



Contractors/Liens

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- [Background](#)
- [Types of Liens](#)
- [Lien Releases](#)
- [Lien Waivers](#)
- [Discharging Liens](#)
- [State Rules Regarding Contractor's Liens](#)
- [Additional Resources](#)
- [Organizations](#)

Background

A [LIEN](#) is a claim to property for the payment of a debt, typically one connected to the property. Because a lien is something that is filed with the local recorder's office, it can be a powerful legal tool. It is a public record, available to anyone, that alleges a valid, unpaid debt against the specific real estate named in the lien.

There are several types of liens, all of which could cloud the title and prevent the seller from conveying marketable title to the buyer. In some states, a [MORTGAGE](#) is regarded as a lien, not a complete transfer of title, and if not repaid the debt is recovered by [FORECLOSURE](#) and sale of the real estate. Real estate can also be affected by liens for federal income taxes. Additionally, liens can be placed on property for the non-payment of real estate taxes and special assessments, including homeowners' association dues. Contractors, subcontractors, material suppliers, and laborers can place liens against property for the value of work or materials installed on that property. The filing requirements and statutes of limitation for these liens vary according to the law of each state.

The word lien, derived from the French, means "knot or binding." The person to whom the debt is owed, the one who binds the property, is known as the lien holder. In certain circumstances, the lien holder may foreclose on the property if the debt is not paid in full. Liens can generally be removed by the payment of the amount owed. This payment can occur at any time up to and including the stage at which the closing documents for the sale of the property are signed.

Types of Liens

Contractor's Lien

A contractor's lien, often known as a mechanic's lien, or a construction lien, is a claim made by contractors or subcontractors who have performed work on a property who have not yet been paid. A supplier of materials delivered to the job may also file a mechanic's lien. In some states, professionals such as architects, engineers, and surveyors may also be entitled to file a lien for services rendered.

The priority of liens on a construction project does not depend upon the time of completion of the particular job, but rather everything relates back to the first visible commencement of the work. This stipulation means

the final work, such as painting, is equal in priority to the initial work of laying a cement foundation. Therefore, during the entire work of construction, the owner must obtain lien releases or waivers of lien from each [SUBCONTRACTOR](#) and material supplier. Without these waivers or releases the real estate is subject to liens of all the subcontractors, even if the general contractor, though paid in full, fails to pay the subcontractors.

In some states, contractors and subcontractors must notify the property owner prior to filing a lien, but in other states such liens can be filed without any notification to the owner. Lien claimants who are contractors or subcontractors are protected under this legal doctrine because all their materials and labor are "buried" in the real estate, having become part of it. Unlike mortgage liens, however, the liens of these claimants cannot force a foreclosure.

Divorce Liens

In a [DIVORCE](#), one party may be awarded the right to live in the marital house. When that spouse sells the property, the ex-spouse may be entitled to half of the equity. That ex-spouse could file a lien to ensure receipt of his or her share of the sales proceeds. In some states, although a lien is not part of a divorce proceeding, it can be placed on property of parents for unpaid [CHILD SUPPORT](#) payments.

Judgment Liens

A judgment lien can be filed if an actual judgment in a lawsuit is obtained from a court. Such cases include failure to pay a debt, including credit cards, bank loans, or deficiency judgements on repossessed vehicles. In some circumstances, judgments can be enforced by sale of property until the amount due is satisfied.

Homeowners' Association Liens

Homeowners' Association Liens are commonly filed against property when Homeowner Association Dues assessed against that property are not paid on time. When a house or condominium belonging to a homeowners' association sells, the title or [ESCROW](#) company will request a certificate of payment from the homeowners' association to be sure that all due and assessments have been paid and are current. If these payments have not been made, the dues will need to be brought current at the time the closing transaction papers are signed.

Federal Tax Liens

A tax lien can sometimes be placed on a property for past taxes due to the government by the taxpayer/owner. In order for a Federal Tax Lien to be filed by the Internal Revenue Service (**IRS**), the IRS must file a Notice of Federal Tax Lien. Prior to even filing a notice, however, the IRS must do all of the following:

- The IRS must determine and assess the exact amount of tax liability
- The IRS must send the taxpayer a notice and demand for payment
- The taxpayer must neglect or refuse to fully pay the liability within 10 days of the notice and demand

If the taxpayer pays the lien or posts a bond guaranteeing payment, the IRS must issue a Release of the Notice of Federal Tax Lien within 30 days. A lien will release automatically if the IRS does not refile the lien before the time expires to legally collect the tax. A taxpayer may sue the federal government for damages if the IRS knowingly or negligently fails to release a Notice of Federal Tax Lien provided the taxpayer first exhausts all administrative appeals within the IRS and the suit is filed within two years from the date the IRS should have released the lien.

A taxpayer can also get a Lien Release by entering into an [INSTALLMENT](#) agreement with the IRS to satisfy the liability. Finally, the IRS can withdraw a filed Notice of Tax Lien if the withdrawal will facilitate collection of the tax or if it is determined by the IRS that the withdrawal would be in the best interest of both the taxpayer and the government.

A Federal Tax Lien is incorrect and may be appealed if any of the following occurs:

- The taxpayer paid the entire amount owed before the lien was filed
- The IRS assessed the tax and filed the lien when the taxpayer was in [BANKRUPTCY](#) and subject to the automatic stay during bankruptcy (although the bankruptcy filing may not absolve the taxpayer of the tax liability, the filing of the lien during that time would not be permissible)
- The IRS made a procedural, administrative, or mathematical error in making an assessment
- The [STATUTE OF LIMITATIONS](#) had expired prior to the time the IRS filed the lien

Equitable Liens

An equitable lien is a legal fiction created by courts in certain circumstances in which justice may require the creation of a lien. Courts of equity have the power to create so-called equitable liens on property to correct some injustice. For example, a person who lived on the property and contributed a substantial amount to the improvement of the property may be able to, with the assistance of the court, obtain a lien on the property by suing for a constructive trust.

Lien Releases

People having a home built can require contractors and subcontractors to provide lien releases or waivers as part of a written project contract. The contract can mandate a lien release be issued before the contractor receives payment for services, in which case it is called a lien [WAIVER](#). If payments are made to a general contractor in stages for work performed by subcontractors, the homeowner can obtain lien releases from the various subcontractors as their part of the project is completed.

Sometimes, construction loan documents drafted by a bank may indicate that the bank will obtain lien releases, but the bank may do this solely for its own benefit. Therefore, the property owner's requiring lien releases should be clearly stated and independent of any agreement made by or with the bank.

Often contractors will have waiver and release forms available. If not, sample waivers and releases can usually be obtained from local or state [CONSUMER PROTECTION](#) organizations. In addition to signed lien releases, those building homes should keep records of what has been paid to contractors, which contractors worked on the job site and when. Unfortunately, unethical contractors can easily file [FRAUDULENT](#) liens for incorrect amounts. Accurate record keeping can help the homeowner ensure lien releases from all necessary parties.

Lien Waivers

Although the terms lien waiver and lien release seem to be interchangeable, a release demonstrates completion and payment, so as to prove any claim has been satisfied, while a waiver demonstrates a relinquishment of a known right. Waivers are typically obtained prior to commencement of any work, whereas releases are subsequently obtained. Waivers of lien must be in writing, give a sufficient description of the real estate, and be signed by the one with authority to file or claim a lien. No payment needs to be made in advance if the

subcontractor agrees to release the land from the lien and rely only on the credit of the owner or general contractor for payment of the debt.

Discharging Liens

Liens can be discharged after a certain length of time. Therefore, if a property owner is in no hurry to sell the property, and the lien holder is not seeking to foreclose, it may make sense to do nothing and wait until the lien expires. If the lien is not renewed, the cloud on the title will no longer exist. If a person pays and satisfies a lien in order to have it discharged, it is imperative that a written, legally sufficient release or satisfaction be obtained and recorded in the appropriate government office. Doing so ensures clear title to the property.

State Rules Regarding Contractor's Liens

ALABAMA: All potential lienors, with the exception of an original contractor (a contractor with a direct contract with the owner who is exempted from the notice requirement), must fulfill three basic steps prior to perfecting a lien: provide [STATUTORY](#) notice to the owner, file a verified statement of lien in the [PROBATE](#) office of the county where the improvement is located, and file suit to enforce the lien. The verified statement of lien must be filed in the office of the judge of probate of the county where the subject property is located. When the property is located in more than one county, the statement must be filed in each county.

ARKANSAS: Unlicensed contractors cannot take legal action to enforce their contracts.

ARIZONA: Unlicensed contractors cannot take legal action to enforce their contracts.

CALIFORNIA: A subcontractor or supplier must give notice to the owner. Unlicensed contractors cannot take legal action to enforce their contracts. Design professionals may file liens, and lien rights may exist even when the design was not used.

DISTRICT OF COLUMBIA: Although the mechanic's lien has no priority over a prior recorded construction loan, it does have priority over any security interest filed after the mechanic's lien even though it is not necessary to file suit to enforce the mechanic's lien until one year after it is filed.

FLORIDA: In cases where the contractor does work and is not paid by the owner for the full amount that is due, the contractor can file a lien against the owner's property. The Claim of Lien must be filed with the Clerk of the Circuit Court in the county where the property is located within 90 days of the date the contractor last performed any labor or services or furnished materials. The contractor is not required to give a Notice To Owner as a condition for obtaining a lien against the owner's property. However, if the contractor is entitled to receive his final payment, the contractor must give the owner a Contractor's **AFFIDAVIT** before any lien can be effective. A Contractor's Affidavit must state that all subcontractors, sub-subcontractors, and material suppliers have been paid. If all subcontractors have not been paid, the Contractor's Affidavit must list those who remain unpaid and the amounts due. If the final payment is due, the contractor has no lien rights until the Contractor's Affidavit is given to the owner.

If the direct contract for the entire job between the owner and the contractor is less than \$2,500, subcontractors and suppliers who do not have a direct contract with the owner have no lien rights on the job. Only the contractor (the person with a direct contract with the owner) can file a lien on jobs of less than \$2,500. Design professionals may file liens, and lien rights may exist even when the design was not used.

Encyclopedia of Everyday Law: Contractors/Liens

GEORGIA: A lien can only be filed if the contractor filing the lien is in substantial compliance in the underlying contract with the owner. All liens must be filed with the clerk of the superior court of the county where the property is located within three months after completion of the work. When filing a lien, the contractor must send a copy of the lien by registered or certified mail to the owner of the property or the contractor as the agent of the owner. The party filing the lien has 14 days to file the lien with the clerk of the superior court in the county where the property is located. This notice must refer to the then-owner of the property against which the lien was filed and refer to a [DEED](#) or other recorded instrument with the chain of title of the affected property.

HAWAII: A lien may be filed for design work and supervision, but only if the design is used to improve the property.

IOWA: A lien may be filed for design work and supervision, but only if the design is used to improve the property.

KANSAS: Posting a bond is permitted; however, the court determines the amount of the bond. No advance notice requirements prior to filing a lien.

LOUISIANA: Subcontractors, laborers, employees, suppliers, and lessors may file claims against both the owner and the general contractor. All claims of suppliers and subcontractors rank equally and ahead of the privilege of contractor and surveyors, architects and engineers, which also rank equally. If no claimant conclusively establishes prior claim superior to others, a pro rata distribution is assumed.

MARYLAND: A lien cannot be filed unless the value of the improvements equals at least 15 percent of the property value. A contractor cannot obtain a lien until suit is filed and a court orders the lien. Once obtained, however, the lien has priority over other liens filed after this court determination.

MASSACHUSETTS: A design professional may lien only for work done supervising construction, but not for design.

MINNESOTA: Liens are filed with the recorder of deeds.

MISSISSIPPI: All parties claiming liens on the same property shall be made parties to the suit. Any sale of property made shall be by a special [WRIT](#) of [EXECUTION](#) and all liens paid pro rata. Subcontractors and laborers may bond amount due by general by written notice to owner. Owner may pay amount due into court for final distribution according to rights of parties.

MISSOURI: The owner cannot put up a bond to fight the lien. The lien is filed with the clerk of the court rather than in the recorder's office. A lien may be filed for design work and supervision, but only if the design is used to improve the property.

NEBRASKA: Lien waivers are invalid. Design professionals may file liens, and lien rights may exist even when the design was not used.

NEW YORK: Unlicensed contractors cannot take legal action to enforce their contracts.

NORTH CAROLINA: All claims of lien must be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien is located. Claims of lien may be filed at any time after the obligation becomes due, but not later than 120 days after the last furnishing of labor or materials.

OHIO: A design professional may lien only for work done supervising construction, but not for design.

Encyclopedia of Everyday Law: Contractors/Liens

PENNSYLVANIA: Advance Lien Waivers are permitted. Subcontractors must serve a Formal Notice on owner at least 30 days before filing a lien claim. Subcontractors performing alterations or repairs must serve an additional notice on the owner before work completed. All contractors must file liens in the court clerk's office within four months of the last work and serve notice of the lien claim on the owner within one month after that. Lawsuits to enforce liens must be filed within two years of lien filing. A General Contractor can file stipulation against liens with court before the project begins waiving all subcontractor mechanic's lien rights. Third tier or sub-subcontractors have no lien rights. A design professional may lien only for work done supervising construction, but not for design.

SOUTH CAROLINA: A person furnishing labor or material actually used in improving real property by agreement with or consent of the owner shall have a lien on such property and on the interest of the owner up to the amount due in contract. South Carolina defines consent to require a contract between the mechanic and owner before labor and material is furnished. Notice is required.

The Notice of Intent to Lien must include:

- The name of the claimant
- The name of the person with whom the claimant contracted or was employed
- A general description of the labor, services, or materials furnished and their contract price or value
- A description of the project sufficient for identification
- The first and last dates on which materials, labor, or services were provided or scheduled to be provided
- The amount due

TENNESSEE: Advance Lien Waivers are permitted. A lien claimant has no lien if the claimant makes even a minor mistake in filing this notice of lien. A single mistake can be [FATAL](#) to the mechanics' lien. The lien attaches only to whatever interest the owner has in the land. Thus, if an owner is leasing property, the lien can only be asserted against the leasehold interest, not the ownership interest of the [LESSOR](#).

A contractor who contracts directly with the owner need not give any formal notice to the owner in order to preserve lien rights against the owner. However, if the contractor desires to perfect the lien against someone who purchases the owner's land without notice of the lien, then the contractor must file a sworn statement. Submitted within 90 days after the project is completed or within 90 days from the contractor's last work on the project, this statement must include the amount due and a complete legal description of the land.

The contractor without a direct contract with the owner must give two separate and distinct notices (although there is no reason why they cannot be done in the same document, if within the proper time period) to the owner and the contractor. Within 60 days of the last day of the month in which work was performed or materials were furnished, the contractor must send a notice of nonpayment to the owner and the contractor who has a contract with the owner. The notice of nonpayment must contain all of the following information: the name and address of the contractor sending the notice of nonpayment; a general description of the work, services or materials provided; a statement of the last date the contractor performed work or furnished materials; and a legal description of the real property. In addition to the notice of nonpayment, the contractor must also send to the owner a notice that the lien is claimed. This notice to the owner must be sent within 90 days from either the time the work is complete or within 90 days from the completion of the improvements. The lien of a contractor who did not contract directly with the owner is valid for 90 days from the date of the notice claiming the lien. The lien continues to be valid until the final termination of any suit for enforcement brought within the 90-day period. A contractor without a direct contract with the owner must also file a sworn statement and notice of the lien in order to be protected from purchasers without notice.

Encyclopedia of Everyday Law: Contractors/Liens

TEXAS: The contractor must file an affidavit claiming a lien no later than the fifteenth day of the fourth month following the month in which the original contract was materially breached or terminated, completed, finally settled, or abandoned. The affidavit must contain the following information: sworn statement of the claim, a legally sufficient description of the real property, a description of the work performed by the claimant, the amount due, the name and address of the reputed owner, and the name and address of the claimant. The affidavit must be filed with the county clerk in the county in which the property is located. The original contractor must send a copy of the lien affidavit to the owner at his last known business or residential address no later than the deadline for filing the affidavit or the tenth day following the filing of the affidavit, whichever is earlier.

There are two types of statutory liens for subcontractors. Fund Trapping occurs when a claimant can obtain a lien on the property and subject the property owner to personal liability to the extent that the owner has received the requisite statutory notice and fails to withhold any further payments from the contractor in an amount sufficient to cover the stated claim. In other words, when an owner receives the required "fund-trapping" notice, any unpaid contract funds (up to the amount of the claim as stated in the notice) are "trapped" in the hands of the owner. The claimant has a lien on the real property and a claim against the owner personally for the funds that were "trapped" by the notice letter. There is a significant problem with this method, however. If the owner has already paid all of the contract funds by the time it receives the "fund-trapping" notice letter, there may be no contract funds trapped. In that case, the claimant does not have a valid lien on the property. Statutory Retainage is handled the following way. To ensure that at least some contract funds will be available to satisfy claims arising toward the completion of construction, the property code requires an owner to retain ten percent of the contract amount (or value of the work then completed) during the course of construction and for 30 days following final completion. The statutory obligation to retain contract funds is commonly known as "statutory retainage." This required retainage creates a fund for the benefit of claimants who have filed lien affidavits within 30 days after the completion of the original contract and who have sent the required notices. If an owner fails to retain sufficient funds as required by the code, the owner will be personally liable and his property subject to a lien to the extent of the funds that should have been retained.

The requirements for a subcontractor's lien where the subcontractor's contract is not directly with the owner are the same but also require notice to the owner. The second-tier contractor is required to furnish the owner with a written notice of its claim. The notice letter must be sent to the owner no later than the fifteenth day of the third month following each month during which the claimant performed work for which payment is sought. For the subcontractor's lien to "trap any contract funds," the letter must contain a specific statutory warning which advises the owner that he will be personally liable and his property will be subject to a lien if he fails to withhold sufficient contract funds to pay the claim. The letter must also be sent to the original contractor by actual delivery or certified mail.

Requirements for a third-tier subcontractor are the same as for a second-tier subcontractor, except that the third-tier subcontractor must also send a letter of notice to the original contractor. Design professionals may file liens, and lien rights may exist even when the design was not used.

UTAH: Unlicensed contractors cannot take legal action to enforce their contracts. State law protects homeowners from having a lien maintained on their home and from civil judgment by persons other than the original contractor, provided the following conditions are met:

- The homeowner used the services of a licensed contractor
- The homeowner has a written contract with the original contractor
- The homeowner pays the original contractor(s) in full according to the terms of the written contract and any amendments to that contract

Encyclopedia of Everyday Law: Contractors/Liens

If a lien is incorrectly placed on a property, it is the owner's responsibility to notify the lien claimant in writing that the above listed requirements have been met and to provide all relevant documentation.

VIRGINIA: The contractor's lien holder has partial priority over even the construction lender. Therefore, banks in Virginia are typically concerned about contractor's lien waivers. All persons performing labor or furnishing materials of the value of \$50 or more for the construction, removal, repair, or improvement of any structure may file a lien upon the structure. The contractor seeking a lien must file a Memorandum of Mechanic's Lien with the land records of the county where the real property is located. The general contractor may file a lien at any time after the work is commenced or materials furnished but not later than 90 days from the last day of the month in which the contractor last performs labor or furnished materials.

The main elements of a lien memorandum are as follows: name of owner, address of owner, name of claimant, address of claimant, type of materials or services furnished, amount claimed, type of structure on which work done or materials furnished, brief description and location of real property, date from which interest on the above amount is claimed and signature of claimant or its authorized agent. In addition, the memorandum must contain an affidavit by the claimant or its agent that the owner is justly indebted to the claimant in the amount claimed by the lien.

WASHINGTON: Unlicensed contractors cannot take legal action to enforce their contracts.

Additional Resources

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Selecting and Working with Architects, Engineers and Contractors. Williams, David J., 1st Books Library, 2001.

Organizations

American Society of Home Inspectors, Inc.

932 Lee Street, Suite 101
Des Plaines, IL 60016 USA
Phone: (847) 759-2820
Fax: (847) 759-1620
URL: <http://www.ashi.com/>

California Contractors State License Board

9821 Business Park Drive
Sacramento, CA 95827 USA

Phone: (800) 321-2752

Fax: (916) 255-4016

URL: <http://www.cslb.ca.gov/offices1.html>

National Association of Home Builders

1201 15th Street, NW

Washington, DC 20005

Phone: (202) 822-

URL: <http://www.nahb.com>

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