation and careful record-keeping will help a Claimant to meet his burden of proof.

The following can prove that labor was supplied on a project:

- The contractor's testimony;
- The foreman's testimony; and
- Diaries, reports, and other project documents, that enhance credibility of the testimony, help refresh stale memories, and potentially be admitted as evidence if witnesses are unable to testify.

To help prove that materials were supplied on a project, contractors and/or material suppliers should preserve potential evidence that is generated and maintained in the ordinary course of business, including:

- Original invoices;
- Sales and delivery tickets, with owner's name and

project location written on them; and

- Purchase orders, if issued by the material supplier's customer.

Notice Required

Before contracting for residential new construction, home improvement, swimming pool or residential service and repair projects, original contractors must comply with the statutory requirement to provide owner with information on California's Mechanic's Lien law. (The required "Notice to Owner" is set forth in *Bus. & Prof. Code § 7159*.)

Failure to comply with this requirement could subject the contractor to disciplinary action by the Contractors State License Board, and may preclude recovery for work performed.

Subcontractors and material suppliers must serve a Preliminary 20-Day Notice of a potential Mechanic's Lien claim on the owner, original contractor(s) and construction lender. Original contractors are not required to give the owner a Preliminary 20-Day Notice (with one exception, however: an original contractor working for a lessee should serve a

Preliminary 20-Day Notice on the property owner).

The Preliminary 20-Day Notice must be served no later than 20 days after the Claimant has first supplied materials or performed labor on the project. If the Preliminary 20-Day Notice is served later than the 20th day, work performed more than 20 days before the date of service is exempted from any Mechanic's Lien claim.

Claimants are only required to serve one Preliminary 20-Day Notice for each project, unless work is performed or materials are supplied under contract with more than one subcontractor. A subcontractor or material supplier contracting with more than one subcontractor on a particular project, must give a Preliminary 20-Day Notice for each contract.

Failure to Notify Owner:

Failure to provide the required Notice to Owner or Preliminary 20-Day Notice eliminates the right to enforce a Mechanic's Lien. In addition, subcontractors with a contract in excess of \$400 who fail to serve a Preliminary 20-Day Notice may be subject to disciplinary action.

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Deadlines to Record a Mechanic's Lien

Claimants may record a Mechanic's Lien as soon as they have completed their work on the project, and must record their Mechanic's Lien claims within 90 days of the date the work of improvement is completed, **unless Notice of Completion or Notice of Cessation of Labor has been recorded.**

If either of these Notices has been recorded, the time to record a Mechanic's Lien is shortened:

- Subcontractors and material suppliers must record their Mechanic's Lien claims within 30 days of the date the

Notice of Completion/ Cessation is recorded

- Original contractors have 60 days.

Completion

A project is "completed" when:

- Owner or his agent occupies premises or uses improvement, *and* all labor ceases
- Owner or his agent accepts work of improvement
- Labor ceases for 60 continuous days, or 30 continuous days *and* owner records Notice of Cessation

Special considerations for separate phases of a larger project:

- Completion of individual homes in housing tract can constitute separate works of improvement
- Completion of each such work of improvement can start deadline running for recordation of lien on that particular work

A Mechanic's Lien recorded before the contract is "completed" is premature and void. A construction contract is "complete" if the contractor's obligations have been fully performed, excused, or otherwise discharged.

A Mechanic's Lien claim must be recorded with the county recorder in the county in which the property is located. Claimants must provide the names and addresses of the parties against whom the lien is being recorded, so that the recorder's office may send notification to the property owner(s).

What to Include in Your Mechanic's Lien

Demand for payment, after deducting all just credits and offsets:

- Include amount due for labor, services, equipment, or materials based on written modification of contract, or as result of rescission, abandonment, or breach of the contract
- In the event of rescission, abandonment, or breach, amount of lien may not exceed reasonable value of labor, services, equipment, and materials furnished by claimant

- Claimant may include in its claim of mechanics' lien all amounts due for breach of contract; it is a question of fact for the trial court to determine the exact amount of the lien claim.

Identify owner: Include name and address of owner or reputed owner, if known.

Description of work performed or materials provided: Include general description of labor, services, equipment, or materials furnished, but no other items; claimants forfeit their lien

rights if they claim anything they did not furnish.

Name person or entity to whom you furnished labor, services, equipment, or material.

Provide **description of job site** sufficient for identification:

- Use legal description, if possible
- Alternatively, use street address if it clearly identifies property

Signature and verification of Mechanic's Lien claim.



Enforcing (Foreclosing) Your Mechanic's Lien

A Mechanic's Lien foreclosure action may be filed as soon as the lien claim has been recorded, and must be filed **no later than 90 days** after the date the Mechanic's Lien is recorded. The complaint must be filed in Superior Court in the county where the property is located.

Note: If defendant owner has filed for bankruptcy, the claimant must obtain permission from the bankruptcy court before filing the complaint.

Extending the Deadline

An extension of this deadline may be obtained by recording a Notice of Extension of Credit with the county recorder before the expiration of the 90-day deadline. This notice must be signed by the owner(s) and lien claimant.

Once recorded, the deadline to file a foreclosure action is extended to **90 days after the date specified in the notice**; however in no event may a Mechanic's Lien foreclosure

action be commenced more later than **one year** after the date the project is complete.

If Deadline Has Passed

If time to file suit has expired, but time to record liens is still open due to continuation of project or only recent completion of project, you can:

- Record a second lien; and
- File suit on this second recorded lien.

Before Filing Complaint to Enforce Mechanic's Lien

It is recommended that you obtain a Preliminary Report or Mechanic's Lien Guaranty from a title insurance company before preparing complaint to foreclose lien. Ask the title company to "date down" its guaranty as of date you file foreclosure action.

Use lien guaranty to obtain information needed to prepare and serve your complaint:

- Correct identification of owner;

- Correct legal description; and
- Correct names of all parties with any interest in the real property.

Representing Yourself in the Foreclosure Action

You can save yourself hundreds, if not thousands, of dollars by representing yourself instead of hiring an attorney. (Note: Contractors and suppliers who are incorporated must be represented by an attorney, so self-representation will not be an option for corporations.)

Several documents must be prepared and filed, and the claimant will have to represent himself or herself before the judge. By hiring a legal document assistant to provide the relevant legal information, prepare court documents and serve as a "legal secretary," most small business owners can easily handle this endeavor.

TOP 5 REASONS TO HIRE CONSTRUCTION COMMANDO TO HELP FORECLOSE YOUR MECHANIC'S LIEN

1. **Empowerment.** Our very foundation is the belief that, armed with the proper tools, DIY (do-it-yourself) legal can be successfully accomplished. Every client receives comprehensive published legal information about the entire mechanic's lien process.
2. **Expertise.** Construction Commando was established by a licensed contractor and trained paralegal. We've walked in your shoes.
3. **Time Management.** You don't have time for endless trips to the law library. One call...one questionnaire...your documents will be prepared for your signature, filed with the appropriate court, and served on the defendants.
4. **Your Right Hand.** That's what Construction Commando is. It's like having your own, personal legal secretary (without the student loans for law school).
5. **Economics.** Save a bundle on non-recoverable attorneys' fees!

Design Professionals' Liens

Similar to a Mechanic's Lien, the Design Professional's Lien enables certified architects, registered professional engineers and licensed land surveyors to secure an interest in real property before construction work is actually commenced.

Once construction begins, the Design Professional's Lien is no longer available, but the design professional is then entitled to the same Mechanic's Lien rights as any other claimant on the project.

The Design Professional's Lien attaches to land, and may only be recorded if a building permit or other governmental approval has been granted for the project. This lien does not apply to single-family, owner-occupied residences with construction costs less than \$100,000.

Timing

The Design Professional's Lien differs from the Mechanic's Lien in that, the

time period for recording the lien is based on the payment terms of the contract, and whether the design professional learns that a project has been abandoned.

A Design Professional's Lien may be recorded at any time after the property owner fails to make a payment under the contract. Prior to recording the lien, the claimant must send a notice to the owner (by registered or certified mail), stating the amount in default and demanding payment. This notice must be sent at least 10 days prior to recording the lien.

A Design Professional's Lien must be recorded no later than 90 days after the date the claimant knows (or should have known) that the property owner is not going to commence construction.

If Construction Begins on the Work of Improvement

The Design Professional's Lien expires when

construction commences on a work of improvement.

In order to preserve the right to record a Mechanic's Lien, an architect, engineer or land surveyor must serve a Preliminary 20-Day Notice within 20 days of the date construction begins.

Amount of Claim

The amount claimed in a Design Professional's Lien is limited to "the design professional's fee for any services rendered prior to commencement of the work of improvement or the reasonable value of those services, whichever is less" (*Civ. Code § 3081.2*). The amount claimed must be reduced by the amount of any retainer fees or payments.

Enforcement of Lien

Enforcement proceedings are the same as those for Mechanic's Liens. See page 4 for more information.

Mechanic's Lien Release Bonds

A Mechanic's Lien Release Bond is a bond obtained by a property owner or contractor or subcontractor who disputes a claim of Mechanic's Lien .

The Mechanic's Lien Release Bond does the following:

- Releases the property from the lien; and
- Provides a financial guaranty to the lien claimant in the event that claimant prevails in court.

A Mechanic's Lien Release Bond insures payment of the following:

- Any sum the lien claimant might recover on a claim; and
- The costs of suit (if claimant recovers).

The bond must be in an amount equal to 150% of the amount claimed in the Mechanic's Lien (or amount of a claim that is allocated to the particular parcel(s) being released).

The Mechanic's Lien Release Bond must then be recorded in the recorder's office in the county where the Mechanic's Lien was recorded. Once the bond is recorded, the property will be released from the Mechanic's Lien and any court action brought by the claimant to foreclose the lien.

A copy of the bond must be sent by certified or registered mail to the lien claimant.



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This publication is not intended to serve as a substitute for legal advice, nor does it create an attorney-client relationship. Please consult with a licensed attorney if you require legal advice.

I am not an attorney, and Construction Commando is not a law firm. I can only provide self-help services at your specific direction. Bonded & registered Legal Document Assistant, LDA #44 (SD, exp. 8/8/08).



P.O. Box 712548
Santee, CA 92072-2548
Ph. (619) 564-4869
Fax (619) 564-4870
suzanne@
constructioncommando.com
www.
constructioncommando.com

Releasing Your Mechanic's Lien

Once the lien claimant is paid, the Mechanic's Lien must be released (note: this is **not** the same "release" as the Waiver and Release typically granted in exchange for a progress or final payment, see discussion below). Similarly, if 90 days passes and the claimant neither files an enforcement

action in court, nor records a Notice of Extension of Credit, that Mechanic's Lien is unenforceable and must be released.

Signatures on the Release of Mechanic's Lien must be notarized and the document must be recorded with the recorder's office in the county

where the Mechanic's Lien was recorded.

Failure to voluntarily release an invalid Mechanic's Lien could subject the claimant to liability for up to \$2,000 to cover the property owner's attorneys' fees and court costs incurred in removing the lien (*Civ. Code § 3154*).

The Waiver & Release

California's Mechanic's Lien Law provides for four distinct Waiver & Release documents:

- Conditional Waiver & Release Upon Progress Payment
- Conditional Waiver & Release Upon Final Payment
- Unconditional Waiver & Release Upon Progress Payment
- Unconditional Waiver & Release upon Final Payment

These releases were created to enable the property owner, who is unaware of the agreements between the original contractor and the subcontractors or suppliers, to determine any potential

liability for Mechanics' Liens, Stop Notices and Bond Claims.

The waiver and release is often required in exchange for payment to a subcontractor or material supplier.

Claimants should take care to ensure that everything they are not willing to release (amounts, change orders, work performed after a specific date, etc.) is explicitly stated in the release.

The statutory Waiver and Release applies only to the claimant's rights to a Mechanic's Lien, Stop Notice or Bond Claim. These release documents **do not waive the right to pursue other remedies, including contract**

rights. However, some original contractors have taken to asking subcontractors and material suppliers to sign their own waiver and release forms that waive rights to change orders, delay damages, retention, etc. In addition, some contractors have incorporated release language into their change orders; any document should be carefully examined before it is signed and it is recommended that an attorney be consulted if the claimant has any questions.

Claimants should **not** sign an Unconditional Waiver and Release unless and until payment has been received—and the check has cleared the bank!

About Construction Commando

With a paralegal background, and nearly a lifetime spent in the construction industry, Suzanne Ervine is uniquely poised to assist contractors in handling their own legal and financial affairs.

Suzanne is a bonded Legal Document Assistant and a practicing freelance Paralegal. She established Construction Commando to provide affordable, quality legal document services to contractors who choose to handle their own legal matters without a lawyer.

Construction Commando's services can be tailored to fit your specific needs, whether you just need a contract, lien or release form, or want an experienced legal professional to take you through the entire process, handling all document preparation, official filing & recording, and service of process on your behalf.

Together with her husband Roger, Suzanne also owns and manages Fidelity Electric, a full-service residential and commercial electrical contracting company.

Mechanic's Lien Flow Chart

Before Starting Work—Gather the following information:

- The legal description of the property (map book and page number, Assessor's Parcel Number, etc.); if this information is unavailable, a good street address should be sufficient;
- The name of the owner and the extent of the owner's interest in the property; and
- Whether the owner is the one who is requesting the improvement; if not, what is the interest of the person requesting it, and are there any others who claim an interest in the property (e.g. lenders, landlords, tenants, etc.).



Upon Commencement of the Work

Subcontractors and Suppliers (required), Original Contractors (optional): Within twenty (20) days of starting work, serve a Preliminary Notice on the owner (if the contract is for tenant improvements, serve the Notice on both the tenant and the landlord). Note: to preserve stop notice or bond claim rights, also serve the Preliminary 20-Day Notice on the construction lender or other holder of construction funds and payment bond surety (if applicable).



Upon Completion of the Project:

Did owner record a Notice of Completion or Notice of Cessation?

YES

NO

If Owner **has** recorded a Notice of Completion or Notice of Cessation:

- You may record a Mechanic's Lien at any time after you have stopped work;
- Subcontractors and suppliers must record their Mechanic's Lien within 30 days of the date the Notice of Completion/Cessation was recorded.
- Original contractors must record their Mechanic's Lien within 60 days of the date the Notice of Completion/Cessation was recorded.
- Record Mechanic's Lien of the office of the county recorder in the county where the property is located.

If Owner **has not** recorded a Notice of Completion or Notice of Cessation, claimants may record a Mechanic's Lien at any time after they have stopped work; but it must be recorded within 90 days of any of the following:

- The project is actually completed; or
- Labor ceases and owner/agent uses work of improvement; or
- Owner or agent accepts work of improvement; or
- Labor ceases for a continuous period of 60 days.



File Lawsuit to Enforce (Foreclose) Mechanic's Lien

Unless a Notice of Extension of Credit is recorded, all claimants must file a Mechanic's Lien enforcement action within 90 days of the date the Mechanic's Lien was recorded.