

# Construction Liens (OR)

A Practical Guidance® Practice Note by William Fig, Sussman Shank LLP



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This practice note explains the construction lien process in Oregon, from pre-lien notice requirements through foreclosure of a construction lien. Construction lien practice is a complex and technical area of the law. However, when properly followed, Oregon's construction lien law gives the parties identified in Or. Rev. Stat. Ann. § 87.010 a powerful collection remedy not otherwise available in common law. Indeed, unlike many states, Oregon law, in certain circumstances, provides a perfected lien super priority over an existing mortgagee, which provides the lien claimant significant negotiation leverage vis a vis the mortgagee. A practitioner representing clients in the construction arena should know and thoroughly understand this powerful set of statutes.

For more on construction liens generally, see [Mechanic's Lien Resource Kit](#), [Mechanic's Lien State Laws Survey](#), [Prompt Payment Acts and Lien Waivers \(Private Construction\) State Law Survey](#), and [Public Construction Projects Performance and Payment Bonds State Law Survey](#).

## Statutory Framework

Or. Rev. Stat. Ann. §§ 87.001 through 87.093 constitute Oregon's construction lien law (the Lien Law). The Lien Law gives suppliers of labor, material, professional services, and rental equipment a means of securing their right to be paid for their contribution to, or work on, a construction project.

Or. Rev. Stat. Ann. § 87.010. A construction lien is generally defined as a secured claim against real property, including any structures located on the property. In Oregon, a lien claim can be a powerful tool because, in some instances, a construction lien has super priority (i.e., priority over preexisting encumbrances recorded against the subject real property). A valid construction lien is foreclosed by court action, which results in the real property being sold by the county sheriff for the lienholder's benefit. Or. Rev. Stat. Ann. § 87.060.

The Lien Law must be read together with Or. Rev. Stat. Ann. § 701.002 et seq. (Construction Contractors & Contracts) and Or. Admin. R. 812-001-0030 et seq. (Construction Contractors Board).

## What Property Is Subject to a Construction Lien?

Public property or property owned by the government is not subject to the Lien Law. Thus, all public works projects are outside the scope of the Lien Law. *First Nat'l Bank of Idaho v. Malheur Cnty.*, 30 Or. 420, 423-24 (1896). This includes projects on tribal lands. See *United States v. Chinburg*, 224 F.2d 177, 180 (10th Cir.), cert. denied, 350 U.S. 897 (1955).

Construction projects on privately owned property that improve the land, or a structure on the land, generally will give rise to a construction lien. The Lien Law defines improvement broadly as including any "building, wharf, bridge, ditch, flume, reservoir, well, tunnel, fence, street, sidewalk, machinery, aqueduct or other structure or superstructure." Or. Rev. Stat. Ann. § 87.005(5). However, items that are not permanently attached to the land, such

as movable equipment and trade fixtures, are not subject to the Lien Law, nor does work upon such items entitle one to claim a construction lien. See *Christenson v. Behrens*, 231 Or. 458, 467–68 (1962); see also *Ward v. Town Tavern*, 191 Or. 1 (1951).

A lien attaches to as much of the real property upon which the structure is located as is necessary for the convenient use and occupancy of the improvement. Or. Rev. Stat. Ann. § 87.015(1). If practical, the improvement may be sold separately from the land, and the purchaser may remove the improvement within a reasonable time not to exceed 30 days from the date of sale. Or. Rev. Stat. Ann. § 87.025(2). If a party holds less than fee simple title to the property (e.g., a lessee or a land sale contract purchaser), the lien may only attach to that interest. Or. Rev. Stat. Ann. § 87.015(3). If the jobsite is a condominium unit, typically the unit and the undivided interest of the condominium owner in the common elements of the complex (such as grounds, parking facilities, and swimming pool) is also subject to the lien. Or. Rev. Stat. Ann. § 87.015(2).

## Who Can Assert a Construction Lien?

As a general rule, anyone who improves real property by furnishing labor; materials; or professional services (e.g., architects, engineers, surveyors, etc.) or provides equipment used to create the improvement is entitled to assert a construction lien. Or. Rev. Stat. Ann. § 87.010. Under Or. Rev. Stat. Ann. § 87.010(2), this includes a person who prepares a lot or parcel of land. The term preparation includes “excavating, surveying, landscaping, demolishing or detaching existing structures, or leveling, filling in or otherwise making land ready for construction.” Or. Rev. Stat. Ann. § 87.005(9). However, to be subject to a lien, the work or materials at issue must be provided according to the terms of the lien claimant’s contract. Or. Rev. Stat. Ann. § 87.070; *King v. Suniga*, 54 Or. App. 267, 270 (1981).

A contractor, as broadly defined by Or. Rev. Stat. Ann. § 87.005(4), that “undertakes, offers to undertake or submits a bid to do work as a contractor must have a current license issued by the Construction Contractors Board (CCB) and possess an appropriate endorsement as provided in this section.” Or. Rev. Stat. Ann. § 701.021(1). A contractor must be licensed and properly endorsed with the CCB to assert lien rights. Or. Rev. Stat. Ann. § 701.131(1). This statute actually bars any right to seek payment for unlicensed work. The contractor must be licensed before executing a contract to do work and must remain continually registered while performing the work. This requirement likely extends

to the contractor properly identifying itself as exempt or not exempt under the workers compensation laws. See *Edwards v. Perry*, 130 Or. App. 165, 168 (1994); Or. Rev. Stat. Ann. § 701.131(3).

Or. Rev. Stat. Ann. § 701.131(2) provides limited exceptions to Or. Rev. Stat. Ann. § 701.131(1) to permit unregistered contractors to assert lien rights. Or. Rev. Stat. Ann. § 701.131(2)(a) provides that an unregistered contractor may assert lien rights when:

- The contractor was not aware of the requirement that the contractor be licensed or properly endorsed for the work performed, and the contractor submitted a completed application for a license within a number of days established by the board, but not more than 90 days, of the date the contractor became aware of the requirement
- At the time the contractor perfected a construction lien or commenced any claim subject to the provisions of subsection (1) of Or. Rev. Stat. Ann. § 701.131, the contractor was licensed by the board and properly endorsed for the work performed –and–
- Enforcement of the provisions of subsection (1) of Or. Rev. Stat. Ann. § 701.131 would result in substantial injustice to the contractor

Or. Rev. Stat. Ann. § 701.131(2)(b) provides an exception for a contractor whose license lapsed during a project. The exception under this section applies when:

- The contractor was not aware of the lapse in the license for more than a number of days established by the board, but not to exceed 90 days, before submitting a completed application for license renewal with the board
- Except for perfection of a construction lien and a court action to foreclose the lien, at the time the contractor commenced any claim subject to the provisions of subsection (1) of Or. Rev. Stat. Ann. § 701.131, the contractor’s license was renewed under Or. Rev. Stat. Ann. § 701.063 to include the entire time period for which a license was required under subsection (1)
- For perfection of a construction lien and a court action to foreclose the lien, the contractor’s license was renewed under Or. Rev. Stat. Ann. § 701.063 for the entire time period for which a license was required under subsection (1) of Or. Rev. Stat. Ann. § 701.131, but not later than 90 days following perfection of the lien

The contractor must prove it meets all of the requirements of Or. Rev. Stat. Ann. § 701.131(2) for the exception to apply. *Stellar J. Corporation v. Smith & Loveless, Inc.*, 749 F. Supp. 2d 1137, 1143 (D. Or. 2010). There are also

exceptions for claims against certain other individuals in construction defect lawsuits. Or. Rev. Stat. Ann. § 701.131(2)(c).

In the limited circumstance of an owner-occupied remodel, the licensing status of a contractor can affect a lower tier claimant's lien rights. Or. Rev. Stat. Ann. § 87.036. In addition, material and equipment suppliers do not need to be licensed, and other than, possibly, owner-occupied remodels, the licensing status of the material supplier's customer does not affect its lien rights. The application of Or. Rev. Stat. Ann. § 87.036 to material and equipment suppliers, which are usually supplied on credit, has not yet been addressed by the courts. Or. Rev. Stat. Ann. § 87.036(2). Architects must be properly licensed to perfect and enforce a lien claim. Or. Rev. Stat. Ann. § 671.220(3). There is no similar statute for engineers; however, it is possible that a court may bar a lien claim by an unlicensed engineer. See *Wheeler v. Bucksteel Co.*, 73 Or. App. 495, rev. denied, 299 Or. 583 (1985) (barring contract claim by unlicensed engineer for work that required license).

## Residential vs. Commercial Projects

Both commercial and residential structures can be subject to a valid construction lien. However, the requirements to perfect lien rights relating to a residential project are stricter than those governing a commercial project. The definition of a residential building is not intuitive. It is defined as a building that is or will be occupied by the owner as a residence and that contains not more than four separate living units. Or. Rev. Stat. Ann. § 87.021(3)(b). The term commercial improvement covers all other structures. Or. Rev. Stat. Ann. § 87.021(3)(a).

## New Construction versus Alteration or Repair

A lien claim may be based on either new construction or the renovation of an existing structure. Any change to an existing structure, from repair of minor damage or weatherization to a complete retro fit, is an alteration or repair. Conversely, building a structure where none existed before is new construction.

Under the Lien Law, as discussed in "Lien Priority" under Foreclosure of a Construction Lien below, the type of construction affects the priority of a lien vis a vis a preexisting encumbrance.

## Steps Necessary to Perfect Lien Rights

Providing labor, professional services, equipment, or furnishing materials in the course of a project creates the right to a lien (Or. Rev. Stat. Ann. § 87.010); however, as discussed below, depending on the claimant's status (e.g., general contractor, subcontractor, supplier, etc.); the type of structure (e.g., residential or commercial); and the type of work performed (e.g., new construction vs. alteration or repair), there are additional steps a claimant needs to take to perfect its lien rights. For a chart summarizing the steps necessary to perfect a lien under different circumstances, see Notice of Right to Lien Chart (Construction Lien) (OR).

### Residential Construction – Information Notice to Owner / Notice to Customer and Written Contract

#### Information Notice to Owner

Any person who enters into a contract directly with an owner for residential construction or improvement for a price exceeding \$2,000 is required to give an Information Notice to Owner in the [form prepared by the CCB](#). Or. Rev. Stat. Ann. § 87.093. Residential construction or improvement means the original construction of residential property and the repair, replacement, remodeling, alteration, or improvement of residential property and includes, but is not limited to, the construction, repair, or improvement of a residence, driveways, swimming pools, terraces, patios, fences, etc. Or. Rev. Stat. Ann. § 87.093(8).

The information notice to owner must be given to the owner or the owner's agent at the time a written contract for the work is signed. Or. Rev. Stat. Ann. § 87.093(2). If the contract was originally less than \$2,000, but during the course of the construction changes were made that increased the construction project to a price greater than \$2,000, the information notice to owner must be given not later than five days after the contractor knows or should reasonably know that the contract price will exceed \$2,000. Or. Rev. Stat. Ann. § 87.093(4). Additionally, the information notice to owner must also be given to the first purchaser of residential property (i.e., new homes) constructed by the contractor when it is sold within 75 days of completion of the construction. Or. Rev. Stat. Ann. § 87.093(2). If the information notice to owner is mailed, proof of mailing is required. Or. Rev. Stat. Ann. § 87.093(3). Failure to give the information notice to owner when required will result in the loss of all lien rights. Or. Rev. Stat. Ann. § 87.093(7).

## Requirement of Written Contract

Under Or. Rev. Stat. Ann. § 701.305(1), “[a] contractor may not perform work to construct, improve or repair a residential structure or zero-lot-line dwelling for a property owner without a written contract if the aggregate contract price exceeds \$2,000. If the price of a contract was initially less than \$2,000, but during the course of performance the contract exceeds that amount, the contractor shall mail or otherwise deliver a written contract to the property owner not later than five days after the contractor knows or should reasonably know that the contract price will exceed \$2,000.” A claimant’s failure to comply with Or. Rev. Stat. Ann. § 701.305 bars a lien claim. Or. Rev. Stat. Ann. § 87.037.

## Notice of Right to a Lien

A notice of right to a lien informs the property owner and, in some circumstances, the holders of secured interests against the real property (mortgagees) that the person giving the notice may claim a construction lien against the premises. It also provides certain information about liens. Or. Rev. Stat. Ann. § 87.021. When the property is leased, notices to the owner should be sent to the property owner and the tenant in possession of the property. Or. Rev. Stat. Ann. § 87.023 specifies the content of the notice of the right to a lien. Or. Rev. Stat. Ann. § 87.025(3) governs the notice of right to a lien to a mortgagee that affects the priority of a lien, not the right to perfect the lien.

Under Or. Rev. Stat. Ann. § 87.021, the status of the lien claimant, the type of project, and the type of work dictate when and to whom a notice of right to a lien must be sent. Examples include:

- An original contractor (i.e., one contracting directly with an owner) does not have to give a notice of right to a lien to that owner, regardless of the nature of the improvement; however, if the contractor furnishes materials as well as labor, a notice of right to a lien should be sent to any mortgagee. Or. Rev. Stat. Ann. § 87.021(1) and Or. Rev. Stat. Ann. § 87.025(3).
- A subcontractor that provides only labor in the construction of a commercial improvement need not give the notice of right to a lien, either to the owner or to a mortgagee. Or. Rev. Stat. Ann. § 87.021(3)(b) and Or. Rev. Stat. Ann. § 87.025(3).
- A subcontractor who provides both labor and materials in the construction of a commercial improvement is not required to give the notice of right to a lien to the owner; however, notice should be given to all mortgagees. Or. Rev. Stat. Ann. § 87.021(3)(b) and Or. Rev. Stat. Ann. § 87.025(3).

- For both residential and commercial construction, a party who only provides materials and who does not sell directly to the owner must give the notice of right to a lien to the owner and to all mortgagees of record (this includes those working only for a lessee or for a party buying the property under a contract). Or. Rev. Stat. Ann. § 87.021(3) and Or. Rev. Stat. Ann. § 87.025(3).
- A subcontractor who provides only labor in residential construction must give the notice of right to a lien to the owner. Or. Rev. Stat. Ann. § 87.021(1), (3)(a).
- A subcontractor who provides both labor and materials in residential construction must give the notice of right to a lien to the owner and to all mortgagees of record. Or. Rev. Stat. Ann. § 87.021(1), (3)(a) and Or. Rev. Stat. Ann. § 87.025(3).
- A subcontractor who provides rental equipment to a non-commercial improvement must give the notice of right to a lien (the only exception is where the equipment was provided at the request of the owner). Or. Rev. Stat. Ann. § 87.021(1), (3)(a).
- A person who rents equipment must give a notice of right to a lien as would a person who provides labor. No notice to the mortgagee is required because a claim for an equipment lien does not have priority over existing encumbrances. Or. Rev. Stat. Ann. § 87.025(1).
- Generally, engineers and architects must provide a notice of right to a lien in the circumstance where a contractor only providing labor would be required to do so.

The notice of right to a lien may be given at any time prior to completion of the construction project, but it only protects the right to claim a lien for materials, equipment, and labor provided after the eighth business day before the notice is delivered or mailed. Or. Rev. Stat. Ann. §§ 87.021(1), 87.025(3) (material supplier’s notice to mortgagee). Thus, it should be given as soon as possible after one first performs labor or provides materials or rental equipment on a project. The notice of right to a lien must be transmitted to the owner and the mortgagee either by personal delivery or by registered or certified mail. Or. Rev. Stat. Ann. § 87.018. If the notice is mailed, return receipt requested is recommended (though not required).

Failure to give the notice of right to a lien to an owner when and if required will result in loss of all lien rights. Or. Rev. Stat. Ann. § 87.021(3)(a). Failure to give the same notice to a mortgagee, as required, will result in the lien being inferior to the mortgagee’s interest for at least that portion of the lien for which notice was required. Or. Rev. Stat. Ann. § 87.025(3).

As you can see, Or. Rev. Stat. Ann. § 87.021 and Or. Rev. Stat. Ann. § 87.025 are detailed and complex. A lien claimant should carefully review and understand these statutes prior to undertaking any work on, or delivering any materials or equipment to, a construction project.

For a form, see Notice of Right to a Lien (Construction Lien) (OR).

## Perfecting a Construction Lien

### Timing

Under Or. Rev. Stat. Ann. § 87.035(1), a lien claimant that provides labor, materials, and/or equipment for the construction of an improvement or the improvement of a parcel or a road adjoining the parcel (see Or. Rev. Stat. Ann. § 87.010(1) or (2)) “shall perfect the lien not later than 75 days after the person has ceased to provide labor, rent equipment or furnish materials or 75 days after completion of construction, whichever is earlier. Every other person claiming a lien created under Or. Rev. Stat. Ann. § 87.010 shall perfect the lien not later than 75 days after the completion of construction.” The lien must be recorded in the real property records of the county in which the improvement is located. Or. Rev. Stat. Ann. § 87.035(2).

The time limit set by Or. Rev. Stat. Ann. § 87.035(1) is strictly enforced. See *Lemire v. McCollum*, 246 Or. 418, 426 (1967). Failure to record a construction lien within the 75-day period will invalidate the lien. *Christenson v. Behrens*, 231 Or. 458 (1962). Trivial amounts of labor and insignificant quantities of materials will not extend the deadline for filing a claim of lien. *Christenson*, 231 Or. at 467. Likewise, lien rights are not extended by punch list work or otherwise returning to a jobsite to correct mistakes in one’s own work or to replace defective materials. *Fox & Co. v. Roman Catholic Bishop of the Diocese of Baker City*, 107 Or. 557, 560–61 (1923).

The deadline to record a lien can also be affected by a notice of completion or a notice of abandonment. Or. Rev. Stat. Ann. § 87.045. These notices create a rebuttal presumption regarding when the 75 days begins to run for claimants who have not yet ceased to provide labor, materials, etc. and, therefore, must be taken seriously.

There is a dearth of litigation on the 75-day deadline. Thus, to be on the safe side, the 75 days should be counted from the earlier of the posting of a notice of completion or abandonment or the last day on which a substantial amount of labor was performed, or a substantial quantity of material

was delivered, not including trifling or corrective measures. If earlier, the date of substantial completion should be used. See *Consol. Elec. Distributors, Inc. v. Jepson Elec. Contracting, Inc.*, 272 Or. 384, 387 (1975).

### Contents of a Lien

A construction lien claim must contain the following information:

- A true statement of the amount owed to the claimant after deducting all payments and other credits or offsets
- The name of the owner or reputed owner of the subject real property, if known
- The name of the person by whom the claimant was employed or to whom the claimant furnished materials or rented the equipment or by whom contributions are owed –and–
- A description of the property charged with the lien sufficient for identification, including the address, if known

Or. Rev. Stat. Ann. § 87.035(3).

A construction lien in Oregon must be signed before a notary public by the claimant or by another person with knowledge of the facts set forth in the lien claim. Or. Rev. Stat. Ann. § 87.035(4). Since attorneys normally do not have personal knowledge of a client’s lien claim, a lien generally should not be signed by counsel. The correct legal name of the claimant must be used when signing the lien (e.g., corporation, limited liability company, individual’s full legal name).

If a lien is deliberately inflated or overstated, it may be disallowed. *J.W. Copeland Yards v. Phillips*, 275 Or. 193, 196–97 (1976). The charges for each category of what the lien claimant supplied to the project (i.e., labor, equipment, materials, others) should be segregated or itemized in the lien. The inclusion of non-lienable items in a lump-sum lien amount may invalidate the entire lien or result in the labor portion of a lien losing its super-priority status. Or. Rev. Stat. Ann. § 87.025(3); see *Anderson v. Chambliss*, 199 Or. 400, 414 (1953). But see *Knez Bldg. Materials Co. v. Bell-Air Estates, Inc.*, 144 Or. App. 392, 398 (1996), rev. denied, 325 Or. 247 (1997).

## Post-lien Notices

### Notice of Recording a Lien

Within 20 days after a construction lien claim is recorded, the claimant must mail written notice to all owners and mortgagees that the lien has been recorded. Or. Rev. Stat.

Ann. § 87.039(1). A copy of the lien must be attached to the notice. Id. Delivery must be accomplished either by personal service or by certified or registered mail. Or. Rev. Stat. Ann. § 87.018. (If the notice is mailed, return receipt requested is recommended (though not required).) If the notice to a mortgagee was required under Or. Rev. Stat. Ann. § 87.021, the notice of recording a lien must also be sent to the mortgagee as required under Or. Rev. Stat. Ann. § 87.018. The failure to properly give a notice of recording a lien to a necessary party results in the claimant's loss of its right to recover attorney's fees incurred in foreclosing the lien. Or. Rev. Stat. Ann. § 87.039(2).

### Notice of Intent to Foreclose

At least 10 days before filing suit to foreclose a construction lien, the claimant must provide all owners and mortgagees with a written notice that the claimant intends to begin foreclosure proceedings unless the lien is paid in full. Or. Rev. Stat. Ann. § 87.057(1). The notice of intent to foreclose may be personally served or given by certified or registered mail, with return receipt requested. Failure to give the notice of intent to foreclose in accordance with the statute will deprive the claimant of the right to recover attorney's fees, recording charges, and title report premiums in the foreclosure action. Or. Rev. Stat. Ann. § 87.057(2). There is no requirement that the notice of recording a lien and the notice of intent to foreclose be separate documents. Thus, a consolidated notice that informs owners and mortgagees that a lien has been recorded and that the claimant intends to begin foreclosure is good practice, so long as it is sent in compliance with both Or. Rev. Stat. Ann. § 87.039 and Or. Rev. Stat. Ann. § 87.057.

## Foreclosure of a Construction Lien

### Timing, Venue, Parties, and Available Recovery

A suit to foreclose a construction lien must be commenced within 120 days (not four months) after the lien is recorded. Or. Rev. Stat. Ann. § 87.055. Failure to bring suit within this period results in the loss of all lien rights. Id. The action is filed in the circuit court for the county in which the subject property is located. Or. Rev. Stat. Ann. § 87.060.

Typically, defendants in the action include the owner or owners, all mortgagees (except for senior mortgagees against whom there is little or no hope of prevailing), and all other lien claimants. If different from the owner, the person who contracted with the claimant to perform labor or furnish materials is not a necessary party, but typically is also named as a defendant. A lien claim is tried to a

judge sitting without a jury. Or. Rev. Stat. Ann. § 87.060(3). However, other claims in the suit (e.g., a breach of contract claim) may be decided by a jury. Or. Rev. Stat. Ann. § 87.060(3), (4).

If the parties have agreed to arbitrate their disputes, an action to foreclose the lien must still be filed with the court. A lien cannot be foreclosed in private arbitration. Typically, the foreclosure action is abated while the parties litigate the substance of the payment dispute in arbitration. At the conclusion of the arbitration, the parties can file the arbitration award with the court and prosecute the foreclosure of the lien in court.

If the lien claimant is successful, the court will enter judgment for money damages against the party with whom the lien claimant contracted; will determine the priority of all liens, mortgages, and other claims upon the real property and the improvement; and will order the sheriff to sell the property and improvement and distribute the proceeds. Or. Rev. Stat. Ann. § 87.060. A lien claimant who has properly perfected his or her lien rights and has given all of the required notices is entitled to recover attorney's fees, recording costs, and the cost for any title report obtained in preparation for foreclosing the lien. Or. Rev. Stat. Ann. § 87.060(5). The right to fees under Or. Rev. Stat. Ann. § 87.060(5) is reciprocal.

### Lien Priority

Construction liens can be an exception to the first in time, first in right rule of priority. In many instances, the priority of a lien claim makes or breaks the viability of the claim. Simply put, priority determines who gets paid first, second, etc. from the foreclosure sale proceeds. Common situations in which priority questions arise are as follows:

- **Multiple construction lien claimants.** All construction liens are deemed to attach to the property and the improvement on the date any work begins. Or. Rev. Stat. Ann. § 87.025(7); Or. Rev. Stat. Ann. § 87.005(1). Thus, all valid construction liens arising out of the same project have equal priority. Or. Rev. Stat. Ann. § 87.025(7). For a construction lien for materials to have equal priority, the notice of right to a lien must be sent as required by Or. Rev. Stat. Ann. § 87.021 and Or. Rev. Stat. Ann. § 87.025(3).
- **Construction lien versus subsequent mortgage.** A mortgage or trust deed that is recorded in the county real property records after a project is underway is inferior to construction liens arising from that project. Or. Rev. Stat. Ann. § 87.025(1); Or. Rev. Stat. Ann. § 87.005(1).



• **Construction lien versus prior mortgage.** For renters of equipment and landscape architects/surveyors, an existing encumbrance has priority over their lien claims. Or. Rev. Stat. Ann. § 87.025(1). However, for labor, material suppliers, and engineer/architects, the priority of a construction lien vis a vis an existing mortgage depends on whether the project was new construction or the alteration or repair of an existing structure. See New Construction versus Alteration or Repair above. A lien on a remodel/repair job does not have priority over a previously recorded mortgage unless it secures a loan to finance the construction. Or. Rev. Stat. Ann. § 87.025(6). The lien of a claimant in this situation has superior priority vis a vis the owner, but inferior priority regarding a mortgagee. Therefore, unless the property is owned free and clear by the owner or there is construction financing in play, the effectiveness of the lien is limited because any foreclosure of the lien would be subject to the mortgagee's superior interest.

However, if the project is new construction, the lien claimant is in a more favorable position. Here, a split priority situation exists. An existing mortgage has priority as to the land and any preexisting improvements. However, a properly perfected lien claimant has first priority (i.e., super priority, over a preexisting mortgagee regarding the new improvement/structures). Or. Rev. Stat. Ann. § 87.025(2). Because it is unlikely the structure can or will be removed from the land and sold separately and because the lien reaches as much land as necessary for the use and improvement of the new improvement/structure (see What Property Is Subject to a Construction Lien? above), the practical effect is that the lien claimant will have first priority to the foreclosure sale proceeds to satisfy the amount of its lien. To protect its secured interest in the property, the mortgagee must satisfy the lien.

## Traps for the Unwary

### Mortgagee's Demand for Information

A mortgagee who receives a notice of right to a lien is entitled to make written demand for the following information:

- A list of the materials supplied –and–
- A statement of the amount due

Or. Rev. Stat. Ann. § 87.025(4).

The requested information must be delivered to the mortgagee within 15 business days following receipt of the written demand. The information should be delivered

personally or by registered or certified mail, with return receipt requested. Id. The failure to timely and properly respond to the demand results in a loss of the material lien's super priority under Or. Rev. Stat. Ann. § 87.025. Id.

### Owner's Demand for Information

An owner who receives a notice of right to a lien is entitled to make written demand for the following information: "a list of materials or equipment or description of labor or services supplied or a statement of the contractual basis for supplying the materials, equipment, services or labor, including the percentage of the contract completed, and the charge therefor to the date of the demand." Or. Rev. Stat. Ann. § 87.027.

The requested information must be delivered to the owner within 15 business days following receipt of the written demand. The information should be delivered personally or by registered or certified mail, with return receipt requested. Id. The failure to timely and properly respond to the demand results in a loss of the right to recover costs and attorney's fees. Id.

### Owner's Second Demand for Materials

Under Or. Rev. Stat. Ann. § 87.057(2), after a notice of intent to foreclose, a construction lien has been given, an owner may demand "a list of the materials and supplies with the charge therefor, or a statement of a contractual basis for the owner's obligation, for which a claim will be made in the suit to foreclose." However, the deadline for the claimant to respond is shortened to five calendar days. Id.

### Waiver of Lien

A lien waiver is a document releasing all or part of the lien rights of the person signing it. Sophisticated owners, developers, and construction lenders regularly insist on the execution of lien waivers before payments are released. If the claimant has been fully paid with collected funds on a job, including all extras, a lien waiver may be appropriate. The right to perfect a construction lien is a statutory privilege that may be waived. *Boise-Payette Lumber Co. v. Dominican Sisters of Ontario*, 102 Or. 314, 319 (1921). A reasonably clear lien waiver will be enforced by the courts. See *P&C Constr. Co. v. Am. Diversified/Wells Park II*, 101 Or. App. 51, 56 (1990). Indeed, under Or. Rev. Stat. Ann. § 87.025(5), when paid in full, a material supplier must execute a lien waiver.

However, claimants are sometimes presented with unconditional lien waivers prior to the release of retention or even when making application for progress

payments early in a job. If a claimant is presented with an unconditional lien waiver, the claimant should insist that the waiver contain a statement that the waiver discharges the claimant's right to a lien only to the extent that the claimant has been paid and the funds received.

### **Joint Checks**

The claimant's endorsement on a joint check is conclusive evidence that the lien claimant has received the funds, even if the claimant does not actually receive the funds. Thus, by endorsing the check, even if the other joint payee deposits the funds, the claimant has waived any right to file a lien for work covered by the check. See *Medford School Dist. No. 549C ex rel. North Coast Elec. Co. v. Peterson & Jones Commercial Const., Inc.*, 76 Or. App. 99 (1985) (by accepting/endorsing joint check, supplier received payment for amount owed to it). That being said, there might be a different result if the funds under the check do not clear the bank.

### **Notice of Non-responsibility**

These notices apply mainly in the context of commercial tenant improvements. Under Or. Rev. Stat. Ann. § 87.030, "within three days after the owner obtains knowledge of the construction, give notice that the owner will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the land or the improvement situated thereon." As a result of the notice, the claimant's lien only attaches to the leasehold interest of the tenant. Or. Rev. Stat. Ann. § 87.015(3).

### **Bond to Remove Lien from Property**

Under Or. Rev. Stat. Ann. § 87.076, an interested party may post a bond or make a cash deposit of 150% of the amount of the lien to bond around a lien. The bond is

recorded in the county in which the lien is recorded. Or. Rev. Stat. Ann. § 87.076(1). Cash is tendered to the county clerk. Or. Rev. Stat. Ann. § 87.076(2). This procedure may be used any time after a lien has been recorded. Or. Rev. Stat. Ann. § 87.076(3). The person filing the bond or depositing cash must give written notice to the lien claimant within 20 days after doing so (Or. Rev. Stat. Ann. § 87.078) and record an affidavit in the county in which the lien is recorded, stating that such notice was served (Or. Rev. Stat. Ann. § 87.081). Once the bond or cash is posted and proper and timely notice is given to the lienholder, the lien shifts from the real property and improvement to the bond or the money deposit. In a suit to foreclose the lien, any judgment will be satisfied out of the bond or cash deposit. Or. Rev. Stat. Ann. § 87.083. All time limits remain the same.

To avoid the recording of frivolous liens, a party who posts a bond can make a written demand upon the claimant that the lien be released. Or. Rev. Stat. Ann. § 87.076(4)(a). If the lien is not released and the claimant does not foreclose the lien, the demanding party is entitled to the greater of its costs or \$500. Attorney's fees may also be recoverable if the demanding party is forced to pursue these costs. Or. Rev. Stat. Ann. § 87.076(4)(b). Likewise, to discourage frivolous release demands, a lien claimant who receives a release demand and ultimately forecloses his or her lien (and is the prevailing party) is entitled to receive \$500 or the cost of addressing the demand, whichever is greater. Or. Rev. Stat. Ann. § 87.076(4)(c). The law also provides for the recovery of attorney's fees in an action to recover those damages. *Id.*

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### **William Fig, Partner, Sussman Shank LLP**

William (Bill) G. Fig is Partner and Construction Group Chair at Sussman Shank LLP. Bill represents mortgage servicers and lenders in prosecuting and defending mortgage foreclosure actions and defending lenders and servicers in "wrongful foreclosure" lawsuits in state and federal courts in both Oregon and Washington. Bill also represents general contractors, subcontractors, and material suppliers in all aspects relating to their businesses. This includes contract review and drafting, preparing construction bond and lien claims, and litigating all types of payment claims in state and federal courts. He also handles administrative claims against contractors' surety bonds.

In addition, Bill represents small to mid-size businesses with their legal needs, including contract disputes and collection of their accounts receivable. Because debtors sometimes attempt to hide assets or do not voluntarily pay the judgment entered against them, Bill also has extensive experience in pre-judgment provisional process and post-judgment collection enforcement.

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